Lesson Title – Supreme Court Case Review
From Joseph Lewerk

Grade - 10th and 11th

Length of class period – 80 minutes

Inquiry – (What essential question are students answering, what problem are they solving, or what decision are they making?)

How do United States Supreme Court decisions reflect the function of the American judicial system and provide examples of judicial review?

Objectives (What content and skills do you expect students to learn from this lesson?)

1. Read and interpret primary source documents from the Supreme Court.
2. Analyze documents to determine the route of the case to the Supreme Court and the constitutional issues involved.
3. Summarize the majority, concurring and dissenting opinions of the Supreme Court in major cases.
4. Describe the impact of the Supreme Court decision on American society.

Materials (What primary sources or local resources are the basis for this lesson?) – (please attach)

A primer on the structure and function of state and federal courts is attached below. The complete text of ten Supreme Court decisions are appended below with each page numbered.
1. Brown v. Board of Education
2. Gideon v. Wainwright
3. Hazelwood v. Kuhlmeier
4. Korematsu v. U.S.
5. Miranda v. Arizona
6. NJ v. T.L.O.
7. Regents of the Univ. of CA v. Bakke
8. Roe v. Wade
9. TX v. Johnson
10. Tinker v. DesMoines

Alternatively teachers may use the oyez.org website to access these and other U.S. Supreme Court decision though some analysis is provided by the web site. Likewise, Street Law’s landmarkcases.org website contains all the cases listed in this lesson and more with in-depth analysis for readers. For students requiring additional support, the Street Law web site may provide options for accommodations.
Activities (What will you and your students do during the lesson to promote learning?)

1. Students will have reviewed the federal judicial branch and the concept of judicial review using the attachment. This should be done during the previous class session or as homework prior to the start of the class.
2. Assess individual student understanding of the background material using the provided quiz. Allow students to correct and review their responses in assigned pairs or groups of three.
3. To the same pairs or groups of students, assign a case for review and provide the attached worksheet with which students are to cooperatively analyze the Supreme Court decision. Explain to students that they will be required to present their analysis to the class as a group but they will also be required to submit individual summaries of the case and descriptions of what they believe to be the decision’s impact on American society.

How will you assess what student learned during this lesson?

1. Completion of quiz on background reading material.
2. Monitoring of pair/group work.
3. Pair/Group completion of case analysis worksheet.
4. Individual completion of case summarization and description of case’s impact.

Connecticut Grade Level Expectations-

18 The student will demonstrate knowledge of the judicial systems established by the Constitution of the United States by describing the exercise of judicial review.

18.1.1 The student understands the case that the Supreme Court of the United States determines the constitutionality of laws and acts of the executive branch of government. This power is called judicial review.

18.1.3 The student understands that the Constitution of the United States is the supreme law of the land.

18.1.4 The student understands that state laws must conform to the United States constitution.
UNDERSTANDING FEDERAL AND STATE COURTS

Introduction
The judicial system in the United States is unique insofar as it is actually made up of two different court systems: the federal court system and the state court systems. While each court system is responsible for hearing certain types of cases, neither is completely independent of the other, and the systems often interact. Furthermore, solving legal disputes and vindicating legal rights are key goals of both court systems. This lesson is designed to examine the differences, similarities, and interactions between the federal and state court systems to make the public aware of how each system goes about achieving these goals.

Objectives
After completing this lesson, one should be able to:

- Understand that the American judicial system is actually made up of two separate court systems: the federal court system and the state court systems.
- Know the structure of the federal court system and a typical state court system and be able to discuss the similarities and differences between the two.
- Distinguish between the types of cases that are heard in the federal courts and those that are heard in the state courts.
- Comprehend how the 14th Amendment to the U.S. Constitution allows the federal courts to become involved in cases arising in state courts and how, subsequently, this allows the two systems to interact.

Overview of Key Concepts

Why Are There Two Court Systems in the United States?
The U.S. Constitution created a governmental structure for the United States known as federalism. Federalism refers to a sharing of powers between the national government and the state governments. The Constitution gives certain powers to the federal government and reserves the rest for the states. Therefore, while the Constitution states that the federal government is supreme with regard to those powers expressly or implicitly delegated to it, the states remain supreme in matters reserved to them. This supremacy of each government in its own sphere is known as separate sovereignty, meaning each government is sovereign in its own right.

Both the federal and state governments need their own court systems to apply and interpret their laws. Furthermore, both the federal and state constitutions attempt to do this by specifically spelling out the jurisdiction of their respective court systems.
For example, since the Constitution gives Congress sole authority to make uniform laws concerning bankruptcies, a state court would lack jurisdiction in this matter. Likewise, since the Constitution does not give the federal government authority in most matters concerning the regulation of the family, a federal court would lack jurisdiction in a divorce case. This is why there are two separate court systems in America. The federal court system deals with issues of law relating to those powers expressly or implicitly granted to it by the U.S. Constitution, while the state court systems deal with issues of law relating to those matters that the U.S. Constitution did not give to the federal government or explicitly deny to the states.

Describe the Differences in the Structure of the Federal and State Court Systems.

Federal Court System
The term federal court can actually refer to one of two types of courts. The first type of court is what is known as an Article III court. These courts get their name from the fact that they derive their power from Article III of the Constitution. These courts include (1) the U.S. District Courts, (2) the U.S. Circuit Courts of Appeal, and (3) the U.S. Supreme Court. They also include two special courts: (a) the U.S. Court of Claims and (b) the U.S. Court of International Trade. These courts are special because, unlike the other courts, they are not courts of general jurisdiction. Courts of general jurisdiction can hear almost any case. All judges of Article III courts are appointed by the President of the United States with the advice and consent of the Senate and hold office during good behavior.

The second type of court also is established by Congress. These courts are (1) magistrate courts, (2) bankruptcy courts, (3) the U.S. Court of Military Appeals, (4) the U.S. Tax Court, and (5) the U.S. Court of Veterans’ Appeals. The judges of these courts are appointed by the President with the advice and consent of the Senate. They hold office for a set number of years, usually about 15. Magistrate and bankruptcy courts are attached to each U.S. District Court. The U.S. Court of Military Appeals, U.S. Tax Court, and U.S. Court of Veterans’ Appeals are called Article I or legislative courts.

U.S. District Courts
There are 94 U.S. District Courts in the United States. Every state has at least one district court, and some large states, such as California, have as many as four. Each district court has between 2 and 28 judges. The U.S. District Courts are trial courts, or courts of original jurisdiction. This means that most federal cases begin here. U.S. District Courts hear both civil and criminal cases. In many cases, the judge determines issues of law, while the jury (or judge sitting without a jury) determines findings of fact.

U.S. Circuit Courts of Appeal
There are 13 U.S. Circuit Courts of Appeal in the United States. These courts are divided into 12 regional circuits and sit in various cities throughout the country. The U.S. Court of Appeals for the Federal Circuit (the 13th Court) sits in Washington. With the exception of criminal cases in which a defendant is found not guilty, any party who is dissatisfied with the judgment of a U.S. District Court (or the findings of certain administrative agencies) may appeal to the U.S. Circuit Court of Appeal in his/her geographical district. These courts will examine the trial record for only mistakes of law; the facts have already been determined by the U.S. District Court. Therefore, the court usually will neither review the facts of the case nor take any additional evidence. When hearing cases, these courts usually sit in panels of three judges.
U.S. Supreme Court
The Supreme Court of the United States sits at the apex of the federal court system. It is made up of nine judges, known as justices, and is presided over by the Chief Justice. It sits in Washington, D.C. Parties who are not satisfied with the decision of a U.S. Circuit Court of Appeal (or, in rare cases, of a U.S. District Court) or a state supreme court can petition the U.S. Supreme Court to hear their case. This is done mainly by a legal procedure known as a Petition for a Writ of Certiorari (cert.). The Court decides whether to accept such cases. Each year, the Court accepts between 100 and 150 of the some 7,000 cases it is asked to hear for argument. The cases typically fit within general criteria for oral arguments. Four justices must agree to hear the case (grant cert). While primarily an appellate court, the Court does have original jurisdiction over cases involving ambassadors and two or more states.

Special Article III Courts

1. **U.S. Court of Claims:** This court sits in Washington, D.C., and handles cases involving suits against the government.
2. **U.S. Court of International Trade:** This court sits in New York and handles cases involving tariffs and international trade disputes.

Special Courts Created by Congress

1. **Magistrate judges:** These judges handle certain criminal and civil matters, often with the consent of the parties.
2. **Bankruptcy courts:** These courts handle cases arising under the Bankruptcy Code.
3. **U.S. Court of Military Appeals:** This court is the final appellate court for cases arising under the Uniform Code of Military Justice.
4. **U.S. Tax Court:** This court handles cases arising over alleged tax deficiencies.
5. **U.S. Court of Veterans' Appeals:** This court handles certain cases arising from the denial of veterans' benefits.

State Court Systems
No two state court systems are exactly alike. Nevertheless, there are sufficient similarities to provide an example of what a typical state court system looks like. Most state court systems are made up of (1) two sets of trial courts: (a) trial courts of limited jurisdiction (probate, family, traffic, etc.) and (b) trial courts of general jurisdiction (main trial-level courts); (2) intermediate appellate courts (in many, but not all, states); and (3) the highest state courts (called by various names). Unlike federal judges, most state court judges are not appointed for life but are either elected or appointed (or a combination of both) for a certain number of years.

Trial Courts of Limited Jurisdiction
Trial courts of limited jurisdiction are courts that deal with only specific types of cases. They are often located in/near the county courthouse and are usually presided over by a single judge. A judge sitting without a jury hears most of the cases heard by these courts. Some examples of trial courts of limited jurisdiction include:
1. **Probate court**: This court handles matters concerning administering the estate of a person who has died (decedent). It sees that the provisions of a will are carried out or sees that a decedent's property is distributed according to state law if he/she died intestate (without a will).

2. **Family court**: This court handles matters concerning adoption, annulments, divorce, alimony, custody, child support, etc.

3. **Traffic court**: This court usually handles minor violations of traffic laws.

4. **Juvenile court**: This court usually handles cases involving delinquent children under a certain age, for example, 18 or 21.

5. **Small claims court**: This court usually handles suits between private persons of a relatively low dollar amount, for example, less than $5,000.

6. **Municipal court**: This court usually handles cases involving offenses against city ordinances.

**Trial Courts of General Jurisdiction**

Trial courts of general jurisdiction are the main trial courts in the state system. They hear cases outside the jurisdiction of the trial courts of limited jurisdiction. These involve both civil and criminal cases. One judge (often sitting with a jury) usually hears them. In such cases, the judge decides issues of law, while the jury decides issues of fact. A record of the proceeding is made and may be used on appeal. These courts are called by a variety of names, including (1) circuit courts, (2) superior courts, (3) courts of common pleas, (4) and even, in New York, supreme courts. In certain cases, these courts can hear appeals from trial courts of limited jurisdiction.

**Intermediate Appellate Courts**

Many, but not all, states have intermediate appellate courts between the trial courts of general jurisdiction and the highest court in the state. Any party, except in a case where a defendant in a criminal trial has been found not guilty, who is not satisfied with the judgment of a state trial court may appeal the matter to an appropriate intermediate appellate court. Such appeals are usually a matter of right (meaning the court must hear them). However, these courts address only alleged procedural mistakes and errors of law made by the trial court. They will usually neither review the facts of the case, which have been established during the trial, nor accept additional evidence. These courts usually sit in panels of two or three judges.

**Highest State Courts**

All states have some sort of highest court. While they are usually referred to as supreme courts, some, such as the highest court in Maryland, are known as courts of appeal. In states with intermediate appellate courts, the highest state courts usually have discretionary review as to whether to accept a case. In states without intermediate appellate courts, appeals may usually be taken to the highest state court as a matter of right. Like the intermediate appellate courts, appeals taken usually allege a mistake of law and not fact. In addition, many state supreme courts have original jurisdiction in certain matters. For example, the highest courts in several states have original jurisdiction over controversies regarding elections and the reapportionment of legislative districts. These courts often sit in panels of three, five, seven, or nine judges/justices.

**What Types of Cases do Federal Courts hear? By State Courts?**

*Note: The definitions for the terms in this section come from Black’s Law Dictionary, Seventh Edition.*

**Jurisdiction of the Federal Courts**

The jurisdiction of the federal courts is spelled out in Article III, Section 2, of the United States Constitution. Federal courts are courts of limited jurisdiction because they can hear only two main types of cases:
1. Diversity of Citizenship
Federal courts can have jurisdiction over a case of a civil nature in which parties are residents of different states and the amount in question exceeds the amount set by federal law (currently $75,000). The federal courts are often required to apply state law when dealing with these cases since the issues concern matters of state law. The fact that the parties are from different states and that the amount in question is high enough is what manages to get such cases into federal court.

2. Federal Question
Federal courts have jurisdiction over cases that arise under the U.S. Constitution, the laws of the United States, and the treaties made under the authority of the United States. These issues are the sole prerogative of the federal courts and include the following types of cases:

a. **Suits between states**—Cases in which two or more states are a party.
   b. **Cases involving ambassadors and other high-ranking public figures**—Cases arising between foreign ambassadors and other high-ranking public officials.
   c. **Federal crimes**—Crimes defined by or mentioned in the U.S. Constitution or those defined and/or punished by federal statute. Such crimes include treason against the United States, piracy, counterfeiting, crimes against the law of nations, and crimes relating to the federal government's authority to regulate interstate commerce. However, most crimes are state matters.
   d. **Bankruptcy**—The statutory procedure, usually triggered by insolvency, by which a person is relieved of most debts and undergoes a judicially supervised reorganization or liquidation for the benefit of the person's creditors.
   e. **Patent, copyright, and trademark cases**
      (1) Patent—The exclusive right to make, use, or sell an invention for a specified period (usually 17 years), granted by the federal government to the inventor if the device or process is novel, useful, and non-obvious.
      (2) Copyright—The body of law relating to a property right in an original work of authorship (such as a literary, musical, artistic, photographic, or film work) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.
      (3) Trademark—A word, phrase, logo, or other graphic symbol used by a manufacturer or seller to distinguish its product or products from those of others.
   f. **Admiralty**—The system of jurisprudence that has grown out of the practice of admiralty courts: courts that exercise jurisdiction over all maritime contracts, torts, injuries, and offenses.
   g. **Antitrust**—The body of law designed to protect trade and commerce from restraining monopolies, price fixing, and price discrimination.
   h. **Securities and banking regulation**—The body of law protecting the public by regulating the registration, offering, and trading of securities and the regulation of banking practices.
   i. **Other cases specified by federal statute**—Any other cases specified by an applicable federal statute.

In addition, the federal courts have jurisdiction over several other types of cases arising from acts of Congress. For example, the courts have jurisdiction in a wide variety of (1) civil rights, (2) labor relations, and (3) environmental cases. While these laws provide a "floor" for the states, they do not provide a
“ceiling.” If states regulate more extensively in these areas than the federal government, then state courts also will have jurisdiction in these areas.

Jurisdiction of the State Courts
The jurisdiction of the state courts extends to basically any type of case that does not fall within the exclusive jurisdiction of the federal courts. State courts are common-law courts. This means that they not only have the authority to apply or interpret the law, but they often have the authority to create law if it does not yet exist by act of the legislature to create an equitable remedy to a specific legal problem. Examples of cases within the jurisdiction of the state courts usually include the following:

1. **Cases involving the state constitution**—Cases involving the interpretation of a state constitution.
2. **State criminal offenses**—Crimes defined and/or punished by the state constitution or applicable state statute. Most crimes are state criminal offenses. They include offenses such as murder, theft, breaking and entering, and destruction of property.
3. **Tort and personal injury law**—Civil wrongs for which a remedy may be obtained, usually in the form of damages; a breach of duty that the law imposes on everyone in the same relation to one another as those involved in a given transaction.
4. **Contract law**—Agreements between two or more parties creating obligations that are either enforceable or otherwise recognized as law.
5. **Probate**—The judicial process by which a testamentary document is established to be a valid will, the proving of a will to the satisfaction of a court, the distribution of a decedent’s assets according to the provisions of the will, or the process whereby a decedent’s assets are distributed according to state law should the decedent have died intestate.
6. **Family**—The body of law dealing with marriage, divorce, adoption, child custody and support, and domestic-relations issues.
7. **Sale of goods**—The law concerning the sale of goods (moveable objects) involved in commerce (especially with regards to the Uniform Commercial Code).
8. **Corporations and business organization**—The law concerning, among other things, the establishment, dissolution, and asset distribution of corporations, partnerships, limited partnerships, limited liability companies, etc.
9. **Election issues**—The law concerning voter registration, voting in general, legislative reapportionment, etc.
10. **Municipal/zoning ordinances**—The law involving municipal ordinances, including zoning ordinances that set aside certain areas for residential, commercial, industrial, or other development.
11. **Traffic regulation**—A prescribed rule of conduct for traffic; a rule intended to promote the orderly and safe flow of traffic.
12. **Real property**—Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land.

Areas of Concurrent Jurisdiction for Federal and State Courts
In addition to areas in which the states have regulated on a matter more extensively than the federal government, state courts have concurrent jurisdiction with federal courts concerning the following points of law:

1. **Diversity of Citizenship**
In civil cases involving citizens of two or more states in which the dollar amount in question exceeds $75,000, a state court may hear the case if the defendant in the case does not petition to have the case removed to federal court. Furthermore, if a civil case involves two or more citizens of different states but the amount in question does not exceed $75,000, the case must be heard by a state court.
2. **Federal Question**: Any state court may interpret the U.S. Constitution, federal statute, treaty, etc., if the applicable Constitutional provision, statute, or treaty has direct bearing on a case
statute, or treaty, the state is subjecting itself to federal review. This means that after a state supreme court has acted on a case, the U.S. Supreme Court may review it. In such instances, the U.S. Supreme Court is concerned only with reviewing the state court's interpretation of the applicable federal Constitutional provision, statute, or treaty. It does not review any matters of law that are under the exclusive jurisdiction of the state courts.

Source:
## JURISDICTION OF STATE AND FEDERAL COURTS

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<tr>
<th>State Courts</th>
<th>Federal Courts</th>
<th>State or Federal Courts</th>
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<tr>
<td>State constitutional issues and cases involving state laws or regulations.</td>
<td>Most cases involving federal laws or regulations (for example: tax, Social Security, broadcasting, civil rights)</td>
<td>Federal constitutional issues.</td>
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<tr>
<td>Family law issues.</td>
<td>Matters involving interstate and international commerce, including airline and railroad regulation.</td>
<td>Certain civil rights claims.</td>
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<td>Real property issues.</td>
<td>Cases involving securities and commodities regulation, including takeover of publicly held corporations.</td>
<td>&quot;Class action&quot; cases.</td>
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<td>Most private contract disputes (except those resolved under bankruptcy law).</td>
<td>Admiraity cases.</td>
<td>Environmental regulations.</td>
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<td>Most issues involving the regulation of trades and professions.</td>
<td>International trade law matters.</td>
<td>Certain disputes involving federal law.</td>
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<td>Most professional malpractice issues.</td>
<td>Patent, copyright, and other intellectual property issues.</td>
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<td>Most issues involving the internal governance of business associations such as partnerships and corporations.</td>
<td>Cases involving rights under treaties, foreign states, and foreign nationals.</td>
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<td>Most personal injury lawsuits.</td>
<td>State law disputes when &quot;diversity of citizenship&quot; exists.</td>
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<td>Most workers' injury claims.</td>
<td>Bankruptcy matters.</td>
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<td>Probate and inheritance matters.</td>
<td>Disputes between states.</td>
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<td>Most traffic violations and registration of motor vehicles.</td>
<td>Habeas corpus actions.</td>
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<td>Traffic violations and other misdemeanors occurring on certain federal property.</td>
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BIRD'S EYE VIEW OF THE FEDERAL COURTS

- The United States has two separate court systems – the federal court system and the state court system of each of the 50 states.
- The federal court system is established by Article III of the U.S. Constitution; state court systems are established by their respective state constitutions.
- The federal courts hear cases that arise under the U.S. Constitution, federal laws and regulations, and treaties. The state courts hear cases concerning issues that are neither preempted by the federal courts nor denied to the states by the U.S. Constitution. The federal courts do not hear cases that deal exclusively with matters which the Constitution reserves to the states.
- Federal judges are nominated by the President and confirmed with the advice and consent of the Senate. They hold office during good behavior, typically for life. States select judges in different ways—election, appointment, or a combination of systems.
- There are three levels of courts in the federal court system -- U.S. District Courts, U.S. Courts of Appeal, and the U.S. Supreme Court.
- The U.S. District Courts are courts of original jurisdiction. This means that these courts hear both criminal and civil cases. There are 94 U.S. District Courts in the United States—at least one U.S. District Court in every state. Some larger states, such as California and Texas, have as many as four.
- When a jury is present in either a criminal or civil trial, it decides the facts of the case and the judge determines the law. When a jury is not present, the judge is both the trier of fact and the determiner of law. In the federal court system, civil juries usually consist of six persons; criminal juries consist of 12. Criminal juries must deliver a unanimous verdict in order to convict. They must find the defendant guilty "beyond a reasonable doubt." In order to find someone liable in a civil case, a civil jury must base its decision only on a "preponderance of the evidence"—meaning that one party's story seems more true than not.
- The U.S. Circuit Courts of Appeals are courts of appellate jurisdiction. This means that if a party is not satisfied with the decision of the U.S. District Court, it may seek relief from this court. There are 13 U.S. Circuit Courts of Appeals in the United States, and most of these courts cover a geographical area that encompasses several states. Usually, a three-judge panel sits on a U.S. Circuit Court of Appeals.
- The U.S. Supreme Court is the highest court in the land. It consists of nine judges, called justices, and is presided over by the Chief Justice. The Court usually hears appeals from the U.S. Circuit Courts of Appeals and, if a federal question has been raised, from the various state courts of last resort. Unlike the U.S. Circuit Courts of Appeals, the U.S.
Supreme Court has "discretionary jurisdiction," meaning that it decides which cases it will hear. In fact, it usually decides to hear fewer than 150 of the some 7,000 cases that it is asked to review each year.

- If the U.S. Supreme Court has spoken on a constitutional issue, its decision is final barring (1) a constitutional amendment to overturn its decision or (2) a later decision of the Court overruling a previous decision. However, if the Court has interpreted an Act of Congress, the Congress may alter the Court's decision by changing the law.

Source:
Federal Courts In a Nutshell: What Do You Know?

1. The highest court in the land and the final decider of constitutional questions is
   A. Congress
   B. The President
   C. The U.S. District Courts
   D. The U.S. Circuit Courts of Appeal
   E. The Supreme Court of the United States

2. What is meant by the term judicial review?
   A. The name of the third branch of government
   B. Congress' authority to make laws
   C. The process of appealing cases to a higher court
   D. The courts' authority to enforce the laws
   E. The courts' authority to declare a law or an act unconstitutional

3. An important attribute of the judiciary is
   A. The ability to make laws consistent with the Constitution
   B. The judiciary's independence from the other two branches
   C. The ability to enforce the law consistent with the Constitution
   D. All of the above
   E. None of the above

4. How can law-abiding citizens get involved in the court system?
   A. Serving on juries
   B. Acting as witnesses
   C. Resolving disputes using the judicial system
   D. All of the above
   E. None of the above
5. Courts are established to
A. Determine the guilt of an individual
B. Settle disputes between individuals
C. Settle disputes between states
D. Ensure that proper procedures are followed
E. All of the above

6. Federal Courts get their power from
A. Judges and lawyers
B. The people through the Constitution
C. The House and the Senate
D. Through nominations by the President
E. The federal bureaucracy

True or False
7. ______ Errors of law and imperfections in the American justice system are mainly corrected by the trial courts.
8. ______ Judges rely on public defenders, among others, to help ensure the fair and impartial administration of justice.
9. ______ Trial courts are responsible for determining the facts of a particular legal case.
10. ______ The judicial branch is called the third branch. It is equal to the executive branch and the legislative branch.

Source:
ANSWER KEY - Federal Courts In a Nutshell: What Do You Know?

1. E
2. E
3. B
4. D
5. E
6. B
7. False/appellate courts
8. True
9. True
10. True
Supreme Court Case Analysis Work Sheet

Group Members ____________________________________________________________

Working with your partner/group you are to analyze a major decision of the United States Supreme Court and record your findings in the appropriate places below. Upon completion all groups will present a summary of the case to the class. Individually members of your group will then be responsible for both summarizing the assigned case and describing its impact on American society.

1. **Plaintiff**: petitioner, person who brought on the legal action

2. **Defendant**: respondent, person defending themselves in a legal action

3. **Part of the Constitution questioned**: cite and discuss exactly which section of the Constitution the case revolves around – provide Article, Section, Clause of the Constitution if possible.
4. **Circumstances:** story of the case – exactly what happened

5. **Background:** describe any lower court (federal or state district and/or appellate courts) rulings before the case reached the Supreme Court.

6. **Decision/Opinions of the Supreme Court:** summarize the actual judges’ majority, concurring, and dissenting opinions.

7. **Rationale:** in your own words, why did the court rule this way?
8. **Impact:** What is this case’s impact on society? How do you feel about the decision?
Segregation of white and Negro children in the public schools of a State solely on the basis of race, pursuant to state laws permitting or requiring such segregation, denies to Negro children the equal protection of the laws guaranteed by the Fourteenth Amendment -- even though the physical facilities and other "tangible" factors of white and Negro schools may be equal. Pp. 347 U. S. 486-496.

(a) The history of the Fourteenth Amendment is inconclusive as to its intended effect on public education. Pp. 347 U. S. 489-490.

(b) The question presented in these cases must be determined not on the basis of conditions existing when the Fourteenth Amendment was adopted, but in the light of the full development of public education and its present place in American life throughout the Nation. Pp. 347 U. S. 492-493.

(c) Where a State has undertaken to provide an opportunity for an education in its public schools, such an opportunity is a right which must be made available to all on equal terms. P. 347 U. S. 493.
(d) Segregation of children in public schools solely on the basis of race deprives children of the minority group of equal educational opportunities, even though the physical facilities and other "tangible" factors may be equal. Pp. 347 U. S. 493-494.

(e) The "separate but equal" doctrine adopted in Plessy v. Ferguson, 163 U. S. 537, has no place in the field of public education. P. 347 U. S. 495.

(f) The cases are restored to the docket for further argument on specified questions relating to the forms of the decrees. Pp. 347 U. S. 495-496.

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

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion. [Footnote 1]

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they had been denied admission to schools attended by white children under laws requiring or permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called "separate but equal" doctrine announced by this Court in Plessy v. Ferguson, 163 U. S. 537. Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not "equal" and cannot be made "equal," and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. [Footnote 2] Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court. [Footnote 3]
Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then-existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among "all persons born or naturalized in the United States." Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history with respect to segregated schools is the status of public education at that time. [Footnote 4] In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences, as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states, and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. [Footnote 5] The doctrine of "separate but equal" did not make its appearance in this Court until 1896 in the case of Plessy v. Ferguson, supra, involving not education but transportation. [Footnote 6] American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the "separate but equal" doctrine in the field of public education. [Footnote 7] In Cumming v. County Board of Education, 175 U. S. 528,
and *Gong Lum v. Rice*, 275 U. S. 78, the validity of the doctrine itself was not challenged. [Footnote 8] In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337; *Sipuel v. Oklahoma*, 332 U. S. 631; *Sweatt v. Painter*, 339 U. S. 629; *McLaurin v. Oklahoma State Regents*, 339 U. S. 637. In none of these cases was it necessary to reexamine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter*, supra, the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter*, there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other "tangible" factors. [Footnote 9] Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: does segregation of children in public schools solely on the basis of race, even though the physical facilities and other "tangible" factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.
In *Sweatt v. Painter*, supra, in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on "those qualities which are incapable of objective measurement but which make for greatness in a law school." In *McLaurin v. Oklahoma State Regents*, supra, the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: ". . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession."

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Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

"Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law, for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to [retard] the educational and mental development of negro children and to deprive them of some of the benefits they would receive in a racial[ly] integrated school system. [Footnote 10]"

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*, this finding is amply supported by modern authority. [Footnote 11] Any language

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in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment. [Footnote 12]

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question -- the
constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. [Footnote 13] The Attorney General

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of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954. [Footnote 14]

It is so ordered.

* Together with No. 2, Briggs et al. v. Elliott et al., on appeal from the United States District Court for the Eastern District of South Carolina, argued December 9-10, 1952, reargued December 7-8, 1953; No. 4, Davis et al. v. County School Board of Prince Edward County, Virginia, et al., on appeal from the United States District Court for the Eastern District of Virginia, argued December 10, 1952, reargued December 7-8, 1953, and No. 10, Gebhart et al. v. Belton et al., on certiorari to the Supreme Court of Delaware, argued December 11, 1952, reargued December 9, 1953.

[Footnote 1]

In the Kansas case, Brown v. Board of Education, the plaintiffs are Negro children of elementary school age residing in Topeka. They brought this action in the United States District Court for the District of Kansas to enjoin enforcement of a Kansas statute which permits, but does not require, cities of more than 15,000 population to maintain separate school facilities for Negro and white students. Kan.Gen.Stat. § 72-1724 (1949). Pursuant to that authority, the Topeka Board of Education elected to establish segregated elementary schools. Other public schools in the community, however, are operated on a nonsegregated basis. The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, found that segregation in public education has a detrimental effect upon Negro children, but denied relief on the ground that the Negro and white schools were substantially equal with respect to buildings, transportation, curricula, and educational qualifications of teachers. 98 F.Supp. 797. The case is here on direct appeal under 28 U.S.C. § 1253.

In the South Carolina case, Briggs v. Elliott, the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. S.C.Const., Art. XI, § 7; S.C.Code § 5377 (1942). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and
denied the requested relief. The court found that the Negro schools were inferior to the white schools, and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 98 F.Supp. 529. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. 342 U.S. 350. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well. 103 F.Supp. 920. The case is again here on direct appeal under 28 U.S.C. § 1253.

In the Virginia case, *Davis v. County School Board*, the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Va.Const., § 140; Va.Code § 22-221 (1950). The three-judge District Court, convened under 28 U.S.C. §§ 2281 and 2284, denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to "proceed with all reasonable diligence and dispatch to remove" the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. 103 F.Supp. 337. The case is here on direct appeal under 28 U.S.C. § 1253.

In the Delaware case, *Gebhart v. Belton*, the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. Del.Const., Art. X, § 2; Del.Rev.Code § 2631 (1935). The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. 87 A.2d 862. The Chancellor also found that segregation itself results in an inferior education for Negro children (see note 10 infra), but did not rest his decision on that ground. Id. at 865. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. 91 A.2d 137, 152. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for certiorari. The writ was granted, 344 U.S. 891. The plaintiffs, who were successful below, did not submit a cross-petition.

[Footnote 2]
344 U.S. 1, 141, 891.

[Footnote 3]

345 U.S. 972. The Attorney General of the United States participated both Terms as *amicus curiae*.

[Footnote 4]

For a general study of the development of public education prior to the Amendment, see Butts and Cremin, *A History of Education in American Culture* (1953), Pts. I, II; Cubberley, *Public Education in the United States* (1934 ed.), cc. II-XII. School practices current at the time of the adoption of the Fourteenth Amendment are described in Butts and Cremin, *supra*, at 269-275; Cubberley, *supra*, at 288-339, 408-431; Knight, *Public Education in the South* (1922), cc. VIII, IX. *See also* H. Ex.Doc. No. 315, 41st Cong., 2d Sess. (1871). Although the demand for free public schools followed substantially the same pattern in both the North and the South, the development in the South did not begin to gain momentum until about 1850, some twenty years after that in the North. The reasons for the somewhat slower development in the South (e.g., the rural character of the South and the different regional attitudes toward state assistance) are well explained in Cubberley, *supra*, at 408-423. In the country as a whole, but particularly in the South, the War virtually stopped all progress in public education. *Id.* at 427-428. The low status of Negro education in all sections of the country, both before and immediately after the War, is described in Beale, *A History of Freedom of Teaching in American Schools* (1941), 112-132, 175-195. Compulsory school attendance laws were not generally adopted until after the ratification of the Fourteenth Amendment, and it was not until 1918 that such laws were in force in all the states. Cubberley, *supra*, at 563-565.

[Footnote 5]

83 U.S. 67-72 (1873); Strauder v. West Virginia,*@* 100 U.S. 303, 100 U.S. 307-308 (1880):

"It ordains that no State shall deprive any person of life, liberty, or property, without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States, and, in regard to the colored race, for whose protection the amendment was primarily designed, that no discrimination shall be made against them by law because of their color? The words of the amendment, it is true, are prohibitory, but they contain a necessary implication of a positive immunity, or right, most valuable to the colored race -- the right to exemption from unfriendly legislation against them distinctively as colored -- exemption from legal discriminations, implying inferiority in civil society, lessening the security of their enjoyment of the rights which others enjoy, and discriminations which are steps towards reducing them to the condition of a subject race."
See also Virginia v. Rives, 100 U. S. 313, 100 U. S. 318 (1880); Ex parte Virginia, 100 U. S. 339, 100 U. S. 344-345 (1880).

[Footnote 6]

The doctrine apparently originated in Roberts v. City of Boston, 59 Mass.198, 206 (1850), upholding school segregation against attack as being violative of a state constitutional guarantee of equality. Segregation in Boston public schools was eliminated in 1855. Mass.Acts 1855, c. 256. But elsewhere in the North, segregation in public education has persisted in some communities until recent years. It is apparent that such segregation has long been a nationwide problem, not merely one of sectional concern.

[Footnote 7]

See also Berea College v. Kentucky, 211 U. S. 45 (1908).

[Footnote 8]

In the Cummins case, Negro taxpayers sought an injunction requiring the defendant school board to discontinue the operation of a high school for white children until the board resumed operation of a high school for Negro children. Similarly, in the Gong Lum case, the plaintiff, a child of Chinese descent, contended only that state authorities had misapplied the doctrine by classifying him with Negro children and requiring him to attend a Negro school.

[Footnote 9]

In the Kansas case, the court below found substantial equality as to all such factors. 98 F.Supp. 797, 798. In the South Carolina case, the court below found that the defendants were proceeding "promptly and in good faith to comply with the court's decree." 103 F.Supp. 920, 921. In the Virginia case, the court below noted that the equalization program was already "afoot and progressing" (103 F.Supp. 337, 341); since then, we have been advised, in the Virginia Attorney General's brief on reargument, that the program has now been completed. In the Delaware case, the court below similarly noted that the state's equalization program was well under way. 91 A.2d 137, 149.

[Footnote 10]

A similar finding was made in the Delaware case:

"I conclude from the testimony that, in our Delaware society, State-imposed segregation in education itself results in the Negro children, as a class, receiving educational opportunities which are substantially inferior to those available to white children otherwise similarly situated."
87 A.2d 862, 865.

[Footnote 11]


[Footnote 12]

See Bolling v. Sharpe, post, p. 347 U. S. 497, concerning the Due Process Clause of the Fifth Amendment.

[Footnote 13]

"4. Assuming it is decided that segregation in public schools violates the Fourteenth Amendment"

"(a) would a decree necessarily follow providing that, within the limits set by normal geographic school districting, Negro children should forthwith be admitted to schools of their choice, or"

"(b) may this Court, in the exercise of its equity powers, permit an effective gradual adjustment to be brought about from existing segregated systems to a system not based on color distinctions?"

"5. On the assumption on which questions 4(a) and (b) are based, and assuming further that this Court will exercise its equity powers to the end described in question 4(b),"

"(a) should this Court formulate detailed decrees in these cases;"

"(b) if so, what specific issues should the decrees reach;"

"(c) should this Court appoint a special master to hear evidence with a view to recommending specific terms for such decrees;"

"(d) should this Court remand to the courts of first instance with directions to frame decrees in these cases and, if so, what general directions should the decrees of this Court
include and what procedures should the courts of first instance follow in arriving at the specific terms of more detailed decrees?"

[Footnote 14]
GIDEON V. WAINWRIGHT, 372 U. S. 335 (1963)

U.S. Supreme Court

Gideon v. Wainwright, 372 U.S. 335 (1963)

Gideon v. Wainwright

No. 155

Argued January 15, 1963

Decided March 18, 1963

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CERTIORARI TO THE SUPREME COURT OF FLORIDA

Syllabus

Charged in a Florida State Court with a noncapital felony, petitioner appeared without funds and without counsel and asked the Court to appoint counsel for him, but this was denied on the ground that the state law permitted appointment of counsel for indigent defendants in capital cases only. Petitioner conducted his own defense about as well as could be expected of a layman, but he was convicted and sentenced to imprisonment. Subsequently, he applied to the State Supreme Court for a writ of habeas corpus, on the ground that his conviction violated his rights under the Federal Constitution. The State Supreme Court denied all relief.

Held: The right of an indigent defendant in a criminal trial to have the assistance of counsel is a fundamental right essential to a fair trial, and petitioner's trial and conviction without the assistance of counsel violated the Fourteenth Amendment. Betts v. Brady, 316 U. S. 455, overruled. Pp. 372 U. S. 336-345.

Reversed and cause remanded.

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MR. JUSTICE BLACK delivered the opinion of the Court.

Petitioner was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor. This offense is a felony under

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Florida law. Appearing in court without funds and without a lawyer, petitioner asked the court to appoint counsel for him, whereupon the following colloquy took place:

"The COURT: Mr. Gideon, I am sorry, but I cannot appoint Counsel to represent you in this case. Under the laws of the State of Florida, the only time the Court can appoint Counsel to represent a Defendant is when that person is charged with a capital offense. I am sorry, but I will have to deny your request to appoint Counsel to defend you in this case."

"The DEFENDANT: The United States Supreme Court says I am entitled to be represented by Counsel."

Put to trial before a jury, Gideon conducted his defense about as well as could be expected from a layman. He made an opening statement to the jury, cross-examined the State's witnesses, presented witnesses in his own defense, declined to testify himself, and made a short argument "emphasizing his innocence to the charge contained in the Information filed in this case." The jury returned a verdict of guilty, and petitioner was sentenced to serve five years in the state prison. Later, petitioner filed in the Florida Supreme Court this habeas corpus petition attacking his conviction and sentence on the ground that the trial court's refusal to appoint counsel for him denied him rights "guaranteed by the Constitution and the Bill of Rights by the United States Government."

[Footnote 1] Treating the petition for habeas corpus as properly before it, the State Supreme Court, "upon consideration thereof" but without an opinion, denied all relief. Since 1942, when Betts v. Brady, 316 U. S. 455, was decided by a divided Court, the problem of a defendant's federal constitutional right to counsel in a state court has been a continuing source of controversy and litigation in both state and federal courts. [Footnote 2] To give this problem another review here, we granted certiorari. 370 U.S. 908. Since Gideon was proceeding in forma pauperis, we appointed counsel to represent him and requested both sides to discuss in their briefs and oral arguments the following: "Should this Court's holding in Betts v. Brady, 316 U. S. 455, be reconsidered?"

I

The facts upon which Betts claimed that he had been unconstitutionally denied the right to have counsel appointed to assist him are strikingly like the facts upon which Gideon
here bases his federal constitutional claim. Betts was indicted for robbery in a Maryland state court. On arraignment, he told the trial judge of his lack of funds to hire a lawyer and asked the court to appoint one for him. Betts was advised that it was not the practice in that county to appoint counsel for indigent defendants except in murder and rape cases. He then pleaded not guilty, had witnesses summoned, cross-examined the State's witnesses, examined his own, and chose not to testify himself. He was found guilty by the judge, sitting without a jury, and sentenced to eight years in prison.

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Like Gideon, Betts sought release by habeas corpus, alleging that he had been denied the right to assistance of counsel in violation of the Fourteenth Amendment. Betts was denied any relief, and, on review, this Court affirmed. It was held that a refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Due Process Clause of the Fourteenth Amendment, which, for reasons given, the Court deemed to be the only applicable federal constitutional provision. The Court said:

"Asserted denial [of due process] is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."

316 U.S. at 316 U. S. 462. Treating due process as "a concept less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights," the Court held that refusal to appoint counsel under the particular facts and circumstances in the Betts case was not so "offensive to the common and fundamental ideas of fairness" as to amount to a denial of due process. Since the facts and circumstances of the two cases are so nearly indistinguishable, we think the Betts v. Brady holding, if left standing, would require us to reject Gideon's claim that the Constitution guarantees him the assistance of counsel. Upon full reconsideration, we conclude that Betts v. Brady should be overruled.

II

The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." We have construed

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this to mean that, in federal courts, counsel must be provided for defendants unable to employ counsel unless the right is competently and intelligently waived. [Footnote 3] Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response, the Court stated that, while the Sixth Amendment laid down
"no rule for the conduct of the States, the question recurs whether the constraint laid by the Amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the States by the Fourteenth Amendment."

316 U.S. at 316 U. S. 465. In order to decide whether the Sixth Amendment's guarantee of counsel is of this fundamental nature, the Court in Betts set out and considered

"[r]elevant data on the subject . . . afforded by constitutional and statutory provisions subsisting in the colonies and the States prior to the inclusion of the Bill of Rights in the national Constitution, and in the constitutional, legislative, and judicial history of the States to the present date."

316 U.S. at 316 U. S. 465. On the basis of this historical data, the Court concluded that "appointment of counsel is not a fundamental right, essential to a fair trial." 316 U.S. at 316 U. S. 471. It was for this reason the Betts Court refused to accept the contention that the Sixth Amendment's guarantee of counsel for indigent federal defendants was extended to or, in the words of that Court, "made obligatory upon, the States by the Fourteenth Amendment." Plainly, had the Court concluded that appointment of counsel for an indigent criminal defendant was "a fundamental right, essential to a fair trial," it would have held that the Fourteenth Amendment requires appointment of counsel in a state court, just as the Sixth Amendment requires in a federal court.

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We think the Court in Betts had ample precedent for acknowledging that those guarantees of the Bill of Rights which are fundamental safeguards of liberty immune from federal abridgment are equally protected against state invasion by the Due Process Clause of the Fourteenth Amendment. This same principle was recognized, explained, and applied in Powell v. Alabama, 287 U. S. 45 (1932), a case upholding the right of counsel, where the Court held that, despite sweeping language to the contrary in Hurtado v. California, 110 U. S. 516 (1884), the Fourteenth Amendment "embraced" those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," even though they had been "specifically dealt with in another part of the federal Constitution." 287 U.S. at 287 U. S. 67. In many cases other than Powell and Betts, this Court has looked to the fundamental nature of original Bill of Rights guarantees to decide whether the Fourteenth Amendment makes them obligatory on the States. Explicitly recognized to be of this "fundamental nature," and therefore made immune from state invasion by the Fourteenth, or some part of it, are the First Amendment's freedoms of speech, press, religion, assembly, association, and petition for redress of grievances. [Footnote 4] For the same reason, though not always in precisely the same terminology, the Court has made obligatory on the States the Fifth Amendment's command that

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private property shall not be taken for public use without just compensation, [Footnote 5] the Fourth Amendment's prohibition of unreasonable searches and seizures, [Footnote 6] and the Eighth's ban on cruel and unusual punishment. [Footnote 7] On the other hand, this Court in Palko v. Connecticut, 302 U. S. 319 (1937), refused to hold that the Fourteenth Amendment made the double jeopardy provision of the Fifth Amendment obligatory on the States. In so refusing, however, the Court, speaking through Mr. Justice Cardozo, was careful to emphasize that

"immunities that are valid as against the federal government by force of the specific pledges of particular amendments have been found to be implicit in the concept of ordered liberty, and thus, through the Fourteenth Amendment, become valid as against the states,"

and that guarantees "in their origin . . . effective against the federal government alone" had, by prior cases,

"been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a process of absorption."

302 U.S. at 302 U. S. 324-326.

We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is "fundamental and essential to a fair trial" is made obligatory upon the States by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights. Ten years before Betts v. Brady, this Court, after full consideration of all the historical data examined in Betts, had unequivocally declared that "the right to the aid of counsel is of this fundamental character." Powell v. Alabama, 287 U. S. 45, 287 U. S. 68 (1932). While the Court, at the close of its Powell opinion, did, by its language, as this Court frequently does, limit its holding to the particular facts and circumstances of that case, its conclusions about the fundamental nature of the right to counsel are unmistakable. Several years later, in 1936, the Court reemphasized what it had said about the fundamental nature of the right to counsel in this language:

"We concluded that certain fundamental rights, safeguarded by the first eight amendments against federal action, were also safeguarded against state action by the due process of law clause of the Fourteenth Amendment, and among them the fundamental right of the accused to the aid of counsel in a criminal prosecution."

Grosjean v. American Press Co., 297 U. S. 233, 297 U. S. 243-244 (1936). And again, in 1938, this Court said:
"[The assistance of counsel] is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that, if the constitutional safeguards it provides be lost, justice will not 'still be done.'"

Johnson v. Zerbst, 304 U. S. 458, 304 U. S. 462 (1938). To the same effect, see Avery v. Alabama, 308 U. S. 444 (1940), and Smith v. O'Grady, 312 U. S. 329 (1941). In light of these and many other prior decisions of this Court, it is not surprising that the Betts Court, when faced with the contention that "one charged with crime, who is unable to obtain counsel, must be furnished counsel by the State," conceded that "[e]xpressions in the opinions of this court lend color to the argument. . . ." 316 U.S. at 316 U. S. 462-463. The fact is that, in deciding as it did -- that "appointment of counsel is not a fundamental right, essential to a fair trial" -- the Court in Betts v. Brady made an abrupt break with its own well considered precedents. In returning to these old precedents, sounder, we believe, than the new, we but restore constitutional principles established to achieve a fair system of justice. Not only these precedents, but also reason and reflection, require us to recognize that, in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of
determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence."

287 U.S. at 287 U. S. 68-69. The Court in Betts v. Brady departed from the sound wisdom upon which the Court's holding in Powell v. Alabama rested. Florida, supported by two other States, has asked that Betts v. Brady be left intact. Twenty-two States, as friends of the Court, argue that Betts was "an anachronism when handed down," and that it should now be overruled. We agree.

The judgment is reversed, and the cause is remanded to the Supreme Court of Florida for further action not inconsistent with this opinion.

Reversed.

[Footnote 1]

Later, in the petition for habeas corpus, signed and apparently prepared by petitioner himself, he stated, "I, Clarence Earl Gideon, claim that I was denied the rights of the 4th, 5th and 14th amendments of the Bill of Rights."

[Footnote 2]


[Footnote 3]


[Footnote 4]

E.g., Gitlow v. New York, 268 U. S. 652, 268 U. S. 666 (1925) (speech and press); Lovell v. City of Griffin, 303 U. S. 444, 303 U. S. 450 (1938) (speech and press); Staub v. City of

[Footnote 5]


[Footnote 6]


[Footnote 7]


MR. JUSTICE DOUGLAS.

While I join the opinion of the Court, a brief historical resume of the relation between the Bill of Rights and the first section of the Fourteenth Amendment seems pertinent. Since the adoption of that Amendment, ten justices have felt that it protects from infringement by the States the privileges, protections, and safeguards granted by the Bill of Rights.


My Brother HARLAN is of the view that a guarantee of the Bill of Rights that is made applicable to the States by reason of the Fourteenth Amendment is a lesser version of that
same guarantee as applied to the Federal Government. [Footnote 2/2] Mr. Justice Jackson shared that view. [Footnote 2/3]

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But that view has not prevailed, [Footnote 2/4] and rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees.

[Footnote 2/1]

Justices Bradley, Swayne and Field emphasized that the first eight Amendments granted citizens of the United States certain privileges and immunities that were protected from abridgment by the States by the Fourteenth Amendment. See Slaughter-House Cases, supra, at 83 U. S. 118-119; O'Neil v. Vermont, supra, at 144 U. S. 363. Justices Harlan and Brewer accepted the same theory in the O'Neil case (see id. at 144 U. S. 370-371), though Justice Harlan indicated that all "persons," not merely "citizens," were given this protection. Ibid. In Twining v. New Jersey, 211 U. S. 78, 211 U. S. 117, Justice Harlan's position was made clear:

"In my judgment, immunity from self-incrimination is protected against hostile state action not only by . . . [the Privileges and Immunities Clause], but [also] by . . . [the Due Process Clause]."

Justice Brewer, in joining the opinion of the Court, abandoned the view that the entire Bill of Rights applies to the States in Maxwell v. Dow, 176 U. S. 581.

[Footnote 2/2]


[Footnote 2/3]


[Footnote 2/4]


MR. JUSTICE CLARK, concurring in the result.
In *Bute v. Illinois*, 333 U. S. 640 (1948), this Court found no special circumstances requiring the appointment of counsel, but stated that,

"if these charges had been capital charges, the court would have been required, both by the state statute and the decisions of this Court interpreting the Fourteenth Amendment, to take some such steps."

*Id.* at 339 U. S. 674. Prior to that case, I find no language in any cases in this Court indicating that appointment of counsel in all capital cases was required by the Fourteenth Amendment. [Footnote 3/1] At the next Term of the Court, Mr. Justice Reed revealed that the Court was divided as to noncapital cases, but that "the due process clause . . . requires counsel for all persons charged with serious crimes. . . ." *Uveges v. Pennsylvania*, 335 U. S. 437, 335 U. S. 441 (1948). Finally, in *Hamilton v. Alabama*, 368 U. S. 52 (1961), we said that, "[w]hen one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." *Id.* at 368 U. S. 55.

That the Sixth Amendment requires appointment of counsel in "all criminal prosecutions" is clear both from the language of the Amendment and from this Court's interpretation. *See Johnson v. Zerbst*, 304 U. S. 458 (1938). It is equally clear from the above cases, all decided after *Betts v. Brady*, 316 U. S. 455 (1942), that the Fourteenth Amendment requires such appointment in all prosecutions for capital crimes. The Court's decision today, then, does no more than erase a distinction which has no basis in logic and an increasingly eroded basis in authority. In *Kinsella v. United States ex rel. Singleton*, 361 U. S. 234 (1960), we specifically rejected any constitutional distinction between capital and noncapital offenses as regards congressional power to provide for court-martial trials of civilian dependents of armed forces personnel. Having previously held that civilian dependents could not constitutionally be deprived of the protections of Article III and the Fifth and Sixth Amendments in capital cases, *Reid v. Covert*, 354 U. S. 1 (1957), we held that the same result must follow in noncapital cases. Indeed, our opinion there foreshadowed the decision today, [Footnote 3/2] as we noted that:

"Obviously Fourteenth Amendment cases dealing with state action have no application here, but if"

they did, we believe that to deprive civilian dependents of the safeguards of a jury trial here . . . would be as invalid under those cases as it would be in cases of a capital nature."

*361 U.S.* at 361 U. S. 246-247.

I must conclude here, as in *Kinsella, supra*, that the Constitution makes no distinction between capital and noncapital cases. The Fourteenth Amendment requires due process of law for the deprival of "liberty," just as for deprival of "life," and there cannot
constitutionally be a difference in the quality of the process based merely upon a supposed difference in the sanction involved. How can the Fourteenth Amendment tolerate a procedure which it condemns in capital cases on the ground that deprival of liberty may be less onerous than deprival of life -- a value judgment not universally accepted [Footnote 3/3] -- or that only the latter deprival is irrevocable? I can find no acceptable rationalization for such a result, and I therefore concur in the judgment of the Court.

[Footnote 3/1]

It might, however, be said that there is such an implication in *Avery v. Alabama*, 308 U.S. 444 (1940), a capital case in which counsel had been appointed, but in which the petitioner claimed a denial of "effective" assistance. The Court, in affirming, noted that, "[h]ad the petitioner been denied any representation of counsel at all, such a clear violation of the Fourteenth Amendment's guarantee of assistance of counsel would have required reversal of his conviction."

*Id.* at 308 U. S. 445. No "special circumstances" were recited by the Court, but, in citing *Powell v. Alabama*, 287 U. S. 45 (1932), as authority for its dictum, it appears that the Court did not rely solely on the capital nature of the offense.

[Footnote 3/2]

Portents of today's decision may be found as well in *Griffin v. Illinois*, 351 U. S. 12 (1956), and *Ferguson v. Georgia*, 365 U. S. 570 (1961). In *Griffin*, a noncapital case, we held that the petitioner's constitutional rights were violated by the State's procedure, which provided free transcripts for indigent defendants only in capital cases. In *Ferguson*, we struck down a state practice denying the appellant the effective assistance of counsel, cautioning that "[o]ur decision does not turn on the facts that the appellant was tried for a capital offense and was represented by employed counsel. The command of the Fourteenth Amendment also applies in the case of an accused tried for a noncapital offense, or represented by appointed counsel."

365 U.S. at 365 U. S. 596.

[Footnote 3/3]

*See, e.g.*, Barzun, In Favor of Capital Punishment, 31 American Scholar 181, 188-189 (1962).

MR. JUSTICE HARLAN, concurring.
I agree that *Betts v. Brady* should be overruled, but consider it entitled to a more respectful burial than has been accorded, at least on the part of those of us who were not on the Court when that case was decided.

I cannot subscribe to the view that *Betts v. Brady* represented "an abrupt break with its own well considered precedents." *Ante*, p. 372 U. S. 344. In 1932, in *Powell v. Alabama*, 287 U. S. 45, a capital case, this Court declared that, under the particular facts there presented --

"the ignorance and illiteracy of the defendants, their youth, the circumstances of public hostility . . . and, above all, that they stood in deadly peril of their lives"

(287 U.S. at 287 U. S. 71) -- the state court had a duty to assign counsel for

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the trial as a necessary requisite of due process of law. It is evident that these limiting facts were not added to the opinion as an afterthought; they were repeatedly emphasized, see 287 U.S. at 287 U. S. 52, 287 U. S. 57-58, 287 U. S. 71, and were clearly regarded as important to the result.

Thus, when this Court, a decade later, decided *Betts v. Brady*, it did no more than to admit of the possible existence of special circumstances in noncapital, as well as capital, trials, while at the same time insisting that such circumstances be shown in order to establish a denial of due process. The right to appointed counsel had been recognized as being considerably broader in federal prosecutions, see *Johnson v. Zerbst*, 304 U. S. 458, but to have imposed these requirements on the States would indeed have been "an abrupt break" with the almost immediate past. The declaration that the right to appointed counsel in state prosecutions, as established in *Powell v. Alabama*, was not limited to capital cases was, in truth, not a departure from, but an extension of, existing precedent.

The principles declared in *Powell* and in *Betts*, however, have had a troubled journey throughout the years that have followed first the one case and then the other. Even by the time of the *Betts* decision, dictum in at least one of the Court's opinions had indicated that there was an absolute right to the services of counsel in the trial of state capital cases. [Footnote 4/1] Such dicta continued to appear in subsequent decisions, [Footnote 4/2] and any lingering doubts were finally eliminated by the holding of *Hamilton v. Alabama*, 368 U. S. 52.

In noncapital cases, the "special circumstances" rule has continued to exist in form while its substance has been substantially and steadily eroded. In the first decade after *Betts*, there were cases in which the Court
found special circumstances to be lacking, but usually by a sharply divided vote. [Footnote 4/3] However, no such decision has been cited to us, and I have found none, after Quicksall v. Michigan, 339 U. S. 660, decided in 1950. At the same time, there have been not a few cases in which special circumstances were found in little or nothing more than the "complexity" of the legal questions presented, although those questions were often of only routine difficulty. [Footnote 4/4] The Court has come to recognize, in other words, that the mere existence of a serious criminal charge constituted, in itself, special circumstances requiring the services of counsel at trial. In truth, the Betts v. Brady rule is no longer a reality.

This evolution, however, appears not to have been fully recognized by many state courts, in this instance charged with the front-line responsibility for the enforcement of constitutional rights. [Footnote 4/5] To continue a rule which is honored by this Court only with lip service is not a healthy thing, and, in the long run, will do disservice to the federal system.

The special circumstances rule has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of a substantial prison sentence. (Whether the rule should extend to all criminal cases need not now be decided.) This indeed does no more than to make explicit something that has long since been foreshadowed in our decisions.

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In agreeing with the Court that the right to counsel in a case such as this should now be expressly recognized as a fundamental right embraced in the Fourteenth Amendment, I wish to make a further observation. When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" [Footnote 4/6] and thus valid against the States, I do not read our past decisions to suggest that, by so holding, we automatically carry over an entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. Cf. Roth v. United States, 354 U. S. 476, 354 U. S. 496-508 (separate opinion of this writer). In what is done today, I do not understand the Court to depart from the principles laid down in Palko v. Connecticut, 302 U. S. 319, or to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.

On these premises I join in the judgment of the Court.

[Footnote 4/1]

[Footnote 4/2]


[Footnote 4/3]


[Footnote 4/4]


[Footnote 4/5]


[Footnote 4/6]

HAZELWOOD SCH. DIST. V. KUHLMEIER, 484 U. S. 260 (1988)

U.S. Supreme Court


Hazelwood School District v. Kuhlmeier

No. 86-836

Argued October 13, 1987

Decided January 13, 1988

484 U.S. 260

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Syllabus

Respondents, former high school students who were staff members of the school's newspaper, filed suit in Federal District Court against petitioners, the school district and school officials, alleging that respondents' First Amendment rights were violated by the deletion from a certain issue of the paper of two pages that included an article describing school students' experiences with pregnancy and another article discussing the impact of divorce on students at the school. The newspaper was written and edited by a journalism class, as part of the school's curriculum. Pursuant to the school's practice, the teacher in charge of the paper submitted page proofs to the school's principal, who objected to the pregnancy story because the pregnant students, although not named, might be identified from the text, and because he believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students. The principal objected to the divorce article because the page proofs he was furnished identified by name (deleted by the teacher from the final version) a student who complained of her father's conduct, and the principal believed that the student's parents should have been given an opportunity to respond to the remarks or to consent to their publication. Believing that there was no time to make necessary changes in the articles if the paper was to be issued before the end of the school year, the principal directed that the pages on which they
appeared be withheld from publication even though other, unobjectionable articles were included on such pages. The District Court held that no First Amendment violation had occurred. The Court of Appeals reversed.

_Held:_ Respondents' First Amendment rights were not violated.

(a) First Amendment rights of students in the public schools are not automatically coextensive with the rights of adults in other settings, and must be applied in light of the special characteristics of the school environment. A school need not tolerate student speech that is inconsistent with its basic educational mission, even though the government could not censor similar speech outside the school.

(b) The school newspaper here cannot be characterized as a forum for public expression. School facilities may be deemed to be public forums only if school authorities have, by policy or by practice, opened the facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. The school officials in this case did not deviate from their policy that the newspaper's production was to be part of the educational curriculum and a regular classroom activity under the journalism teacher's control as to almost every aspect of publication. The officials did not evince any intent to open the paper's pages to indiscriminate use by its student reporters and editors, or by the student body generally. Accordingly, school officials were entitled to regulate the paper's contents in any reasonable manner.

(c) The standard for determining when a school may punish student expression that happens to occur on school premises is not the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. _Tinker v. Des Moines Independent Community School Dist._, 393 U. S. 503, distinguished. Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns.

(d) The school principal acted reasonably in this case in requiring the deletion of the pregnancy article, the divorce article, and the other articles that were to appear on the same pages of the newspaper.

_795 F.2d 1368_, reversed.
JUSTICE WHITE delivered the opinion of the Court.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

I

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982-1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

The Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper. The printing expenses during the 1982-1983 school year totaled $4,668.50; revenue from sales was $1,166.84. The other costs associated with the newspaper -- such as supplies, textbooks, and a portion of the journalism teacher's salary -- were borne entirely by the Board.

The Journalism II course was taught by Robert Stergos for most of the 1982-1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of Spectrum was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that
edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. App. to Pet. for Cert. 38. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks, or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run,

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and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. [Footnote 1] He informed his superiors of the decision, and they concurred.

Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri, seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages. After a bench trial, the District Court denied an injunction, holding that no First Amendment violation had occurred. 607 F.Supp. 1450 (1985).

The District Court concluded that school officials may impose restraints on students' speech in activities that are "an integral part of the school's educational function" -- including the publication of a school-sponsored newspaper by a journalism class -- so long as their decision has "a substantial and reasonable basis." Id. at 1466 (quoting Frasca v. Andrews, 463 F.Supp. 1043, 1052 (EDNY 1979)). The court found that Principal Reynolds' concern that the pregnant students' anonymity would be lost and their privacy invaded was "legitimate and reasonable," given "the small number of pregnant students at Hazelwood East and several identifying characteristics that were
"disclosed in the article." 607 F.Supp. at 1466. The court held that Reynolds' action was also justified "to avoid the impression that [the school] endorses the sexual norms of the subjects" and to shield younger students from exposure to unsuitable material. Ibid. The deletion of the article on divorce was seen by the court as a reasonable response to the invasion of privacy concerns raised by the named student's remarks. Because the article did not indicate that the student's parents had been offered an opportunity to respond to her allegations, said the court, there was cause for "serious doubt that the article complied with the rules of fairness which are standard in the field of journalism and which were covered in the textbook used in the Journalism II class."

Id. at 1467. Furthermore, the court concluded that Reynolds was justified in deleting two full pages of the newspaper, instead of deleting only the pregnancy and divorce stories or requiring that those stories be modified to address his concerns, based on his "reasonable belief that he had to make an immediate decision and that there was no time to make modifications to the articles in question."

Id. at 1466.

The Court of Appeals for the Eighth Circuit reversed. 795 F.2d 1368 (1986). The court held at the outset that Spectrum was not only "a part of the school adopted curriculum," id. at 1373, but also a public forum, because the newspaper was "intended to be and operated as a conduit for student viewpoint." Id. at 1372. The court then concluded that Spectrum's status as a public forum precluded school officials from censoring its contents except when "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others." Id. at 1374 (quoting Tinker v. Des Moines Independent Community School Dist., 393 U. S. 503, 393 U. S. 511 (1969)).

The Court of Appeals found "no evidence in the record that the principal could have reasonably forecast that the censored articles or any materials in the censored articles would have materially disrupted classwork or given rise to substantial disorder in the school."

795 F.2d 1375. School officials were entitled to censor the articles on the ground that they invaded the rights of others, according to the court, only if publication of the articles could have resulted in tort liability to the school. The court concluded that no tort action
for libel or invasion of privacy could have been maintained against the school by the subjects of the two articles or by their families. Accordingly, the court held that school officials had violated respondents' First Amendment rights by deleting the two pages of the newspaper.

We granted certiorari, 479 U.S. 1053 (1987), and we now reverse.

II

Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker, supra, at 393 U. S. 506. They cannot be punished merely for expressing their personal views on the school premises -- whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours," 393 U.S. at 393 U. S. 512-513 -- unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students." Id. at 393 U. S. 509.

We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings," Bethel School District No. 403 v. Fraser, 478 U. S. 675, 403 U. S. 682 (1986), and must be "applied in light of the special characteristics of the school environment." Tinker, supra, at 393 U. S. 506; cf. New Jersey v. T.L.O., 469 U. S. 325, 469 U. S. 341-343 (1985). A school need not tolerate student speech that is inconsistent with its "basic educational mission," Fraser, supra, at 478 U. S. 685, even though the government could not censor similar speech outside the school. Accordingly, we held in Fraser that a student could be disciplined for having delivered a speech that was "sexually explicit" but not legally obscene at an official school assembly, because the school was entitled to "disassociate itself from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the fundamental values' of public school education." 478 U.S. at 478 U. S. 685-686. We thus recognized that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," id. at 478 U. S. 683, rather than with the federal courts. It is in this context that respondents' First Amendment claims must be considered.

A

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hague v. CIO, 307 U. S. 496, 307 U. S. 515 (1939). Cf. Widmar v. Vincent, 454 U. S. 263, 454 U. S. 267-268, n. 5 (1981). Hence, school facilities may be
deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U. S. 37, 460 U. S. 47 (1983), or by some segment of the public, such as student organizations. *Id.* at 460 U. S. 46, n. 7 (citing *Widmar v. Vincent*). If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. 460 U.S. at 460 U. S. 46, n. 7.

"The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."


The policy of school officials toward Spectrum was reflected in Hazelwood School Board Policy 348.51 and the Hazelwood East Curriculum Guide. Board Policy 348.51 provided that

"[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities."

App. 22. The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." *Id.* at 11. The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." *Ibid.* Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum, and a "regular classroom activity[.]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982-1983 school year, "both had the authority to exercise, and in fact exercised, a great deal of control over Spectrum." 607 F.Supp. at 1453. For example, Stergos selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company. Many of these decisions were made without consultation with the Journalism II students. The District Court thus found it
"clear that Mr. Stergos was the final authority with respect to almost every aspect of the production and publication of Spectrum, including its content."

*Ibid.* Moreover, after

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each Spectrum issue had been finally approved by Stergos or his successor, the issue still had to be reviewed by Principal Reynolds prior to publication. Respondents' assertion that they had believed that they could publish "practically anything" in Spectrum was therefore dismissed by the District Court as simply "not credible." *Id.* at 1456. These factual findings are amply supported by the record, and were not rejected as clearly erroneous by the Court of Appeals.

The evidence relied upon by the Court of Appeals in finding Spectrum to be a public forum, see 795 F.2d 1372-1373, is equivocal, at best. For example, Board Policy 348.51, which stated in part that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism," also stated that such publications were "developed within the adopted curriculum and its educational implications." App. 22. One might reasonably infer from the full text of Policy 348.51 that school officials retained ultimate control over what constituted "responsible journalism" in a school-sponsored newspaper. Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that "Spectrum, as a student-press publication, accepts all rights implied by the First Amendment," this statement, understood in the context of the paper's role in the school's curriculum, suggests, at most, that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum. [*Footnote 2*] Finally,

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that students were permitted to exercise some authority over the contents of Spectrum was fully consistent with the Curriculum Guide objective of teaching the Journalism II students "leadership responsibilities as issue and page editors." App. 11. A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity. In sum, the evidence relied upon by the Court of Appeals fails to demonstrate the "clear intent to create a public forum," *Cornelius*, 473 U.S. at 473 U. S. 802, that existed in cases in which we found public forums to have been created. *See id.* at 473 U. S. 802-803 (citing *Widmar v. Vincent*, 454 U.S. at 454 U. S. 267; *Madison School District v. Wisconsin Employment Relations Comm'n*, 429 U. S. 167, 429 U. S. 174, n. 6 (1976); *Southeastern Promotions, Ltd. v. Conrad*, 420 U. S. 546, 420 U. S. 555 (1975)). School officials did not evince either "by policy or by practice," *Perry Education Assn.*, 460 U.S. at 460 U. S. 47, any intent to open the pages of Spectrum to "indiscriminate use," *ibid.*, by its student reporters and editors, or by the student body generally. Instead, they "reserve[d] the forum for its intended purpos[e]," *id.*
at 460 U. S. 46, as a supervised learning experience for journalism students. Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. Ibid. It is this standard, rather than our decision in Tinker, that governs this case.

B

The question whether the First Amendment requires a school to tolerate particular student speech -- the question that we addressed in Tinker -- is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences. [Footnote 3]

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may, in its capacity as publisher of a school newspaper or producer of a school play, "disassociate itself," Fraser, 478 U.S. at 478 U. S. 685, not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," Tinker, 393 U.S. at 393 U. S. 509, but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. [Footnote 4] A school must be able to set high standards for the student speech that is disseminated under its auspices -- standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world -- and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct

Footnote 3

Footnote 4
otherwise inconsistent with "the shared values of a civilized social order," *Fraser, supra*, at 478 U. S. 683, or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."


Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. [Footnote 5] Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities, so long as their actions are reasonably related to legitimate pedagogical concerns. [Footnote 6]

This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. See, e.g., *Board of Education of Hendrick Hudson Central School Dist. v. Rowley, 458 U. S. 176, 458 U. S. 208* (1982); *Wood v. Strickland, 420 U. S. 308, 420 U. S. 326* (1975); *Epperson v. Arkansas, 393 U. S. 97, 393 U. S. 104* (1968). It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]," *ibid.*, as to require judicial intervention to protect students' constitutional rights. [Footnote 7]

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III

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls, and possibly all three. It is likely that many students at Hazelwood East would
have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen

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and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent - - indeed, as one who chose "playing cards with the guys" over home and family -- was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982-1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name. [Footnote 8]

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with Emerson, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable, given the particular circumstances of this case. These circumstances included the very recent

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replacement of Stergos by Emerson, who may not have been entirely familiar with Spectrum editorial and production procedures, and the pressure felt by Reynolds to make an immediate decision so that students would not be deprived of the newspaper altogether.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum
that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred. [Footnote 9]

The judgment of the Court of Appeals for the Eighth Circuit is therefore Reversed.

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[Footnote 1]

The two pages deleted from the newspaper also contained articles on teenage marriage, runaways, and juvenile delinquents, as well as a general article on teenage pregnancy. Reynolds testified that he had no objection to these articles, and that they were deleted only because they appeared on the same pages as the two objectionable articles.

[Footnote 2]

The Statement also cited Tinker v. Des Moines Independent Community School Dist., 393 U. S. 503 (1969), for the proposition that "[o]nly speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore be prohibited."

App. 26. This portion of the Statement does not, of course, even accurately reflect our holding in Tinker. Furthermore, the Statement nowhere expressly extended the Tinker standard to the news and feature articles contained in a school-sponsored newspaper. The dissent apparently finds as a fact that the Statement was published annually in Spectrum; however, the District Court was unable to conclude that the Statement appeared on more than one occasion. In any event, even if the Statement says what the dissent believes that it says, the evidence that school officials never intended to designate Spectrum as a public forum remains overwhelming.

[Footnote 3]

The distinction that we draw between speech that is sponsored by the school and speech that is not is fully consistent with Papish v. University of Missouri Board of Curators, 410 U. S. 667 (1973) (per curiam), which involved an off-campus "underground"
newspaper that school officials merely had allowed to be sold on a state university campus.

[Footnote 4]

The dissent perceives no difference between the First Amendment analysis applied in *Tinker* and that applied in *Fraser*. We disagree. The decision in *Fraser* rested on the "vulgar," "lewd," and "plainly offensive" character of a speech delivered at an official school assembly, rather than on any propensity of the speech to "materially disrupt classwork or involve[ ] substantial disorder or invasion of the rights of others." 393 U.S. at 393 U.S. 513. Indeed, the *Fraser* Court cited as "especially relevant" a portion of Justice Black's dissenting opinion in *Tinker*

"'disclaim[ing] any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.'"

478 U.S. at 478 U.S. 686 (quoting 393 U.S. at 393 U.S. 526). Of course, Justice Black's observations are equally relevant to the instant case.

[Footnote 5]

We therefore need not decide whether the Court of Appeals correctly construed *Tinker* as precluding school officials from censoring student speech to avoid "invasion of the rights of others," 393 U.S. at 393 U.S. 513, except where that speech could result in tort liability to the school.

[Footnote 6]

We reject respondents' suggestion that school officials be permitted to exercise prepublication control over school-sponsored publications only pursuant to specific written regulations. To require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate. We need not now decide whether such regulations are required before school officials may censor publications not sponsored by the school that students seek to distribute on school grounds. See *Baughman v. Freienmuth*, 478 F.2d 1345 (CA4 1973); *Shanley v. Northeast Independent School Dist., Bexar Cty., Tex.*, 462 F.2d 960 (CA5 1972); *Eisner v. Stamford Board of Education*, 440 F.2d 803 (CA2 1971).

[Footnote 7]

A number of lower federal courts have similarly recognized that educators' decisions with regard to the content of school-sponsored newspapers, dramatic productions, and other expressive activities are entitled to substantial deference. See, e.g., *Nicholson v. Board of Education, Torrance Unified School Dist.*, 682 F.2d 858 (CA9 1982); *Seyfried v. Walton*, 668 F.2d 214 (CA3 1981); *Trachtman v. Anker*, 563 F.2d 512 (CA2 1977), cert. denied,
We need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level.

[Footnote 8]

The reasonableness of Principal Reynolds' concerns about the two articles was further substantiated by the trial testimony of Martin Duggan, a former editorial page editor of the St. Louis Globe Democrat and a former college journalism instructor and newspaper adviser. Duggan testified that the divorce story did not meet journalistic standards of fairness and balance because the father was not given an opportunity to respond, and that the pregnancy story was not appropriate for publication in a high school newspaper because it was unduly intrusive into the privacy of the girls, their parents, and their boyfriends. The District Court found Duggan to be "an objective and independent witness" whose testimony was entitled to significant weight. 607 F.Supp. 1450, 1461 (ED Mo.1985).

[Footnote 9]

It is likely that the approach urged by the dissent would, as a practical matter, have far more deleterious consequences for the student press than does the approach that we adopt today. The dissent correctly acknowledges "[t]he State's prerogative to dissolve the student newspaper entirely." Post at 484 U. S. 287. It is likely that many public schools would do just that rather than open their newspapers to all student expression that does not threaten "materia[l] disrup[tion of] classwork" or violation of "rights that are protected by law," post at 484 U. S. 289, regardless of how sexually explicit, racially intemperate, or personally insulting that expression otherwise might be.

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

When the young men and women of Hazelwood East High School registered for Journalism II, they expected a civics lesson. Spectrum, the newspaper they were to publish,

"was not just a class exercise in which students learned to prepare papers and hone writing skills, it was a . . . forum established to give students an opportunity to express their views while gaining an appreciation of their rights and responsibilities under the First Amendment to the United States Constitution. . . ."

795 F.2d 1368, 1373 (CA8 1986). "[A]t the beginning of each school year," id. at 1372, the student journalists published a Statement of Policy -- tacitly approved each year by school authorities -- announcing their expectation that
"Spectrum, as a student-press publication, accepts all rights implied by the First Amendment. . . . Only speech that 'materially and substantially interferes with the requirements of appropriate discipline' can be found unacceptable and therefore prohibited."

App. 26 (quoting Tinker v. Des Moines Independent Community School Dist., 393 U. S. 503, 393 U. S. 513 (1969)). [Footnote 2/1] The school board itself affirmatively guaranteed the students of Journalism II an atmosphere conducive to fostering such an appreciation and exercising the full panoply of rights associated with a free student press. "School-sponsored student publications," it vowed, "will not restrict free expression or diverse viewpoints within the rules of responsible journalism." App. 22 (Board Policy 348.51).

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This case arose when the Hazelwood East administration breached its own promise, dashing its students' expectations. The school principal, without prior consultation or explanation, excised six articles -- comprising two full pages -- of the May 13, 1983, issue of Spectrum. He did so not because any of the articles would "materially and substantially interfere with the requirements of appropriate discipline," but simply because he considered two of the six "inappropriate, personal, sensitive, and unsuitable" for student consumption. 795 F.2d 1371.

In my view, the principal broke more than just a promise. He violated the First Amendment's prohibitions against censorship of any student expression that neither disrupts classwork nor invades the rights of others, and against any censorship that is not narrowly tailored to serve its purpose.

I

Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. See Brown v. Board of Education, 347 U. S. 483, 347 U. S. 493 (1954). The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's leaders the "fundamental values necessary to the maintenance of a democratic political system. . . ." Ambach v. Norwick, 441 U. S. 68, 441 U. S. 77 (1979). All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of "community values." Board of Education v. Pico, 457 U. S. 853, 457 U. S. 864 (1982) (plurality opinion) (citation omitted).

The public educator's task is weighty and delicate indeed. It demands particularized and supremely subjective choices among diverse curricula, moral values, and political stances to teach or inculcate in students, and among various methodologies for doing so. Accordingly, we have traditionally reserved
the "daily operation of school systems" to the States and their local school boards. *Epperson v. Arkansas*, 393 U. S. 97, 393 U. S. 104 (1968); see *Board of Education v. Pico*, supra, at 457 U. S. 863–864. We have not, however, hesitated to intervene where their decisions run afoul of the Constitution. See e.g., *Edwards v. Aguillard*, 482 U. S. 578 (1987) (striking state statute that forbade teaching of evolution in public school unless accompanied by instruction on theory of "creation science"); *Board of Education v. Pico*, supra, (school board may not remove books from library shelves merely because it disapproves of ideas they express); *Epperson v. Arkansas*, supra, (striking state law prohibition against teaching Darwinian theory of evolution in public school); *West Virginia Board of Education v. Barnette*, 319 U. S. 624 (1943) (public school may not compel student to salute flag); *Meyer v. Nebraska*, 262 U. S. 390 (1923) (state law prohibiting the teaching of foreign languages in public or private schools is unconstitutional).

Free student expression undoubtedly sometimes interferes with the effectiveness of the school's pedagogical functions. Some brands of student expression do so by directly preventing the school from pursuing its pedagogical mission: the young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus. And the student who delivers a lewd endorsement of a student government candidate might so extremely distract an impressionable high school audience as to interfere with the orderly operation of the school. See *Bethel School Dist. No. 403 v. Fraser*, 478 U. S. 675 (1986). Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: a student who responds to a political science teacher's question with the retort, "socialism is good," subverts the school's inculcation of the message that capitalism is better.

Even the maverick who sits in class passively sporting a symbol of protest against a governmental policy, cf. *Tinker v. Des Moines Independent Community School Dist.*, 393 U. S. 503 (1969), or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy or condemning teenage sex. Likewise, the student newspaper that, like *Spectrum*, conveys a moral position at odds with the school's official stance might subvert the administration's legitimate inculcation of its own perception of community values.

If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into "enclaves of totalitarianism," *id.* at 393 U. S. 511, that "strangle the free mind at its source," *West Virginia Board of Education v. Barnette*, supra, at 319
The First Amendment permits no such blanket censorship authority. While the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Fraser*, *supra*, at 478 U. S. 682, students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, *supra*, at 393 U. S. 506. Just as the public on the street corner must, in the interest of fostering "enlightened opinion," *Cantwell v. Connecticut*, 310 U. S. 296, 310 U. S. 310 (1940), tolerate speech that "tempt[s] [the listener] to throw [the speaker] off the street," *id.* at 310 U. S. 309, public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.

In *Tinker*, this Court struck the balance. We held that official censorship of student expression -- there the suspension of several students until they removed their armbands protesting the Vietnam war -- is unconstitutional unless the speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others. . . ." 393 U.S. at 393 U. S. 513. School officials may not suppress "silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of" the speaker. *Id.* at 393 U. S. 508. The "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id.* at 393 U. S. 509, or an unsavory subject, *Fraser, supra*, at 478 U. S. 688-689 (BRENNAN, J., concurring in judgment), does not justify official suppression of student speech in the high school.

This Court applied the *Tinker* test just a Term ago in *Fraser, supra*, upholding an official decision to discipline a student for delivering a lewd speech in support of a student government candidate. The Court today casts no doubt on *Tinker's* vitality. Instead, it erects a taxonomy of school censorship, concluding that *Tinker* applies to one category, and not another. On the one hand is censorship "to silence a student's personal expression that happens to occur on the school premises." *Ante* at 484 U. S. 271. On the other hand is censorship of expression that arises in the context of "school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Ibid.*

The Court does not, for it cannot, purport to discern from our precedents the distinction it creates. One could, I suppose, readily characterize the students' symbolic speech in *Tinker* as "personal expression that happens to [have] occur[red] on school premises," although *Tinker* did not even hint that the personal nature of the speech was of any (much less dispositive) relevance. But that same description could not, by any stretch of the imagination, fit Fraser's speech. He did not just "happen" to deliver his lewd speech to an *ad hoc* gathering on the playground. As the second paragraph of *Fraser* evinces, if ever a forum for student expression was "school-sponsored," Fraser's was:
"Fraser . . . delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students . . . attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government."

Fraser, 478 U.S. at 478 U. S. 677 (emphasis added). Yet, from the first sentence of its analysis, see id. at 478 U. S. 680, Fraser faithfully applied Tinker.

Nor has this Court ever intimated a distinction between personal and school-sponsored speech in any other context. Particularly telling is this Court's heavy reliance on Tinker in two cases of First Amendment infringement on state college campuses. See Papish v. University of Missouri Board of Curators, 410 U. S. 667, 410 U. S. 671, n. 6 (1973) (per curiam); Healy v. James, 408 U. S. 169, 408 U. S. 180, 408 U. S. 189, and n. 18, 408 U. S. 191 (1972). One involved the expulsion of a student for lewd expression in a newspaper that she sold on campus pursuant to university authorization, see Papish, supra, at 410 U. S. 667-668, and the other involved the denial of university recognition and concomitant benefits to a political student organization, see Healy, supra, at 408 U. S. 174, 408 U. S. 176, 408 U. S. 181-182. Tracking Tinker's analysis, the Court found each act of suppression unconstitutional. In neither case did this Court suggest the distinction, which the Court today finds dispositive, between school-sponsored and incidental student expression.

II

Even if we were writing on a clean slate, I would reject the Court's rationale for abandoning Tinker in this case. The Court offers no more than an obscure tangle of three excuses to afford educators "greater control" over school-sponsored speech than the Tinker test would permit: the public educator's prerogative to control curriculum; the pedagogical interest in shielding the high school audience from objectionable viewpoints and sensitive topics; and the school's need to dissociate itself from student expression. Ante at 484 U. S. 271. None of the excuses, once disentangled, supports the distinction that the Court draws. Tinker fully addresses the first concern; the second is illegitimate; and the third is readily achievable through less oppressive means.

A

The Court is certainly correct that the First Amendment permits educators "to assure that participants learn whatever lessons the activity is designed to teach. . . ." Ante at 484 U. S. 271. That is, however, the essence of the Tinker test, not an excuse to abandon it. Under Tinker, school officials may censor only such student speech as would "materially
disrupt," a legitimate curricular function. Manifestly, student speech is more likely to disrupt a curricular function when it arises in the context of a curricular activity -- one that "is designed to teach" something -- than when it arises in the context of a noncurricular activity. Thus, under Tinker, the school may constitutionally punish the budding political orator if he disrupts calculus class, but not if he holds his tongue for the cafeteria. See Consolidated Edison Co. v. Public Service Comm'n of New York, 447 U. S. 530, 447 U. S. 544-545 (1980) (STEVENS, J., concurring in judgment).

That is not because some more stringent standard applies in the curricular context. (After all, this Court applied the same standard whether the students in Tinker wore their armbands to the "classroom" or the "cafeteria." 393 U.S. at 393 U. S. 512.) It is because student speech in the noncurricular context is less likely to disrupt materially any legitimate pedagogical purpose.

I fully agree with the Court that the First Amendment should afford an educator the prerogative not to sponsor the publication of a newspaper article that is "ungrammatical, poorly written, inadequately researched, biased or prejudiced," or that falls short of the "high standards for . . . student speech that is disseminated under [the school's] auspices. . . ." Ante at 484 U. S. 271-272. But we need not abandon Tinker to reach that conclusion; we need only apply it. The enumerated criteria reflect the skills that the curricular newspaper "is designed to teach." The educator may, under Tinker, constitutionally "censor" poor grammar, writing, or research, because to reward such expression would "materially disrupt[" the newspaper's curricular purpose.

The same cannot be said of official censorship designed to shield the audience or dissociate the sponsor from the expression. Censorship so motivated might well serve (although, as I demonstrate infra at 484 U. S. 285-289, cannot legitimately serve) some other school purpose. But it in no way furthers the curricular purposes of a student newspaper unless one believes that the purpose of the school newspaper is to teach students that the press ought never report bad news, express unpopular views, or print a thought that might upset its sponsors. Unsurprisingly, Hazelwood East claims no such pedagogical purpose.

The Court relies on bits of testimony to portray the principal's conduct as a pedagogical lesson to Journalism II students who

"had not sufficiently mastered those portions of the . . . curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals . . . and 'the legal, moral, and ethical restrictions imposed upon journalists. . . .""

Ante at 484 U. S. 276. In that regard, the Court attempts to justify censorship of the article on teenage pregnancy on the basis of the principal's judgment that (1) "the
[pregnant] students' anonymity was not adequately protected," despite the article's use of aliases; and (2) the judgment that "the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents. . . ." Ante at 484 U. S. 274. Similarly, the Court finds in the principal's decision to censor the divorce article a journalistic lesson that the author should have given the father of one student an "opportunity to defend himself" against her charge that (in the Court's words) he "chose

"playing cards with the guys' over home and family. . . ." Ante at 484 U. S. 275.

But the principal never consulted the students before censoring their work. "[T]hey learned of the deletions when the paper was released. . . ." 795 F.2d 1371. Further, he explained the deletions only in the broadest of generalities. In one meeting called at the behest of seven protesting Spectrum staff members (presumably a fraction of the full class), he characterized the articles as "too sensitive for 'our immature audience of readers,'" 607 F.Supp. 1450, 1459 (ED Mo.1985), and in a later meeting he deemed them simply "inappropriate, personal, sensitive and unsuitable for the newspaper," ibid. The Court's supposition that the principal intended (or the protesters understood) those generalities as a lesson on the nuances of journalistic responsibility is utterly incredible. If he did, a fact that neither the District Court nor the Court of Appeals found, the lesson was lost on all but the psychic Spectrum staffer.

B

The Court's second excuse for deviating from precedent is the school's interest in shielding an impressionable high school audience from material whose substance is "unsuitable for immature audiences." Ante at 484 U. S. 271 (footnote omitted). Specifically, the majority decrees that we must afford educators authority to shield high school students from exposure to "potentially sensitive topics" (like "the particulars of teenage sexual activity") or unacceptable social viewpoints (like the advocacy of "irresponsible se[x] or conduct otherwise inconsistent with the shared values of a civilized social order") through school-sponsored student activities. Ante at 484 U. S. 272 (citation omitted).

_Tinker_ teaches us that the state educator's undeniable, and undeniably vital, mandate to inculcate moral and political values is not a general warrant to act as "thought police" stifling discussion of all but state-approved topics and advocacy of all
the classroom," Keyishian v. Board of Regents, 385 U. S. 589, 385 U. S. 603 (1967). Thus, the State cannot constitutionally prohibit its high school students from recounting in the locker room "the particulars of [their] teen-age sexual activity," nor even from advocating "irresponsible sex" or other presumed abominations of "the shared values of a civilized social order." Even in its capacity as educator, the State may not assume an Orwellian "guardianship of the public mind," Thomas v. Collins, 323 U. S. 516, 323 U. S. 545 (1945) (Jackson, J., concurring).

The mere fact of school sponsorship does not, as the Court suggests, license such thought control in the high school, whether through school suppression of disfavored viewpoints or through official assessment of topic sensitivity. [Footnote 2/2] The former would constitute unabashed and unconstitutional viewpoint discrimination, see Board of Education v. Pico, 457 U.S. at 457 U. S. 878-879 (BLACKMUN, J., concurring in part and concurring in judgment), as well as an impermissible infringement of the students' "right to receive information and ideas," id. at 457 U. S. 867 (plurality opinion) (citations omitted); see First National Bank v. Bellotti, 435 U. S. 765, 435 U. S. 783 (1978). [Footnote 2/3] Just as a school board may not purge its state-funded library of all books that "offends [its] social, political and moral tastes," 457 U.S. at 457 U. S. 858-859 (plurality opinion) (citation omitted), school officials may not, out of like motivation, discriminatorily excise objectionable ideas from a student publication. The State's prerogative to dissolve the student newspaper entirely (or to limit its subject matter) no more entitles it to dictate which viewpoints students may express on its pages than the State's prerogative to close down the schoolhouse entitles it to prohibit the nondisruptive expression of antiwar sentiment within its gates.

Official censorship of student speech on the ground that it addresses "potentially sensitive topics" is, for related reasons, equally impermissible. I would not begrudge an educator the authority to limit the substantive scope of a school-sponsored publication to a certain, objectively definable topic, such as literary criticism, school sports, or an overview of the school year. Unlike those determinate limitations, "potential topic sensitivity" is a vaporous nonstandard -- like "public welfare, peace, safety, health, decency, good order, morals or convenience," Shuttlesworth v. Birmingham, 394 U. S. 147, 394 U. S. 150 (1969), or "general welfare of citizens," Staub v. Baxley, 355 U. S. 313, 355 U. S. 322 (1958) -- that invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination and chills student speech to which school officials might not object. In part because of those dangers, this Court has consistently condemned any scheme allowing a state official boundless discretion in licensing speech from a

The case before us aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the "mere" protection of students from sensitive topics. Among the grounds that the Court advances to uphold the principal's censorship of one of the articles was the potential sensitivity of "teenage sexual activity." Ante at 484 U. S. 272. Yet the District Court specifically found that the principal "did not, as a matter of principle, oppose discussion of said topic in Spectrum." 607 F.Supp. at 1467. That much is also clear from the same principal's approval of the "squeal law" article on the same page, dealing forthrightly with "teenage sexuality," "the use of contraceptives by teenagers," and "teenage pregnancy," App. 4-5. If topic sensitivity were the true basis of the principal's decision, the two articles should have been equally objectionable. It is much more likely that the objectionable article was objectionable because of the viewpoint it expressed: it might have been read (as the majority apparently does) to advocate "irresponsible sex." See ante at 484 U. S. 272.

C

The sole concomitant of school sponsorship that might conceivably justify the distinction that the Court draws between sponsored and nonsponsored student expression is the risk "that the views of the individual speaker [might be] erroneously attributed to the school." Ante at 484 U. S. 271. Of course, the risk of erroneous attribution inheres in any student expression, including "personal expression" that, like the armbands in Tinker, "happens to occur on the school premises," ante at 484 U. S. 271. Nevertheless, the majority is certainly correct that indicia of school sponsorship increase the likelihood of such attribution, and that state educators may therefore have a legitimate interest in dissociating themselves from student speech.

But

"[e]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."

Keyishian v. Board of Regents, 385 U.S. at 385 U. S. 602 (quoting Shelton v. Tucker, 364 U. S. 479, 364 U. S. 488 (1960)). Dissociative means short of censorship are available to the school. It could, for example, require the student activity to publish a disclaimer, such as the "Statement of Policy" that Spectrum published each school year announcing that
"[a]ll . . . editorials appearing in this newspaper reflect the opinions of the Spectrum staff, which are not necessarily shared by the administrators or faculty of Hazelwood East," App. 26; or it could simply issue its own response clarifying the official position on the matter and explaining why the student position is wrong. Yet, without so much as acknowledging the less oppressive alternatives, the Court approves of brutal censorship.

III

Since the censorship served no legitimate pedagogical purpose, it cannot by any stretch of the imagination have been designed to prevent "materia[l] disrup[tion of] classwork," Tinker, 393 U.S. at 393 U. S. 513. Nor did the censorship fall within the category that Tinker described as necessary to prevent student expression from "inva[ding] the rights of others," ibid. If that term is to have any content, it must be limited to rights that are protected by law. "Any yardstick less exacting than [that] could result in school officials curtailing speech at the slightest fear of disturbance," 795 F.2d 1376, a prospect that would be completely at odds with this Court's pronouncement that the "undifferentiated fear or apprehension of disturbance is not enough [even in the public school context] to overcome the right to freedom of expression."

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Tinker, supra, at 393 U. S. 508. And, as the Court of Appeals correctly reasoned, whatever journalistic impropriety these articles may have contained, they could not conceivably be tortious, much less criminal. See 795 F.2d 1375-1376

Finally, even if the majority were correct that the principal could constitutionally have censored the objectionable material, I would emphatically object to the brutal manner in which he did so. Where "[t]he separation of legitimate from illegitimate speech calls for more sensitive tools," Speiser v. Randall, 357 U. S. 513, 357 U. S. 525 (1958); see Keyishian v. Board of Regents, supra, at 385 U. S. 602, the principal used a paper shredder. He objected to some material in two articles, but excised six entire articles. He did not so much as inquire into obvious alternatives, such as precise deletions or additions (one of which had already been made), rearranging the layout, or delaying publication. Such unthinking contempt for individual rights is intolerable from any state official. It is particularly insidious from one to whom the public entrusts the task of inculcating in its youth an appreciation for the cherished democratic liberties that our Constitution guarantees.

IV

The Court opens its analysis in this case by purporting to reaffirm Tinker's time-tested proposition that public school students "do not shed their constitutional rights to freedom
of speech or expression at the schoolhouse gate." Ante at 484 U. S. 266 (quoting Tinker, supra, at 393 U. S. 506). That is an ironic introduction to an opinion that denudes high school students of much of the First Amendment protection that Tinker itself prescribed. Instead of "teach[ing] children to respect the diversity of ideas that is fundamental to the American system," Board of Education v. Pico, 457 U.S. at 457 U. S. 880 (BLACKMUN, J., concurring in part and concurring in judgment), and "that our Constitution is a living reality, not parchment preserved under glass," Shanley v. Northeast Independent School Dist., Bexar Cty., Tex., 462 F.2d 960, 972 (CA5 1972), the Court today "teach[es] youth to discount important principles of our government as mere platitudes." West Virginia Board of Education v. Barnette, 319 U.S. at 319 U. S. 637. The young men and women of Hazelwood East expected a civics lesson, but not the one the Court teaches them today.

I dissent.

[Footnote 2/1]

The Court suggests that the passage quoted in the text did not "exten[d] the Tinker standard to the news and feature articles contained in a school-sponsored newspaper" because the passage did not expressly mention them. Ante at 484 U. S. 269, n 2. It is hard to imaging why the Court (or anyone else) might expect a passage that applies categorically to "a student-press publication," composed almost exclusively of "news and feature articles," to mention those categories expressly. Understandably, neither court below so limited the passage.

[Footnote 2/2]

The Court quotes language in Bethel School Dist. No. 403 v. Fraser, 478 U. S. 675 (1986), for the proposition that

"'[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.'"

Ante at 484 U. S. 267 (quoting 478 U.S. at 478 U. S. 683). As the discussion immediately preceding that quotation makes clear, however, the Court was referring only to the appropriateness of the manner in which the message is conveyed, not of the message's content. See, e.g., Fraser, 478 U.S. at 478 U. S. 683 ("[T]he fundamental values necessary to the maintenance of a democratic political system' disfavor the use of terms of debate highly offensive or highly threatening to others"). In fact, the Fraser Court coupled its first mention of "society's . . . interest in teaching students the boundaries of socially appropriate behavior," with an acknowledgment of "'[t]he undoubted freedom to
advocate unpopular and controversial views in schools and classrooms," id. at 478 U. S. 681 (emphasis added). See also id. at 478 U. S. 689 (BRENNAN, J., concurring in judgment) ("Nor does this case involve an attempt by school officials to ban written materials they consider `inappropriate' for high school students" (citation omitted)).

[Footnote 2/3]

Petitioners themselves concede that "[c]ontrol over access" to Spectrum is permissible only if "the distinctions drawn . . . are viewpoint-neutral." Brief for Petitioners 32 (quoting Cornelius v. NAACP Legal Defense & Educational Fund, Inc., 473 U. S. 788, 473 U. S. 806 (1985)).
KOREMATSU V. UNITED STATES, 323 U. S. 214 (1944)

U.S. Supreme Court

Korematsu v. United States, 323 U.S. 214 (1944)

Korematsu v. United States

No. 22

Argued October 11, 12, 1944

Decided December 18, 1944

323 U.S. 214

CERTIORARI TO THE CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

Syllabus

1. Civilian Exclusion Order No. 34 which, during a state of war with Japan and as a protection against espionage and sabotage, was promulgated by the Commanding General of the Western Defense Command under authority of Executive Order No. 9066 and the Act of March 21, 1942, and which directed the exclusion after May 9, 1942, from a described West Coast military area of all persons of Japanese ancestry, held constitutional as of the time it was made and when the petitioner -- an American citizen of Japanese descent whose home was in the described area -- violated it. P. 323 U. S. 219.

2. The provisions of other orders requiring persons of Japanese ancestry to report to assembly centers and providing for the detention of such persons in assembly and relocation centers were separate, and their validity is not in issue in this proceeding. P. 323 U. S. 222.

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3. Even though evacuation and detention in the assembly center were inseparable, the order under which the petitioner was convicted was nevertheless valid. P. 323 U. S. 223.

140 F.2d 289, affirmed.

CERTIORARI, 321 U. S. 760, to review the affirmance of a judgment of conviction.

MR. JUSTICE BLACK delivered the opinion of the Court.

The petitioner, an American citizen of Japanese descent, was convicted in a federal district court for remaining in San Leandro, California, a "Military Area," contrary to Civilian Exclusion Order No. 34 of the Commanding General

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of the Western Command, U.S. Army, which directed that, after May 9, 1942, all persons of Japanese ancestry should be excluded from that area. No question was raised as to petitioner's loyalty to the United States. The Circuit Court of Appeals affirmed, [Footnote 1] and the importance of the constitutional question involved caused us to grant certiorari.

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can.

In the instant case, prosecution of the petitioner was begun by information charging violation of an Act of Congress, of March 21, 1942, 56 Stat. 173, which provides that

"... whoever shall enter, remain in, leave, or commit any act in any military area or military zone prescribed, under the authority of an Executive order of the President, by the Secretary of War, or by any military commander designated by the Secretary of War, contrary to the restrictions applicable to any such area or zone or contrary to the order of the Secretary of War or any such military commander, shall, if it appears that he knew or should have known of the existence and extent of the restrictions or order and that his act was in violation thereof, be guilty of a misdemeanor and upon conviction shall be liable to a fine of not to exceed $5,000 or to imprisonment for not more than one year, or both, for each offense."

Exclusion Order No. 34, which the petitioner knowingly and admittedly violated, was one of a number of military orders and proclamations, all of which were substantially
based upon Executive Order No. 9066, 7 Fed.Reg. 1407. That order, issued after we were at war with Japan, declared that

"the successful prosecution of the war requires every possible protection against espionage and against sabotage to national defense material, national defense premises, and national defense utilities. . ."

One of the series of orders and proclamations, a curfew order, which, like the exclusion order here, was promulgated pursuant to Executive Order 9066, subjected all persons of Japanese ancestry in prescribed West Coast military areas to remain in their residences from 8 p.m. to 6 a.m. As is the case with the exclusion order here, that prior curfew order was designed as a "protection against espionage and against sabotage." In *Hirabayashi v. United States*, 320 U. S. 81, we sustained a conviction obtained for violation of the curfew order. The Hirabayashi conviction and this one thus rest on the same 1942 Congressional Act and the same basic executive and military orders, all of which orders were aimed at the twin dangers of espionage and sabotage.

The 1942 Act was attacked in the *Hirabayashi* case as an unconstitutional delegation of power; it was contended that the curfew order and other orders on which it rested were beyond the war powers of the Congress, the military authorities, and of the President, as Commander in Chief of the Army, and, finally, that to apply the curfew order against none but citizens of Japanese ancestry amounted to a constitutionally prohibited discrimination solely on account of race. To these questions, we gave the serious consideration which their importance justified. We upheld the curfew order as an exercise of the power of the government to take steps necessary to prevent espionage and sabotage in an area threatened by Japanese attack.

In the light of the principles we announced in the *Hirabayashi* case, we are unable to conclude that it was beyond the war power of Congress and the Executive to exclude

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those of Japanese ancestry from the West Coast war area at the time they did. True, exclusion from the area in which one's home is located is a far greater deprivation than constant confinement to the home from 8 p.m. to 6 a.m. Nothing short of apprehension by the proper military authorities of the gravest imminent danger to the public safety can constitutionally justify either. But exclusion from a threatened area, no less than curfew, has a definite and close relationship to the prevention of espionage and sabotage. The military authorities, charged with the primary responsibility of defending our shores, concluded that curfew provided inadequate protection and ordered exclusion. They did so, as pointed out in our *Hirabayashi* opinion, in accordance with Congressional authority to the military to say who should, and who should not, remain in the threatened areas.

In this case, the petitioner challenges the assumptions upon which we rested our conclusions in the *Hirabayashi* case. He also urges that, by May, 1942, when Order No.
34 was promulgated, all danger of Japanese invasion of the West Coast had disappeared. After careful consideration of these contentions, we are compelled to reject them.

Here, as in the Hirabayashi case, supra, at p. 320 U. S. 99.

"...we cannot reject as unfounded the judgment of the military authorities and of Congress that there were disloyal members of that population, whose number and strength could not be precisely and quickly ascertained. We cannot say that the war-making branches of the Government did not have ground for believing that, in a critical hour, such persons could not readily be isolated and separately dealt with, and constituted a menace to the national defense and safety which demanded that prompt and adequate measures be taken to guard against it."

Like curfew, exclusion of those of Japanese origin was deemed necessary because of the presence of an unascertained number of disloyal members of the group, most of whom we have no doubt were loyal to this country. It was because we could not reject the finding of the military authorities that it was impossible to bring about an immediate segregation of the disloyal from the loyal that we sustained the validity of the curfew order as applying to the whole group. In the instant case, temporary exclusion of the entire group was rested by the military on the same ground. The judgment that exclusion of the whole group was, for the same reason, a military imperative answers the contention that the exclusion was in the nature of group punishment based on antagonism to those of Japanese origin. That there were members of the group who retained loyalties to Japan has been confirmed by investigations made subsequent to the exclusion. Approximately five thousand American citizens of Japanese ancestry refused to swear unqualified allegiance to the United States and to renounce allegiance to the Japanese Emperor, and several thousand evacuees requested repatriation to Japan. [Footnote 2]

We uphold the exclusion order as of the time it was made and when the petitioner violated it. Cf. Chastleton Corporation v. Sinclair, 264 U. S. 543, 264 U. S. 547; Block v. Hirsh, 256 U. S. 135, 256 U. S. 155. In doing so, we are not unmindful of the hardships imposed by it upon a large group of American citizens. Cf. Ex parte Kawato, 317 U. S. 69, 317 U. S. 73. But hardships are part of war, and war is an aggregation of hardships. All citizens alike, both in and out of uniform, feel the impact of war in greater or lesser measure. Citizenship has its responsibilities, as well as its privileges, and, in time of war, the burden is always heavier. Compulsory exclusion of large groups of citizens from their homes, except under circumstances of direst emergency and peril, is inconsistent with our basic governmental institutions. But
when, under conditions of modern warfare, our shores are threatened by hostile forces, the power to protect must be commensurate with the threatened danger.

It is argued that, on May 30, 1942, the date the petitioner was charged with remaining in the prohibited area, there were conflicting orders outstanding, forbidding him both to leave the area and to remain there. Of course, a person cannot be convicted for doing the very thing which it is a crime to fail to do. But the outstanding orders here contained no such contradictory commands.

There was an order issued March 27, 1942, which prohibited petitioner and others of Japanese ancestry from leaving the area, but its effect was specifically limited in time "until and to the extent that a future proclamation or order should so permit or direct." 7 Fed.Reg. 2601. That "future order," the one for violation of which petitioner was convicted, was issued May 3, 1942, and it did "direct" exclusion from the area of all persons of Japanese ancestry before 12 o'clock noon, May 9; furthermore, it contained a warning that all such persons found in the prohibited area would be liable to punishment under the March 21, 1942, Act of Congress. Consequently, the only order in effect touching the petitioner's being in the area on May 30, 1942, the date specified in the information against him, was the May 3 order which prohibited his remaining there, and it was that same order which he stipulated in his trial that he had violated, knowing of its existence. There is therefore no basis for the argument that, on May 30, 1942, he was subject to punishment, under the March 27 and May 3 orders, whether he remained in or left the area.

It does appear, however, that, on May 9, the effective date of the exclusion order, the military authorities had already determined that the evacuation should be effected by assembling together and placing under guard all those of Japanese ancestry at central points, designated as "assembly centers," in order "to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration."

Public Proclamation No. 4, 7 Fed.Reg. 2601. And on May 19, 1942, eleven days before the time petitioner was charged with unlawfully remaining in the area, Civilian Restrictive Order No. 1, 8 Fed.Reg. 982, provided for detention of those of Japanese ancestry in assembly or relocation centers. It is now argued that the validity of the exclusion order cannot be considered apart from the orders requiring him, after departure from the area, to report and to remain in an assembly or relocation center. The contention is that we must treat these separate orders as one and inseparable; that, for this reason, if detention in the assembly or relocation center would have illegally deprived the petitioner of his liberty, the exclusion order and his conviction under it cannot stand.
We are thus being asked to pass at this time upon the whole subsequent detention program in both assembly and relocation centers, although the only issues framed at the trial related to petitioner's remaining in the prohibited area in violation of the exclusion order. Had petitioner here left the prohibited area and gone to an assembly center, we cannot say, either as a matter of fact or law, that his presence in that center would have resulted in his detention in a relocation center. Some who did report to the assembly center were not sent to relocation centers, but were released upon condition that they remain outside the prohibited zone until the military orders were modified or lifted. This illustrates that they pose different problems, and may be governed by different principles. The lawfulness of one does not necessarily determine the lawfulness of the others. This is made clear when we analyze the requirements of the separate provisions of the separate orders. These separate requirements were that those of Japanese ancestry (1) depart from the area; (2) report to and temporarily remain in an assembly center; (3) go under military control to a relocation center, there to remain for an indeterminate period until released conditionally or unconditionally by the military authorities. Each of these requirements, it will be noted, imposed distinct duties in connection with the separate steps in a complete evacuation program. Had Congress directly incorporated into one Act the language of these separate orders, and provided sanctions for their violations, disobedience of any one would have constituted a separate offense. Cf. Blockburger v. United States, 284 U. S. 299, 284 U. S. 304. There is no reason why violations of these orders, insofar as they were promulgated pursuant to Congressional enactment, should not be treated as separate offenses.

The Endo case, post, p. 323 U. S. 283, graphically illustrates the difference between the validity of an order to exclude and the validity of a detention order after exclusion has been effected.

Since the petitioner has not been convicted of failing to report or to remain in an assembly or relocation center, we cannot in this case determine the validity of those separate provisions of the order. It is sufficient here for us to pass upon the order which petitioner violated. To do more would be to go beyond the issues raised, and to decide momentous questions not contained within the framework of the pleadings or the evidence in this case. It will be time enough to decide the serious constitutional issues which petitioner seeks to raise when an assembly or relocation order is applied or is certain to be applied to him, and we have its terms before us.

Some of the members of the Court are of the view that evacuation and detention in an Assembly Center were inseparable. After May 3, 1942, the date of Exclusion

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Order No. 34, Korematsu was under compulsion to leave the area not as he would choose, but via an Assembly Center. The Assembly Center was conceived as a part of the machinery for group evacuation. The power to exclude includes the power to do it by force if necessary. And any forcible measure must necessarily entail some degree of detention or restraint, whatever method of removal is selected. But whichever view is taken, it results in holding that the order under which petitioner was convicted was valid.

It is said that we are dealing here with the case of imprisonment of a citizen in a concentration camp solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. Our task would be simple, our duty clear, were this a case involving the imprisonment of a loyal citizen in a concentration camp because of racial prejudice. Regardless of the true nature of the assembly and relocation centers -- and we deem it unjustifiable to call them concentration camps, with all the ugly connotations that term implies -- we are dealing specifically with nothing but an exclusion order. To cast this case into outlines of racial prejudice, without reference to the real military dangers which were presented, merely confuses the issue. Korematsu was not excluded from the Military Area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and, finally, because Congress, reposing its confidence in this time of war in our military leaders -- as inevitably it must -- determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short. We cannot -- by availing ourselves of the calm perspective of hindsight -- now say that, at that time, these actions were unjustified.

_Affirmed._

[Footnote 1]

140 F.2d 289.

[Footnote 2]

MR. JUSTICE FRANKFURTER, concurring.

According to my reading of Civilian Exclusion Order No. 34, it was an offense for Korematsu to be found in Military Area No. 1, the territory wherein he was previously living, except within the bounds of the established Assembly Center of that area. Even though the various orders issued by General DeWitt be deemed a comprehensive code of instructions, their tenor is clear, and not contradictory. They put upon Korematsu the obligation to leave Military Area No. 1, but only by the method prescribed in the instructions, i.e., by reporting to the Assembly Center. I am unable to see how the legal considerations that led to the decision in Hirabayashi v. United States, 320 U. S. 81, fail to sustain the military order which made the conduct now in controversy a crime. And so I join in the opinion of the Court, but should like to add a few words of my own.

The provisions of the Constitution which confer on the Congress and the President powers to enable this country to wage war are as much part of the Constitution as provisions looking to a nation at peace. And we have had recent occasion to quote approvingly the statement of former Chief Justice Hughes that the war power of the Government is "the power to wage war successfully." Hirabayashi v. United States, supra, at 320 U. S. 93, and see Home Bldg. & L. Assn. v. Blaisdell, 290 U. S. 398, 290 U. S. 426. Therefore, the validity of action under the war power must be judged wholly in the context of war. That action is not to be stigmatized as lawless because like action in times of peace would be lawless. To talk about a military order that expresses an allowable judgment of war needs by those entrusted with the duty of conducting war as "an unconstitutional order" is to suffuse a part of the Constitution with an atmosphere of unconstitutionality. The respective spheres of action of military authorities and of judges are, of course, very different. But, within their sphere, military authorities are no more outside the bounds of obedience to the Constitution than are judges within theirs. "The war power of the United States, like its other powers . . . is subject to applicable constitutional limitations," Hamilton v. Kentucky Distilleries Co., 251 U. S. 146, 251 U. S. 156. To recognize that military orders are "reasonably expedient military precautions" in time of war, and yet to deny them constitutional legitimacy, makes of the Constitution an instrument for dialectic subtleties not reasonably to be attributed to the hard-headed Framers, of whom a majority had had actual participation in war. If a military order such as that under review does not transcend the means appropriate for conducting war, such action by the military is as constitutional as would be any authorized action by the Interstate Commerce Commission within the limits of the constitutional power to regulate commerce. And, being an exercise of the war power explicitly granted by the Constitution for safeguarding the national life by prosecuting war effectively, I find nothing in the Constitution which denies to Congress the power to enforce such a valid military order by making its violation an offense triable in the civil courts. Compare Interstate Commerce Commission v. Brimson, 154 U. S. 447; 155 U. S. 155 U.S. 3, and
Monongahela Bridge Co. v. United States, 216 U. S. 177. To find that the Constitution does not forbid the military measures now complained of does not carry with it approval of that which Congress and the Executive did. That is their business, not ours.

MR. JUSTICE ROBERTS.

I dissent, because I think the indisputable facts exhibit a clear violation of Constitutional rights.

This is not a case of keeping people off the streets at night, as was Hirabayashi v. United States, 320 U. S. 81,

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nor a case of temporary exclusion of a citizen from an area for his own safety or that of the community, nor a case of offering him an opportunity to go temporarily out of an area where his presence might cause danger to himself or to his fellows. On the contrary, it is the case of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely because of his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States. If this be a correct statement of the facts disclosed by this record, and facts of which we take judicial notice, I need hardly labor the conclusion that Constitutional rights have been violated.

The Government's argument, and the opinion of the court, in my judgment, erroneously divide that which is single and indivisible, and thus make the case appear as if the petitioner violated a Military Order, sanctioned by Act of Congress, which excluded him from his home by refusing voluntarily to leave, and so knowingly and intentionally defying the order and the Act of Congress.

The petitioner, a resident of San Leandro, Alameda County, California, is a native of the United States of Japanese ancestry who, according to the uncontradicted evidence, is a loyal citizen of the nation.

A chronological recitation of events will make it plain that the petitioner's supposed offense did not, in truth, consist in his refusal voluntarily to leave the area which included his home in obedience to the order excluding him therefrom. Critical attention must be given to the dates and sequence of events.

December 8, 1941, the United States declared war on Japan.

February 19, 1942, the President issued Executive Order No. 9066, [Footnote 2/1] which, after stating the reason for issuing the
order as "protection against espionage and against sabotage to national
defense material, national defense premises, and national defense utilities,"
provided that certain Military Commanders might, in their discretion,
"prescribe military areas" and define their extent,

"from which any or all persons may be excluded, and with respect to which
the right of any person to enter, remain in, or leave shall be subject to
whatever restrictions"

the "Military Commander may impose in his discretion."

February 20, 1942, Lieutenant General DeWitt was designated Military Commander of
the Western Defense Command embracing the westernmost states of the Union -- about
one-fourth of the total area of the nation.

March 2, 1942, General DeWitt promulgated Public Proclamation No. 1, [Footnote 2/2]
which recites that the entire Pacific Coast is "particularly subject to attack, to attempted
invasion . . . , and, in connection therewith, is subject to espionage and acts of sabotage."
It states that, "as a matter of military necessity," certain military areas and zones are
established known as Military Areas Nos. 1 and 2. It adds that ":[s]uch persons or classes
of persons as the situation may require" will, by subsequent orders, "be excluded from all
of Military Area No. 1" and from certain zones in Military Area No. 2. Subsequent
proclamations were made which, together with Proclamation No. 1, included in such
areas and zones all of California, Washington, Oregon, Idaho, Montana, Nevada and
Utah, and the southern portion of Arizona. The orders required that, if any person of
Japanese, German or Italian ancestry residing in Area No. 1 desired to change his
habitual residence, he must execute and deliver to the authorities a Change of Residence
Notice.

San Leandro, the city of petitioner's residence, lies in Military Area No. 1.

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On March 2, 1942, the petitioner, therefore, had notice that, by Executive Order, the
President, to prevent espionage and sabotage, had authorized the Military to exclude him
from certain areas and to prevent his entering or leaving certain areas without permission.
He was on notice that his home city had been included, by Military Order, in Area No. 1,
and he was on notice further that, at sometime in the future, the Military Commander
would make an order for the exclusion of certain persons, not described or classified,
from various zones including that, in which he lived.

March 21, 1942, Congress enacted [Footnote 2/3] that anyone who knowingly

"shall enter, remain in, leave, or commit any act in any military area or military zone
prescribed . . . by any military commander . . . contrary to the restrictions applicable to
any such area or zone or contrary to the order of . . . any such military commander"
shall be guilty of a misdemeanor. This is the Act under which the petitioner was charged.

March 24, 1942, General DeWitt instituted the curfew for certain areas within his command, by an order the validity of which was sustained in Hirabayashi v. United States, supra.

March 24, 1942, General DeWitt began to issue a series of exclusion orders relating to specified areas.

March 27, 1942, by Proclamation No. 4, the General recited that

"it is necessary, in order to provide for the welfare and to insure the orderly evacuation and resettlement of Japanese voluntarily migrating from Military Area No. 1, to restrict and regulate such migration, and ordered that, as of March 29, 1942,"

"all alien Japanese and persons of Japanese ancestry who are within the limits of Military Area No. 1, be and they are hereby prohibited from leaving that area for any purpose until and to the extent that a future proclamation or order of this headquarters shall so permit or direct."

No order had been made excluding the petitioner from the area in which he lived. By Proclamation No. 4, he was, after March 29, 1942, confined to the limits of Area No. 1. If the Executive Order No. 9066 and the Act of Congress meant what they said, to leave that area, in the face of Proclamation No. 4, would be to commit a misdemeanor.

May 3, 1942, General DeWitt issued Civilian Exclusion Order No. 34 providing that, after 12 o'clock May 8, 1942, all persons of Japanese ancestry, both alien and nonalien, were to be excluded from a described portion of Military Area No. 1, which included the County of Alameda, California. The order required a responsible member of each family and each individual living alone to report, at a time set, at a Civil Control Station for instructions to go to an Assembly Center, and added that any person failing to comply with the provisions of the order who was found in the described area after the date set would be liable to prosecution under the Act of March 21, 1942, supra. It is important to note that the order, by its express terms, had no application to persons within the bounds "of an established Assembly Center pursuant to instructions from this Headquarters . . ." The obvious purpose of the orders made, taken together, was to drive all citizens of Japanese ancestry into Assembly Centers within the zones of their residence, under pain of criminal prosecution.
The predicament in which the petitioner thus found himself was this: he was forbidden, by Military Order, to leave the zone in which he lived; he was forbidden, by Military Order, after a date fixed, to be found within that zone unless he were in an Assembly Center located in that zone. General DeWitt's report to the Secretary of War concerning the programme of evacuation and relocation of Japanese makes it entirely clear, if it were necessary to refer to that document -- and, in the light of the above recitation, I think it is not, -- that an Assembly Center was a euphemism for a prison. No person within such a center was permitted to leave except by Military Order.

In the dilemma that he dare not remain in his home, or voluntarily leave the area, without incurring criminal penalties, and that the only way he could avoid punishment was to go to an Assembly Center and submit himself to military imprisonment, the petitioner did nothing.

June 12, 1942, an Information was filed in the District Court for Northern California charging a violation of the Act of March 21, 1942, in that petitioner had knowingly remained within the area covered by Exclusion Order No. 34. A demurrer to the information having been overruled, the petitioner was tried under a plea of not guilty, and convicted. Sentence was suspended, and he was placed on probation for five years. We know, however, in the light of the foregoing recitation, that he was at once taken into military custody and lodged in an Assembly Center. We further know that, on March 18, 1942, the President had promulgated Executive Order No. 9102, [Footnote 2/7] establishing the War Relocation Authority under which so-called Relocation Centers, a euphemism for concentration camps, were established pursuant to cooperation between the military authorities of the Western Defense Command and the Relocation Authority, and that the petitioner has

been confined either in an Assembly Center within the zone in which he had lived or has been removed to a Relocation Center where, as the facts disclosed in Ex parte Endo (post, p. 323 U. S. 283) demonstrate, he was illegally held in custody.

The Government has argued this case as if the only order outstanding at the time the petitioner was arrested and informed against was Exclusion Order No. 34, ordering him to leave the area in which he resided, which was the basis of the information against him. That argument has evidently been effective. The opinion refers to the Hirabayashi case, supra, to show that this court has sustained the validity of a curfew order in an emergency. The argument, then, is that exclusion from a given area of danger, while somewhat more sweeping than a curfew regulation, is of the same nature -- a temporary expedient made necessary by a sudden emergency. This, I think, is a substitution of an hypothetical case for the case actually before the court. I might agree with the court's disposition of the hypothetical case. [Footnote 2/8] The liberty of every American citizen freely to come and to go must frequently, in the face of sudden danger, be temporarily limited or suspended. The civil authorities must often resort to the expedient of excluding
citizens temporarily from a locality. The drawing of fire lines in the case of a conflagration, the removal of persons from the area where a pestilence has broken out, are familiar examples. If the exclusion worked by Exclusion Order No. 34 were of that nature, the Hirabayashi case would be authority for sustaining it.

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But the facts above recited, and those set forth in Ex parte Endo, supra, show that the exclusion was but a part of an over-all plan for forceable detention. This case cannot, therefore, be decided on any such narrow ground as the possible validity of a Temporary Exclusion Order under which the residents of an area are given an opportunity to leave and go elsewhere in their native land outside the boundaries of a military area. To make the case turn on any such assumption is to shut our eyes to reality.

As I have said above, the petitioner, prior to his arrest, was faced with two diametrically contradictory orders given sanction by the Act of Congress of March 21, 1942. The earlier of those orders made him a criminal if he left the zone in which he resided; the later made him a criminal if he did not leave.

I had supposed that, if a citizen was constrained by two laws, or two orders having the force of law, and obedience to one would violate the other, to punish him for violation of either would deny him due process of law. And I had supposed that, under these circumstances, a conviction for violating one of the orders could not stand.

We cannot shut our eyes to the fact that, had the petitioner attempted to violate Proclamation No. 4 and leave the military area in which he lived, he would have been arrested and tried and convicted for violation of Proclamation No. 4. The two conflicting orders, one which commanded him to stay and the other which commanded him to go, were nothing but a cleverly devised trap to accomplish the real purpose of the military authority, which was to lock him up in a concentration camp. The only course by which the petitioner could avoid arrest and prosecution was to go to that camp according to instructions to be given him when he reported at a Civil Control Center. We know that is the fact. Why should we set up a figmentary and artificial situation, instead of addressing ourselves to the actualities of the case?

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These stark realities are met by the suggestion that it is lawful to compel an American citizen to submit to illegal imprisonment on the assumption that he might, after going to the Assembly Center, apply for his discharge by suing out a writ of habeas corpus, as was done in the Endo case, supra. The answer, of course, is that, where he was subject to two conflicting laws, he was not bound, in order to escape violation of one or the other, to surrender his liberty for any period. Nor will it do to say that the detention was a necessary part of the process of evacuation, and so we are here concerned only with the validity of the latter.
Again, it is a new doctrine of constitutional law that one indicted for disobedience to an unconstitutional statute may not defend on the ground of the invalidity of the statute, but must obey it though he knows it is no law, and, after he has suffered the disgrace of conviction and lost his liberty by sentence, then, and not before, seek, from within prison walls, to test the validity of the law.

Moreover, it is beside the point to rest decision in part on the fact that the petitioner, for his own reasons, wished to remain in his home. If, as is the fact, he was constrained so to do, it is indeed a narrow application of constitutional rights to ignore the order which constrained him in order to sustain his conviction for violation of another contradictory order.

I would reverse the judgment of conviction.

[Footnote 2/1]

[Footnote 2/2]
7 Fed.Reg. 2320

[Footnote 2/3]
56 Stat. 173.

[Footnote 2/4]

[Footnote 2/5]
The italics in the quotation are mine. The use of the word "voluntarily" exhibits a grim irony probably not lost on petitioner and others in like case. Either so or its use was a disingenuous attempt to camouflage the compulsion which was to be applied.

[Footnote 2/6]

[Footnote 2/7]

[Footnote 2/8]
My agreement would depend on the definition and application of the terms "temporary" and "emergency." No pronouncement of the commanding officer can, in my view, preclude judicial inquiry and determination whether an emergency ever existed and whether, if so, it remained at the date of the restraint out of which the litigation arose. Cf. Chastleton Corp. v. Sinclair, 264 U. S. 543.

MR. JUSTICE MURPHY, dissenting.

This exclusion of "all persons of Japanese ancestry, both alien and non-alien," from the Pacific Coast area on a plea of military necessity in the absence of martial law ought not to be approved. Such exclusion goes over "the very brink of constitutional power," and falls into the ugly abyss of racism.

In dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts. The scope of their discretion must, as a matter of necessity and common sense, be wide. And their judgments ought not to be overruled lightly by those whose training and duties ill-equip them to deal intelligently with matters so vital to the physical security of the nation.

At the same time, however, it is essential that there be definite limits to military discretion, especially where martial law has not been declared. Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support. Thus, like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled.

"What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."


The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so "immediate, imminent, and impending" as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger. 80 U. S. 627-628; 54 U. S. 134-135; Raymond v. Thomas, 91 U. S. 712, 91 U. S. 716. Civilian Exclusion Order No. 34, banishing from a prescribed area of the Pacific Coast "all persons of Japanese ancestry, both alien and non-alien," clearly does not meet that test. Being an obvious racial discrimination, the
order deprives all those within its scope of the equal protection of the laws as guaranteed by the Fifth Amendment. It further deprives these individuals of their constitutional rights to live and work where they will, to establish a home where they choose and to move about freely. In excommunicating them without benefit of hearings, this order also deprives them of all their constitutional rights to procedural due process. Yet no reasonable relation to an "immediate, imminent, and impending" public danger is evident to support this racial restriction, which is one of the most sweeping and complete deprivations of constitutional rights in the history of this nation in the absence of martial law.

It must be conceded that the military and naval situation in the spring of 1942 was such as to generate a very real fear of invasion of the Pacific Coast, accompanied by fears of sabotage and espionage in that area. The military command was therefore justified in adopting all reasonable means necessary to combat these dangers. In adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too meticulous standards; it is necessary only that the action have some reasonable relation to the removal of the dangers of invasion, sabotage and espionage. But the exclusion, either temporarily or permanently, of all persons with Japanese blood in their veins has no such reasonable relation. And that relation is lacking because the exclusion order necessarily must rely for its reasonableness upon the assumption that all persons of Japanese ancestry may have a dangerous tendency to commit sabotage and espionage and to aid our Japanese enemy in other ways. It is difficult to believe that reason, logic, or experience could be marshalled in support of such an assumption.

That this forced exclusion was the result in good measure of this erroneous assumption of racial guilt, rather than

**bona fide** military necessity is evidenced by the Commanding General's Final Report on the evacuation from the Pacific Coast area. [Footnote 3/1] In it, he refers to all individuals of Japanese descent as "subversive," as belonging to "an enemy race" whose "racial strains are undiluted," and as constituting "over 112,000 potential enemies . . . at large today" along the Pacific Coast. [Footnote 3/2] In support of this blanket condemnation of all persons of Japanese descent, however, no reliable evidence is cited to show that such individuals were generally disloyal, [Footnote 3/3] or had generally so conducted themselves in this area as to constitute a special menace to defense installations or war industries, or had otherwise, by their behavior, furnished reasonable ground for their exclusion as a group.

Justification for the exclusion is sought, instead, mainly upon questionable racial and sociological grounds not
ordinarily within the realm of expert military judgment, supplemented by certain semi-military conclusions drawn from an unwarranted use of circumstantial evidence. Individuals of Japanese ancestry are condemned because they are said to be "a large, unassimilated, tightly knit racial group, bound to an enemy nation by strong ties of race, culture, custom and religion." [Footnote 3/4] They are claimed to be given to "emperor worshipping ceremonies," [Footnote 3/5] and to "dual citizenship." [Footnote 3/6] Japanese language schools and allegedly pro-Japanese organizations are cited as evidence of possible group disloyalty, [Footnote 3/7] together with facts as to

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certain persons being educated and residing at length in Japan. [Footnote 3/8] It is intimated that many of these individuals deliberately resided "adjacent to strategic points," thus enabling them

"to carry into execution a tremendous program of sabotage on a mass scale should any considerable number of them have been inclined to do so. [Footnote 3/9]"

The need for protective custody is also asserted. The report refers, without identity, to "numerous incidents of violence," as well as to other admittedly unverified or cumulative incidents. From this, plus certain other events not shown to have been connected with the Japanese Americans, it is concluded that the "situation was fraught with danger to the Japanese population itself," and that the general public "was ready to take matters into its own hands." [Footnote 3/10] Finally, it is intimated, though not directly

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charged or proved, that persons of Japanese ancestry were responsible for three minor isolated shellings and bombings of the Pacific Coast area, [Footnote 3/11] as well as for unidentified radio transmissions and night signaling.

The main reasons relied upon by those responsible for the forced evacuation, therefore, do not prove a reasonable relation between the group characteristics of Japanese Americans and the dangers of invasion, sabotage and espionage. The reasons appear, instead, to be largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices -- the same people who have been among the foremost advocates of the evacuation. [Footnote 3/12] A military judgment

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based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations. Especially is this so when every charge relative to race, religion, culture, geographical location, and
legal and economic status has been substantially discredited by independent
studies made by experts in these matters. [Footnote 3/13]

The military necessity which is essential to the validity of the evacuation
order thus resolves itself into a few intimations that certain individuals
actively aided the enemy, from which it is inferred that the entire group of
Japanese Americans could not be trusted to be or remain loyal to the United
States. No one denies, of course, that there were some disloyal persons of
Japanese descent on the Pacific Coast who did all in their power to aid their ancestral
land. Similar disloyal activities have been engaged in by many persons of German, Italian
and even more pioneer stock in our country. But to infer that examples of individual
disloyalty prove group disloyalty and justify discriminatory action against the entire
group is to deny that, under our system of law, individual guilt is the sole basis for
deprivation of rights. Moreover, this inference, which is at the very heart of the
evacuation orders, has been used in support of the abhorrent and despicable treatment of
minority groups by the dictatorial tyrannies which this nation is now pledged to destroy.
To give constitutional sanction to that inference in this case, however well intentioned
may have been the military command on the Pacific Coast, is to adopt one of the cruelest
of the rationales used by our enemies to destroy the dignity of the individual and to
encourage and open the door to discriminatory actions against other minority groups in
the passions of tomorrow.

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No adequate reason is given for the failure to treat these Japanese Americans on an
individual basis by holding investigations and hearings to separate the loyal from the
disloyal, as was done in the case of persons of German and Italian ancestry. See House
Report No. 2124 (77th Cong., 2d Sess.) 247-52. It is asserted merely that the loyalties of
this group "were unknown and time was of the essence." [Footnote 3/14] Yet nearly four
months elapsed after Pearl Harbor before the first exclusion order was issued; nearly
eight months went by until the last order was issued, and the last of these "subversive"
persons was not actually removed until almost eleven months had elapsed. Leisure and
deliberation seem to have been more of the essence than speed. And the fact that
conditions were not such as to warrant a declaration of martial law adds strength to the
belief that the factors of time and military necessity were not as urgent as they have been
represented to be.

Moreover, there was no adequate proof that the Federal Bureau of Investigation and the
military and naval intelligence services did not have the espionage and sabotage situation
well in hand during this long period. Nor is there any denial of the fact that not one
person of Japanese ancestry was accused or convicted of espionage or sabotage after
Pearl Harbor while they were still free, [Footnote 3/15] a fact which is some evidence of
the loyalty of the vast majority of these individuals and of the effectiveness of the
established methods of combatting these evils. It
seems incredible that, under these circumstances, it would have been impossible to hold loyalty hearings for the mere 112,000 persons involved -- or at least for the 70,000 American citizens -- especially when a large part of this number represented children and elderly men and women. [Footnote 3/16] Any inconvenience that may have accompanied an attempt to conform to procedural due process cannot be said to justify violations of constitutional rights of individuals.

I dissent, therefore, from this legalization of racism. Racial discrimination in any form and in any degree has no justifiable part whatever in our democratic way of life. It is unattractive in any setting, but it is utterly revolting among a free people who have embraced the principles set forth in the Constitution of the United States. All residents of this nation are kin in some way by blood or culture to a foreign land. Yet they are primarily and necessarily a part of the new and distinct civilization of the United States. They must, accordingly, be treated at all times as the heirs of the American experiment, and as entitled to all the rights and freedoms guaranteed by the Constitution.

[Footnote 3/1]

Final Report, Japanese Evacuation from the West Coast, 1942, by Lt.Gen. J. L. DeWitt. This report is dated June 5, 1943, but was not made public until January, 1944.

[Footnote 3/2]

Further evidence of the Commanding General's attitude toward individuals of Japanese ancestry is revealed in his voluntary testimony on April 13, 1943, in San Francisco before the House Naval Affairs Subcommittee to Investigate Congested Areas, Part 3, pp. 739-40 (78th Cong., 1st Sess.):

"I don't want any of them [persons of Japanese ancestry] here. They are a dangerous element. There is no way to determine their loyalty. The west coast contains too many vital installations essential to the defense of the country to allow any Japanese on this coast. . . . The danger of the Japanese was, and is now -- if they are permitted to come back -- espionage and sabotage. It makes no difference whether he is an American citizen, he is still a Japanese. American citizenship does not necessarily determine loyalty. . . . But we must worry about the Japanese all the time until he is wiped off the map. Sabotage and espionage will make problems as long as he is allowed in this area. . . ."

[Footnote 3/3]

The Final Report, p. 9, casts a cloud of suspicion over the entire group by saying that, "while it was believed that some were loyal, it was known that many were not." (Italics added.)

[Footnote 3/4]
To the extent that assimilation is a problem, it is largely the result of certain social customs and laws of the American general public. Studies demonstrate that persons of Japanese descent are readily susceptible to integration in our society if given the opportunity. Strong, The Second-Generation Japanese Problem (1934); Smith, Americans in Process (1937); Mears, Resident Orientals on the American Pacific Coast (1928); Millis, The Japanese Problem in the United States (1942). The failure to accomplish an ideal status of assimilation, therefore, cannot be charged to the refusal of these persons to become Americanized, or to their loyalty to Japan. And the retention by some persons of certain customs and religious practices of their ancestors is no criterion of their loyalty to the United States.

[Footnote 3/5]

Final Report, pp. 10-11. No sinister correlation between the emperor worshiping activities and disloyalty to America was shown.

[Footnote 3/6]

Final Report, p. 22. The charge of "dual citizenship" springs from a misunderstanding of the simple fact that Japan, in the past, used the doctrine of *jus sanguinis*, as she had a right to do under international law, and claimed as her citizens all persons born of Japanese nationals wherever located. Japan has greatly modified this doctrine, however, by allowing all Japanese born in the United States to renounce any claim of dual citizenship and by releasing her claim as to all born in the United States after 1925. See Freeman, "Genesis, Exodus, and Leviticus: Genealogy, Evacuation, and Law," 28 Cornell L.Q. 414, 447-8, and authorities there cited; McWilliams, Prejudice, 123-4 (1944).

[Footnote 3/7]

Final Report, pp. 12-13. We have had various foreign language schools in this country for generations without considering their existence as ground for racial discrimination. No subversive activities or teachings have been shown in connection with the Japanese schools. McWilliams, Prejudice, 121-3 (1944).

[Footnote 3/8]

Final Report, pp. 13-15. Such persons constitute a very small part of the entire group, and most of them belong to the Kibei movement -- the actions and membership of which are well known to our Government agents.

[Footnote 3/9]

Final Report, p. 10; see also pp. vii, 9, 15-17. This insinuation, based purely upon speculation and circumstantial evidence, completely overlooks the fact that the main
The geographic pattern of Japanese population was fixed many years ago with reference to economic, social and soil conditions. Limited occupational outlets and social pressures encouraged their concentration near their initial points of entry on the Pacific Coast. That these points may now be near certain strategic military and industrial areas is no proof of a diabolical purpose on the part of Japanese Americans. See McWilliams, Prejudice, 119-121 (1944); House Report No. 2124 (77th Cong., 2d Sess.), 59-93.

[Footnote 3/10]


[Footnote 3/11]

Final Report, p. 18. One of these incidents (the reputed dropping of incendiary bombs on an Oregon forest) occurred on Sept. 9, 1942 -- a considerable time after the Japanese Americans had been evacuated from their homes and placed in Assembly Centers. See New York Times, Sept. 15, 1942, p. 1, col. 3.

[Footnote 3/12]

Special interest groups were extremely active in applying pressure for mass evacuation. See House Report No. 2124 (77th Cong., 2d Sess.) 154-6; McWilliams, Prejudice, 128 (1944). Mr. Austin E. Anson, managing secretary of the Salinas Vegetable Grower-Shipper Association, has frankly admitted that

"We're charged with wanting to get rid of the Japs for selfish reasons. . . . We do. It's a question of whether the white man lives on the Pacific Coast or the brown men. They came into this valley to work, and they stayed to take over. . . . They undersell the white man in the markets. . . . They work their women and children while the white farmer has to pay wages for his help. If all the Japs were removed tomorrow, we'd never miss them in two weeks, because the white farmers can take over and produce everything the Jap grows. And we don't want them back when the war ends, either."


[Footnote 3/13]

See 323 U. S. supra.
Footnote 3/14

Final Report, p. vii; see also p. 18.

Footnote 3/15

The Final Report, p. 34, makes the amazing statement that, as of February 14, 1942, "The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." Apparently, in the minds of the military leaders, there was no way that the Japanese Americans could escape the suspicion of sabotage.

Footnote 3/16

During a period of six months, the 112 alien tribunals or hearing boards set up by the British Government shortly after the outbreak of the present war summoned and examined approximately 74,000 German and Austrian aliens. These tribunals determined whether each individual enemy alien was a real enemy of the Allies or only a "friendly enemy." About 64,000 were freed from internment and from any special restrictions, and only 2,000 were interned. Kempner, "The Enemy Alien Problem in the Present War," 34 Amer.Journ. of Int.Law 443, 414-416; House Report No. 2124 (77th Cong., 2d Sess.), 280-281.

MR. JUSTICE JACKSON, dissenting.

Korematsu was born on our soil, of parents born in Japan. The Constitution makes him a citizen of the United States by nativity, and a citizen of California by residence. No claim is made that he is not loyal to this country. There is no suggestion that, apart from the matter involved here, he is not law-abiding and well disposed. Korematsu, however, has been convicted of an act not commonly a crime. It consists merely of being present in the state whereof he is a citizen, near the place where he was born, and where all his life he has lived.

Even more unusual is the series of military orders which made this conduct a crime. They forbid such a one to remain, and they also forbid him to leave. They were so drawn that the only way Korematsu could avoid violation was to give himself up to the military authority. This meant submission to custody, examination, and transportation out of the territory, to be followed by indeterminate confinement in detention camps.

A citizen's presence in the locality, however, was made a crime only if his parents were of Japanese birth. Had Korematsu been one of four -- the others being, say, a German alien enemy, an Italian alien enemy, and a citizen of American-born ancestors, convicted of treason but out on parole -- only Korematsu's presence would have violated the order.
The difference between their innocence and his crime would result, not from anything he did, said, or thought, different than they, but only in that he was born of different racial stock.

Now, if any fundamental assumption underlies our system, it is that guilt is personal and not inheritable. Even if all of one's antecedents had been convicted of treason, the Constitution forbids its penalties to be visited upon him, for it provides that "no attainder of treason shall work corruption of blood, or forfeiture except during the life of the person attained." But here is an attempt to make an otherwise innocent act a crime merely because this prisoner is the son of parents as to whom he had no choice, and belongs to a race from which there is no way to resign. If Congress, in peacetime legislation, should enact such a criminal law, I should suppose this Court would refuse to enforce it.

But the "law" which this prisoner is convicted of disregarding is not found in an act of Congress, but in a military order. Neither the Act of Congress nor the Executive Order of the President, nor both together, would afford a basis for this conviction. It rests on the orders of General DeWitt. And it is said that, if the military commander had reasonable military grounds for promulgating the orders, they are constitutional, and become law, and the Court is required to enforce them. There are several reasons why I cannot subscribe to this doctrine.

It would be impracticable and dangerous idealism to expect or insist that each specific military command in an area of probable operations will conform to conventional tests of constitutionality. When an area is so beset that it must be put under military control at all, the paramount consideration is that its measures be successful, rather than legal. The armed services must protect a society, not merely its Constitution. The very essence of the military job is to marshal physical force, to remove every obstacle to its effectiveness, to give it every strategic advantage. Defense measures will not, and often should not, be held within the limits that bind civil authority in peace. No court can require such a commander in such circumstances to act as a reasonable man; he may be unreasonably cautious and exacting. Perhaps he should be. But a commander, in temporarily focusing the life of a community on defense, is carrying out a military program; he is not making law in the sense the courts know the term. He issues orders, and they may have a certain authority as military commands, although they may be very bad as constitutional law.

But if we cannot confine military expedients by the Constitution, neither would I distort the Constitution to approve all that the military may deem expedient. That is what the Court appears to be doing, whether consciously or not. I cannot say, from any evidence before me, that the orders of General DeWitt were not reasonably expedient
military precautions, nor could I say that they were. But even if they were permissible military procedures, I deny that it follows that they are constitutional. If, as the Court holds, it does follow, then we may as well say that any military order will be constitutional, and have done with it.

The limitation under which courts always will labor in examining the necessity for a military order are illustrated by this case. How does the Court know that these orders have a reasonable basis in necessity? No evidence whatever on that subject has been taken by this or any other court. There is sharp controversy as to the credibility of the DeWitt report. So the Court, having no real evidence before it, has no choice but to accept General DeWitt's own unsworn, self-serving statement, untested by any cross-examination, that what he did was reasonable. And thus it will always be when courts try to look into the reasonableness of a military order.

In the very nature of things, military decisions are not susceptible of intelligent judicial appraisal. They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence, courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.

Much is said of the danger to liberty from the Army program for deporting and detaining these citizens of Japanese extraction. But a judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period, a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes. All who observe the work of courts are familiar with what Judge Cardozo described as "the tendency of a principle to expand itself to the limit of its logic." A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court's opinion in this case.
It argues that we are bound to uphold the conviction of Korematsu because we upheld one in *Hirabayashi v. United States*, 320 U. S. 81, when we sustained these orders insofar as they applied a curfew requirement to a citizen of Japanese ancestry. I think we should learn something from that experience.

In that case, we were urged to consider only the curfew feature, that being all that technically was involved, because it was the only count necessary to sustain Hirabayashi's conviction and sentence. We yielded, and the Chief Justice guarded the opinion as carefully as language will do. He said:

"Our investigation here does not go beyond the inquiry whether, in the light of all the relevant circumstances preceding and attending their promulgation, the challenged orders and statute afforded a reasonable basis for the action taken in imposing the curfew."


"We decide only the issue as we have defined it -- we decide only that the curfew order, as applied, and at the time it was applied, was within the boundaries of the war power."

320 U.S. at 320 U. S. 102. And again: "It is unnecessary to consider whether or to what extent such findings would support orders differing from the curfew order." 320 U.S. at 320 U. S. 105. (Italics supplied.) However, in spite of our limiting words, we did validate a discrimination on the basis of ancestry for mild and temporary deprivation of liberty. Now the principle of racial discrimination is pushed from support of mild measures to very harsh ones, and from temporary deprivations to indeterminate ones. And the precedent which it is said requires us to do so is *Hirabayashi*. The Court is now saying that, in *Hirabayashi*, we did decide the very things we there said we were not deciding. Because we said that these citizens could be made to stay in their homes during the hours of dark, it is said we must require them to leave home entirely, and if that, we are told they may also be taken into custody for deportation, and, if that, it is argued, they may also be held for some undetermined time in detention camps. How far the principle of this case would be extended before plausible reasons would play out, I do not know.

I should hold that a civil court cannot be made to enforce an order which violates constitutional limitations even if it is a reasonable exercise of military authority. The courts can exercise only the judicial power, can apply only law, and must abide by the Constitution, or they cease to be civil courts and become instruments of military policy.

Of course, the existence of a military power resting on force, so vagrant, so centralized, so necessarily heedless of the individual, is an inherent threat to liberty. But I would not
lead people to rely on this Court for a review that seems to me wholly delusive. The military reasonableness of these orders can only be determined by military superiors. If the people ever let command of the war power fall into irresponsible and unscrupulous hands, the courts wield no power equal to its restraint. The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.

My duties as a justice, as I see them, do not require me to make a military judgment as to whether General DeWitt's evacuation and detention program was a reasonable military necessity. I do not suggest that the courts should have attempted to interfere with the Army in carrying out its task. But I do not think they may be asked to execute a military expedient that has no place in law under the Constitution. I would reverse the judgment and discharge the prisoner.

In each of these cases, the defendant, while in police custody, was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. None of the defendants was given a full and effective warning of his rights at the outset of the interrogation process. In all four cases, the questioning elicited oral admissions, and, in three of them, signed statements as well, which were admitted at their trials. All defendants were convicted, and all convictions, except in No. 584, were affirmed on appeal.

Held:

1. The prosecution may not use statements, whether exculpatory or inculpatory, stemming from questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way, unless it demonstrates the use of procedural safeguards effective to secure the Fifth Amendment's privilege against self-incrimination. Pp. 384 U. S. 444-491.

(a) The atmosphere and environment of incommunicado interrogation as it exists today is inherently intimidating, and works to undermine the privilege against self-incrimination. Unless adequate preventive measures are taken to dispel the compulsion inherent in
custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice. Pp. 384 U. S. 445-458.

(b) The privilege against self-incrimination, which has had a long and expansive historical development, is the essential mainstay of our adversary system, and guarantees to the individual the "right to remain silent unless he chooses to speak in the unfettered exercise of his own will," during a period of custodial interrogation.

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as well as in the courts or during the course of other official investigations. Pp. 384 U. S. 458-465.

(c) The decision in Escobedo v. Illinois, 378 U. S. 478, stressed the need for protective devices to make the process of police interrogation conform to the dictates of the privilege. Pp. 384 U. S. 465-466.

(d) In the absence of other effective measures, the following procedures to safeguard the Fifth Amendment privilege must be observed: the person in custody must, prior to interrogation, be clearly informed that he has the right to remain silent, and that anything he says will be used against him in court; he must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation, and that, if he is indigent, a lawyer will be appointed to represent him. Pp. 384 U. S. 467-473.

(e) If the individual indicates, prior to or during questioning, that he wishes to remain silent, the interrogation must cease; if he states that he wants an attorney, the questioning must cease until an attorney is present. Pp. 384 U. S. 473-474.

(f) Where an interrogation is conducted without the presence of an attorney and a statement is taken, a heavy burden rests on the Government to demonstrate that the defendant knowingly and intelligently waived his right to counsel. P. 384 U. S. 475.

(g) Where the individual answers some questions during in-custody interrogation, he has not waived his privilege, and may invoke his right to remain silent thereafter. Pp. 384 U. S. 475-476.

(h) The warnings required and the waiver needed are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement, inculpatory or exculpatory, made by a defendant. Pp. 384 U. S. 476-477.

2. The limitations on the interrogation process required for the protection of the individual's constitutional rights should not cause an undue interference with a proper system of law enforcement, as demonstrated by the procedures of the FBI and the safeguards afforded in other jurisdictions. Pp. 384 U. S. 479-491.
3. In each of these cases, the statements were obtained under circumstances that did not meet constitutional standards for protection of the privilege against self-incrimination. Pp. 384 U. S. 491-499.


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

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.

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We dealt with certain phases of this problem recently in Escobedo v. Illinois, 378 U. S. 478 (1964). There, as in the four cases before us, law enforcement officials took the defendant into custody and interrogated him in a police station for the purpose of obtaining a confession. The police did not effectively advise him of his right to remain silent or of his right to consult with his attorney. Rather, they confronted him with an alleged accomplice who accused him of having perpetrated a murder. When the defendant denied the accusation and said "I didn't shoot Manuel, you did it," they handcuffed him and took him to an interrogation room. There, while handcuffed and standing, he was questioned for four hours until he confessed. During this interrogation, the police denied his request to speak to his attorney, and they prevented his retained attorney, who had come to the police station, from consulting with him. At his trial, the State, over his objection, introduced the confession against him. We held that the statements thus made were constitutionally inadmissible.

This case has been the subject of judicial interpretation and spirited legal debate since it was decided two years ago. Both state and federal courts, in assessing its implications, have arrived at varying conclusions. [Footnote 1] A wealth of scholarly material has been written tracing its ramifications and underpinnings. [Footnote 2] Police and prosecutor

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have speculated on its range and desirability. [Footnote 3] We granted certiorari in these cases, 382 U.S. 924, 925, 937, in order further to explore some facets of the problems thus exposed of applying the privilege against self-incrimination to in-custody interrogation, and to give
concrete constitutional guidelines for law enforcement agencies and courts to follow.

We start here, as we did in Escobedo, with the premise that our holding is not an innovation in our jurisprudence, but is an application of principles long recognized and applied in other settings. We have undertaken a thorough reexamination of the Escobedo decision and the principles it announced, and we reaffirm it. That case was but an explication of basic rights that are enshrined in our Constitution -- that "No person . . . shall be compelled in any criminal case to be a witness against himself," and that "the accused shall . . . have the Assistance of Counsel" -- rights which were put in jeopardy in that case through official overbearing. These precious rights were fixed in our Constitution only after centuries of persecution and struggle. And, in the words of Chief Justice Marshall, they were secured "for ages to come, and . . . designed to approach immortality as nearly as human institutions can approach it," @ 19 U. S. 387 (1821).

Over 70 years ago, our predecessors on this Court eloquently stated:

"The maxim nemo tenetur seipsum accusare had its origin in a protest against the inquisitorial and manifestly unjust methods of interrogating accused persons, which [have] long obtained in the continental system, and, until the expulsion of the Stuarts from the British throne in 1688 and the erection of additional barriers for the protection of the people against the exercise of arbitrary power, [were] not uncommon even in England. While the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence, if an accused person be asked to explain his apparent connection with a crime under investigation, the ease with which the questions put to him may assume an inquisitorial character, the temptation to press the witness unduly, to browbeat him if he be timid or reluctant, to push him into a corner, and to entrap him into fatal contradictions, which is so painfully evident in many of the earlier state trials, notably in those of Sir Nicholas Throckmorton and Udal, the Puritan minister, made the system so odious as to give rise to a demand for its total abolition. The change in the English criminal procedure in that particular seems to be founded upon no statute and no judicial opinion, but upon a general and silent acquiescence of the courts in a popular demand. But, however adopted, it has become firmly embedded in English as well as in American jurisprudence. So deeply did the iniquities of the ancient system impress themselves upon the minds of the American colonists that the States, with one accord, made a denial of the right to question an accused person a part of their fundamental law, so that a maxim, which in England was a mere rule of evidence, became clothed in this country with the impregnability of a constitutional enactment."

". . . our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The

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meaning and vitality of the Constitution have developed against narrow and restrictive construction."

This was the spirit in which we delineated, in meaningful language, the manner in which the constitutional rights of the individual could be enforced against overzealous police practices. It was necessary in Escobedo, as here, to insure that what was proclaimed in the Constitution had not become but a "form of words," Silverthorne Lumber Co. v. United States, 251 U. S. 385, 251 U. S. 392 (1920), in the hands of government officials. And it is in this spirit, consistent with our role as judges, that we adhere to the principles of Escobedo today.

Our holding will be spelled out with some specificity in the pages which follow, but, briefly stated, it is this: the prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. [Footnote 4] As for the procedural safeguards to be employed, unless other fully effective means are devised to inform accused persons of their right of silence and to assure a continuous opportunity to exercise it, the following measures are required. Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed. The defendant may waive effectuation of these rights, provided the waiver is made voluntarily, knowingly and intelligently. If, however, he indicates in any manner and at any stage of the

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process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him. The mere fact that he may have answered some questions or volunteered some statements on his own does not
deprive him of the right to refrain from answering any further inquiries until he has consulted with an attorney and thereafter consents to be questioned.

I

The constitutional issue we decide in each of these cases is the admissibility of statements obtained from a defendant questioned while in custody or otherwise deprived of his freedom of action in any significant way. In each, the defendant was questioned by police officers, detectives, or a prosecuting attorney in a room in which he was cut off from the outside world. In none of these cases was the defendant given a full and effective warning of his rights at the outset of the interrogation process. In all the cases, the questioning elicited oral admissions, and in three of them, signed statements as well which were admitted at their trials. They all thus share salient features -- incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

An understanding of the nature and setting of this in-custody interrogation is essential to our decisions today. The difficulty in depicting what transpires at such interrogations stems from the fact that, in this country, they have largely taken place incommunicado. From extensive factual studies undertaken in the early 1930's, including the famous Wickersham Report to Congress by a Presidential Commission, it is clear that police violence and the "third degree" flourished at that time. [Footnote 5]

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In a series of cases decided by this Court long after these studies, the police resorted to physical brutality -- beating, hanging, whipping -- and to sustained and protracted questioning incommunicado in order to extort confessions. [Footnote 6] The Commission on Civil Rights in 1961 found much evidence to indicate that "some policemen still resort to physical force to obtain confessions," 1961 Comm'n on Civil Rights Rep. Justice, pt. 5, 17. The use of physical brutality and violence is not, unfortunately, relegated to the past or to any part of the country. Only recently in Kings County, New York, the police brutally beat, kicked and placed lighted cigarette butts on the back of a potential witness under interrogation for the purpose of securing a statement incriminating a third party. People v. Portelli, 15 N.Y.2d 235, 205 N.E.2d 857, 257 N.Y.S.2d 931 (1965). [Footnote 7]

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The examples given above are undoubtedly the exception now, but they are sufficiently widespread to be the object of concern. Unless a proper limitation upon custodial interrogation is achieved -- such as these decisions will advance -- there can be no assurance that practices of this nature will be eradicated in the foreseeable future. The conclusion of the Wickersham Commission Report, made over 30 years ago, is still pertinent:
"To the contention that the third degree is necessary to get the facts, the reporters aptly reply in the language of the present Lord Chancellor of England (Lord Sankey):

"It is not admissible to do a great right by doing a little wrong. . . . It is not sufficient to do justice by obtaining a proper result by irregular or improper means."

"Not only does the use of the third degree involve a flagrant violation of law by the officers of the law, but it involves also the dangers of false confessions, and it tends to make police and prosecutors less zealous in the search for objective evidence. As the New York prosecutor quoted in the report said, 'It is a short-cut, and makes the police lazy and unenterprising.' Or, as another official quoted remarked: 'If you use your fists, you are not so likely to use your wits.' We agree with the conclusion expressed in the report, that"

"The third degree brutalizes the police, hardens the prisoner against society, and lowers the esteem in which the administration of Justice is held by the public."

"IV National Commission on Law Observance and Enforcement, Report on Lawlessness in Law Enforcement 5 (1931)."

Again we stress that the modern practice of in-custody interrogation is psychologically, rather than physically, oriented. As we have stated before,

"Since Chambers v. Florida, 309 U. S. 227, this Court has recognized that coercion can be mental as well as physical, and that the blood of the accused is not the only hallmark of an unconstitutional inquisition."

*Blackburn v. Alabama, 361 U. S. 199, 361 U. S. 206 (1960).* Interrogation still takes place in privacy. Privacy results in secrecy, and this, in turn, results in a gap in our knowledge as to what, in fact, goes on in the interrogation rooms. A valuable source of information about present police practices, however, may be found in various police manuals and texts which document procedures employed with success in the past, and which recommend various other effective tactics. [Footnote 8] These texts are used by law enforcement agencies themselves as guides. [Footnote 9] It should be noted that these texts professedly present the most enlightened and effective means presently used to obtain statements through custodial interrogation. By considering these
texts and other data, it is possible to describe procedures observed and noted around the country.

The officers are told by the manuals that the

"principal psychological factor contributing to a successful interrogation is privacy -- being alone with the person under interrogation. [Footnote 10]"

The efficacy of this tactic has been explained as follows:

"If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home, he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and

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more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggests the invincibility of the forces of the law. [Footnote 11]"

To highlight the isolation and unfamiliar surroundings, the manuals instruct the police to display an air of confidence in the suspect's guilt and, from outward appearance, to maintain only an interest in confirming certain details. The guilt of the subject is to be posited as a fact. The interrogator should direct his comments toward the reasons why the subject committed the act, rather than court failure by asking the subject whether he did it. Like other men, perhaps the subject has had a bad family life, had an unhappy childhood, had too much to drink, had an unrequited desire for women. The officers are instructed to minimize the moral seriousness of the offense, [Footnote 12] to cast blame on the victim or on society. [Footnote 13] These tactics are designed to put the subject in a psychological state where his story is but an elaboration of what the police purport to know already -- that he is guilty. Explanations to the contrary are dismissed and discouraged.

The texts thus stress that the major qualities an interrogator should possess are patience and perseverance.

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One writer describes the efficacy of these characteristics in this manner:

"In the preceding paragraphs, emphasis has been placed on kindness and stratagems. The investigator will, however, encounter many situations where the sheer weight of his personality will be the deciding factor. Where emotional appeals and tricks are employed to no avail, he must rely on an oppressive atmosphere of dogged persistence. He must
interrogate steadily and without relent, leaving the subject no prospect of surcease. He must dominate his subject and overwhelm him with his inexorable will to obtain the truth. He should interrogate for a spell of several hours, pausing only for the subject's necessities in acknowledgment of the need to avoid a charge of duress that can be technically substantiated. In a serious case, the interrogation may continue for days, with the required intervals for food and sleep, but with no respite from the atmosphere of domination. It is possible in this way to induce the subject to talk without resorting to duress or coercion. The method should be used only when the guilt of the subject appears highly probable. [Footnote 14]"

The manuals suggest that the suspect be offered legal excuses for his actions in order to obtain an initial admission of guilt. Where there is a suspected revenge killing, for example, the interrogator may say:

"Joe, you probably didn't go out looking for this fellow with the purpose of shooting him. My guess is, however, that you expected something from him, and that's why you carried a gun -- for your own protection. You knew him for what he was, no good. Then when you met him, he probably started using foul, abusive language and he gave some indication that he was about to pull a gun on you, and that's when you had to act to save your own life. That's about it, isn't it, Joe? [Footnote 15]"

Having then obtained the admission of shooting, the interrogator is advised to refer to circumstantial evidence which negates the self-defense explanation. This should enable him to secure the entire story. One text notes that,

"Even if he fails to do so, the inconsistency between the subject's original denial of the shooting and his present admission of at least doing the shooting will serve to deprive him of a self-defense 'out' at the time of trial. [Footnote 16]"

When the techniques described above prove unavailing, the texts recommend they be alternated with a show of some hostility. One ploy often used has been termed the "friendly-unfriendly," or the "Mutt and Jeff" act:

"... In this technique, two agents are employed. Mutt, the relentless investigator, who knows the subject is guilty and is not going to waste any time. He's sent a dozen men away for this crime, and he's going to send the subject away for the full term. Jeff, on the other hand, is obviously a kindhearted man. He has a family himself. He has a brother who was involved in a little scrape like this. He disapproves of Mutt and his tactics, and will arrange to get him off the case if the subject will cooperate. He can't hold Mutt off for very long. The subject would be wise to make a quick decision. The technique is applied by having both investigators present while Mutt acts out his role. Jeff may stand
by quietly and demur at some of Mutt's tactics. When Jeff makes his plea for cooperation, Mutt is not present in the room. [Footnote 17]"

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The interrogators sometimes are instructed to induce a confession out of trickery. The technique here is quite effective in crimes which require identification or which run in series. In the identification situation, the interrogator may take a break in his questioning to place the subject among a group of men in a line-up.

"The witness or complainant (previously coached, if necessary) studies the line-up and confidently points out the subject as the guilty party. [Footnote 18]"

Then the questioning resumes "as though there were now no doubt about the guilt of the subject." A variation on this technique is called the "reverse line-up":

"The accused is placed in a line-up, but this time he is identified by several fictitious witnesses or victims who associated him with different offenses. It is expected that the subject will become desperate and confess to the offense under investigation in order to escape from the false accusations. [Footnote 19]"

The manuals also contain instructions for police on how to handle the individual who refuses to discuss the matter entirely, or who asks for an attorney or relatives. The examiner is to concede him the right to remain silent.

"This usually has a very undermining effect. First of all, he is disappointed in his expectation of an unfavorable reaction on the part of the interrogator. Secondly, a concession of this right to remain silent impresses

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the subject with the apparent fairness of his interrogator. [Footnote 20]"

After this psychological conditioning, however, the officer is told to point out the incriminating significance of the suspect's refusal to talk:

"Joe, you have a right to remain silent. That's your privilege, and I'm the last person in the world who'll try to take it away from you. If that's the way you want to leave this, O. K. But let me ask you this. Suppose you were in my shoes, and I were in yours, and you called me in to ask me about this, and I told you, 'I don't want to answer any of your questions.' You'd think I had something to hide, and you'd probably be right in thinking that. That's exactly what I'll have to think about you, and so will everybody else. So let's sit here and talk this whole thing over. [Footnote 21]"
Few will persist in their initial refusal to talk, it is said, if this monologue is employed correctly.

In the event that the subject wishes to speak to a relative or an attorney, the following advice is tendered:

"[T]he interrogator should respond by suggesting that the subject first tell the truth to the interrogator himself, rather than get anyone else involved in the matter. If the request is for an attorney, the interrogator may suggest that the subject save himself or his family the expense of any such professional service, particularly if he is innocent of the offense under investigation. The interrogator may also add, 'Joe, I'm only looking for the truth, and if you're telling the truth, that's it. You can handle this by yourself.' [Footnote 22]"

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From these representative samples of interrogation techniques, the setting prescribed by the manuals and observed in practice becomes clear. In essence, it is this: to be alone with the subject is essential to prevent distraction and to deprive him of any outside support. The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe. Patience and persistence, at times relentless questioning, are employed. To obtain a confession, the interrogator must "patiently maneuver himself or his quarry into a position from which the desired objective may be attained." [Footnote 23] When normal procedures fail to produce the needed result, the police may resort to deceptive stratagems such as giving false legal advice. It is important to keep the subject off balance, for example, by trading on his insecurity about himself or his surroundings. The police then persuade, trick, or cajole him out of exercising his constitutional rights.

Even without employing brutality, the "third degree" or the specific stratagems described above, the very fact of custodial interrogation exacts a heavy toll on individual liberty, and trades on the weakness of individuals. [Footnote 24]

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This fact may be illustrated simply by referring to three confession cases decided by this Court in the Term immediately preceding our Escobedo decision. In Townsend v. Sain, 372 U. S. 293 (1963), the defendant was a 19-year-old heroin addict, described as a "near mental defective," id. at 372 U. S. 307-310. The defendant in Lynumn v. Illinois, 372 U. S. 528 (1963), was a woman who confessed to the arresting officer after being importuned to "cooperate" in order to prevent her children from being taken by relief authorities. This Court, as in those cases, reversed the conviction of a defendant in Haynes v. Washington, 373 U. S. 503 (1963), whose persistent request during his interrogation was to phone his wife or attorney. [Footnote 25] In other settings, these individuals might have exercised their constitutional rights. In the incommunicado police-dominated atmosphere, they succumbed.
In the cases before us today, given this background, we concern ourselves primarily with this interrogation atmosphere and the evils it can bring. In No. 759, *Miranda v. Arizona*, the police arrested the defendant and took him to a special interrogation room, where they secured a confession. In No. 760, *Vignera v. New York*, the defendant made oral admissions to the police after interrogation in the afternoon, and then signed an inculpatory statement upon being questioned by an assistant district attorney later the same evening. In No. 761, *Westover v. United States*, the defendant was handed over to the Federal Bureau of Investigation by local authorities after they had detained and interrogated him for a lengthy period, both at night and the following morning. After some two hours of questioning, the federal officers had obtained signed statements from the defendant. Lastly, in No. 584, *California v. Stewart*, the local police held the defendant five days in the station and interrogated him on nine separate occasions before they secured his inculpatory statement.

In these cases, we might not find the defendants' statements to have been involuntary in traditional terms. Our concern for adequate safeguards to protect precious Fifth Amendment rights is, of course, not lessened in the slightest. In each of the cases, the defendant was thrust into an unfamiliar atmosphere and run through menacing police interrogation procedures. The potentiality for compulsion is forcefully apparent, for example, in *Miranda*, where the indigent Mexican defendant was a seriously disturbed individual with pronounced sexual fantasies, and in *Stewart*, in which the defendant was an indigent Los Angeles Negro who had dropped out of school in the sixth grade. To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to insure that the statements were truly the product of free choice.

It is obvious that such an interrogation environment is created for no purpose other than to subjugate the individual to the will of his examiner. This atmosphere carries its own badge of intimidation. To be sure, this is not physical intimidation, but it is equally destructive of human dignity. [Footnote 26] The current practice of incommunicado interrogation is at odds with one of our Nation's most cherished principles -- that the individual may not be compelled to incriminate himself. Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.
From the foregoing, we can readily perceive an intimate connection between the privilege against self-incrimination and police custodial questioning. It is fitting to turn to history and precedent underlying the Self-Incrimination Clause to determine its applicability in this situation.

II

We sometimes forget how long it has taken to establish the privilege against self-incrimination, the sources from which it came, and the fervor with which it was defended. Its roots go back into ancient times. [Footnote 27] Perhaps the critical historical event shedding light on its origins and evolution was the trial of one John Lilburn, a vocal anti-Stuart Leveller, who was made to take the Star Chamber Oath in 1637. The oath would have bound him to answer to all questions posed to him on any subject. The Trial of John Lilburn and John Wharton, 3 How.St.Tr. 1315 (1637). He resisted the oath and declaimed the proceedings, stating:

"Another fundamental right I then contended for was that no man's conscience ought to be racked by oaths imposed to answer to questions concerning himself in matters criminal, or pretended to be so."

Haller & Davies, The Leveller Tracts 1647-1653, p. 454 (1944)

On account of the Lilburn Trial, Parliament abolished the inquisitorial Court of Star Chamber and went further in giving him generous reparation. The lofty principles to which Lilburn had appealed during his trial gained popular acceptance in England. [Footnote 28] These sentiments worked their way over to the Colonies, and were implanted after great struggle into the Bill of Rights. [Footnote 29] Those who framed our Constitution and the Bill of Rights were ever aware of subtle encroachments on individual liberty. They knew that "illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."

Boyd v. United States, 116 U. S. 616, 116 U. S. 635 (1886). The privilege was elevated to constitutional status, and has always been "as broad as the mischief against which it seeks to guard." Counselman v. Hitchcock, 142 U. S. 547, 142 U. S. 562 (1892). We cannot depart from this noble heritage.

Thus, we may view the historical development of the privilege as one which groped for the proper scope of governmental power over the citizen. As a "noble principle often
transcends its origins," the privilege has come rightfully to be recognized in part as an individual's substantive right, a "right to a private enclave where he may lead a private life. That right is the hallmark of our democracy." United States v. Grunewald, 233 F.2d 556, 579, 581-582 (Frank, J., dissenting), rev'd, 363 U. S. 353 U.S. 391 (1957). We have recently noted that the privilege against self-incrimination -- the essential mainstay of our adversary system -- is founded on a complex of values, Murphy v. Waterfront Comm'n, 378 U. S. 52, 378 U. S. 55-57, n. 5 (1964); Tehan v. Shott, 382 U. S. 406, 382 U. S. 414-415, n. 12 (1966). All these policies point to one overriding thought: the constitutional foundation underlying the privilege is the respect a government -- state or federal -- must accord to the dignity and integrity of its citizens. To maintain a "fair state-individual balance," to require the government "to shoulder the entire load," 8 Wigmore, Evidence 317 (McNaughton rev.1961), to respect the inviolability of the human personality, our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth. Chambers v. Florida, 309 U. S. 227, 309 U. S. 235-238 (1940). In sum, the privilege is fulfilled only when the person is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own will." Malloy v. Hogan, 378 U. S. 1, 378 U. S. 8 (1964).

The question in these cases is whether the privilege is fully applicable during a period of custodial interrogation.

In this Court, the privilege has consistently been accorded a liberal construction. Albertson v. SACB, 382 U. S. 70, 382 U. S. 81 (1965); Hoffman v. United States, 341 U. S. 479, 341 U. S. 486 (1951); Arndstein v. McCarthy, 254 U. S. 71, 254 U. S. 72-73 (1920); Counselman v. Hitchcock, 142 U. S. 547, 142 U. S. 562 (1892). We are satisfied that all the principles embodied in the privilege apply to informal compulsion exerted by law enforcement officers during in-custody questioning. An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak. As a practical matter, the compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery.  

[Footnote 30]

This question, in fact, could have been taken as settled in federal courts almost 70 years ago, when, in Bram v. United States, 168 U. S. 532, 168 U. S. 542 (1897), this Court held:

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment . . . commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"
In *Bram*, the Court reviewed the British and American history and case law and set down the Fifth Amendment standard for compulsion which we implement today:

"Much of the confusion which has resulted from the effort to deduce from the adjudged cases what

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would be a sufficient quantum of proof to show that a confession was or was not voluntary, has arisen from a misconception of the subject to which the proof must address itself. The rule is not that, in order to render a statement admissible, the proof must be adequate to establish that the particular communications contained in a statement were voluntarily made, but it must be sufficient to establish that the making of the statement was voluntary; that is to say, that from the causes, which the law treats as legally sufficient to engender in the mind of the accused hope or fear in respect to the crime charged, the accused was not involuntarily impelled to make a statement, when, but for the improper influences, he would have remained silent. . . ."

168 U. S. at 168 U. S. 549. And see id. at 168 U. S. 542.

The Court has adhered to this reasoning. In 1924, Mr. Justice Brandeis wrote for a unanimous Court in reversing a conviction resting on a compelled confession, *Wan v. United States*, 266 U. S. 1. He stated:

"In the federal courts, the requisite of voluntariness is not satisfied by establishing merely that the confession was not induced by a promise or a threat. A confession is voluntary in law if, and only if, it was, in fact, voluntarily made. A confession may have been given voluntarily, although it was made to police officers, while in custody, and in answer to an examination conducted by them. But a confession obtained by compulsion must be excluded whatever may have been the character of the compulsion, and whether the compulsion was applied in a judicial proceeding or otherwise. *Bram v. United States*, 168 U. S. 532."

266 U.S. at 266 U. S. 14-15. In addition to the expansive historical development of the privilege and the sound policies which have nurtured

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its evolution, judicial precedent thus clearly establishes its application to incommunicado interrogation. In fact, the Government concedes this point as well established in No. 761, *Westover v. United States*, stating:

"We have no doubt . . . that it is possible for a suspect's Fifth Amendment right to be violated during in-custody questioning by a law enforcement officer. [Footnote 31]"
Because of the adoption by Congress of Rule 5(a) of the Federal Rules of Criminal Procedure, and this Court's effectuation of that Rule in *McNabb v. United States*, 318 U. S. 332 (1943), and *Mallory v. United States*, 354 U. S. 449 (1957), we have had little occasion in the past quarter century to reach the constitutional issues in dealing with federal interrogations. These supervisory rules, requiring production of an arrested person before a commissioner "without unnecessary delay" and excluding evidence obtained in default of that statutory obligation, were nonetheless responsive to the same considerations of Fifth Amendment policy that unavoidably face us now as to the States. In *McNabb*, 318 U.S. at 318 U. S. 343-344, and in *Mallory*, 354 U.S. at 354 U. S. 455-456, we recognized both the dangers of interrogation and the appropriateness of prophylaxis stemming from the very fact of interrogation itself. [Footnote 32]

Our decision in *Malloy v. Hogan*, 378 U. S. 1 (1964), necessitates an examination of the scope of the privilege in state cases as well. In *Malloy*, we squarely held the privilege applicable to the States, and held that the substantive standards underlying the privilege applied with full force to state court proceedings. There, as in *Murphy v. Waterfront Comm'n*, 378 U. S. 52 (1964), and *Griffin v. California*, 380 U. S. 609 (1965), we applied the existing Fifth Amendment standards to the case before us. Aside from the holding itself, the reasoning in *Malloy* made clear what had already become apparent -- that the substantive and procedural safeguards surrounding admissibility of confessions in state cases had become exceedingly exacting, reflecting all the policies embedded in the privilege, 378 U.S. at 378 U. S. 7-8. [Footnote 33] The voluntariness doctrine in the state cases, as *Malloy* indicates, encompasses all interrogation practices which are likely to exert such pressure upon an individual as to disable him from making a free and rational choice. [Footnote 34] The implications of this proposition were elaborated in our decision in *Escobedo v. Illinois*, 378 U. S. 478, decided one week after *Malloy* applied the privilege to the States.

Our holding there stressed the fact that the police had not advised the defendant of his constitutional privilege to remain silent at the outset of the interrogation, and we drew attention to that fact at several points in the decision, 378 U.S. at 378 U. S. 483, 378 U. S. 485, 378 U. S. 491. This was no isolated factor, but an essential ingredient in our decision. The entire thrust of police interrogation there, as in all the cases today, was to put the defendant in such an emotional state as to impair his capacity for rational judgment. The abdication of the constitutional privilege -- the choice on his part to speak to the police -- was not made knowingly or competently because of the failure to apprise him of his rights; the compelling atmosphere of the in-custody interrogation, and not an independent decision on his part, caused the defendant to speak.
A different phase of the *Escobedo* decision was significant in its attention to the absence of counsel during the questioning. There, as in the cases today, we sought a protective device to dispel the compelling atmosphere of the interrogation. In *Escobedo*, however, the police did not relieve the defendant of the anxieties which they had created in the interrogation rooms. Rather, they denied his request for the assistance of counsel, 378 U.S. at 378 U. S. 481, 378 U. S. 488, 378 U. S. 491. [Footnote 35] This heightened his dilemma, and made his later statements the product of this compulsion. *Cf.* *Haynes v. Washington*, 373 U. S. 503, 373 U. S. 514 (1963). The denial of the defendant's request for his attorney thus undermined his ability to exercise the privilege -- to remain silent if he chose or to speak without any intimidation, blatant or subtle. The presence of counsel, in all the cases before us today, would be the adequate protective device necessary to make the process of police interrogation conform to the dictates of the privilege. His presence would insure that statements made in the government-established atmosphere are not the product of compulsion.

It was in this manner that *Escobedo* explicated another facet of the pretrial privilege, noted in many of the Court's prior decisions: the protection of rights at trial. [Footnote 36] That counsel is present when statements are taken from an individual during interrogation obviously enhances the integrity of the factfinding processes in court. The presence of an attorney, and the warnings delivered to the individual, enable the defendant under otherwise compelling circumstances to tell his story without fear, effectively, and in a way that eliminates the evils in the interrogation process. Without the protections flowing from adequate warnings and the rights of counsel, "all the careful safeguards erected around the giving of testimony, whether by an accused or any other witness, would become empty formalities in a procedure where the most compelling possible evidence of guilt, a confession, would have already been obtained at the unsupervised pleasure of the police."


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III

Today, then, there can be no doubt that the Fifth Amendment privilege is available outside of criminal court proceedings, and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that, without proper safeguards, the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to
compel him to speak where he would not otherwise do so freely. In order to
combat these pressures and to permit a full opportunity to exercise the privilege
against self-incrimination, the accused must be adequately and effectively
apprised of his rights, and the exercise of those rights must be fully honored.

It is impossible for us to foresee the potential alternatives for protecting the
privilege which might be devised by Congress or the States in the exercise of
their creative rulemaking capacities. Therefore, we cannot say that the
Constitution necessarily requires adherence to any particular solution for the inherent
compulsions of the interrogation process as it is presently conducted. Our decision in no
way creates a constitutional straitjacket which will handicap sound efforts at reform, nor
is it intended to have this effect. We encourage Congress and the States to continue their
laudable search for increasingly effective ways of protecting the rights of the individual
while promoting efficient enforcement of our criminal laws. However, unless we are
shown other procedures which are at least as effective in apprising accused persons of
their right of silence and in assuring a continuous opportunity to exercise it, the following
safeguards must be observed.

At the outset, if a person in custody is to be subjected to interrogation, he must first be
informed in clear and

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unequivocal terms that he has the right to remain silent. For those unaware of the
privilege, the warning is needed simply to make them aware of it -- the threshold
requirement for an intelligent decision as to its exercise. More important, such a warning
is an absolute prerequisite in overcoming the inherent pressures of the interrogation
atmosphere. It is not just the subnormal or woefully ignorant who succumb to an
interrogator's imprecations, whether implied or expressly stated, that the interrogation
will continue until a confession is obtained or that silence in the face of accusation is
itself damning, and will bode ill when presented to a jury. [Footnote 37] Further, the
warning will show the individual that his interrogators are prepared to recognize his
privilege should he choose to exercise it.

The Fifth Amendment privilege is so fundamental to our system of constitutional rule,
and the expedient of giving an adequate warning as to the availability of the privilege so
simple, we will not pause to inquire in individual cases whether the defendant was aware
of his rights without a warning being given. Assessments of the knowledge the defendant
possessed, based on information

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as to his age, education, intelligence, or prior contact with authorities, can never be more
than speculation; [Footnote 38] a warning is a clear-cut fact. More important, whatever
the background of the person interrogated, a warning at the time of the interrogation is
indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the privilege at that point in time.

The warning of the right to remain silent must be accompanied by the explanation that anything said can and will be used against the individual in court. This warning is needed in order to make him aware not only of the privilege, but also of the consequences of forgoing it. It is only through an awareness of these consequences that there can be any assurance of real understanding and intelligent exercise of the privilege. Moreover, this warning may serve to make the individual more acutely aware that he is faced with a phase of the adversary system -- that he is not in the presence of persons acting solely in his interest.

The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process. A once-stated warning, delivered by those who will conduct the interrogation, cannot itself suffice to that end among those who most require knowledge of their rights. A mere warning given by the interrogators is not alone sufficient to accomplish that end. Prosecutors themselves claim that the admonishment of the right to remain silent, without more, "will benefit only the recidivist and the professional." Brief for the National District Attorneys Association as amicus curiae, p. 14. Even preliminary advice given to the accused by his own attorney can be swiftly overcome by the secret interrogation process. Cf. Escobedo v. Illinois, 378 U. S. 478, 378 U. S. 485, n. 5. Thus, the need for counsel to protect the Fifth Amendment privilege comprehends not merely a right to consult with counsel prior to questioning, but also to have counsel present during any questioning if the defendant so desires.

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The presence of counsel at the interrogation may serve several significant subsidiary functions, as well. If the accused decides to talk to his interrogators, the assistance of counsel can mitigate the dangers of untrustworthiness. With a lawyer present, the likelihood that the police will practice coercion is reduced, and, if coercion is nevertheless exercised, the lawyer can testify to it in court. The presence of a lawyer can also help to guarantee that the accused gives a fully accurate statement to the police, and that the statement is rightly reported by the prosecution at trial. See Crooker v. California, 357 U. S. 433, 357 U. S. 443-448 (1958) (DOUGLAS, J., dissenting).

An individual need not make a pre-interrogation request for a lawyer. While such request affirmatively secures his right to have one, his failure to ask for a lawyer does not constitute a waiver. No effective waiver of the right to counsel during interrogation can
be recognized unless specifically made after the warnings we here delineate have been given. The accused who does not know his rights and therefore does not make a request may be the person who most needs counsel. As the California Supreme Court has aptly put it:

"Finally, we must recognize that the imposition of the requirement for the request would discriminate against the defendant who does not know his rights. The defendant who does not ask for counsel is the very defendant who most needs counsel. We cannot penalize a defendant who, not understanding his constitutional rights, does not make the formal request, and, by such failure, demonstrates his helplessness. To require the request would be to favor the defendant whose sophistication or status had fortuitously prompted him to make it."

_J.], in *Carnley v. Cochran*, 369 U. S. 506, 369 U. S. 513 (1962), we stated:

"[I]t is settled that, where the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request."

This proposition applies with equal force in the context of providing counsel to protect an accused's Fifth Amendment privilege in the face of interrogation. [Footnote 39] Although the role of counsel at trial differs from the role during interrogation, the differences are not relevant to the question whether a request is a prerequisite.

Accordingly, we hold that an individual held for interrogation must be clearly informed that he has the right to consult with a lawyer and to have the lawyer with him during interrogation under the system for protecting the privilege we delineate today. As with the warnings of the right to remain silent and that anything stated can be used in evidence against him, this warning is an absolute prerequisite to interrogation. No amount of circumstantial evidence that the person may have been aware of this right will suffice to stand in its stead. Only through such a warning is there ascertainable assurance that the accused was aware of this right.

If an individual indicates that he wishes the assistance of counsel before any interrogation occurs, the authorities cannot rationally ignore or deny his request on the basis that the individual does not have or cannot afford a retained attorney. The financial ability of the individual has no relationship to the scope of the rights involved here. The privilege against self-incrimination secured by the Constitution applies to all individuals. The need
for counsel in order to protect the privilege exists for the indigent as well as the affluent. In fact, were we to limit these constitutional rights to those who can retain an attorney, our decisions today would be of little significance. The cases before us, as well as the vast majority of confession cases with which we have dealt in the past, involve those unable to retain counsel. [Footnote 40] While authorities are not required to relieve the accused of his poverty, they have the obligation not to take advantage of indigence in the administration of justice. [Footnote 41] Denial

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of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and on appeal struck down in Gideon v. Wainwright, 372 U. S. 335 (1963), and Douglas v. California, 372 U. S. 353 (1963).

In order fully to apprise a person interrogated of the extent of his rights under this system, then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that, if he is indigent, a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one. The warning of a right to counsel would be hollow if not couched in terms that would convey to the indigent -- the person most often subjected to interrogation -- the knowledge that he too has a right to have counsel present. [Footnote 42] As with the warnings of the right to remain silent and of the general right to counsel, only by effective and express explanation to the indigent of this right can there be assurance that he was truly in a position to exercise it. [Footnote 43]

Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner,

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at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. [Footnote 44] At this point, he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.
This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that, if police propose to interrogate a person, they must make known to him that he is entitled to a lawyer and that, if he cannot afford one, a lawyer will be provided for him prior to any interrogation. If authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time.

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If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel. Escobedo v. Illinois, 378 U. S. 478, 378 U. S. 490, n. 14. This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, 304 U. S. 458 (1938), and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place, and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders.

An express statement that the individual is willing to make a statement and does not want an attorney, followed closely by a statement, could constitute a waiver. But a valid waiver will not be presumed simply from the silence of the accused after warnings are given, or simply from the fact that a confession was, in fact, eventually obtained. A statement we made in Carnley v. Cochran, 369 U. S. 506, 369 U. S. 516 (1962), is applicable here:

"Presuming waiver from a silent record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver."

See also Glasser v. United States, 315 U. S. 60 (1942). Moreover, where in-custody interrogation is involved, there is no room for the contention that the privilege is waived if the individual answers some questions or gives some information on his own prior to invoking his right to remain silent when interrogated. [Footnote 45]

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Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances,
the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege. Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. The requirement of warnings and waiver of rights is a fundamental with respect to the Fifth Amendment privilege, and not simply a preliminary ritual to existing methods of interrogation.

The warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisites to the admissibility of any statement made by a defendant. No distinction can be drawn between statements which are direct confessions and statements which amount to "admissions" of part or all of an offense. The privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination. Similarly,

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for precisely the same reason, no distinction may be drawn between inculpatory statements and statements alleged to be merely "exculpatory." If a statement made were, in fact, truly exculpatory, it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation, and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word, and may not be used without the full warnings and effective waiver required for any other statement. In Escobedo itself, the defendant fully intended his accusation of another as the slayer to be exculpatory as to himself.

The principles announced today deal with the protection which must be given to the privilege against self-incrimination when the individual is first subjected to police interrogation while in custody at the station or otherwise deprived of his freedom of action in any significant way. It is at this point that our adversary system of criminal proceedings commences, distinguishing itself at the outset from the inquisitorial system recognized in some countries. Under the system of warnings we delineate today, or under any other system which may be devised and found effective, the safeguards to be erected about the privilege must come into play at this point.

Our decision is not intended to hamper the traditional function of police officers in investigating crime. See Escobedo v. Illinois, 378 U. S. 478, 378 U. S. 492. When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the factfinding process is not affected by our holding. It is an act of
responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations, the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. [Footnote 46]

In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, [Footnote 47] or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment, and their admissibility is not affected by our holding today.

To summarize, we hold that, when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege, and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, and that, if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him. [Footnote 48]

IV

A recurrent argument made in these cases is that society's need for interrogation outweighs the privilege. This argument is not unfamiliar to this Court. See, e.g., Chambers v. Florida, 309 U.S. 227, 309 U. S. 240-241 (1940). The whole thrust of our foregoing discussion demonstrates that the Constitution has prescribed the rights of the individual when confronted with the power of government when it provided in the Fifth
Amendment that an individual cannot be compelled to be a witness against himself. That right cannot be abridged. As Mr. Justice Brandeis once observed:

"Decency, security and liberty alike demand that government officials shall be subjected to the same

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rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperilled if it fail to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that, in the administration of the criminal law, the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."


[Footnote 49] In this connection, one of our country's distinguished jurists has pointed out: "The quality of a nation's civilization can be largely measured by the methods it uses in the enforcement of its criminal law." [Footnote 50]

If the individual desires to exercise his privilege, he has the right to do so. This is not for the authorities to decide. An attorney may advise his client not to talk to police until he has had an opportunity to investigate the case, or he may wish to be present with his client during any police questioning. In doing so an attorney is merely exercising the good professional judgment he has been taught. This is not cause for considering the attorney a menace to law enforcement. He is merely carrying out what he is sworn to do under his oath -- to protect to the extent of his ability the rights of his client.

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In fulfilling this responsibility, the attorney plays a vital role in the administration of criminal justice under our Constitution.

In announcing these principles, we are not unmindful of the burdens which law enforcement officials must bear, often under trying circumstances. We also fully recognize the obligation of all citizens to aid in enforcing the criminal laws. This Court, while protecting individual rights, has always given ample latitude to law enforcement agencies in the legitimate exercise of their duties. The limits we have placed on the interrogation process should not constitute an undue interference with a proper system of law enforcement. As we have noted, our decision does not in any way preclude police from carrying out their traditional investigatory functions. Although confessions may play an important role in some convictions, the cases before us present graphic examples of the overstatement of the "need" for confessions. In each case, authorities conducted interrogations ranging up to five days in duration despite the presence, through standard

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It is also urged that an unfettered right to detention for interrogation should be allowed because it will often redound to the benefit of the person questioned. When police inquiry determines that there is no reason to believe that the person has committed any crime, it is said, he will be released without need for further formal procedures. The person who has committed no offense, however, will be better able to clear himself after warnings with counsel present than without. It can be assumed that, in such circumstances, a lawyer would advise his client to talk freely to police in order to clear himself.

Custodial interrogation, by contrast, does not necessarily afford the innocent an opportunity to clear themselves. A serious consequence of the present practice of the interrogation alleged to be beneficial for the innocent is that many arrests "for investigation" subject large numbers of innocent persons to detention and interrogation. In one of the cases before us, No. 584, California v. Stewart, police held four persons, who were in the defendant's house at the time of the arrest, in jail for five days until defendant confessed. At that time, they were finally released. Police stated that there was "no evidence to connect them with any crime." Available statistics on the extent of this practice where it is condoned indicate that these four are far from alone in being subjected to arrest, prolonged detention, and interrogation without the requisite probable cause. [Footnote 53]

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Over the years, the Federal Bureau of Investigation has compiled an exemplary record of effective law enforcement while advising any suspect or arrested person, at the outset of an interview, that he is not required to make a statement, that any statement may be used against him in court, that the individual may obtain the services of an attorney of his own choice, and, more recently, that he has a right to free counsel if he is unable to pay. [Footnote 54] A letter received from the Solicitor General in response to a question from the Bench makes it clear that the present pattern of warnings and respect for the

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rights of the individual followed as a practice by the FBI is consistent with the procedure which we delineate today. It states:

"At the oral argument of the above cause, Mr. Justice Fortas asked whether I could provide certain information as to the practices followed by the Federal Bureau of Investigation. I have directed these questions to the attention of the Director of the
Federal Bureau of Investigation, and am submitting herewith a statement of the questions and of the answers which we have received."

"(1) When an individual is interviewed by agents of the Bureau, what warning is given to him?"

"The standard warning long given by Special Agents of the FBI to both suspects and persons under arrest is that the person has a right to say nothing and a right to counsel, and that any statement he does make may be used against him in court. Examples of this warning are to be found in the Westover case at 342 F.2d 684 (1965), and Jackson v. U.S., 337 F.2d 136 (1964), cert. den., 380 U.S. 935."

"After passage of the Criminal Justice Act of 1964, which provides free counsel for Federal defendants unable to pay, we added to our instructions to Special Agents the requirement that any person who is under arrest for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, must also be advised of his right to free counsel if he is unable to pay, and the fact that such counsel will be assigned by the Judge. At the same time, we broadened the right to counsel warning to read counsel of his own choice, or anyone else with whom he might wish to speak."

"(2) When is the warning given?"

"The FBI warning is given to a suspect at the very outset of the interview, as shown in the Westover case, cited above. The warning may be given to a person arrested as soon as practicable after the arrest, as shown in the Jackson case, also cited above, and in U.S. v. Konigsberg, 336 F.2d 844 (1964), cert. den., 379 U.S. 933, but, in any event, it must precede the interview with the person for a confession or admission of his own guilt."

"(3) What is the Bureau's practice in the event that (a) the individual requests counsel and (b) counsel appears?"

"When the person who has been warned of his right to counsel decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point, Shultz v. U.S., 351 F.2d 287 (1965). It may be continued, however, as to all matters other than the person's own guilt or innocence. If he is indecisive in his request for counsel, there may be some question on whether he did or did not waive counsel. Situations of this kind must necessarily be left to the judgment of the interviewing Agent. For example, in Hiram v. U.S., 354 F.2d 4 (1965), the Agent's conclusion that the person arrested had waived his right to counsel was upheld by the courts."

"A person being interviewed and desiring to consult counsel by telephone must be permitted to do so, as shown in Caldwell v. U.S., 351 F.2d 459 (1965). When counsel appears in person, he is permitted to confer with his client in private."
"(4) What is the Bureau's practice if the individual requests counsel, but cannot afford to retain an attorney?"

"If any person being interviewed after warning of counsel decides that he wishes to consult with counsel before proceeding, further the interview is terminated, as shown above. FBI Agents do not pass judgment on the ability of the person to pay for counsel. They do, however, advise those who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, of a right to free counsel if they are unable to pay, and the availability of such counsel from the Judge. [Footnote 55]"

The practice of the FBI can readily be emulated by state and local enforcement agencies. The argument that the FBI deals with different crimes than are dealt with by state authorities does not mitigate the significance of the FBI experience. [Footnote 56]

The experience in some other countries also suggests that the danger to law enforcement in curbs on interrogation is overplayed. The English procedure, since 1912 under the Judges' Rules, is significant. As recently strengthened, the Rules require that a cautionary warning be given an accused by a police officer as soon as he has evidence that affords reasonable grounds for suspicion; they also require that any statement made be given by the accused without questioning by police. [Footnote 57]

The right of the individual to consult with an attorney during this period is expressly recognized. [Footnote 58]

The safeguards present under Scottish law may be even greater than in England. Scottish judicial decisions bar use in evidence of most confessions obtained through police interrogation. [Footnote 59] In India, confessions made to police not in the presence of a magistrate have been excluded by rule of evidence since 1872, at a time when it operated under British law. [Footnote 60] Identical provisions appear in the Evidence Ordinance of Ceylon, enacted in 1895. [Footnote 61] Similarly, in our country, the Uniform Code of Military Justice has long provided that no suspect may be interrogated without first being warned of his right not to make a statement, and that any statement he makes may be used against him. [Footnote 62] Denial of the right to consult counsel during interrogation has also been proscribed by
military tribunals. [Footnote 63] There appears to have been no marked
detrimental effect on criminal law enforcement in these jurisdictions as a result
of these rules. Conditions of law enforcement in our country are sufficiently
similar to permit reference to this experience as assurance that lawlessness will
not result from warning an individual of his rights or allowing him to exercise
them. Moreover, it is consistent with our legal system that we give at least as
much protection to these rights as is given in the jurisdictions described. We deal
in our country with rights grounded in a specific requirement of the Fifth
Amendment of the Constitution,

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whereas other jurisdictions arrived at their conclusions on the basis of principles of
justice not so specifically defined. [Footnote 64]

It is also urged upon us that we withhold decision on this issue until state legislative
bodies and advisory groups have had an opportunity to deal with these problems by
rulemaking. [Footnote 65] We have already pointed out that the Constitution does not
require any specific code of procedures for protecting the privilege against self-
incrimination during custodial interrogation. Congress and the States are free to develop
their own safeguards for the privilege, so long as they are fully as effective as those
described above in informing accused persons of their right of silence and in affording a
continuous opportunity to exercise it. In any event, however, the issues presented are of
constitutional dimensions, and must be determined by the courts. The admissibility of a
statement in the face of a claim that it was obtained in violation of the defendant's
constitutional rights is an issue the resolution of which has long since been undertaken by
this Court. See Hopt v. Utah, 110 U. S. 574 (1884). Judicial solutions to problems of
constitutional dimension have evolved decade by decade. As courts have been presented
with the need to enforce constitutional rights, they have found means of doing so. That
was our responsibility when Escobedo was before us, and it is our

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

V

Because of the nature of the problem and because of its recurrent significance in
numerous cases, we have to this point discussed the relationship of the Fifth Amendment
privilege to police interrogation without specific concentration on the facts of the cases
before us. We turn now to these facts to consider the application to these cases of the
constitutional principles discussed above. In each instance, we have concluded that
statements were obtained from the defendant under circumstances that did not meet
constitutional standards for protection of the privilege.
No. 759. Miranda v. Arizona

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

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

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

We reverse. From the testimony of the officers and by the admission of respondent, it is clear that Miranda was not in any way apprised of his right to consult with an attorney and to have one present during the interrogation, nor was his right not to be compelled to incriminate himself effectively protected in any other manner. Without these warnings, the statements were inadmissible. The mere fact that he signed a statement which contained a typed-in clause stating that he had "full knowledge" of his "legal rights" does not approach the knowing and intelligent waiver required to relinquish constitutional rights. Cf. 373 U. S. 512-513 (1963); Haley v. Ohio, 332 U. S. 596, 332 U. S. 601 (1948) (opinion of MR JUSTICE DOUGLAS).

No. 760. Vignera v. New York

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

"The law doesn't say that the confession is void or invalidated because the police officer didn't advise the defendant as to his rights. Did you hear what I said? I am telling you what the law of the State of New York is."

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

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

No. 761. Westover v. United States

At approximately 9:45 p.m. on March 20, 1963, petitioner, Carl Calvin Westover, was arrested by local police in Kansas City as a suspect in two Kansas City robberies. A report was also received from the FBI that he was wanted on a felony charge in California. The local authorities took him to a police station and placed him in a line-up on the local charges, and, at about 11:45 p.m., he was booked. Kansas City police interrogated Westover
on the night of his arrest. He denied any knowledge of criminal activities. The next day, local officers interrogated him again throughout the morning. Shortly before noon, they informed the FBI that they were through interrogating Westover and that the FBI could proceed to interrogate him. There is nothing in the record to indicate that Westover was ever given any warning as to his rights by local police. At noon, three special agents of the FBI continued the interrogation in a private interview room of the Kansas City Police Department, this time with respect to the robbery of a savings and loan association and bank in Sacramento, California. After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation. At trial, one of the agents testified, and a paragraph on each of the statements states, that the agents advised Westover that he did not have to make a statement, that any statement he made could be used against him, and that he had the right to see an attorney.

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

We reverse. On the facts of this case, we cannot find that Westover knowingly and intelligently waived his right to remain silent and his right to consult with counsel prior to the time he made the statement. [Footnote 69] At the time the FBI agents began questioning Westover, he had been in custody for over 14 hours, and had been interrogated at length during that period. The FBI interrogation began immediately upon the conclusion of the interrogation by Kansas City police, and was conducted in local police headquarters. Although the two law enforcement authorities are legally distinct, and the crimes for which they interrogated Westover were different, the impact on him was that of a continuous period of questioning. There is no evidence of any warning given prior to the FBI interrogation, nor is there any evidence of an articulated waiver of rights after the FBI commenced its interrogation. The record simply shows that the defendant did, in fact, confess a short time after being turned over to the FBI following interrogation by local police. Despite the fact that the FBI agents gave warnings at the outset of their interview, from Westover's point of view, the warnings came at the end of the interrogation process. In these circumstances, an intelligent waiver of constitutional rights cannot be assumed.

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

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

No. 584. California v. Stewart

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

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

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

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

Stewart was charged with kidnapping to commit robbery, rape, and murder. At his trial, transcripts of the first interrogation and the confession at the last interrogation were introduced in evidence. The jury found Stewart guilty of robbery and first degree murder, and fixed the penalty as death. On appeal, the Supreme Court of California reversed. 62 Cal.2d 571, 400 P.2d 97, 43 Cal.Rptr. 201. It held that, under this Court's decision in Escobedo, Stewart should have been advised of his right to remain silent and of his right to counsel, and that it would not presume in the face of a silent record that the police advised Stewart of his rights. [Footnote 70]
We affirm. [Footnote 71] In dealing with custodial interrogation, we will not presume that a defendant has been effectively apprised of his rights and that his privilege against self-incrimination has been adequately safeguarded on a record that does not show that any warnings have been given or that any effective alternative has been employed. Nor can a knowing and intelligent waiver of these rights be assumed on a silent record. Furthermore, Stewart's steadfast denial of the alleged offenses through eight of the nine interrogations over a period of five days is subject to no other construction than that he was compelled by persistent interrogation to forgo his Fifth Amendment privilege.

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

* It is so ordered.

* Together with No. 760, Vignera v. New York, on certiorari to the Court of Appeals of New York and No. 761, Westover v. United States, on certiorari to the United States Court of Appeals for the Ninth Circuit, both argued February 28-March 1, 1966, and No. 584, California v. Stewart, on certiorari to the Supreme Court of California, argued February 28-March 2, 1966.

[Footnote 1]


[Footnote 2]


For example, the Los Angeles Police Chief stated that,

"If the police are required . . . to . . . establish that the defendant was apprised of his constitutional guarantees of silence and legal counsel prior to the uttering of any admission or confession, and that he intelligently waived these guarantees . . . a whole Pandora's box is opened as to under what circumstances . . . can a defendant intelligently waive these rights. . . . Allegations that modern criminal investigation can compensate for the lack of a confession or admission in every criminal case is totally absurd!"

Parker, 40 L.A.Bar Bull. 603, 607, 642 (1965). His prosecutorial counterpart, District Attorney Younger, stated that

"[I]t begins to appear that many of these seemingly restrictive decisions are going to contribute directly to a more effective, efficient and professional level of law enforcement."

L.A. Times, Oct. 2, 1965, p. 1. The former Police Commissioner of New York, Michael J. Murphy, stated of Escobedo:

"What the Court is doing is akin to requiring one boxer to fight by Marquis of Queensbury rules while permitting the other to butt, gouge and bite."

N.Y. Times, May 14, 1965, p. 39. The former United States Attorney for the District of Columbia, David C. Acheson, who is presently Special Assistant to the Secretary of the Treasury (for Enforcement), and directly in charge of the Secret Service and the Bureau of Narcotics, observed that

"Prosecution procedure has, at most, only the most remote causal connection with crime. Changes in court decisions and prosecution procedure would have about the same effect on the crime rate as an aspirin would have on a tumor of the brain."


This is what we meant in Escobedo when we spoke of an investigation which had focused on an accused.

[Footnote 6]


[Footnote 7]

In addition, see People v. Wakat, 415 Ill. 610, 114 N.E.2d 706 (1953); Wakat v. Harlib, 253 F.2d 59 (C.A. 7th Cir. 1958) (defendant suffering from broken bones, multiple bruises and injuries sufficiently serious to require eight months' medical treatment after being manhandled by five policemen); Kier v. State, 213 Md. 556, 132 A.2d 494 (1957) (police doctor told accused, who was strapped to a chair completely nude, that he proposed to take hair and skin scrapings from anything that looked like blood or sperm from various parts of his body); Bruner v. People, 113 Colo. 194, 156 P.2d 494 (1945) (defendant held in custody over two months, deprived of food for 15 hours, forced to submit to a lie detector test when he wanted to go to the toilet); People v. Matlock, 51 Cal.2d 682, 336 P.2d 505 (1959) (defendant questioned incessantly over an evening's time, made to lie on cold board and to answer questions whenever it appeared he was getting sleepy). Other cases are documented in American Civil Liberties Union, Illinois Division, Secret Detention by the Chicago Police (1959); Potts, The Preliminary Examination and "The Third Degree," 2 Baylor L.Rev. 131 (1950); Sterling, Police Interrogation and the Psychology of Confession, 14 J. Pub.L. 25 (1965).

[Footnote 8]

The manuals quoted in the text following are the most recent and representative of the texts currently available. Material of the same nature appears in Kidd, Police Interrogation (1940); Mulbar, Interrogation (1951); Dienstein, Technics for the Crime Investigator 97-115 (1952). Studies concerning the observed practices of the police appear in LaFave, Arrest: The Decision To Take a Suspect Into Custody 244-437, 490-521 (1965); LaFave, Detention for Investigation by the Police: An Analysis of Current

[Footnote 9]

The methods described in Inbau & Reid, Criminal Interrogation and Confessions (1962), are a revision and enlargement of material presented in three prior editions of a predecessor text, Lie Detection and Criminal Interrogation (3d ed.1953). The authors and their associates are officers of the Chicago Police Scientific Crime Detection Laboratory, and have had extensive experience in writing, lecturing and speaking to law enforcement authorities over a 20-year period. They say that the techniques portrayed in their manuals reflect their experiences, and are the most effective psychological stratagems to employ during interrogations. Similarly, the techniques described in O'Hara, Fundamentals of Criminal Investigation (1956), were gleaned from long service as observer, lecturer in police science, and work as a federal criminal investigator. All these texts have had rather extensive use among law enforcement agencies and among students of police science, with total sales and circulation of over 44,000.

[Footnote 10]

Inbau & Reid, Criminal Interrogation and Confessions (1962), at 1.

[Footnote 11]

O'Hara, supra, at 99.

[Footnote 12]

Inbau & Reid, supra, at 34-43, 87. For example, in Leyra v. Denno, 347 U. S. 556 (1954), the interrogator-psychiatrist told the accused, "We do sometimes things that are not right, but in a fit of temper or anger we sometimes do things we aren't really responsible for," id. at 347 U. S. 562, and again, "We know that morally, you were just in anger. Morally, you are not to be condemned," id. at 347 U. S. 582.

[Footnote 13]

Inbau Reid, supra, at 43-55.

[Footnote 14]

O'Hara, supra, at 112.

[Footnote 15]
Inbau & Reid, supra, at 40.

[Footnote 16]

Ibid.

[Footnote 17]


"Why this talk about being undressed? Of course, they had a right to undress him to look for bullet scars, and keep the clothes off him. That was quite proper police procedure. That is some more psychology -- let him sit around with a blanket on him, humiliate him there for a while; let him sit in the corner, let him think he is going to get a shellacking."

[Footnote 18]

O'Hara, supra, at 105-106.

[Footnote 19]

Id. at 106.

[Footnote 20]

Inbau & Reid, supra, at 111.

[Footnote 21]

Ibid.

[Footnote 22]

Inbau & Reid, supra, at 112.

[Footnote 23]

Inbau & Reid, Lie Detection and Criminal Interrogation 185 (3d ed. 1953).

[Footnote 24]

Interrogation procedures may even give rise to a false confession. The most recent conspicuous example occurred in New York, in 1964, when a Negro of limited
intelligence confessed to two brutal murders and a rape which he had not committed. When this was discovered, the prosecutor was reported as saying:

"Call it what you want -- brainwashing, hypnosis, fright. They made him give an untrue confession. The only thing I don't believe is that Whitmore was beaten."


[Footnote 25]

In the fourth confession case decided by the Court in the 1962 Term, Fay v. Noia, 372 U.S. 391 (1963), our disposition made it unnecessary to delve at length into the facts. The facts of the defendant's case there, however, paralleled those of his codefendants, whose confessions were found to have resulted from continuous and coercive interrogation for 27 hours, with denial of requests for friends or attorney. See United States v. Murphy, 222 F.2d 698 (C.A.2d Cir.1955) (Frank, J.); People v. Bonino, 1 N.Y.2d 752, 135 N.E.2d 51 (1956).

[Footnote 26]

The absurdity of denying that a confession obtained under these circumstances is compelled is aptly portrayed by an example in Professor Sutherland's recent article, Crime and Confession, 79 Harv.L.Rev. 21, 37 (1965):

"Suppose a well-to-do testatrix says she intends to will her property to Elizabeth. John and James want her to bequeath it to them instead. They capture the testatrix, put her in a carefully designed room, out of touch with everyone but themselves and their convenient 'witnesses,' keep her secluded there for hours while they make insistent demands, weary her with contradictions of her assertions that she wants to leave her money to Elizabeth, and finally induce her to execute the will in their favor. Assume that John and James are deeply and correctly convinced that Elizabeth is unworthy, and will make base use of the property if she gets her hands on it, whereas John and James have the noblest and most righteous intentions. Would any judge of probate accept the will so procured as the 'voluntary' act of the testatrix?"

[Footnote 27]

Thirteenth century commentators found an analogue to the privilege grounded in the Bible. "To sum up the matter, the principle that no man is to be declared guilty on his own admission is a divine decree." Maimonides, Mishneh Torah (Code of Jewish Law), Book of Judges, Laws of the Sanhedrin, c. 18, 116, III Yale Judaica Series 52-53. See
also Lamm, The Fifth Amendment and Its Equivalent in the Halakhah, 5 Judaism 53 (Winter 1956).

[Footnote 28]


[Footnote 29]


[Footnote 30]


[Footnote 31]


[Footnote 32]

Our decision today does not indicate in any manner, of course, that these rules can be disregarded. When federal officials arrest an individual, they must as always comply with the dictates of the congressional legislation and cases thereunder. See generally Hogan & Snee, The McNabb-Mallory Rule: Its Rise, Rationale and Rescue, 47 Geo.L.J. 1 (1958).

[Footnote 33]

The decisions of this Court have guaranteed the same procedural protection for the defendant whether his confession was used in a federal or state court. It is now axiomatic that the defendant's constitutional rights have been violated if his conviction is based, in whole or in part, on an involuntary confession, regardless of its truth or falsity. Rogers v. Richmond, 365 U.S. 534, 365 U.S. 544 (1961); Wan v. United States, 266 U.S. 1 (1924). This is so even if there is ample evidence aside from the confession to support the conviction, e.g., Malinski v. New York, 324 U.S. 401, 324 U.S. 404 (1945); Bram v. United States, 168 U.S. 532, 168 U.S. 540-542 (1897). Both state and federal courts now adhere to trial procedures which seek to assure a reliable and clear-cut determination of the voluntariness of the confession offered at trial, Jackson v. Denno, 378 U.S. 368

[Footnote 34]


[Footnote 35]

The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel, and excludes any statement obtained in its wake. See People v. Donovan, 13 N.Y.2d 148, 193 N.E.2d 628, 243 N.Y.S.2d 841 (1963) (Fuld, J.)

[Footnote 36]


[Footnote 37]

See p. 384 U. S. 454, supra. Lord Devlin has commented:

"It is probable that, even today, when there is much less ignorance about these matters than formerly, there is still a general belief that you must answer all questions put to you by a policeman, or at least that it will be the worse for you if you do not."


In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation. Cf. Griffin v. California, 380 U. S. 609 (1965); Malloy v. Hogan, 378 U. S. 1, 378 U. S. 8 (1964); Comment, 31 U.Chi.L.Rev. 556 (1964);

[Footnote 38]


[Footnote 39]


[Footnote 40]

Estimates of 50-90% indigency among felony defendants have been reported. Pollock, Equal Justice in Practice, 45 Minn.L.Rev. 737, 738-739 (1961); Birzon, Kasanof & Forma, The Right to Counsel and the Indigent Accused in Courts of Criminal Jurisdiction in New York State, 14 Buffalo L.Rev. 428, 433 (1965).

[Footnote 41]


"When government chooses to exert its powers in the criminal area, its obligation is surely no less than that of taking reasonable measures to eliminate those factors that are irrelevant to just administration of the law, but which, nevertheless, may occasionally affect determinations of the accused's liability or penalty. While government may not be required to relieve the accused of his poverty, it may properly be required to minimize the influence of poverty on its administration of justice."

[Footnote 42]


[Footnote 43]

While a warning that the indigent may have counsel appointed need not be given to the person who is known to have an attorney or is known to have ample funds to secure one, the expedient of giving a warning is too simple, and the rights involved too important, to
engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score.

[Footnote 44]

If an individual indicates his desire to remain silent, but has an attorney present, there may be some circumstances in which further questioning would be permissible. In the absence of evidence of overbearing, statements then made in the presence of counsel might be free of the compelling influence of the interrogation process and might fairly be construed as a waiver of the privilege for purposes of these statements.

[Footnote 45]

Although this Court held in *Rogers v. United States*, 340 U. S. 367 (1951), over strong dissent, that a witness before a grand jury may not in certain circumstances decide to answer some questions and then refuse to answer others, that decision has no application to the interrogation situation we deal with today. No legislative or judicial factfinding authority is involved here, nor is there a possibility that the individual might make self-serving statements of which he could make use at trial while refusing to answer incriminating statements.

[Footnote 46]

The distinction and its significance has been aptly described in the opinion of a Scottish court:

"In former times, such questioning, if undertaken, would be conducted by police officers visiting the house or place of business of the suspect and there questioning him, probably in the presence of a relation or friend. However convenient the modern practice may be, it must normally create a situation very unfavourable to the suspect."


[Footnote 47]


[Footnote 48]


[Footnote 49]
In quoting the above from the dissenting opinion of Mr. Justice Brandeis we, of course, do not intend to pass on the constitutional questions involved in the *Olmstead* case.

[Footnote 50]

Schaefer, Federalism and State Criminal Procedure, 70 Harv.L.Rev. 1, 26 (1956).

[Footnote 51]

Miranda, Vignera, and Westover were identified by eyewitnesses. Marked bills from the bank robbed were found in Westover's car. Articles stolen from the victim as well as from several other robbery victims were found in Stewart's home at the outset of the investigation.

[Footnote 52]


[Footnote 53]

See, e.g., Report and Recommendations of the [District of Columbia] Commissioners' Committee on Police Arrests for Investigation (1962); American Civil Liberties Union, Secret Detention by the Chicago Police (1959). An extreme example of this practice occurred in the District of Columbia in 1958. Seeking three "stocky" young Negroes who had robbed a restaurant, police rounded up 90 persons of that general description. Sixty-three were held overnight before being released for lack of evidence. A man not among the 90 arrested was ultimately charged with the crime. Washington Daily News, January 21, 1958, p. 5, col. 1; Hearings before a Subcommittee of the Senate Judiciary Committee on H.R. 11477, S. 2970, S. 3325, and S. 3355, 85th Cong., 2d Sess. (July 1958), pp. 40, 78.

[Footnote 54]

In 1952, J. Edgar Hoover, Director of the Federal Bureau of Investigation, stated:

"Law enforcement, however, in defeating the criminal, must maintain inviolate the historic liberties of the individual. To turn back the criminal, yet, by so doing, destroy the dignity of the individual, would be a hollow victory."
"We can have the Constitution, the best laws in the land, and the most honest reviews by courts -- but unless the law enforcement profession is steeped in the democratic tradition, maintains the highest in ethics, and makes its work a career of honor, civil liberties will continually -- and without end -- be violated. . . . The best protection of civil liberties is an alert, intelligent and honest law enforcement agency. There can be no alternative."

". . . Special Agents are taught that any suspect or arrested person, at the outset of an interview, must be advised that he is not required to make a statement and that any statement given can be used against him in court. Moreover, the individual must be informed that, if he desires, he may obtain the services of an attorney of his own choice."

Hoover, Civil Liberties and Law Enforcement: The Role of the FBI, 37 Iowa L.Rev. 175, 177-182 (1952).

[Footnote 55]

We agree that the interviewing agent must exercise his judgment in determining whether the individual waives his right to counsel. Because of the constitutional basis of the right, however, the standard for waiver is necessarily high. And, of course, the ultimate responsibility for resolving this constitutional question lies with the courts.

[Footnote 56]


[Footnote 57]

[1964] Crim.L.Rev. at 166-170. These Rules provide in part:

"II. As soon as a police officer has evidence which would afford reasonable grounds for suspecting that a person has committed an offence, he shall caution that person or cause him to be cautioned before putting to him any questions, or further questions, relating to that offence."

"The caution shall be in the following terms: " 
"You are not obliged to say anything unless you wish to do so, but what you say may be put into writing and given in evidence."

"When, after being cautioned a person is being questioned, or elects to make a statement, a record shall be kept of the time and place at which any such questioning or statement began and ended and of the persons present."

"III . . . "

"* * * * ."

"(b) It is only in exceptional cases that questions relating to the offence should be put to the accused person after he has been charged or informed that he may be prosecuted."

"* * * *"

"IV. All written statements made after caution shall be taken in the following manner: "

"(a) If a person says that he wants to make a statement, he shall be told that it is intended to make a written record of what he says."

"He shall always be asked whether he wishes to write down himself what he wants to say; if he says that he cannot write, or that he would like someone to write it for him, a police officer may offer to write the statement for him. . . ."

"(b) Any person writing his own statement shall be allowed to do so without any prompting, as distinct from indicating to him what matters are material."

"* * * *"

"(d) Whenever a police officer writes the statement, he shall take down the exact words spoken by the person making the statement, without putting any questions other than such as may be needed to make the statement coherent, intelligible and relevant to the material matters: he shall not prompt him."


Despite suggestions of some laxity in enforcement of the Rules, and despite the fact some discretion as to admissibility is invested in the trial judge, the Rules are a significant influence in the English criminal law enforcement system. See, e.g., [1964] Crim.L.Rev. at 182, and articles collected in [1960] Crim.L.Rev. at 298-356.

[Footnote 58]

The introduction to the Judges' Rules states in part:
"These Rules do not affect the principles"

"* * * *"

"(c) That every person at any stage of an investigation should be able to communicate and to consult privately with a solicitor. This is so even if he is in custody provided that, in such a case, no unreasonable delay or hindrance is caused to the processes of investigation or the administration of justice by his doing so. . . ."


[Footnote 59]


"The theory of our law is that, at the stage of initial investigation, the police may question anyone with a view to acquiring information which may lead to the detection of the criminal; but that, when the stage has been reached at which suspicion, or more than suspicion, has in their view centered upon some person as the likely perpetrator of the crime, further interrogation of that person becomes very dangerous, and, if carried too far, e.g., to the point of extracting a confession by what amounts to cross-examination, the evidence of that confession will almost certainly be excluded. Once the accused has been apprehended and charged, he has the statutory right to a private interview with a solicitor and to be brought before a magistrate with all convenient speed so that he may, if so advised, emit a declaration in presence of his solicitor under conditions which safeguard him against prejudice."

[Footnote 60]

"No confession made to a police officer shall be proved as against a person accused of any offence." Indian Evidence Act § 25.

"No confession made by any person whilst he is in the custody of a police officer unless it be made in the immediate presence of a Magistrate, shall be proved as against such person."

Indian Evidence Act § 26. See 1 Ramaswami & Rajagopalan, Law of Evidence in India 553-569 (1962). To avoid any continuing effect of police pressure or inducement, the Indian Supreme Court has invalidated a confession made shortly after police brought a suspect before a magistrate, suggesting:

"[I]t would, we think, be reasonable to insist upon giving an accused person at least 24 hours to decide whether or not he should make a confession."

[Footnote 61]

I Legislative Enactments of Ceylon 211 (1958).

[Footnote 62]

10 U.S.C. § 831(b) (1964 ed.)

[Footnote 63]


[Footnote 64]

Although no constitution existed at the time confessions were excluded by rule of evidence in 1872, India now has a written constitution which includes the provision that "No person accused of any offence shall be compelled to be a witness against himself." Constitution of India, Article 20(3). See Tope, The Constitution of India 63-67 (1960).

[Footnote 65]


[Footnote 66]

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

[Footnote 67]

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

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

[Footnote 69]

The failure of defense counsel to object to the introduction of the confession at trial, noted by the Court of Appeals and emphasized by the Solicitor General, does not preclude our consideration of the issue. Since the trial was held prior to our decision in *Escobedo* and, of course, prior to our decision today making the objection available, the failure to object at trial does not constitute a waiver of the claim. See, e.g., *United States ex rel. Angelet v. Fay*, 333 F.2d 12, 16 (C.A.2d Cir.1964), *aff'd*, 381 U. S. 654 (1965). Cf. *Ziffrin, Inc. v. United States*, 318 U. S. 73, 318 U. S. 78 (1943).

[Footnote 70]

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

[Footnote 71]

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

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

It is with regret that I find it necessary to write in these cases. However, I am unable to join the majority because its opinion goes too far on too little, while my dissenting brethren do not go quite far enough. Nor can I join in the Court's criticism of the present practices of police and investigatory agencies as to custodial interrogation. The materials it refers to as "police manuals" [Footnote 2/1] are, as I read them, merely writings in this field by professors and some police officers. Not one is shown by the record here to be the official manual of any police department, much less in universal use in crime detection. Moreover, the examples of police brutality mentioned by the Court [Footnote 2/2] are rare exceptions to the thousands of cases
that appear every year in the law reports. The police agencies -- all the way from municipal and state forces to the federal bureaus -- are responsible for law enforcement and public safety in this country. I am proud of their efforts, which, in my view, are not fairly characterized by the Court's opinion.

I

The *ipse dixit* of the majority has no support in our cases. Indeed, the Court admits that "we might not find the defendants' statements [here] to have been involuntary in traditional terms." *Ante*, p. 384 U. S. 457. In short, the Court has added more to the requirements that the accused is entitled to consult with his lawyer and that he must be given the traditional warning that he may remain silent and that anything that he says may be used against him. *Escobedo v. Illinois*, 378 U. S. 478, 378 U. S. 490-491 (1964).

Now the Court fashions a constitutional rule that the police may engage in no custodial interrogation without additionally advising the accused that he has a right under the Fifth Amendment to the presence of counsel during interrogation and that, if he is without funds, counsel will be furnished him. When, at any point during an interrogation, the accused seeks affirmatively or impliedly to invoke his rights to silence or counsel, interrogation must be forgone or postponed. The Court further holds that failure to follow the new procedures requires inexorably the exclusion of any statement by the accused, as well as the fruits thereof. Such a strict constitutional specific inserted at the nerve center of crime detection may well kill the patient. [*Footnote 2/3]*

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

II

Custodial interrogation has long been recognized as "undoubtedly an essential tool in effective law enforcement." *Haynes v. Washington*, 373 U. S. 503, 373 U. S. 515 (1963). Recognition of this fact should put us on guard against the promulgation of doctrinaire rules. Especially is this true where the Court finds that "the Constitution has prescribed" its holding, and where the light of our past cases, from *Hopt v. Utah*, 110 U. S. 574 (1884), down to *Haynes v. Washington*, *supra*, is to the contrary. Indeed, even in *Escobedo*, the Court never hinted that an affirmative "waiver" was a prerequisite to questioning; that the burden of proof as to waiver was on the prosecution; that the presence of counsel -- absent a waiver -- during interrogation was required; that a waiver can be withdrawn at the will of the accused; that counsel must
be furnished during an accusatory stage to those unable to pay; nor that admissions and exculpatory statements are "confessions." To require all those things at one gulp should cause the Court to choke over more cases than *Crooker v. California*, 357 U. S. 433 (1958), and *Cicenia v. Lagay*, 357 U. S. 504 (1958), which it expressly overrules today.

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

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

*Id.* at 373 U. S. 514-515.

III

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

Rather than employing the arbitrary Fifth Amendment rule [*Footnote 2/4*] which the Court lays down, I would follow the more pliable dictates of the Due Process Clauses of the Fifth and Fourteenth Amendments which we are accustomed to administering, and which we know from our cases are effective instruments in protecting persons in police custody. In this way, we would not be acting in the dark, nor, in one full sweep, changing the traditional rules of custodial interrogation which this Court has for so long recognized as a justifiable and proper tool in balancing individual rights against the rights of society.
It will be soon enough to go further when we are able to appraise with somewhat better accuracy the effect of such a holding.

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

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

[Footnote 2/1]

*E.g.*, Inbau & Reid, Criminal Interrogation and Confessions (196); O'Hara, Fundamentals Of Criminal Investigation (1956); Dienstein, Technics for the Crime Investigator (1952); Mulbar, Interrogation (1951); Kidd, Police Interrogation (1940).

[Footnote 2/2]

As developed by my Brother HARLAN, *post* pp. 384 U. S. 506-514, such cases, with the exception of the long-discredited decision in *Bram v. United States*, 168 U. S. 532 (1897), were adequately treated in terms of due process.

[Footnote 2/3]

The Court points to England, Scotland, Ceylon and India as having equally rigid rules. As in Brother HARLAN points out, *post*, pp. 384 U. S. 521-523, the Court is mistaken in this regard, for it overlooks counterbalancing prosecutorial advantages. Moreover, the requirements of the Federal Bureau of Investigation do not appear from the Solicitor General's letter, *ante*, pp. 384 U. S. 484-46, to be as strict as those imposed today in at least two respects: (1) The offer of counsel is articulated only as "a right to counsel"; nothing is said about a right to have counsel present at the custodial interrogation. (See also the examples cited by the Solicitor General, *Westover v. United States*, 342 F.2d 684, 685 (1965) ("right to consult counsel"); *Jackson v. United States*, 337 F.2d 136, 138 (1964) (accused "entitled to an attorney").) Indeed, the practice is that, whenever the suspect "decides that he wishes to consult with counsel before making a statement, the interview is terminated at that point. . . . When counsel appears in person, he is permitted to confer with his client in private."
This clearly indicates that the FBI does not warn that counsel may be present during custodial interrogation. (2) The Solicitor General's letter states:

"[T]hose who have been arrested for an offense under FBI jurisdiction, or whose arrest is contemplated following the interview, [are advised] of a right to free counsel if they are unable to pay, and the availability of such counsel from the Judge."

So phrased, this warning does not indicate that the agent will secure counsel. Rather, the statement may well be interpreted by the suspect to mean that the burden is placed upon himself, and that he may have counsel appointed only when brought before the judge or at trial -- but not at custodial interrogation. As I view the FBI practice, it is not as broad as the one laid down today by the Court.

[Footnote 2/4]

In my view, there is "no significant support" in our cases for the holding of the Court today that the Fifth Amendment privilege, in effect, forbids custodial interrogation. For a discussion of this point, see the dissenting opinion of my Brother WHITE, post pp. 384 U. S. 526-531.

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

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

I

. INTRODUCTION

At the outset, it is well to note exactly what is required by the Court's new constitutional code of rules for confessions. The foremost requirement, upon which later admissibility of a confession depends, is that a four-fold warning be given to a person in custody before he is questioned, namely, that he has a right to remain silent, that anything he says may be used against him, that he has a right to have present an attorney during the questioning, and that, if indigent he has a right to a lawyer without charge. To forgo these rights, some affirmative statement of rejection is seemingly required, and threats, tricks, or cajolings to obtain this waiver are forbidden. If, before or during questioning, the suspect seeks to invoke his right to remain silent, interrogation must be forgone or cease; a request for counsel
brings about the same result until a lawyer is procured. Finally, there are a miscellany of minor directives, for example, the burden of proof of waiver is on the State, admissions and exculpatory statements are treated just like confessions, withdrawal of a waiver is always permitted, and so forth. [Footnote 3/1]

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

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

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II

. CONSTITUTIONAL PREMISES

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

The earliest confession cases in this Court emerged from federal prosecutions, and were settled on a nonconstitutional basis, the Court adopting the common law rule that the absence of inducements, promises, and threats made a confession voluntary and admissible. *Hopt v. Utah*, 110 U. S. 574; *Pierce v. United States*, 160 U. S. 355. While a later case said the Fifth Amendment privilege controlled admissibility, this proposition was not itself developed in subsequent decisions. [Footnote 3/2] The Court did, however, heighten the test of admissibility in federal trials to one of voluntariness "in fact," 266 U.
S. 14 (quoted, ante p. 384 U. S. 462), and then, by and large, left federal judges to apply the same standards the Court began to derive in a string of state court cases.

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

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

There are several relevant lessons to be drawn from this constitutional history. The first is that, with over 25 years of precedent, the Court has developed an elaborate, sophisticated, and sensitive approach to admissibility of confessions. It is "judicial" in its treatment of one case at a time, see Culombe v. Connecticut, 367 U. S. 568, 367 U. S. 635 (concurring opinion of THE CHIEF JUSTICE), flexible in its ability to respond to the endless mutations of fact presented, and ever more familiar to the lower courts.
Of course, strict certainty is not obtained in this developing process, but this is often so with constitutional principles, and disagreement is usually confined to that borderland of close cases where it matters least.

The second point is that, in practice and, from time to time, in principle, the Court has given ample recognition to society's interest in suspect questioning as an instrument of law enforcement. Cases countenancing quite significant pressures can be cited without difficulty, [Footnote 3/5] and the lower courts may often have been yet more tolerant. Of course, the limitations imposed today were rejected by necessary implication in case after case, the right to warnings having been explicitly rebuffed in this Court many years ago. Powers v. United States, 223 U. S. 303; Wilson v. United States, 162 U. S. 613. As recently as Haynes v. Washington, 373 U. S. 503, 373 U. S. 515, the Court openly acknowledged that questioning of witnesses and suspects "is undoubtedly an essential tool in effective law enforcement." Accord, Crooker v. California, 357 U. S. 433, 357 U. S. 441.

Finally, the cases disclose that the language in many of the opinions overstates the actual course of decision. It has been said, for example, that an admissible confession must be made by the suspect "in the unfettered exercise of his own will," Malloy v. Hogan, 378 U. S. 1, 378 U. S. 8, and that "a prisoner is not to be made the deluded instrument of his own conviction," Culombe v. Connecticut, 367 U. S. 568, 367 U. S. 581 (Frankfurter, J., announcing the Court's judgment and an opinion). Though often repeated, such principles are rarely observed in full measure. Even the word "voluntary" may be deemed some what misleading, especially when one considers many of the confessions that have been brought under its umbrella. See, e.g., supra, 384 U. S. 5. The tendency to overstate may be laid in part to the flagrant facts often before the Court; but, in any event, one must recognize how it has tempered attitudes and lent some color of authority to the approach now taken by the Court.

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

The Court's opening contention, that the Fifth Amendment governs police station confessions, is perhaps not an impermissible extension of the law but it has little to commend itself in the present circumstances. Historically, the privilege against self-incrimination did not bear at all on the use of extra-legal confessions, for which distinct standards evolved; indeed,
"the history of the two principles is wide apart, differing by one hundred years in origin, and derived through separate lines of precedents. . . ."

8 Wigmore, Evidence § 2266, at 401 (McNaughton rev.1961). Practice under the two doctrines has also differed in a number of important respects. [Footnote 3/6]

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

Though weighty, I do not say these points and similar ones are conclusive, for, as the Court reiterates, the privilege embodies basic principles always capable of expansion. [Footnote 3/7] Certainly the privilege does represent a protective concern for the accused and an emphasis upon accusatorial, rather than inquisitorial, values in law enforcement, although this is similarly true of other limitations such as the grand jury requirement and the reasonable doubt standard. Accusatorial values, however, have openly been absorbed into the due process standard governing confessions; this, indeed, is why, at present, "the kinship of the two rules [governing confessions and self-incrimination] is too apparent for denial." McCormick, Evidence 155 (1954). Since extension of the general principle has already occurred, to insist that the privilege applies as such serves only to carry over inapposite historical details and engaging rhetoric and to obscure the policy choices to be made in regulating confessions.

Having decided that the Fifth Amendment privilege does apply in the police station, the Court reveals that the privilege imposes more exacting restrictions than does the Fourteenth Amendment's voluntariness test. [Footnote 3/8]

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It then emerges from a discussion of Escobedo that the Fifth Amendment requires, for an admissible confession, that it be given by one distinctly aware of his right not to speak and shielded from "the compelling atmosphere" of interrogation. See ante pp. 384 U. S. 465-466. From these key premises, the Court finally develops the safeguards of warning, counsel, and so forth. I do not believe these premises are sustained by precedents under the Fifth Amendment. [Footnote 3/9]

The more important premise is that pressure on the suspect must be eliminated, though it be only the subtle influence of the atmosphere and surroundings. The Fifth Amendment, however, has never been thought to forbid all pressure to incriminate one's self in the situations covered by it. On the contrary, it has been held that failure to incriminate one's self can result in denial of removal of one's case from state to federal court, Maryland v.
in refusal of a military commission, *Orloff v. Willoughby*, 345 U. S. 83; in denial of a discharge in bankruptcy, *Kaufman v. Hurwitz*, 176 F.2d 210, and in numerous other adverse consequences. See 8 Wigmore, Evidence § 2272, at 441-444, n. 18 (McNaughton rev.1961); Maguire, Evidence of Guilt § 2.062 (1959). This is not to say that, short of jail or torture, any sanction is permissible in any case; policy and history alike may impose sharp limits. See, e.g., *Griffin v. California*, 380 U. S. 609. However, the Court's unspoken assumption that *any* pressure violates the privilege is not supported by the precedents, and it has failed to show why the Fifth Amendment prohibits that relatively mild pressure the Due Process Clause permits.

The Court appears similarly wrong in thinking that precise knowledge of one's rights is a settled prerequisite under the Fifth Amendment to the loss of its protections. A number of lower federal court cases have held that grand jury witnesses need not always be warned of their privilege, e.g., *United States v. Scully*, 225 F.2d 113, 116, and Wigmore states this to be the better rule for trial witnesses. See 8 Wigmore, Evidence § 2269 (McNaughton rev.1961). Cf. *Henry v. Mississippi*, 379 U. S. 443, 379 U. S. 451-452 (waiver of constitutional rights by counsel despite defendant's ignorance held allowable). No Fifth Amendment precedent is cited for the Court's contrary view. There might, of course, be reasons apart from Fifth Amendment precedent for requiring warning or any other safeguard on questioning, but that is a different matter entirely. See infra pp. 384 U. S. 516-517.

A closing word must be said about the Assistance of Counsel Clause of the Sixth Amendment, which is never expressly relied on by the Court, but whose judicial precedents turn out to be linchpins of the confession rules announced today. To support its requirement of a knowing and intelligent waiver, the Court cites *Johnson v. Zerbst*, 304 U. S. 458, ante p. 384 U. S. 475; appointment of counsel for the indigent suspect is tied to *Gideon v. Wainwright*, 372 U. S. 335, and *Douglas v. California*, 372 U. S. 353, ante p. 384 U. S. 473; the silent-record doctrine is borrowed from *Carnley v. Cochran*, 369 U. S. 506, ante p. 384 U. S. 475, as is the right to an express offer of counsel, ante p. 384 U. S. 471. All these cases imparting glosses to the Sixth Amendment concerned counsel at trial or on appeal. While the Court finds no pertinent difference between judicial proceedings and police interrogation, I believe

the differences are so vast as to disqualify wholly the Sixth Amendment precedents as suitable analogies in the present cases. [Footnote 3/10]

The only attempt in this Court to carry the right to counsel into the stationhouse occurred in *Escobedo*, the Court repeating several times that that stage was no less "critical" than
trial itself. See 378 U. S. 378 U. S. 485-488. This is hardly persuasive when we consider that a grand jury inquiry, the filing of a certiorari petition, and certainly the purchase of narcotics by an undercover agent from a prospective defendant may all be equally "critical," yet provision of counsel and advice on that score have never been thought compelled by the Constitution in such cases. The sound reason why this right is so freely extended for a criminal trial is the severe injustice risked by confronting an untrained defendant with a range of technical points of law, evidence, and tactics familiar to the prosecutor, but not to himself. This danger shrinks markedly in the police station, where, indeed, the lawyer, in fulfilling his professional responsibilities, of necessity may become an obstacle to truthfinding. See infra, 384 U. S. 12. The Court's summary citation of the Sixth Amendment cases here seems to me best described as

"the domino method of constitutional adjudication . . ., wherein every explanatory statement in a previous opinion is made the basis for extension to a wholly different situation."

Friendly, supra, 384 U. S. 10, at 950.

III

POLICY CONSIDERATIONS

Examined as an expression of public policy, the Court's new regime proves so dubious that there can be no due compensation for its weakness in constitutional law. The foregoing discussion has shown, I think, how mistaken is the Court in implying that the Constitution has struck the balance in favor of the approach the Court takes. Ante, p. 384 U. S. 479. Rather, precedent reveals that the Fourteenth Amendment, in practice, has been construed to strike a different balance, that the Fifth Amendment gives the Court little solid support in this context, and that the Sixth Amendment should have no bearing at all. Legal history has been stretched before to satisfy deep needs of society. In this instance, however, the Court has not and cannot make the powerful showing that its new rules are plainly desirable in the context of our society, something which is surely demanded before those rules are engrafted onto the Constitution and imposed on every State and county in the land.

Without at all subscribing to the generally black picture of police conduct painted by the Court, I think it must be frankly recognized at the outset that police questioning allowable under due process precedents may inherently entail some pressure on the suspect, and may seek advantage in his ignorance or weaknesses. The atmosphere and questioning techniques, proper and fair though they be, can, in themselves, exert a tug on the suspect to confess, and, in this light,
"[t]o speak of any confessions of crime made after arrest as being 'voluntary' or 'uncoerced' is somewhat inaccurate, although traditional. A confession is wholly and incontestably voluntary only if a guilty person gives himself up to the law and becomes his own accuser."


Until today, the role of the Constitution has been only to sift out undue pressure, not to assure spontaneous confessions. [Footnote 3/11]

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The Court's new rules aim to offset these minor pressures and disadvantages intrinsic to any kind of police interrogation. The rules do not serve due process interests in preventing blatant coercion, since, as I noted earlier, they do nothing to contain the policemen who is prepared to lie from the start. The rules work for reliability in confessions almost only in the Pickwickian sense that they can prevent some from being given at all. [Footnote 3/12] In short, the benefit of this new regime is simply to lessen or wipe out the inherent compulsion and inequalities to which the Court devotes some nine pages of description. _Ante_, pp. 384 U. S. 448-456.

What the Court largely ignores is that its rules impair, if they will not eventually serve wholly to frustrate, an instrument of law enforcement that has long and quite reasonably been thought worth the price paid for it. [Footnote 3/13] There can be little doubt that the Court's new code would markedly decrease the number of confessions. To warn the suspect that he may remain silent and remind him that his confession may be used in court are minor obstructions. To require also an express waiver by the suspect and an end to questioning whenever he demurs must heavily handicap questioning. And to suggest or provide counsel for the suspect simply invites the end of the interrogation. _See supra_, 384 U. S. 12.

How much harm this decision will inflict on law enforcement cannot fairly be predicted with accuracy. Evidence on the role of confessions is notoriously incomplete, _see_ Developments, _supra_, 384 U. S. 2, at 941-944, and little is added by the Court's reference to the FBI experience and the resources believed wasted in interrogation. _See infra_, 384 U. S. 19, and text. We do know that some crimes cannot be solved without confessions, that ample expert testimony attests to their importance in crime control, [Footnote 3/14] and that the Court is taking a real risk with society's welfare in imposing its new regime on the country. The social costs of crime are too great to call the new rules anything but a hazardous experimentation.

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

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

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the Constitution. However, it may make the analysis more graphic to consider the actual facts of one of the four cases reversed by the Court. Miranda v. Arizona serves best, being neither the hardest nor easiest of the four under the Court's standards. [Footnote 3/15]

On March 3, 1963, an 18-year-old girl was kidnapped and forcibly raped near Phoenix, Arizona. Ten days later, on the morning of March 13, petitioner Miranda was arrested and taken to the police station. At this time, Miranda was 23 years old, indigent, and educated to the extent of completing half the ninth grade. He had "an emotional illness" of the schizophrenic type, according to the doctor who eventually examined him; the doctor's report also stated that Miranda was "alert and oriented as to time, place, and person," intelligent within normal limits, competent to stand trial, and sane within the legal definition. At the police station, the victim picked Miranda out of a lineup, and two officers then took him into a separate room to interrogate him, starting about 11:30 a.m. Though at first denying his guilt, within a short time, Miranda gave a detailed oral confession, and then wrote out in his own hand and signed a brief statement admitting and describing the crime. All this was accomplished in two hours or less, without any force, threats or promises, and -- I will assume this, though the record is uncertain, ante 384 U. S. 491-492 and nn 66-67 -- without any effective warnings at all

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

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during brief daytime questioning conducted by two officers and unmarked by any of the traditional indicia of coercion. They assured a conviction for a brutal and unsettling crime, for which the police had and quite possibly could obtain little evidence other than the victim's identifications, evidence which is frequently unreliable. There was, in sum, a legitimate purpose, no perceptible unfairness, and certainly little risk of injustice in the interrogation. Yet the resulting confessions, and the responsible course of police practice they represent, are to be sacrificed to the Court's own finespun conception of fairness,
which I seriously doubt is shared by many thinking citizens in this country. [Footnote 3/16]

The tenor of judicial opinion also falls well short of supporting the Court's new approach. Although Escobedo has widely been interpreted as an open invitation to lower courts to rewrite the law of confessions, a significant heavy majority of the state and federal decisions in point have sought quite narrow interpretations. [Footnote 3/17]

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the courts that have accepted the invitation, it is hard to know how many have felt compelled by their best guess as to this Court's likely construction; but none of the state decisions saw fit to rely on the state privilege against self-incrimination, and no decision at all has gone as far as this Court goes today. [Footnote 3/18]

It is also instructive to compare the attitude in this case of those responsible for law enforcement with the official views that existed when the Court undertook three major revisions of prosecutorial practice prior to this case, Johnson v. Zerbst, 304 U. S. 458, Mapp v. Ohio, 367 U. S. 643, and Gideon v. Wainwright, 372 U. S. 335. In Johnson, which established that appointed counsel must be offered the indigent in federal criminal trials, the Federal Government all but conceded the basic issue, which had, in fact, been recently fixed as Department of Justice policy. See Beaney, Right to Counsel 29-30, 342 (1955). In Mapp, which imposed the exclusionary rule on the States for Fourth Amendment violations, more than half of the States had themselves already adopted some such rule. See 367 U.S. at 367 U. S. 651. In Gideon, which extended Johnson v. Zerbst to the States, an amicus brief was filed by 22 States and Commonwealths urging that course; only two States besides that of the respondent came forward to protest. See 372 U.S. at 372 U. S. 345. By contrast, in this case, new restrictions on police questioning have been opposed by the United States and in an amicus brief signed by 27 States and Commonwealths, not including the three other States which are parties. No State in the country has urged this Court to impose the newly announced rules, nor has any State chosen to go nearly so far on its own.

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The Court, in closing its general discussion, invokes the practice in federal and foreign jurisdictions as lending weight to its new curbs on confessions for all the States. A brief resume will suffice to show that none of these jurisdictions has struck so one-sided a balance as the Court does today. Heaviest reliance is placed on the FBI practice. Differing circumstances may make this comparison quite untrustworthy, [Footnote 3/19] but, in any event, the FBI falls sensibly short of the Court's formalistic rules. For example, there is no indication that FBI agents must obtain an affirmative "waiver" before they pursue their questioning. Nor is it clear that one invoking his right to silence may not be prevailed upon to change his mind. And the warning as to appointed counsel...
apparently indicates only that one will be assigned by the judge when the suspect appears before him; the thrust of the Court's rules is to induce the suspect to obtain appointed counsel before continuing the interview. See ante pp. 384 U. S. 484-486. Apparently, American military practice, briefly mentioned by the Court, has these same limits, and is still less favorable to the suspect than the FBI warning, making no mention of appointed counsel. Developments, supra, 384 U. S. 2, at 1084-1089.

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

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the accused as against those of society when other data are considered. Concededly, the English experience is most relevant. In that country, a caution as to silence, but not counsel, has long been mandated by the "Judges' Rules," which also place other somewhat imprecise limits on police cross-examination of suspects. However, in the court's discretion, confessions can be, and apparently quite frequently are, admitted in evidence despite disregard of the Judges' Rules, so long as they are found voluntary under the common law test. Moreover, the check that exists on the use of pretrial statements is counterbalanced by the evident admissibility of fruits of an illegal confession and by the judge's often-used authority to comment adversely on the defendant's failure to testify. [Footnote 3/20] India, Ceylon and Scotland are the other examples chosen by the Court. In India and Ceylon, the general ban on police-adduced confessions cited by the Court is subject to a major exception: if evidence is uncovered by police questioning, it is fully admissible at trial along with the confession itself, so far as it relates to the evidence and is not blatantly coerced. See Developments, supra, 384 U. S. 2, at 1106-1110; Reg. v. Ramasamy [1965] A.C. 1 (P.C.). Scotland's limits on interrogation do measure up to the Court's; however, restrained comment at trial on the defendant's failure to take the stand is allowed the judge, and, in many other respects, Scotch law redresses the prosecutor's disadvantage in ways not permitted in this country. [Footnote 3/21] The Court ends its survey by imputing

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

In closing this necessarily truncated discussion of policy considerations attending the new confession rules, some reference must be made to their ironic untimeliness. There is now in progress in this country a massive reexamination of criminal law enforcement procedures on a scale never before witnessed. Participants in this undertaking include a Special Committee of the American Bar Association, under the chairmanship of Chief Judge Lumbard of the Court of Appeals for the Second Circuit; a distinguished study
group of the American Law Institute, headed by Professors Vorenberg and Bator of the Harvard Law School, and the President's Commission on Law Enforcement and Administration of Justice, under the leadership of the Attorney General of the United States. [Footnote 3/22] Studies are also being conducted by the District of Columbia Crime Commission, the Georgetown Law Center, and by others equipped to do practical research. [Footnote 3/23] There are also signs that legislatures in some of the States may be preparing to reexamine the problem before us. [Footnote 3/24]

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It is no secret that concern has been expressed lest long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course, legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past. [Footnote 3/25] But the legislative reforms, when they come, would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.

IV

CONCLUSIONS

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

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

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

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

In conclusion: nothing in the letter or the spirit of the Constitution or in the precedents squares with the heavy-handed and one-sided action that is so precipitously taken by the Court in the name of fulfilling its constitutional responsibilities. The foray which the Court makes today brings to mind the wise and farsighted words of Mr. Justice Jackson in *Douglas v. Jeannette*, 319 U. S. 157, 319 U. S. 181 (separate opinion):

"This Court is forever adding new stories to the temples of constitutional law, and the temples have a way of collapsing when one story too many is added."

[Footnote 3/1]

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

[Footnote 3/2]


[Footnote 3/3]

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

[Footnote 3/4]


"In fact, the concept of involuntariness seems to be used by the courts as a shorthand to refer to practices which are repellent to civilized standards of decency or which, under the circumstances, are thought to apply a degree of pressure to an individual which unfairly impairs his capacity to make a rational choice."


[Footnote 3/5]

See the cases synopsized in Herman, *supra*, 384 U. S. 4, at 456, nn. 36-39. One not too distant example is *Stroble v. California*, 343 U. S. 181, in which the suspect was kicked and threatened after his arrest, questioned a little later for two hours, and isolated from a lawyer trying to see him; the resulting confession was held admissible.

[Footnote 3/6]

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

[Footnote 3/7]

Additionally, there are precedents and even historical arguments that can be arrayed in favor of bringing extra-legal questioning within the privilege. See generally Maguire, Evidence of Guilt § 2.03, at 15-16 (1959).
This, of course, is implicit in the Court's introductory announcement that "[o]ur decision in Malloy v. Hogan, 378 U. S. 1 (1964) [extending the Fifth Amendment privilege to the States] necessitates an examination of the scope of the privilege in state cases as well." Ante, p. 384 U. S. 463. It is also inconsistent with Malloy itself, in which extension of the Fifth Amendment to the States rested in part on the view that the Due Process Clause restriction on state confessions has, in recent years, been "the same standard" as that imposed in federal prosecutions assertedly by the Fifth Amendment. 378 U.S. at 378 U. S. 7.

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

Since the Court conspicuously does not assert that the Sixth Amendment itself warrants its new police interrogation rules, there is no reason now to draw out the extremely powerful historical and precedential evidence that the Amendment will bear no such meaning. See generally Friendly, The Bill of Rights as a Code of Criminal Procedure, 53 Calif.L.Rev. 99, 943-948 (1965).

See supra, 384 U. S. 4, and text. Of course, the use of terms like voluntariness involves questions of law and terminology quite as much as questions of fact. See Collins v. Beto, 348 F.2d 823, 832 (concurring opinion); Bator & Vorenberg, supra, 384 U. S. 4, at 72-73.

The Court's vision of a lawyer "mitigat[ing] the dangers of untrustworthiness" (ante, p. 384 U. S. 470) by witnessing coercion and assisting accuracy in the confession is largely a fancy; for if counsel arrives, there is rarely going to be a police station confession. Watt v. Indiana, 338 U. S. 49, 338 U. S. 59 (separate opinion of Jackson, J.): "[A]ny lawyer worth his salt will tell the suspect in no uncertain terms to make no statement to police under any circumstances." See Enker & Elsen, Counsel for the Suspect, 49 Minn.L.Rev. 47, 66-68 (1964).

This need is, of course, what makes so misleading the Court's comparison of a probate judge readily setting aside as involuntary the will of an old lady badgered and
beleaguered by the new heirs. *Ante*, pp. 384 U. S. 457-458, n. 26. With wills, there is no public interest save in a totally free choice; with confessions, the solution of crime is a countervailing gain however the balance is resolved.

[Footnote 3/14]

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

[Footnote 3/15]

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

[Footnote 3/16]

"[J]ustice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true."


[Footnote 3/17]


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

[Footnote 3/18]
For instance, compare the requirements of the catalytic case of People v. Dorado, 62 Cal.2d 338, 398 P.2d 361, with those laid down today. See also Traynor, The Devils of Due Process in Criminal Detection, Detention, and Trial, 33 U.Chi.L.Rev. 657, 670.

[Footnote 3/19]

The Court's obiter dictum notwithstanding, ante p. 384 U. S. 486, there is some basis for believing that the staple of FBI criminal work differs importantly from much crime within the ken of local police. The skill and resources of the FBI may also be unusual.

[Footnote 3/20]

For citations and discussion covering each of these points, see Developments, supra, 384 U. S. 2, at 1091-1097, and Enker & Elsen, supra, 384 U. S. 12, at 80 & n. 94.

[Footnote 3/21]

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

[Footnote 3/22]

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

[Footnote 3/23]

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

[Footnote 3/24]

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

[Footnote 3/25]
The Court waited 12 years after *Wolf v. Colorado*, 338 U. S. 25, declared privacy against improper state intrusions to be constitutionally safeguarded before it concluded, in *Mapp v. Ohio*, 367 U. S. 643, that adequate state remedies had not been provided to protect this interest, so the exclusionary rule was necessary.

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

I

The proposition that the privilege against self-incrimination forbids in-custody interrogation without the warnings specified in the majority opinion and without a clear waiver of counsel has no significant support in the history of the privilege or in the language of the Fifth Amendment. As for the English authorities and the common law history, the privilege, firmly established in the second half of the seventeenth century, was never applied except to prohibit compelled judicial interrogations. The rule excluding coerced confessions matured about 100 years later,

"[b]ut there is nothing in the reports to suggest that the theory has its roots in the privilege against self-incrimination. And, so far as the cases reveal, the privilege, as such, seems to have been given effect only in judicial proceedings, including the preliminary examinations by authorized magistrates."

Morgan, The Privilege Against Self-Incrimination, 34 Minn.L.Rev. 1, 18 (1949).

Our own constitutional provision provides that no person "shall be compelled in any criminal case to be a witness against himself." These words, when

"[c]onsidered in the light to be shed by grammar and the dictionary . . . , appear to signify simply that nobody shall be compelled to give oral testimony against himself in a criminal proceeding under way in which he is defendant."

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

A few years later, the Fifth Amendment privilege was similarly extended to encompass the then well established rule against coerced confessions:

"In criminal trials, in the courts of the United States, wherever a question arises whether a confession is incompetent because not voluntary, the issue is controlled by that portion of the Fifth Amendment to the Constitution of the United States, commanding that no person 'shall be compelled in any criminal case to be a witness against himself.'"

Bram v. United States, 168 U. S. 532, 168 U. S. 542. Although this view has found approval in other cases, Burdeau v. McDowell, 256 U. S. 465, 256 U. S. 475; Powers v. United States, 223 U. S. 303, 223 U. S. 313; Shotwell v. United States, 371 U. S. 341, 371 U. S. 347, it has also been questioned, see Brown v. Mississippi, 297 U. S. 278, 297 U. S. 285; 342 U. S. 41; Stein v. New York, 346 U. S. 156, 346 U. S. 191, n. 35, and finds scant support in either the English or American authorities, see generally Regina v. Scott, Dears. & Bell 47; 3 Wigmore, Evidence § 823 (3d ed.1940), at 249 ("a confession is not rejected because of any connection with the privilege against self-crimination"), and 250, n. 5 (particularly criticizing Bram); 8 Wigmore, Evidence § 2266, at 400-401 (McNaughton rev.1961). Whatever the source of the rule excluding coerced confessions, it is clear that, prior to the application of the privilege itself to state courts, Malloy v. Hogan, 378 U. S. 1, the admissibility of a confession in a state criminal prosecution was tested by the same standards as were applied in federal prosecutions. Id. at 378 U. S. 6-7, 378 U. S. 10.

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

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

168 U. S. at 168 U. S. 558. In this respect, the Court was wholly consistent with prior and subsequent pronouncements in this Court.

Thus, prior to Bram, the Court, in Hopt v. Utah, 110 U. S. 574, 110 U. S. 583-587, had upheld the admissibility of a
confession made to police officers following arrest, the record being silent concerning what conversation had occurred between the officers and the defendant in the short period preceding the confession. Relying on *Hopt*, the Court ruled squarely on the issue in *Sparf and Hansen v. United States*, 156 U. S. 51, 156 U. S. 55:

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


And in *Wilson v. United States*, 162 U. S. 613, 162 U. S. 623, the Court had considered the significance of custodial interrogation without any antecedent warnings regarding the right to remain silent or the right to counsel. There, the defendant had answered questions posed by a Commissioner, who had failed to advise him of his rights, and his answers were held admissible over his claim of involuntariness.

"The fact that [a defendant] is in custody and manacled does not necessarily render his statement involuntary, nor is that necessarily the effect of popular excitement shortly preceding. . . . And it is laid down

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

Since *Bram*, the admissibility of statements made during custodial interrogation has been frequently reiterated. *Powers v. United States*, 223 U. S. 303, cited *Wilson* approvingly and held admissible as voluntary statements the accused's testimony at a preliminary hearing even though he was not warned that what he said might be used against him. Without any discussion of the presence or absence of warnings, presumably because such discussion was deemed unnecessary, numerous other cases have declared that "[t]he mere fact that a confession was made while in the custody of the police does not render it inadmissible," *McNabb v. United States*, 318 U. S. 332, 318 U. S. 346; *accord, United States v. Mitchell*, 322 U. S. 65, despite its having been elicited by police examination,

"the bare fact of police 'detention and police examination in private of one in official state custody' does not render involuntary a confession by the one so detained."

And finally, in Cicenia v. Lagay, 357 U. S. 504, a confession obtained by police interrogation after arrest was held voluntary even though the authorities refused to permit the defendant to consult with his attorney. See generally Culombe v. Connecticut, 367 U. S. 568, 367 U. S. 587-602 (opinion of Frankfurter, J.); 3 Wigmore, Evidence § 851, at 313 (3d ed.1940); see also Joy, Admissibility of Confessions 38, 46 (1842).

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

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

II

That the Court's holding today is neither compelled nor even strongly suggested by the language of the Fifth Amendment, is at odds with American and English legal history, and involves a departure from a long line of precedent does not prove either that the Court has exceeded its powers or that the Court is wrong or unwise in its present reinterpretation of the Fifth Amendment. It does, however, underscore the obvious -- that the Court has not discovered or found the law in making today's decision, nor has it derived it from some irrefutable sources; what it has done is to make new law and new public policy in much the same way that it has in the course of interpreting other great clauses of the Constitution. [Footnote 4/1] This is what the Court historically has done. Indeed, it is what it must do, and will continue to do until and unless there is some fundamental change in the constitutional distribution of governmental powers.

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

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

III

First, we may inquire what are the textual and factual bases of this new fundamental rule. To reach the result announced on the grounds it does, the Court must stay within the confines of the Fifth Amendment, which forbids self-incrimination only if compelled. Hence, the core of the Court's opinion is that, because of the

"compulsion inherent in custodial surroundings, no statement obtained from [a] defendant [in custody] can truly be the product of his free choice,"

_ante_ at 384 U. S. 458, absent the use of adequate protective devices as described by the Court. However, the Court does not point to any sudden inrush of new knowledge requiring the rejection of 70 years' experience. Nor does it assert that its novel conclusion reflects a changing consensus among state courts, _see_ Mapp v. Ohio, 367 U. S. 643, or that a succession of cases had steadily eroded the old rule and proved it unworkable, _see_ Gideon v. Wainwright, 372 U. S. 335. Rather than asserting new knowledge, the Court concedes that it cannot truly know what occurs during custodial questioning, because of the innate secrecy of such proceedings. It extrapolates a picture of what it conceives to be the norm from police investigatorial manuals, published in 1959 and 1962 or earlier, without any attempt to allow for adjustments in police practices that may have occurred in the wake of more recent decisions of state appellate tribunals or this Court. But even if the relentless application of the described procedures could lead to involuntary confessions, it most assuredly does not follow that each and every case will disclose this kind of interrogation or this kind of consequence. [Footnote 4/2] Insofar as appears from the Court's opinion, it has not examined a single transcript of any police interrogation, let alone the interrogation that took place in any one of these cases which it decides today. Judged by any of the standards for empirical investigation utilized in the social sciences, the factual basis for the Court's premise is patently inadequate.

Although, in the Court's view, in-custody interrogation is inherently coercive, the Court says that the spontaneous product of the coercion of arrest and detention is still to be deemed voluntary. An accused, arrested on probable cause, may blurt out a confession which will be admissible despite the fact that he is alone and in custody, without any showing that he had any notion of his right to remain silent or of the consequences of his
admission. Yet, under the Court's rule, if the police ask him a single question, such as "Do you have anything to say?" or "Did you kill your wife?", his response, if there is one, has somehow been compelled, even if the accused has been clearly warned of his right to remain silent. Common sense informs us to the contrary. While one may say that the response was "involuntary" in the sense the question provoked or was the occasion for the response, and thus the defendant was induced to speak out when he might have remained silent if not arrested and not questioned, it is patently unsound to say the response is compelled.

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

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

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

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

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

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

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self-incrimination the Court has created a limited Fifth Amendment right to counsel -- or, as the Court expresses it, a "need for counsel to protect the Fifth Amendment privilege. . ." Ante at 384 U. S. 470. The focus then is not on the will of the accused, but on the will of counsel, and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for thus installing counsel as the arbiter of the privilege.

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

Criticism of the Court's opinion, however, cannot stop with a demonstration that the factual and textual bases for the rule it propounds are, at best, less than compelling. Equally relevant is an assessment of the rule's consequences measured against community values. The Court's duty to assess the consequences of its action is not satisfied by the utterance of the truth that a value of our system of criminal justice is "to respect the inviolability of the human personality" and to require government to produce the evidence against the accused by its own independent labors. *Ante* at 384 U. S. 460. More than the human dignity of the accused is involved; the human personality of others in the society must also be preserved. Thus, the values reflected by the privilege are not the sole desideratum; society's interest in the general security is of equal weight.

The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions. As the Court declares that the accused may not be interrogated without counsel present, absent a waiver of the right to counsel, and as the Court all but admonishes the lawyer to advise the accused to remain silent, the result adds up to a judicial judgment that evidence from the accused should not be used against him in any way, whether compelled or not. This is the not so subtle overtone of the opinion -- that it is inherently wrong for the police to gather evidence from the accused himself. And this is precisely the nub of this dissent. I see nothing wrong or immoral, and certainly nothing unconstitutional, in the police's asking a suspect whom they have reasonable cause to arrest whether or not he killed his wife, or in confronting him with the evidence on which the arrest was based, at least where he has been plainly advised that he may remain completely silent, see *Escobedo v. Illinois*, 378 U. S. 478, 378 U. S. 499 (dissenting opinion). Until today, "the admissions or confessions of the prisoner, when voluntarily and freely made, have always ranked high in the scale of incriminating evidence." *Brown v. Walker*, 161 U. S. 591, 161 U. S. 596; see also *Hopt v. Utah*, 110 U. S. 574, 110 U. S. 584-585. Particularly when corroborated, as where the police have confirmed the accused's disclosure of the hiding place of implements or fruits of the crime, such confessions have the highest reliability, and significantly contribute to the certitude with which we may believe the accused is guilty. Moreover, it is by no means certain that the process of confessing is injurious to the accused. To the contrary, it may provide psychological relief, and enhance the prospects for rehabilitation. This is not to say that the value of respect for the inviolability of the accused's individual personality should be accorded no weight, or that all confessions should be indiscriminately admitted. This Court has long read the Constitution to proscribe compelled confessions, a salutary rule from which there should be no retreat. But I see no sound basis, factual or otherwise, and the Court gives none, for concluding that the present rule against the receipt of coerced confessions is inadequate for the
task of sorting out inadmissible evidence, and must be replaced by the per se rule which is now imposed. Even if the new concept can be said to have advantages of some sort over the present law, they are far outweighed by its likely undesirable impact on other very relevant and important interests.

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

The modes by which the criminal laws serve the interest in general security are many. First, the murderer who has taken the life of another is removed from the streets, deprived of his liberty, and thereby prevented from repeating his offense. In view of the statistics on recidivism in this country, [*Footnote 4/4*] and of the number of instances in which apprehension occurs only after repeated offenses, no one can sensibly claim that this aspect of the criminal law does not prevent crime or contribute significantly to the personal security of the ordinary citizen.

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

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

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

The rule announced today will measurably weaken the ability of the criminal law to perform these tasks. It is a deliberate calculus to prevent interrogations, to reduce the
incidence of confessions and pleas of guilty, and to increase the number of trials. [Footnote 4/5] Criminal trials, no

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matter how efficient the police are, are not sure bets for the prosecution, nor should they be if the evidence is not forthcoming. Under the present law, the prosecution fails to prove its case in about 30% of the criminal cases actually tried in the federal courts. See Federal Offenders: 1964, supra, 384 U. S. at 6 (Table 4), 59 (Table 1); Federal Offenders: 1963, supra, 384 U. S. at 5 (Table 3); District of Columbia Offenders: 1963, supra, 384 U. S. at 2 (Table 1). But it is something else again to remove from the ordinary criminal case all those confessions which heretofore have been held to be free and voluntary acts of the accused, and to thus establish a new constitutional barrier to the ascertainment of truth by the judicial process. There is, in my view, every reason to believe that a good many criminal defendants who otherwise would have been convicted on what this Court has previously thought to be the most satisfactory kind of evidence will now, under this new version of the Fifth Amendment, either not be tried at all or will be acquitted if the State's evidence, minus the confession, is put to the test of litigation.

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

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

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

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

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

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

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

At the same time, the Court's per se approach may not be justified on the ground that it provides a "bright line" permitting the authorities to judge in advance whether interrogation may safely be pursued without jeopardizing the admissibility of any information obtained as a consequence. Nor can it be claimed that judicial time and effort, assuming that is a relevant consideration,
will be conserved because of the ease of application of the new rule. Today's decision leaves open such questions as whether the accused was in custody, whether his statements were spontaneous or the product of interrogation, whether the accused has effectively waived his rights, and whether nontestimonial evidence introduced at trial is the fruit of statements made during a prohibited interrogation, all of which are certain to prove productive of uncertainty during investigation and litigation during prosecution. For all these reasons, if further restrictions on police interrogation are desirable at this time, a more flexible approach makes much more sense than the Court's constitutional straitjacket, which forecloses more discriminating treatment by legislative or rulemaking pronouncements.

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

[Footnote 4/1]

Of course, the Court does not deny that it is departing from prior precedent; it expressly overrules Crooker and Cicenia, ante at 384 U. S. 479, n. 48, and it acknowledges that, in the instant "cases, we might not find the defendants' statements to have been involuntary in traditional terms," ante at 384 U. S. 457.

[Footnote 4/2]

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

[Footnote 4/3]

By contrast, the Court indicates that, in applying this new rule, it "will not pause to inquire in individual cases whether the defendant was aware of his rights without a warning being given." Ante at 384 U. S. 468. The reason given is that assessment of the knowledge of the defendant based on information as to age, education, intelligence, or prior contact with authorities can never be more than speculation, while a warning is a clear-cut fact. But the officers' claim that they gave the requisite warnings may be disputed, and facts respecting the defendant's prior experience may be undisputed, and be of such a nature as to virtually preclude any doubt that the defendant knew of his rights. See United States v. Bolden, 355 F.2d 453 (C.A. 7th Cir.1965), petition for cert. pending.
Precise statistics on the extent of recidivism are unavailable, in part because not all crimes are solved and in part because criminal records of convictions in different jurisdictions are not brought together by a central data collection agency. Beginning in 1963, however, the Federal Bureau of Investigation began collating data on "Careers in Crime," which it publishes in its Uniform Crime Reports. Of 92,869 offenders processed in 1963 and 1964, 76% had a prior arrest record on some charge. Over a period of 10 years, the group had accumulated 434,000 charges. FBI, Uniform Crime Reports -- 1964, 27-28. In 1963 and 1964, between 23% and 25% of all offenders sentenced in 88 federal district courts (excluding the District Court for the District of Columbia) whose criminal records were reported had previously been sentenced to a term of imprisonment of 13 months or more. Approximately an additional 40% had a prior record less than prison (juvenile record, probation record, etc.). Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1964, x, 36 (hereinafter cited as Federal Offenders: 1964); Administrative Office of the United States Courts, Federal Offenders in the United States District Courts: 1963, 25-27 (hereinafter cited as Federal Offenders: 1963). During the same two years in the District Court for the District of Columbia, between 28% and 35% of those sentenced had prior prison records, and from 37% to 40% had a prior record less than prison. Federal Offenders: 1964, xii, 64, 66; Administrative Office of the United States Courts, Federal Offenders in the United States District Court for the District of Columbia: 1963, 8, 10 (hereinafter cited as District of Columbia Offenders: 1963).

A similar picture is obtained if one looks at the subsequent records of those released from confinement. In 1964, 12.3% of persons on federal probation had their probation revoked because of the commission of major violations (defined as one in which the probationer has been committed to imprisonment for a period of 90 days or more, been placed on probation for over one year on a new offense, or has absconded with felony charges outstanding). Twenty-three and two-tenths percent of parolees and 16.9% of those who had been mandatorily released after service of a portion of their sentence likewise committed major violations. Reports of the Proceedings of the Judicial Conference of the United States and Annual Report of the Director of the Administrative Office of the United States Courts: 1965, 138. See also Mandel et al., Recidivism Studied and Defined, 56 J.Crim.L., C. & P. S. 59 (1965) (within five years of release, 62.33% of sample had committed offenses placing them in recidivist category).
convictions upon pleas of guilty and 10.1% were dismissed. Stated differently, approximately 90% of all convictions resulted from guilty pleas. Federal Offenders: 1964, supra, note 4, 3-6. In the District Court for the District of Columbia, a higher percentage, 27%, went to trial, and the defendant pleaded guilty in approximately 78% of the cases terminated prior to trial. Id. at 58-59. No reliable statistics are available concerning the percentage of cases in which guilty pleas are induced because of the existence of a confession or of physical evidence unearthed as a result of a confession. Undoubtedly the number of such cases is substantial.

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

U.S. Supreme Court


468 U.S. 1214

NEW JERSEY, petitioner,
v. T.L.O.
No. 83-712.

Supreme Court of the United States

July 5, 1984.

This case is restored to the calendar for reargument. In addition to the question presented by the petition for writ of certiorari and previously briefed and argued, the parties are requested to brief and argue the following question:

Did the assistant principal violate the Fourth Amendment in opening respondent's purse in the facts and circumstances of this case?

Justice BLACKMUN dissents.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

In its decision in this case, the New Jersey Supreme Court addressed three distinct questions: (1) what is the proper standard for judging the reasonableness of a school official's search of a student's purse; (2) on the facts of this case, did the school official violate that standard; and (3) whether the exclusionary rule bars the use in a criminal proceeding of evidence that a school official obtained in violation of that standard. The Supreme Court held (1) that the correct standard is one of reasonable suspicion rather than probable cause; (2) that the standard was violated in this case; and (3) that the evidence obtained as the result of a violation may not be introduced in evidence against TLO in any criminal proceeding, including this delinquency proceeding.
New Jersey's petition for certiorari sought review of only the third question. [Footnote 1] The reasons why it did not seek review of either of the other two questions are tolerably clear. There is substantial agreement among appellate courts that the New Jersey Supreme Court applied the correct standard, and it is apparently one that the New Jersey law enforcement authorities favor. As far as the specific facts of the case are concerned, presumably New Jersey believed that this Court is too busy to take a case just for the purpose of reviewing the State Supreme Court's application of this standard to the specific facts of this case.

The single question presented to the Court has now been briefed and argued. Evidently unable or unwilling to decide the question presented by the parties, the Court, instead of dismissing the writ of certiorari as improvidently granted, orders reargument directed to the questions that New Jersey decided not to bring here. This is done even though New Jersey agrees with its Supreme Court's resolution of these questions, and has no desire to seek reversal on those grounds. [Footnote 2] Thus, in this nonadversarial context, the Court has decided to plunge into the merits of the Fourth Amendment issues despite the fact that no litigant before it wants the Court's guidance on these questions. Volunteering unwanted advice is rarely a wise course of action.

Of late, the Court has acquired a voracious appetite for judicial activism in its Fourth Amendment jurisprudence, at least when it comes to restricting the constitutional rights of the citizen. In United States v. Leon, 468 U.S. 897, 905, 3412, and Massachusetts v. Sheppard, 468 U.S. 981, 988, n. 5, 3428, n. 5, the Court fashioned a new exception to the exclusionary rule despite its acknowledgment that narrower grounds for decision were available in both cases. [Footnote 3] In United States v. Karo, 468 U.S. 705, in order to reverse a decision requiring the suppression of evidence, the Court on its own initiative made an analysis of a factual question that had not been presented or argued by either of the parties and managed to find a basis for ruling in favor of the Government. In Segura v. United States, 468 U.S. 796, two creative Justices reached the surprising conclusion that an 18-20 hour warrantless occupation of a citizen's home was "reasonable," despite the fact that the issue had not been argued and the Government had expressly conceded the unreasonableness of the occupation. And, as I have previously observed, in recent Terms the Court has elected to use its power of summary disposition exclusively for the benefit of prosecutors. [Footnote 4] In this case, the special judicial action is to order the parties to argue a constitutional question that they have no desire to raise, in a context in which a ground for decision that the Court currently views as nonconstitutional is available, and on which the State's chief prosecutor believes no guidance from this Court is necessary.
I believe that the adversary process functions most effectively when we rely on the initiative of lawyers, rather than the activism of judges, to fashion the questions for review. I respectfully dissent.

Footnotes

Footnote 1 The petition presented a single question for review: "Whether the Fourth Amendment's exclusionary rule applies to searches made by public school officials and teachers in school."

Footnote 2 At oral argument, the following colloquy took place between counsel for New Jersey and the bench:

"QUESTION: Well, do you think it is open to us to deal with the reasonableness of the search?
"MR. NODES: I believe that could be considered a question subsumed within the-
"QUESTION: But it wasn't your intention to raise it?
"MR. NODES: It wasn't our intention to raise it because we agree with the standard that was set forth by the New Jersey Supreme Court. We feel that that is a workable standard." Tr. of Oral Arg. 7.

Footnote 3 See 468 U.S. at 962-963, 104 S.Ct. at 3447-3448 (STEVENS, J., concurring in judgment in Sheppard and dissenting in Leon).


Footnote 5 We are told that questions concerning the remedies for a Fourth Amendment violation are not constitutional in dimension. United States v. Leon, 468 U.S. 897, 905-906, 3411-3412. Apparently, this Court has imposed the exclusionary rule on the States as a result of the Fourth Amendment's "invisible radiations," Keeton v. Hustler Magazine, Inc., 465 U.S. 770, 780, n. 12, 1481, n. 12 (1984), which act to somehow give the Court nonconstitutional supervisory powers over the State courts. My own view is different. See 468 U.S. at 978 and n. 37, 104 S.Ct. at 3456 and n. 37 (STEVENS, J., concurring in judgment in Sheppard and dissenting in Leon).
REGENTS OF UNIV. OF CALIFORNIA V. BAKKE, 438 U.S. 265 (1978)

U.S. Supreme Court


Regents of the University of California v. Bakke

No. 7811

Argued October 12, 1977

Decided June 28, 1978

438 U.S. 265

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Syllabus

The Medical School of the University of California at Davis (hereinafter Davis) had two admissions programs for the entering class of 100 students -- the regular admissions program and the special admissions program. Under the regular procedure, candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. About one out of six applicants was then given an interview, following which he was rated on a scale of 1 to 100 by each of the committee members (five in 1973 and six in 1974), his rating being based on the interviewers' summaries, his overall grade point average, his science courses grade point average, his Medical College Admissions Test (MCAT) scores, letters of recommendation, extracurricular activities, and other biographical data, all of which resulted in a total "benchmark score." The full admissions committee then made offers of admission on the basis of their review of the applicant's file and his score, considering and acting upon applications as they were received. The committee chairman was responsible for placing names on the waiting list and had discretion to include persons with "special skills." A separate committee, a majority of whom were members of minority groups, operated the special admissions program. The 1973 and 1974 application forms, respectively, asked candidates whether they wished to be considered as "economically and/or educationally disadvantaged" applicants and members of a "minority group" (blacks, Chicanos, Asians, American Indians). If an applicant of a minority group was found to be "disadvantaged," he would
be rated in a manner similar to the one employed by the general admissions committee. Special candidates, however, did not have to meet the 2.5 grade point cutoff and were not ranked against candidates in the general admissions process. About one-fifth of the special applicants were invited for interviews in 1973 and 1974, following which they were given benchmark scores, and the top choices were then given to the general admissions committee, which could reject special candidates for failure to meet course requirements or other specific deficiencies. The special committee continued to recommend candidates until 16 special admission selections had been made. During a four-year period, 63 minority students were admitted to Davis under the special program and 44 under the general program. No disadvantaged whites were admitted under the special program, though many applied. Respondent, a white male, applied to Davis in 1973 and 1974, in both years being considered only under the general admissions program. Though he had a 468 out of 500 score in 1973, he was rejected, since no general applicants with scores less than 470 were being accepted after respondent's application, which was filed late in the year, had been processed and completed. At that time, four special admission slots were still unfilled. In 1974 respondent applied early, and though he had a total score of 549 out of 600, he was again rejected. In neither year was his name placed on the discretionary waiting list. In both years, special applicants were admitted with significantly lower scores than respondent's. After his second rejection, respondent filed this action in state court for mandatory, injunctive, and declaratory relief to compel his admission to Davis, alleging that the special admissions program operated to exclude him on the basis of his race in violation of the Equal Protection Clause of the Fourteenth Amendment, a provision of the California Constitution, and § 601 of Title VI of the Civil Rights Act of 1964, which provides, inter alia, that no person shall on the ground of race or color be excluded from participating in any program receiving federal financial assistance. Petitioner cross-claimed for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota, because minority applicants in that program were rated only against one another, and 16 places in the class of 100 were reserved for them. Declaring that petitioner could not take race into account in making admissions decisions, the program was held to violate the Federal and State Constitutions and Title VI. Respondent's admission was not ordered, however, for lack of proof that he would have been admitted but for the special program. The California Supreme Court, applying a strict scrutiny standard, concluded that the special admissions program was not the least intrusive means of achieving the goals of the admittedly compelling state interests of integrating the medical profession and increasing the number of doctors willing to serve minority patients. Without passing on the state constitutional or federal statutory grounds, the court held that petitioner's special admissions program violated the Equal Protection Clause. Since petitioner could not satisfy its burden of demonstrating that respondent, absent the special program, would not have been admitted, the court ordered his admission to Davis.
Held: The judgment below is affirmed insofar as it orders respondent's admission to Davis and invalidates petitioner's special admissions program, but is reversed insofar as it prohibits petitioner from taking race into account as a factor in its future admissions decisions.

18 Cal.3d 34, 553 P.2d 1152, affirmed in part and reversed in part.

MR. JUSTICE POWELL concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 438 U. S. 281-287.

2. Racial and ethnic classifications of any sort are inherently suspect and call for the most exacting judicial scrutiny. While the goal of achieving a diverse student body is sufficiently compelling to justify consideration of race in admissions decisions under some circumstances, petitioner's special admissions program, which forecloses consideration to persons like respondent, is unnecessary to the achievement of this compelling goal, and therefore invalid under the Equal Protection Clause. Pp. 438 U. S. 287-320.

3. Since petitioner could not satisfy its burden of proving that respondent would not have been admitted even if there had been no special admissions program, he must be admitted. P. 438 U. S. 320.

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concluded:

1. Title VI proscribes only those racial classifications that would violate the Equal Protection Clause if employed by a State or its agencies. Pp. 438 U. S. 328-355.

2. Racial classifications call for strict judicial scrutiny. Nonetheless, the purpose of overcoming substantial, chronic minority underrepresentation in the medical profession is sufficiently important to justify petitioner's remedial use of race. Thus, the judgment below must be reversed in that it prohibits race from being used as a factor in university admissions. Pp. 438 U. S. 355-379.

MR. JUSTICE STEVENS, joined by THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST, being of the view that whether race can ever be a factor in an admissions policy is not an issue here; that Title VI applies; and that respondent was excluded from Davis in violation of Title VI, concurs in the Court's judgment insofar as it affirms the judgment of the court below ordering respondent admitted to Davis. Pp. 438 U. S. 408-421.
POWELL, J., announced the Court's judgment and filed an opinion expressing his views of the case, in Parts I, III-A, and V-C of which WHITE, J., joined; and in Parts I and V-C of which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, WHITE, MARSHALL, and BLACKMUN,

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MR. JUSTICE POWELL announced the judgment of the Court.

This case presents a challenge to the special admissions program of the petitioner, the Medical School of the University of California at Davis, which is designed to assure the admission

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of a specified number of students from certain minority groups. The Superior Court of California sustained respondent's challenge, holding that petitioner's program violated the California Constitution, Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., and the Equal Protection Clause of the Fourteenth Amendment. The court enjoined petitioner from considering respondent's race or the race of any other applicant in making admissions decisions. It refused, however, to order respondent's admission to the Medical School, holding that he had not carried his burden of proving that he would have been admitted but for the constitutional and statutory violations. The Supreme Court of California affirmed those portions of the trial court's judgment declaring the special admissions program unlawful and enjoining petitioner from considering the race of any applicant.

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It modified that portion of the judgment denying respondent's requested injunction and directed the trial court to order his admission.

For the reasons stated in the following opinion, I believe that so much of the judgment of the California court as holds petitioner's special admissions program unlawful and directs that respondent be admitted to the Medical School must be affirmed. For the reasons expressed in a separate opinion, my Brothers THE CHIEF JUSTICE, MR. JUSTICE
I also conclude, for the reasons stated in the following opinion, that the portion of the court's judgment enjoining petitioner from according any consideration to race in its admissions process must be reversed. For reasons expressed in separate opinions, my Brothers MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN concur in this judgment.

Affirmed in part and reversed in part.

I

**

The Medical School of the University of California at Davis opened in 1968 with an entering class of 50 students. In 1971, the size of the entering class was increased to 100 students, a level at which it remains. No admissions program for disadvantaged or minority students existed when the school opened, and the first class contained three Asians but no blacks, no Mexican-Americans, and no American Indians. Over the next two years, the faculty devised a special admissions program to increase the representation of "disadvantaged" students in each Medical School class. [Footnote 1] The special program consisted of a separate admissions system operating in coordination with the regular admissions process.

Under the regular admissions procedure, a candidate could submit his application to the Medical School beginning in July of the year preceding the academic year for which admission was sought. Record 149. Because of the large number of applications, [Footnote 2] the admissions committee screened each one to select candidates for further consideration. Candidates whose overall undergraduate grade point averages fell below 2.5 on a scale of 4.0 were summarily rejected. Id. at 63. About one out of six applicants was invited for a personal interview. Ibid. Following the interviews, each candidate was rated on a scale of 1 to 100 by his interviewers and four other members of the admissions committee. The rating embraced the interviewers' summaries, the candidate's overall grade point average, grade point average in science courses, scores on the Medical College Admissions Test (MCAT), letters of
recommendation, extracurricular activities, and other biographical data. \textit{Id.} at 62. The ratings were added together to arrive at each candidate's "benchmark" score. Since five committee members rated each candidate in 1973, a perfect score was 500; in 1974, six members rated each candidate, so that a perfect score was 600. The full committee then reviewed the file and scores of each applicant and made offers of admission on a "rolling" basis. [Footnote 3] The chairman was responsible for placing names on the waiting list. They were not placed in strict numerical order; instead, the chairman had discretion to include persons with "special skills." \textit{Id.} at 63-64.

The special admissions program operated with a separate committee, a majority of whom were members of minority groups. \textit{Id.} at 163. On the 1973 application form, candidates were asked to indicate whether they wished to be considered as "economically and/or educationally disadvantaged" applicants; on the 1974 form the question was whether they wished to be considered as members of a "minority group," which the Medical School apparently viewed as "Blacks," "Chicanos," "Asians," and "American Indians." \textit{Id.} at 65-66, 146, 197, 203-205, 216-218. If these questions were answered affirmatively, the application was forwarded to the special admissions committee. No formal definition of "disadvantaged" was ever produced, \textit{id.} at 163-164, but the chairman of the special committee screened each application to see whether it reflected economic or educational deprivation. [Footnote 4] Having passed this initial hurdle, the applications then were rated by the special committee in a fashion similar to that used by the general admissions committee, except that special candidates did not have to meet the 2.5 grade point average cutoff applied to regular applicants. About one-fifth of the total number of special applicants were invited for interviews in 1973 and 1974. [Footnote 5] Following each interview, the special committee assigned each special applicant a benchmark score. The special committee then presented its top choices to the general admissions committee. The latter did not rate or compare the special candidates against the general applicants, \textit{id.} at 388, but could reject recommended special candidates for failure to meet course requirements or other specific deficiencies. \textit{Id.} at 171-172. The special committee continued to recommend special applicants until a number prescribed by faculty vote were admitted. While the overall class size was still 50, the prescribed number was 8; in 1973 and 1974, when the class size had doubled to 100, the prescribed number of special admissions also doubled, to 16. \textit{Id.} at 164, 166.

From the year of the increase in class size -- 1971 -- through 1974, the special program resulted in the admission of 21 black students, 30 Mexican-Americans, and 12 Asians, for a total of 63 minority students. Over the same period, the regular admissions program produced 1 black, 6 Mexican-Americans,
and 37 Asians, for a total of 44 minority students. [Footnote 6] Although disadvantaged whites applied to the special program in large numbers, see n 5, supra, none received an offer of admission through that process. Indeed, in 1974, at least, the special committee explicitly considered only "disadvantaged" special applicants who were members of one of the designated minority groups. Record 171.

Allan Bakke is a white male who applied to the Davis Medical School in both 1973 and 1974. In both years, Bakke's application was considered under the general admissions program, and he received an interview. His 1973 interview was with Dr. Theodore C. West, who considered Bakke "a very desirable applicant to [the] medical school." Id. at 225. Despite a strong benchmark score of 468 out of 500, Bakke was rejected. His application had come late in the year, and no applicants in the general admissions process with scores below 470 were accepted after Bakke's application was completed. Id. at 69. There were four special admissions slots unfilled at that time, however, for which Bakke was not considered. Id. at 70. After his 1973 rejection, Bakke wrote to Dr. George H. Lowrey, Associate Dean and Chairman of the Admissions Committee, protesting that the special admissions program operated as a racial and ethnic quota. Id. at 259.

Bakke's 1974 application was completed early in the year. Id. at 70. His student interviewer gave him an overall rating of 94, finding him "friendly, well tempered, conscientious and delightful to speak with." Id. at 229. His faculty interviewer was, by coincidence, the same Dr. Lowrey to whom he had written in protest of the special admissions program. Dr. Lowrey found Bakke "rather limited in his approach" to the problems of the medical profession, and found disturbing Bakke's "very definite opinions which were based more on his personal viewpoints than upon a study of the total problem." Id. at 226. Dr. Lowrey gave Bakke the lowest of his six ratings, an 86; his total was 549 out of 600. Id. at 230. Again, Bakke's application was rejected. In neither year did the chairman of the admissions committee, Dr. Lowrey, exercise his discretion to place Bakke on the waiting list. Id. at 64. In both years, applicants were admitted under the special program with grade point averages, MCT scores, and benchmark scores significantly lower than Bakke's. [Footnote 7]

After the second rejection, Bakke filed the instant suit in the Superior Court of California. [Footnote 8] He sought mandatory, injunctive, and declaratory relief compelling his admission to the Medical School. He alleged that the Medical School's special admissions program operated to exclude him from the school on the basis of his race, in violation of his rights under the Equal Protection Clause of the Fourteenth Amendment, [Footnote 9] Art. I, § 21, of the California Constitution, [Footnote 10] and § 601 of Title VI of the Civil Rights Act of 1964, 78 Stat.
The University cross-complained for a declaration that its special admissions program was lawful. The trial court found that the special program operated as a racial quota because minority applicants in the special program were rated only against one another, Record 388, and 16 places in the class of 100 were reserved for them. Id. at 295-296. Declaring that the University could not take race into account in making admissions decisions, the trial court held the challenged program violative of the Federal Constitution, the State Constitution, and Title VI. The court refused to order Bakke's admission, however, holding that he had failed to carry his burden of proving that he would have been admitted but for the existence of the special program.

Bakke appealed from the portion of the trial court judgment denying him admission, and the University appealed from the decision that its special admissions program was unlawful and the order enjoining it from considering race in the processing of applications. The Supreme Court of California transferred the case directly from the trial court, "because of the importance of the issues involved." 18 Cal.3d 34, 39, 553 P.2d 1152, 1156 (1976). The California court accepted the findings of the trial court with respect to the University's program. [Footnote 12] Because the special admissions program involved a racial classification, the Supreme Court held itself bound to apply strict scrutiny. Id. at 49, 553 P.2d at 1162-1163. It then turned to the goals of the University presented as justifying the special program. Although the court agreed that the goals of integrating the medical profession and increasing the number of physicians willing to serve members of minority groups were compelling state interests, id. at 53, 553 P.2d at 1165, it concluded that the special admissions program was not the least intrusive means of achieving those goals. Without passing on the state constitutional or federal statutory grounds cited in the trial court's judgment, the California court held that the Equal Protection Clause of the Fourteenth Amendment required that "no applicant may be rejected because of his race, in favor of another who is less qualified, as measured by standards applied without regard to race."

Id. at 55, 553 P.2d at 1166.

Turning to Bakke's appeal, the court ruled that, since Bakke had established that the University had discriminated against him on the basis of his race, the burden of proof shifted to the University to demonstrate that he would not have been admitted even in the absence of the special admissions program. [Footnote 13] Id. at 63-64, 553 P.2d at 1172. The court analogized Bakke's situation to that of a plaintiff under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-17 (1970 ed., Supp. V), see, e.g., Franks v. Bowman Transportation Co., 424 U. S. 747, 424 U. S. 772 (176). 18 Cal.3d at 64, 553
P.2d at 1172. On this basis, the court initially ordered a remand for the purpose of determining whether, under the newly allocated burden of proof, Bakke would have been admitted to either the 1973 or the 1974 entering class in the absence of the special admissions program. App. A to Application for Stay 4. In its petition for rehearing below, however, the University conceded its inability to carry that burden. App. B to Application for Stay A19-A20.

[Footnote 14] The California court thereupon amended its opinion to direct that the trial court enter judgment ordering Bakke's admission to the Medical School. 18 Cal.3d at 64, 553. P.2d at 1172. That order was stayed pending review in this Court. 429 U.S. 953 (1976). We granted certiorari to consider the important constitutional issue. 429 U.S. 1090 (1977).

II

In this Court, the parties neither briefed nor argued the applicability of Title VI of the Civil Rights Act of 1964. Rather, as had the California court, they focused exclusively upon the validity of the special admissions program under the Equal Protection Clause. Because it was possible, however, that a decision on Title VI might obviate resort to constitutional interpretation, see Ashwander v. TVA, 297 U. S. 288, 297 U. S. 346-348 (1936) (concurring opinion), we requested supplementary briefing on the statutory issue. 434 U.S. 900 (1977).

A

At the outset, we face the question whether a right of action for private parties exists under Title VI. Respondent argues that there is a private right of action, invoking the test set forth in Cort v. Ash, 422 U. S. 66, 422 U. S. 78 (1975). He contends that the statute creates a federal right in his favor, that legislative history reveals an intent to permit private actions, [Footnote 15] that such actions would further the remedial purposes of the statute, and that enforcement of federal rights under the Civil Rights Act generally is not relegated to the States. In addition, he cites several lower court decisions which have recognized or assumed the existence of a private right of action. [Footnote 16] Petitioner denies the existence of a private right of action, arguing that the sole function of § 601, see n 11, supra, was to establish a predicate for administrative action under § 602, 78 Stat. 252, 42 U.S.C. § 2000d-1. [Footnote 17] In its view, administrative curtailment of federal funds under that section was the only sanction to be imposed upon recipients that

We find it unnecessary to resolve this question in the instant case. The question of respondent's right to bring an action under Title VI was neither argued nor decided in either of the courts below, and this Court has been hesitant to review questions not addressed below. McGoldrick v. Companie Generale Transatlantique, 309 U. S. 430, 309 U. S. 434-435 (1940). See also Massachusetts v. Westcott, 431 U. S. 322 (1977); Cardinale v. Louisiana, 394 U. S. 437, 394 U. S. 439 (1969). Cf. Singleton v. Wulff, 428 U. S. 106, 428 U. S. 121 (1976). We therefore do not address this difficult issue. Similarly, we need not pass

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upon petitioner's claim that private plaintiffs under Title VI must exhaust administrative remedies. We assume, only for the purposes of this case, that respondent has a right of action under Title VI. See Lau v. Nichols, 414 U. S. 563, 414 U. S. 571 n. 2 (1974) (STEWART, J., concurring in result).

B

The language of § 601, 78 Stat. 252, like that of the Equal Protection Clause, is majestic in its sweep:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The concept of "discrimination," like the phrase "equal protection of the laws," is susceptible of varying interpretations, for, as Mr. Justice Holmes declared,

"[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought, and may vary greatly in color and content according to the circumstances and the time in which it is used."

Towne v. Eisner, 245 U. S. 418, 245 U. S. 425 (1918). We must, therefore, seek whatever aid is available in determining the precise meaning of the statute before us. Train v. Colorado Public Interest Research Group, 426 U. S. 1, 426 U. S. 10 (1976), quoting United States v. American Trucking Assns., 310 U. S. 534, 310 U. S. 543-544 (1940). Examination of the voluminous legislative history of Title VI reveals a congressional intent to halt federal funding of entities that violate a prohibition of racial discrimination similar to that of the Constitution. Although isolated statements of various legislators, taken out of context, can be marshaled in support of the proposition that § 601 enacted a
purely color-blind scheme, [Footnote 19] without regard to the reach of the Equal Protection Clause, these comments must be read against the background of both the problem that Congress was addressing and the broader view of the statute that emerges from a full examination of the legislative debates.

The problem confronting Congress was discrimination against Negro citizens at the hands of recipients of federal moneys. Indeed, the color blindness pronouncements cited in the margin at n19 generally occur in the midst of extended remarks dealing with the evils of segregation in federally funded programs. Over and over again, proponents of the bill detailed the plight of Negroes seeking equal treatment in such programs. [Footnote 20] There simply was no reason for Congress to consider the validity of hypothetical preferences that might be accorded minority citizens; the legislators were dealing with the real and pressing problem of how to guarantee those citizens equal treatment.

In addressing that problem, supporters of Title VI repeatedly declared that the bill enacted constitutional principles. For example, Representative Celler, the Chairman of the House Judiciary Committee and floor manager of the legislation in the House, emphasized this in introducing the bill:

"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of high[er] education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association."

110 Cong.Rec. 1519 (1964) (emphasis added). Other sponsors shared Representative Celler's view that Title VI embodied constitutional principles. [Footnote 21]

In the Senate, Senator Humphrey declared that the purpose of Title VI was "to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation." Id. at 6544. Senator Ribicoff agreed that Title VI embraced the constitutional standard:

"Basically, there is a constitutional restriction against discrimination in the use of federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction."
Further evidence of the incorporation of a constitutional standard into Title VI appears in the repeated refusals of the legislation's supporters precisely to define the term "discrimination." Opponents sharply criticized this failure, [Footnote 23] but proponents of the bill merely replied that the meaning of "discrimination" would be made clear by reference to the Constitution or other existing law. For example, Senator Humphrey noted the relevance of the Constitution:

"As I have said, the bill has a simple purpose. That purpose is to give fellow citizens -- Negroes -- the same rights and opportunities that white people take for granted. This is no more than what was preached by the prophets, and by Christ Himself. It is no more than what our Constitution guarantees."

In view of the clear legislative intent, Title VI must be held to proscribe only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.

III

A

Petitioner does not deny that decisions based on race or ethnic origin by faculties and administrations of state universities are reviewable under the Fourteenth Amendment. See, e.g., Missouri ex rel. Gaines v. Canada, 305 U. S. 337 (1938); Sipuel v. Board of Regents, 332 U. S. 631 (1948); Sweatt v. Painter, 339 U. S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950). For his part, respondent does not argue that all racial or ethnic classifications are per se invalid. See, e.g., Hirabayashi v. United States, 320 U. S. 81 (1943); Korematsu v. United States, 323 U. S. 214 (1944); Lee v. Washington, 390 U. S. 333, 390 U. S. 334 (1968) (Black, Harlan, and STEWART, JJ., concurring); United Jewish Organizations v. Carey, 430 U. S. 144 (1977). The parties do disagree as to the level of judicial scrutiny to be applied to the special admissions program. Petitioner argues that the court below erred in applying strict scrutiny, as this inexact term has been applied in our cases. That level of review, petitioner asserts, should be reserved for classifications that disadvantage "discrete and insular minorities." See United States v. Carolene Products Co., 304 U. S. 144, 304 U. S. 152 n. 4 (1938). Respondent, on the other hand, contends that the California court correctly rejected the notion that the degree of Judicial scrutiny accorded a particular racial or ethnic classification hinges upon
membership in a discrete and insular minority and duly recognized that the "lights established [by the Fourteenth Amendment] are personal rights." *Shelley v. Kraemer*, 334 U. S. 1, 334 U. S. 22 (1948).

En route to this crucial battle over the scope of judicial review, the parties fight a sharp preliminary action over the proper characterization of the special admissions program. Petitioner prefers to view it as establishing a "goal" of minority representation in the Medical School. Respondent, echoing the courts below, labels it a racial quota. [Footnote 26]

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This semantic distinction is beside the point: the special admissions program is undeniably a classification based on race and ethnic background. To the extent that there existed a pool of at least minimally qualified minority applicants to fill the 16 special admissions seats, white applicants could compete only for 84 seats in the entering class, rather than the 100 open to minority applicants. Whether this limitation is described as a quota or a goal, it is a line drawn on the basis of race and ethnic status. [Footnote 27]

The guarantees of the Fourteenth Amendment extend to all persons. Its language is explicit: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." It is settled beyond question that the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights," *Shelley v. Kraemer*, supra at 334 U. S. 22. Accord, *Missouri ex rel. Gaines v. Canada*, supra at 305 U. S. 351; *McCabe v. Atchison, T. & S.F. R. Co.*, 235 U. S. 151, 235 U. S. 161-162 (1914). The guarantee of equal protection cannot mean one thing when applied to one individual and something else when applied to a person of another color. If both are not accorded the same protection, then it is not equal.

Nevertheless, petitioner argues that the court below erred in applying strict scrutiny to the special admissions program because white males, such as respondent, are not a "discrete and insular minority" requiring extraordinary protection from the majoritarian political process. *Carolene Products Co.*, supra at 304 U. S. 152-153, n. 4. This rationale, however, has never been invoked in our decisions as a prerequisite to subjecting racial or ethnic distinctions to strict scrutiny. Nor has this Court held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. [Footnote 28] See, e.g., *Skinner v. Oklahoma ex rel. Williamson*, 316 U. S. 535, 316 U. S. 541 (1942); *Carrington v. Rash*, 380 U. S. 89, 380 U. S. 96-97 (1965). These characteristics may be relevant in deciding whether or not to add new types of
classifications to the list of "suspect" categories or whether a particular classification survives close examination. See, e.g., *Massachusetts Board of Retirement v. Murgia*, 427 U. S. 307, 427 U. S. 313 (1976) (age); *San Antonio Independent School Dist. v. Rodriguez*, 411 U. S. 1, 411 U. S. 28 (1973) (wealth); *Graham v. Richardson*, 403 U. S. 365, 403 U. S. 372 (1971) (aliens). Racial and ethnic classifications, however, are subject to stringent examination without regard to these additional characteristics. We declared as much in the first cases explicitly to recognize racial distinctions as suspect:

"Distinctions between citizens solely because of their ancestry are, by their very nature, odious to a free people whose institutions are founded upon the doctrine of equality."

*Hirabayashi*, 320 U.S. at 320 U. S. 100.

"[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."

*Korematsu*, 323 U.S. at 323 U. S. 216. The Court has never questioned the validity of those pronouncements. Racial and ethnic distinctions of any sort are inherently suspect, and thus call for the most exacting judicial examination.

B

This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history. The Court's initial view of the Fourteenth Amendment was that its "one pervading purpose" was

"the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppressions of those who had formerly exercised dominion over him."

*83 U. S. 71* (1873). The Equal Protection Clause, however, was "[v]irtually strangled in infancy by post-civil-war judicial reactionism." [*Footnote 29*] It was relegated to decades of relative desuetude while the Due Process Clause of the Fourteenth Amendment, after a short germinal period, flourished as a cornerstone in the Court's defense of property and liberty of contract. See, e.g., *Mugler v. Kansas*, 123 U. S. 623, 123 U. S. 661 (1887); *Allgeyer v. Louisiana*, 165 U. S. 578 (1897); *Lochner v. New York*, 198 U. S. 45 (1905). In that cause, the Fourteenth Amendment's "one pervading purpose" was displaced. See, e.g., *Plessy v. Ferguson*, 163 U. S. 537 (1896). It was only as the era of substantive due process came to a close, see, e.g., *291 U. S. New*
York, 291 U. S. 502 (1934); West Coast Hotel Co. v. Parrish, 300 U. S. 379 (1937), that the Equal Protection Clause began to attain a genuine measure of vitality, see, e.g., United States v. Carolene Products, 304 U. S. 144 (1938); Skinner v. Oklahoma ex rel. Williamson, supra.@

By that time, it was no longer possible to peg the guarantees of the Fourteenth Amendment to the struggle for equality of one racial minority. During the dormancy of the Equal Protection Clause, the United States had become a Nation of minorities. [Footnote 30] Each had to struggle [Footnote 31] -- and, to some extent, struggles still [Footnote 32] -- to overcome the prejudices not of a monolithic majority, but of a "majority" composed of various minority groups of whom it was said -- perhaps unfairly, in many cases -- that a shared characteristic was a willingness to disadvantage other groups. [Footnote 33] As the Nation filled with the stock of many lands, the reach of the Clause was gradually extended to all ethnic groups seeking protection from official discrimination. See Strauder v. West Virginia, 100 U. S. 303, 100 U. S. 308 (1880) (Celtic Irishmen) (dictum); Yick Wo v. Hopkins, 118 U. S. 356 (1886) (Chinese); Truax v. Raich, 239 U. S. 33, 239 U. S. 41 (1915) (Austrian resident aliens); Korematsu, supra, (Japanese); Hernandez v. Texas, 347 U. S. 475 (1954) (Mexican-Americans). The guarantees of equal protection, said the Court in

Yick Wo,

"are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws."

118 U.S. at 118 U. S. 369.

Although many of the Framers of the Fourteenth Amendment conceived of its primary function as bridging the vast distance between members of the Negro race and the white "majority," Slaughter-House Cases, supra, the Amendment itself was framed in universal terms, without reference to color, ethnic origin, or condition of prior servitude. As this Court recently remarked in interpreting the 1866 Civil Rights Act to extend to claims of racial discrimination against white persons,

"the 39th Congress was intent upon establishing in the federal law a broader principle than would have been necessary simply to meet the particular and immediate plight of the newly freed Negro slaves."

McDonald v. Santa Fe Trail Transportation Co., 427 U. S. 273, 427 U. S. 296 (1976). And that legislation was specifically broadened in 1870 to ensure that "all persons," not merely "citizens," would enjoy equal rights under the law. See Runyon v. McCrary, 427
Indeed, it is not unlikely that, among the Framers, were many who would have applauded a reading of the Equal Protection Clause that states a principle of universal application and is responsive to the racial, ethnic, and cultural diversity of the Nation. See, e.g., Cong.Globe, 39th Cong., 1st Sess., 1056 (1866) (remarks of Rep. Niblack); id. at 2891-2892 (remarks of Sen. Conness); id. 40th Cong., 2d Sess., 883 (1868) (remarks of Sen. Howe) (Fourteenth Amendment "protect[s] classes from class legislation"). See also Bickel, The Original Understanding and the Segregation Decision, 69 Harv.L.Rev. 1, 60-63 (1955).

Over the past 30 years, this Court has embarked upon the crucial mission of interpreting the Equal Protection Clause with the view of assuring to all persons "the protection of equal laws," Yick Wo, supra at 118 U. S. 369, in a Nation confronting a legacy of slavery and racial discrimination. See, e.g., Shelley v. Kraemer, 334 U. S. 1 (1948); Brown v. Board of Education, 347 U. S. 483 (1954); Hills v. Gautreaux, 425 U. S. 284 (1976). Because the landmark decisions in this area arose in response to the continued exclusion of Negroes from the mainstream of American society, they could be characterized as involving discrimination by the "majority" white race against the Negro minority. But they need not be read as depending upon that characterization for their results. It suffices to say that,

"[o]ver the years, this Court has consistently repudiated '[d]istinctions between citizens solely because of their ancestry' as being 'odious to a free people whose institutions are founded upon the doctrine of equality.'"


Petitioner urges us to adopt for the first time a more restrictive view of the Equal Protection Clause, and hold that discrimination against members of the white "majority" cannot be suspect if its purpose can be characterized as "benign." [Footnote 34]

The clock of our liberties, however, cannot be turned back to 1868. Brown v. Board of Education, supra at 347 U. S. 492; accord, Loving v. Virginia supra at 388 U. S. 9. It is far too late to argue that the guarantee of equal protection to all persons permits the recognition of special wards entitled to a degree of protection greater than that accorded others. [Footnote 35]

"The Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory' -- that is, bad upon differences between 'white' and Negro."
Once the artificial line of a "two-class theory" of the Fourteenth Amendment is put aside, the difficulties entailed in varying the level of judicial review according to a perceived "preferred" status of a particular racial or ethnic minority are intractable. The concepts of "majority" and "minority" necessarily reflect temporary arrangements and political judgments. As observed above, the white "majority" itself is composed of various minority groups, most of which can lay claim to a history of prior discrimination at the hands of the State and private individuals. Not all of these groups can receive preferential treatment and corresponding judicial tolerance of distinctions drawn in terms of race and nationality, for then the only "majority" left would be a new minority of white Anglo-Saxon Protestants. There is no principled basis for deciding which groups would merit "heightened judicial solicitude" and which would not. [Footnote 36] Courts would be asked to evaluate the extent of the prejudice and consequent harm suffered by various minority groups. Those whose societal injury is thought to exceed some arbitrary level of tolerability then would be entitled to preferential classifications at the expense of individuals belonging to other groups. Those classifications would be free from exacting judicial scrutiny. As these preferences began to have their desired effect, and the consequences of past discrimination were undone, new judicial rankings would be necessary. The kind of variable sociological and political analysis necessary to produce such rankings simply does not lie within the judicial competence -- even if they otherwise were politically feasible and socially desirable. [Footnote 37]

Moreover, there are serious problems of justice connected with the idea of preference itself. First, it may not always be clear that a so-called preference is, in fact, benign. Courts may be asked to validate burdens imposed upon individual members of a particular group in order to advance the group's general interest. See United Jewish Organizations v. Carey, 430 U.S. at 430 U. S. 172-173 (BRENNAN, J., concurring in part). Nothing in the Constitution supports the notion that individuals may be asked to suffer otherwise impermissible burdens in order to enhance the societal standing of their ethnic groups. Second, preferential programs may only reinforce common stereotypes holding that certain groups are unable to achieve success without special protection based on a factor having no relationship to individual worth. See DeFunis v. Odegard, 416 U. S. 312, 416 U. S. 343 (1974) (Douglas, J., dissenting). Third, there is a measure of
inequity in forcing innocent persons in respondent's position to bear the burdens of redressing grievances not of their making.

By hitching the meaning of the Equal Protection Clause to these transitory considerations, we would be holding, as a constitutional principle, that judicial scrutiny of classifications touching on racial and ethnic background may vary with the ebb and flow of political forces. Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms, rather than alleviate them. United Jewish Organizations, supra at 430 U. S. 173-174 (BRENNAN, J., concurring in part). Also, the mutability of a constitutional principle, based upon shifting political and social judgments, undermines the chances for consistent application of the Constitution from one generation to the next, a critical feature of its coherent interpretation. Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 157 U. S. 650-651 (1895) (White, J., dissenting). In expounding the Constitution, the Court's role is to discern "principles sufficiently absolute to give them roots throughout the community and continuity over significant periods of time, and to lift them above the level of the pragmatic political judgments of a particular time and place."


If it is the individual who is entitled to judicial protection against classifications based upon his racial or ethnic background because such distinctions impinge upon personal rights, rather than the individual only because of his membership in a particular group, then constitutional standards may be applied consistently. Political judgments regarding the necessity for the particular classification may be weighed in the constitutional balance, Korematsu v. United States, 323 U. S. 214 (1944), but the standard of justification will remain constant. This is as it should be, since those political judgments are the product of rough compromise struck by contending groups within the democratic process. [Footnote 38] When they touch upon an individual's race or ethnic background, he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest. The Constitution guarantees that right to every person regardless of his background. Shelley v. Kraemer, 334 U. S. at 334 U. S. 22; Missouri ex rel. Gaines v. Canada, 305 U. S. at 305 U. S. 351.

C

Petitioner contends that, on several occasions, this Court has approved preferential classifications without applying the most exacting scrutiny. Most of the cases upon which petitioner relies are drawn from three areas: school desegregation, employment
discrimination, and sex discrimination. Each of the cases cited presented a situation materially different from the facts of this case.

The school desegregation cases are inapposite. Each involved remedies for clearly determined constitutional violations. E.g., Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1 (1971); McDaniel v. Barresi, 402 U. S. 39 (1971); Green v. County School Board, 391 U. S. 430 (1968). Racial classifications thus were designed as remedies for the vindication of constitutional entitlement. [Footnote 39] Moreover, the scope of the remedies was not permitted to exceed the extent of the

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The employment discrimination cases also do not advance petitioner's cause. For example, in Franks v. Bowman Transportation Co., 424 U. S. 747 (1976), we approved a retroactive award of seniority to a class of Negro truckdrivers who had been the victims of discrimination -- not just by society at large, but by the respondent in that case. While this relief imposed some burdens on other employees, it was held necessary "to make [the victims] whole for injuries suffered on account of unlawful employment discrimination." Id. at 424 U. S. 763, quoting Albemarle Paper Co. v. Moody, 422 U. S. 405, 422 U. S. 418 (1975). The Courts of Appeals have fashioned various types of racial preferences as remedies for constitutional or statutory violations resulting in identified, race-based injuries to individuals held entitled to the preference. E.g., Bridgeport Guardians, Inc. v. Bridgeport Civil Service Commission, 482 F.2d 1333 (CA2 1973); Carter v. Gallagher, 452 F.2d 315 (CA8 1972), modified on rehearing en banc, id. at 327. Such preferences also have been upheld where a legislative or administrative body charged with the responsibility made determinations of past discrimination by the industries affected, and fashioned remedies deemed appropriate to rectify the discrimination. E.g., Contractors Association of Eastern Pennsylvania v. Secretary of Labor, 442 F.2d 159 (CA3), cert. denied, 404 U.S. 854 (1971); [Footnote 40] Associated General

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Nor is petitioner's view as to the applicable standard supported by the fact that gender-based classifications are not subjected to this level of scrutiny. E.g., Califano v. Webster, 430 U. S. 313, 430 U. S. 316-317 (1977); Craig v. Boren, 429 U. S. 190, 429 U. S. 211 n. (1976) (POWELL, J., concurring). Gender-based distinctions are less likely to create the analytical and practical problems present in preferential programs premised on racial or ethnic criteria. With respect to gender, there are only two possible classifications. The incidence of the burdens imposed by preferential classifications is clear. There are no rival groups which can claim that they, too, are entitled to preferential treatment. Classwide questions as to the group suffering previous injury and groups which fairly can be burdened are relatively manageable for reviewing courts. See, e.g., Califano v. Goldfarb, 430 U. S. 199, 430 U. S. 212-217 (1977); Weinberger v. Wiesenfeld, 420 U. S. 636, 420 U. S. 645 (1975). The resolution of these same questions in the context of racial and ethnic preferences presents far more complex and intractable problems than gender-based classifications. More importantly, the perception of racial classifications as inherently odious stems from a lengthy and tragic history that gender-based classifications do not share. In sum, the Court has never viewed such classification as inherently suspect or as comparable to racial or ethnic classifications for the purpose of equal protection analysis.

Petitioner also cites Lau v. Nichols, 414 U. S. 563 (1974), in support of the proposition that discrimination favoring racial or ethnic minorities has received judicial approval without the exacting inquiry ordinarily accorded "suspect" classifications. In Lau, we held that the failure of the San Francisco school system to provide remedial English instruction for some 1,800 students of oriental ancestry who spoke no English amounted to a violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, and the regulations promulgated thereunder. Those regulations required remedial instruction where inability to understand English excluded children of foreign ancestry from participation in educational programs. 414 U. S. at 414 U. S. 568. Because we found that the students in Lau were denied "a meaningful opportunity to participate in the educational program," ibid., we remanded for the fashioning of a remedial order.

Lau provides little support for petitioner's argument. The decision rested solely on the statute, which had been construed by the responsible administrative agency to each educational practices "which have the effect of subjecting individuals to discrimination," ibid. We stated:

"Under these state-imposed standards, there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum, for students who do not understand English are effectively foreclosed from any meaningful education."
Moreover, the "preference" approved did not result in the denial of the relevant benefit -- "meaningful opportunity to participate in the educational program" -- to anyone else. No other student was deprived by that preference of the ability to participate in San Francisco's school system, and the applicable regulations required similar assistance for all students who suffered similar linguistic deficiencies. \textit{Id.} at 414 U. S. 570-571 (STEWART, J., concurring in result).

In a similar vein, [Footnote 42] petitioner contends that our recent decision in \textit{United Jewish Organization v. Carey}, 430 U. S. 144 (1977), indicates a willingness to approve racial classifications designed to benefit certain minorities, without denoting the classifications as "suspect." The State of New York had redrawn its reapportionment plan to meet objections of the Department of Justice under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). Specifically, voting districts were redrawn to enhance the electoral power of certain "nonwhite" voters found to have been the victims of unlawful "dilution" under the original reapportionment plan. \textit{United Jewish Organizations}, like \textit{Lau}, properly is viewed as a case in which the remedy for an administrative finding of discrimination encompassed measures to improve the previously disadvantaged group's ability to participate, without excluding individuals belonging to any other group from enjoyment of the relevant opportunity -- meaningful participation in the electoral process.

In this case, unlike \textit{Lau} and \textit{United Jewish Organizations}, there has been no determination by the legislature or a responsible administrative agency that the University engaged in a discriminatory practice requiring remedial efforts. Moreover, the operation of petitioner's special admissions program is quite different from the remedial measures approved in those cases. It prefers the designated minority groups at the expense of other individuals who are totally foreclosed from competition for the 16 special admissions seats in every Medical School class. Because of that foreclosure, some individuals are excluded from enjoyment of a state-provided benefit -- admission to the Medical School -- they otherwise would receive. When a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as suspect. \textit{E.g., McLaurin v. Oklahoma State Regents}, 339 U.S. at 339 U. S. 641-642.

\textbf{IV}

We have held that, in

"order to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary . . . to the accomplishment' of its purpose or the safeguarding of its interest."
In re Griffiths, 413 U. S. 717, 413 U. S. 721-722 (1973) (footnotes omitted); Loving v. Virginia, 388 U.S. at 388 U. S. 11; McLaughlin v. Florida, 379 U. S. 184, 379 U. S. 196 (1964). The special admissions program purports to serve the purposes of: (i) "reducing the historic deficit of traditionally disfavored minorities in medical schools and in the medical profession," Brief for Petitioner 32; (ii) countering the effects of societal discrimination; [Footnote 43] (iii) increasing the number of physicians who will practice in communities currently underserved; and (iv) obtaining the educational benefits that flow from an ethnically diverse student body. It is necessary to decide which, if any, of these purposes is substantial enough to support the use of a suspect classification.

A

If petitioner's purpose is to assure within its student body some specified percentage of a particular group merely because of its race or ethnic origin, such a preferential purpose must be rejected not as insubstantial, but as facially invalid. Preferring members of any one group for no reason other than race or ethnic origin is discrimination for its own sake. This the Constitution forbids. E.g., Loving v. Virginia, supra at 388 U. S. 11; McLaughlin v. Florida, supra at 379 U. S. 198; Brown v. Board of Education, 347 U. S. 483 (1954).

B

The State certainly has a legitimate and substantial interest in ameliorating, or eliminating where feasible, the disabling effects of identified discrimination. The line of school desegregation cases, commencing with Brown, attests to the importance of this state goal and the commitment of the judiciary to affirm all lawful means toward its attainment. In the school cases, the States were required by court order to redress the wrongs worked by specific instances of racial discrimination. That goal was far more focused than the remedying of the effects of "societal discrimination," an amorphous concept of injury that may be ageless in its reach into the past.

We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative, or administrative findings of constitutional or statutory violations. See, e.g., Teamsters v. United States, 431 U. S. 324, 431 U. S. 367-376 (1977); United Jewish Organizations, 430 U.S. at 430 U. S. 155-156; South Carolina v. Katzenbach, 383 U. S. 301, 383 U. S. 308 (1966). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the
extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, [Footnote 44] it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm.

Petitioner does not purport to have made, and is in no position to make, such findings. Its broad mission is education, not the formulation of any legislative policy or the adjudication of particular claims of illegality. For reasons similar to those stated in 438 U. S. 316-321; Califano

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v. Goldfarb, 430 U. S. 212-217. Lacking this capability, petitioner has not carried its burden of justification on this issue.

Hence, the purpose of helping certain groups whom the faculty of the Davis Medical School perceived as victims of "societal discrimination" does not justify a classification that imposes disadvantages upon persons like respondent, who bear no responsibility for whatever harm the beneficiaries of the special admissions program are thought to have suffered. To hold otherwise would be to convert a remedy heretofore reserved for violations of legal rights into a privilege that all institutions throughout the Nation could grant at their pleasure to whatever groups are perceived as victims of societal discrimination. That is a step we have never approved. Cf. Pasadena Cty Board of Education v. Spangler, 427 U. S. 424 (1976).

C

Petitioner identifies, as another purpose of its program, improving the delivery of health care services to communities currently underserved. It may be assumed that, in some situations, a State's interest in facilitating the health care of its citizens is sufficiently compelling to support the use of a suspect classification. But there is virtually no evidence in the record indicating that petitioner's special admissions program is either needed or geared to promote that goal. [Footnote 46] The court below addressed this failure of proof:

"The University concedes it cannot assure that minority doctors who entered under the program, all of whom expressed an 'interest' in practicing in a disadvantaged community,
will actually do so. It may be correct to assume that some of them will carry out this intention, and that it is more likely they will practice in minority communities than the average white doctor. (See Sandalow, Racial Preferences in Higher Education: Political Responsibility and the Judicial Role (1975) 42 U.Chi.L.Rev. 653, 688.) Nevertheless, there are more precise and reliable ways to identify applicants who are genuinely interested in the medical problems of minorities than by race. An applicant of whatever race who has demonstrated his concern for disadvantaged minorities in the past and who declares that practice in such a community is his primary professional goal would be more likely to contribute to alleviation of the medical shortage than one who is chosen entirely on the basis of race and disadvantage. In short, there is no empirical data to demonstrate that any one race is more selflessly socially oriented or by contrast that another is more selfishly acquisitive."

18 Cal.3d at 56, 553 P.2d at 1167.

Petitioner simply has not carried its burden of demonstrating that it must prefer members of particular ethnic groups over all other individuals in order to promote better health care delivery to deprived citizens. Indeed, petitioner has not shown that its preferential classification is likely to have any significant effect on the problem. [Footnote 47]

D

The fourth goal asserted by petitioner is the attainment of a diverse student body. This clearly is a constitutionally permissible goal for an institution of higher education. Academic freedom, though not a specifically enumerated constitutional right, long has been viewed as a special concern of the First Amendment. The freedom of a university to make its own judgments as to education includes the selection of its student body. Mr. Justice Frankfurter summarized the "four essential freedoms" that constitute academic freedom:

"'It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment and creation. It is an atmosphere in which there prevail 'the four essential freedoms' of a university -- to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.'"

Our national commitment to the safeguarding of these freedoms within university communities was emphasized in *Keyishian v. Board of Regents*, 385 U. S. 589, 385 U. S. 603 (1967):

"Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us, and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment. . . . The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.' *United States v. Associated Press*, 52 F.Supp. 362, 372."

The atmosphere of "speculation, experiment and creation" -- so essential to the quality of higher education -- is widely believed to be promoted by a diverse student body. [Footnote 48] As the Court noted in *Keyishian*, it is not too much to say that the "nation's future depends upon leaders trained through wide exposure" to the ideas and mores of students as diverse as this Nation of many peoples.

Thus, in arguing that its universities must be accorded the right to select those students who will contribute the most to the "robust exchange of ideas," petitioner invokes a countervailing constitutional interest, that of the First Amendment. In this light, petitioner must be viewed as seeking to achieve a goal that is of paramount importance in the fulfillment of its mission.

It may be argued that there is greater force to these views at the undergraduate level than in a medical school, where the training is centered primarily on professional competency. But even at the graduate level, our tradition and experience lend support to the view that the contribution of diversity is substantial. In *Sweatt v. Painter*, 339 U.S. at 339 U. S. 634, the Court made a similar point with specific reference to legal education:

"The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students, and no one who has practiced law, would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."

Physicians serve a heterogeneous population. An otherwise qualified medical student with a particular background -- whether it be ethnic, geographic, culturally advantaged or
disadvantaged -- may bring to a professional school of medicine experiences, outlooks, and ideas that enrich the training of its student body and better equip its graduates to render with understanding their vital service to humanity. [Footnote 49]

Ethnic diversity, however, is only one element in a range of factors a university properly may consider in attaining the goal of a heterogeneous student body. Although a university must have wide discretion in making the sensitive judgments as to who should be admitted, constitutional limitations protecting individual rights may not be disregarded. Respondent urges -- and the courts below have held -- that petitioner's dual admissions program is a racial classification that impermissibly infringes his rights under the Fourteenth Amendment. As the interest of diversity is compelling in the context of a university's admissions program, the question remains whether the program's racial classification is necessary to promote this interest. In re Griffiths, 413 U.S. at 413 U. S. 721-722.

V

A

It may be assumed that the reservation of a specified number of seats in each class for individuals from the preferred ethnic groups would contribute to the attainment of considerable ethnic diversity in the student body. But petitioner's argument that this is the only effective means of serving the interest of diversity is seriously flawed. In a most fundamental sense, the argument misconceives the nature of the state interest that would justify consideration of race or ethnic background. It is not an interest in simple ethnic diversity, in which a specified percentage of the student body is in effect guaranteed to be members of selected ethnic groups, with the remaining percentage an undifferentiated aggregation of students. The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics, of which racial or ethnic origin is but a single, though important, element. Petitioner's special admissions program, focused solely on ethnic diversity, would hinder, rather than further, attainment of genuine diversity. [Footnote 50]

Nor would the state interest in genuine diversity be served by expanding petitioner's two-track system into a multi-track program with a prescribed number of seats set aside for each identifiable category of applicants. Indeed, it is inconceivable that a university would thus pursue the logic of petitioner's two-track program to the illogical end of insulating each category of applicants with certain desired qualifications from competition with all other applicants.
The experience of other university admissions programs, which take race into account in achieving the educational diversity valued by the First Amendment, demonstrates that the assignment of a fixed number of places to a minority group is not a necessary means toward that end. An illuminating example is found in the Harvard College program:

"In recent years, Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans but also blacks and Chicanos and other minority students. . . ."

"In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group of applicants who are 'admissible' and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. . . . [See 438 U. S. ]"

"In Harvard College admissions, the Committee has not set target quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. . . . But that awareness [of the necessity of including more than a token number of black students] does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that, in choosing among thousands of applicants who are not only 'admissible' academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students."

App. to Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae 2-3.

In such an admissions program, [Footnote 51] race or ethnic background may be deemed a "plus" in a particular applicant's file, yet it does not insulate the individual from comparison with all other candidates for the available seats. The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in
this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight. Indeed, the weight attributed to a particular quality may vary from year to year depending upon the "mix" both of the student body and the applicants for the incoming class.

This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would mean only that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have no basis to complain of unequal treatment under the Fourteenth Amendment. [Footnote 52]

It has been suggested that an admissions program which considers race only as one factor is simply a subtle and more sophisticated -- but no less effective -- means of according racial preference than the Davis program. A facial intent to discriminate, however, is evident in petitioner's preference program, and not denied in this case. No such facial infirmity exists in an admissions program where race or ethnic background is simply one element -- to be weighed fairly against other elements -- in the selection process. "A boundary line," as Mr. Justice Frankfurter remarked in another connection, "is none the worse for being narrow." McLeod v. Dilworth, 322 U. S. 327, 322 U. S. 329 (1944). And a court would not assume that a university, professing to employ a facially nondiscriminatory admissions policy, would operate it as a cover for the functional equivalent of a quota system. In short, good faith would be presumed in the absence of a showing to the contrary in the manner permitted by our cases. See, e.g., Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252 (1977); Washington v. Davis, 426 U. S. 229 (1976); Swain v. Alabama, 380 U. S. 202 (1965). [Footnote 53]

B

In summary, it is evident that the Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with
applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. at 334 U. S. 22. Such rights are not absolute. But when a State's distribution of benefits or imposition of burdens hinges on ancestry or the color of a person's skin, that individual is entitled to a demonstration that the challenged classification is necessary to promote a substantial state interest. Petitioner has failed to carry this burden. For this reason, that portion of the California court's judgment holding petitioner's special admissions program invalid under the Fourteenth Amendment must be affirmed.

C

In enjoining petitioner from ever considering the race of any applicant, however, the courts below failed to recognize that the State has a substantial interest that legitimately may be served by a properly devised admissions program involving the competitive consideration of race and ethnic origin. For this reason, so much of the California court's judgment as enjoins petitioner from any consideration of the race of any applicant must be reversed.

VI

With respect to respondent's entitlement to an injunction directing his admission to the Medical School, petitioner has conceded that it could not carry its burden of proving that, but for the existence of its unlawful special admissions program, respondent still would not have been admitted. Hence, respondent is entitled to the injunction, and that portion of the judgment must be affirmed. [Footnote 54]

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**APPENDIX TO OPINION OF POWELL, J.**

**Harvard College Admissions Program [Footnote 55]**

For the past 30 years, Harvard College has received each year applications for admission that greatly exceed the number of places in the freshman class. The number of applicants who are deemed to be not "qualified" is comparatively small. The vast majority of applicants demonstrate through test scores, high school records and teachers' recommendations that they have the academic ability to do adequate work at Harvard,
and perhaps to do it with distinction. Faced with the dilemma of choosing among a large number of "qualified" candidates, the Committee on Admissions could use the single criterion of scholarly excellence and attempt to determine who among the candidates were likely to perform best academically. But for the past 30 years, the Committee on Admissions has never adopted this approach. The belief has been that, if scholarly excellence were the sole or even predominant criterion, Harvard College would lose a great deal of its vitality and intellectual excellence, and that the quality of the educational experience offered to all students would suffer. Final Report of W. J. Bender, Chairman of the Admission and Scholarship Committee and Dean of Admissions and Financial Aid, pp. 20 et seq. (Cambridge, 1960). Consequently, after selecting those students whose intellectual potential will seem extraordinary to the faculty -- perhaps 150 or so out of an entering class of over 1,100 -- the Committee seeks --

"variety in making its choices. This has seemed important . . . in part because it adds a critical ingredient to the effectiveness of the educational experience [in Harvard College]. . . . The effectiveness of our students' educational experience has seemed to the Committee to be affected as importantly by a wide variety of interests, talents, backgrounds and career goals as it is by a fine faculty and our libraries, laboratories and housing arrangements."

Dean of Admissions Fred L. Glimp, Final Report to the Faculty of Arts and Sciences, 65 Official Register of Harvard University No. 25, 93, 10105 (1968) (emphasis supplied).

The belief that diversity adds an essential ingredient to the educational process has long been a tenet of Harvard College admissions. Fifteen or twenty years ago, however, diversity meant students from California, New York, and Massachusetts; city dwellers and farm boys; violinists, painters and football players; biologists, historians and classicists; potential stockbrokers, academics and politicians. The result was that very few ethnic or racial minorities attended Harvard College. In recent years, Harvard College has expanded the concept of diversity to include students from disadvantaged economic, racial and ethnic groups. Harvard College now recruits not only Californians or Louisianans, but also blacks and Chicanos and other minority students. Contemporary conditions in the United States mean that, if Harvard College is to continue to offer a first-rate education to its students,

minority representation in the undergraduate body cannot be ignored by the Committee on Admissions.

In practice, this new definition of diversity has meant that race has been a factor in some admission decisions. When the Committee on Admissions reviews the large middle group
of applicants who are "admissible" and deemed capable of doing good work in their courses, the race of an applicant may tip the balance in his favor just as geographic origin or a life spent on a farm may tip the balance in other candidates' cases. A farm boy from Idaho can bring something to Harvard College that a Bostonian cannot offer. Similarly, a black student can usually bring something that a white person cannot offer. The quality of the educational experience of all the students in Harvard College depends in part on these differences in the background and outlook that students bring with them.

In Harvard College admissions, the Committee has not set target quotas for the number of blacks, or of musicians, football players, physicists or Californians to be admitted in a given year. At the same time the Committee is aware that, if Harvard College is to provide a truly heterogeneous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1, 100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves, and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted. But that awareness does not mean that the Committee sets a minimum number of blacks or of people from west of the Mississippi who are to be admitted. It means only that, in choosing among thousands of applicants who are not only "admissible" academically but have other strong qualities, the Committee, with a number of criteria in mind, pays some attention to distribution among many types and categories of students.

The further refinements sometimes required help to illustrate the kind of significance attached to race. The Admissions Committee, with only a few places left to fill, might find itself forced to choose between A, the child of a successful black physician in an academic community with promise of superior academic performance, and B, a black who grew up in an inner-city ghetto of semi-literate parents whose academic achievement was lower, but who had demonstrated energy and leadership, as well as an apparently abiding interest in black power. If a good number of black students much like A, but few like B, had already been admitted, the Committee might prefer B, and vice versa. If C, a white student with extraordinary artistic talent, were also seeking one of the remaining places, his unique quality might give him an edge over both A and B. Thus, the critical criteria are often individual qualities or experience not dependent upon race but sometimes associated with it.
MR. JUSTICE STEVENS views the judgment of the California court as limited to prohibiting the consideration of race only in passing upon Bakke's application. Post at 438 U. S. 408-411. It must be remembered, however, that petitioner here cross-complained in the trial court for a declaratory judgment that its special program was constitutional, and it lost. The trial court's judgment that the special program was unlawful was affirmed by the California Supreme Court in an opinion which left no doubt that the reason for its holding was petitioner's use of race in consideration of any candidate's application. Moreover, in explaining the scope of its holding, the court quite clearly stated that petitioner was prohibited from taking race into account in any way in making admissions decisions:

"In addition, the University may properly as it in fact does, consider other factors in evaluating an applicant, such as the personal interview, recommendations, character, and matters relating to the needs of the profession and society, such as an applicant's professional goals. In short, the standards for admission employed by the University are not constitutionally infirm except to the extent that they are utilized in a racially discriminatory manner. Disadvantaged applicants of all races must be eligible for sympathetic consideration, and no applicant may be rejected because of his race in favor of another who is less qualified, as measured by standards applied without regard to race. We reiterate, in view of the dissent's misinterpretation, that we do not compel the University to utilize only 'the highest objective academic credentials' as the criterion for admission."

18 Cal.3d 34, 54-55, 553 P.2d 1152, 1166 (1976) (footnote omitted). This explicit statement makes it unreasonable to assume that the reach of the California court's judgment can be limited in the manner suggested by MR. JUSTICE STEVENS.

** MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN join Parts I and V-C of this opinion. MR. JUSTICE WHITE also joins Part III-A of this opinion.

[Footnote 1]

Material distributed to applicants for the class entering in 1973 described the special admissions program as follows:

"A special subcommittee of the Admissions Committee, made up of faculty and medical students from minority groups, evaluates applications from economically and/or educationally disadvantaged backgrounds. The applicant may designate on the application form that he or she requests such an evaluation. Ethnic minorities are not categorically considered under the Task Force Program unless they are from disadvantaged backgrounds. Our goals are: 1) A short-range goal in the identification and recruitment of potential candidates for admission to medical school in the near future, and 2) Our long-range goal is to stimulate career interest in health professions among junior high and high school students."
"After receiving all pertinent information selected applicants will receive a letter inviting them to our School of Medicine in Davis for an interview. The interviews are conducted by at least one faculty member and one student member of the Task Force Committee. Recommendations are then made to the Admissions Committee of the medical school. Some of the Task Force Faculty are also members of the Admissions Committee."

"Long-range goals will be approached by meeting with counselors and students of schools with large minority populations, as well as with local youth and adult community groups."

"Applications for financial aid are available only after the applicant has been accepted, and can only be awarded after registration. Financial aid is available to students in the form of scholarships and loans. In addition to the Regents' Scholarships and President's Scholarship programs, the medical school participates in the Health Professions Scholarship Program, which makes funds available to students who otherwise might not be able to pursue a medical education. Other scholarships and awards are available to students who meet special eligibility qualifications. Medical students are also eligible to participate in the Federally Insured Student Loan Program and the American Medical Association Education and Research Foundation Loan Program."

Applications for Admission are available from:

Admissions Office

School of Medicine

University of California

Davis, California 95616

Record 195. The letter distributed the following year was virtually identical, except that the third paragraph was omitted.

[Footnote 2]

For the 1973 entering class of 100 seats, the Davis Medical School received 2,464 applications. Id. at 117. For the 1974 entering class, 3,737 applications were submitted. Id. at 289.

[Footnote 3]

That is, applications were considered and acted upon as they were received, so that the process of filling the class took place over a period of months, with later applications being considered against those still on file from earlier in the year. Id. at 64.
The chairman normally checked to see if, among other things, the applicant had been granted a waiver of the school's application fee, which required a means test; whether the applicant had worked during college or interrupted his education to support himself or his family; and whether the applicant was a member of a minority group. *Id.* at 666.

For the class entering in 1973, the total number of special applicants was 297, of whom 73 were white. In 1974, 628 persons applied to the special committee, of whom 172 were white. *Id.* at 133-134.

The following table provides a year-by-year comparison of minority admissions at the Davis Medical School:

<table>
<thead>
<tr>
<th>Year</th>
<th>Special Admissions Program</th>
<th>General Admissions</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970</td>
<td>5 3 0 8 0 0 4 4 12</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1971</td>
<td>4 9 2 15 1 0 8 9 24</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1972</td>
<td>5 6 5 16 0 0 11 11 27</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1973</td>
<td>6 8 2 16 0 2 13 15 31</td>
<td></td>
<td></td>
</tr>
<tr>
<td>1974</td>
<td>6 7 3 16 0 4 5 9 25</td>
<td></td>
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</tbody>
</table>

Id. at 216-218. Sixteen persons were admitted under the special program in 1974, *ibid.*, but one Asian withdrew before the start of classes, and the vacancy was filled by a candidate from the general admissions waiting list. Brief for Petitioner *n.* 5.
The following table compares Bakke's science grade point average, overall grade point average, and MCAT scores with the average scores of regular admittees and of special admittees in both 1973 and 1974. Record 210, 223, 231, 234:

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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Bakke</td>
<td>3.44 3.46 96 94 97 72</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average of regular</td>
<td>3.51 3.49 81 76 83 69</td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Average of special</td>
<td>2.62 2.88 46 24 35 33</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Class Entering in 1974

<table>
<thead>
<tr>
<th>MCAT (Percentiles)</th>
<th>Quanti-Gen.</th>
<th>SGPA</th>
<th>OGPA</th>
<th>Verbal</th>
<th>Science</th>
<th>Infor.</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bakke</td>
<td>3.44 3.46 96 94 97 72</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average of regular</td>
<td>3.36 3.29 69 67 82 72</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average of special</td>
<td>2.42 2.62 34 30 37 18</td>
<td></td>
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</tbody>
</table>

ewm:
Applicants admitted under the special program also had benchmark scores significantly lower than many students, including Bakke, rejected under the general admissions program, even though the special rating system apparently gave credit for overcoming "disadvantage." *Id.* at 181, 388.

[Footnote 8]

Prior to the actual filing of the suit, Bakke discussed his intentions with Peter C. Storandt, Assistant to the Dean of Admissions at the Davis Medical School. *Id.* at 259-269. Storandt expressed sympathy for Bakke's position and offered advice on litigation strategy. Several *amici* imply that these discussions render Bakke's suit "collusive." There is no indication, however, that Storandt's views were those of the Medical School, or that anyone else at the school even was aware of Storandt's correspondence and conversations with Bakke. Storandt is no longer with the University.

[Footnote 9]

"[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws."

[Footnote 10]

"No special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens."

This section was recently repealed, and its provisions added to Art. I, § 7, of the State Constitution.

[Footnote 11]

Section 601 of Title VI, 78 Stat. 252, provides as follows:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

[Footnote 12]

Indeed, the University did not challenge the finding that applicants who were not members of a minority group were excluded from consideration in the special admissions process. 18 Cal.3d at 44, 553 P.2d at 1159.

[Footnote 13]
Petitioner has not challenged this aspect of the decision. The issue of the proper placement of the burden of proof, then, is not before us.

[Footnote 14]

Several amici suggest that Bakke lacks standing, arguing that he never showed that his injury -- exclusion from the Medical School -- will be redressed by a favorable decision, and that the petitioner "fabricated" jurisdiction by conceding its inability to meet its burden of proof. Petitioner does not object to Bakke's standing, but inasmuch as this charge concerns our jurisdiction under Art. III, it must be considered and rejected. First, there appears to be no reason to question the petitioner's concession. It was not an attempt to stipulate to a conclusion of law or to disguise actual facts of record. Cf. Swift & Co. v. Hocking Valley R. Co., 243 U. S. 281 (1917).

Second, even if Bakke had been unable to prove that he would have been admitted in the absence of the special program, it would not follow that he lacked standing. The constitutional element of standing is plaintiff's demonstration of any injury to himself that is likely to be redressed by favorable decision of his claim. Warth v. Seldin, 422 U. S. 490, 498 (1975). The trial court found such an injury, apart from failure to be admitted, in the University's decision not to permit Bakke to compete for all 100 places in the class, simply because of his race. Record 323. Hence, the constitutional requirements of Art. III were met. The question of Bakke's admission vel non is merely one of relief.

Nor is it fatal to Bakke's standing that he was not a "disadvantaged" applicant. Despite the program's purported emphasis on disadvantage, it was a minority enrollment program with a secondary disadvantage element. White disadvantaged students were never considered under the special program, and the University acknowledges that its goal in devising the program was to increase minority enrollment.

[Footnote 15]


[Footnote 16]


[Footnote 17]

Section 602, as set forth in 42 U.S.C. § 2000d-1, reads as follows:
"Each Federal department and agency which is empowered to extend Federal financial assistance to any program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 2000d of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made and, shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: Provided, however, That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report."

[Footnote 18]

Several comments in the debates cast doubt on the existence of any intent to create a private right of action. For example, Representative Gill stated that no private right of action was contemplated:

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim."


[Footnote 19]

For example, Senator Humphrey stated as follows:
"Racial discrimination or segregation in the administration of disaster relief is particularly shocking; and offensive to our sense of justice and fair play. Human suffering draws no color lines, and the administration of help to the sufferers should not."

_Id._ at 6547. _See also id._ at 12675 (remarks of Sen. Allott); 6561 (remarks of Sen. Kuchel); 2494, 6047 (remarks of Sen. Pastore). _But see id._ at 15893 (remarks of Rep. MacGregor); 13821 (remarks of Sen. Saltonstall); 10920 (remarks of Sen. Javits); 5266, 5807 (remarks of Sen. Keating).

_Footnote 20_ [ ]


_Footnote 21_  


_Footnote 22_  

_See, e.g., id._ at 12675, 12677 (remarks of Sen. Allott); 7064 (remarks of Sen. Pell); 7057, 7062-7064 (remarks of Sen. Pastore); 5243 (remarks of Sen. Clark).

_Footnote 23_  

_See, e.g., id._ at 6052 (remarks of Sen. Johnston); 5863 (remarks of Sen. Eastland); 5612 (remarks of Sen. Ervin); 5251 (remarks of Sen. Talmadge); 1632 (remarks of Rep. Dowdy); 1619 (remarks of Rep. Abernethy).

_Footnote 24_  

_See also id._ at 7057, 13333 (remarks of Sen. Ribicoff); 7057 (remarks of Sen. Pastore); 5606-5607 (remarks of Sen. Javits); 5253, 5863-5864, 13442 (remarks of Sen. Humphrey).

_Footnote 25_  

That issue has generated a considerable amount of scholarly controversy. _See, e.g.,_ Ely, _The Constitutionality of Reverse Racial Discrimination_, 41 U.Chi.L.Rev. 723 (1974); Greenawalt, _Judicial Scrutiny of "Benign" Racial Preference in Law School Admissions_, 75 Colum.L.Rev. 559 (1975); Kaplan, _Equal Justice in an Unequal World: Equality for

[Footnote 26]

Petitioner defines "quota" as a requirement which must be met, but can never be exceeded, regardless of the quality of the minority applicants. Petitioner declares that there is no "floor" under the total number of minority students admitted; completely unqualified students will not be admitted simply to meet a "quota." Neither is there a "ceiling," since an unlimited number could be admitted through the general admissions process. On this basis, the special admissions program does not meet petitioner's definition of a quota.

The court below found -- and petitioner does not deny -- that white applicants could not compete for the 16 places reserved solely for the special admissions program. 18 Cal.3d at 44, 553 P.2d at 1159. Both courts below characterized this as a "quota" system.

[Footnote 27]

Moreover, the University's special admissions program involves a purposeful, acknowledged use of racial criteria. This is not a situation in which the classification on its face is racially neutral, but has a disproportionate racial impact. In that situation, plaintiff must establish an intent to discriminate. Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 429 U.S. 264-265 (1977); Washington v. Davis, 426 U.S. 229, 426 U.S. 242 (1976); see Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[Footnote 28]


[Footnote 29]

[Footnote 30]

M. Jones, American Immigration 177-246 (1960).

[Footnote 31]


[Footnote 32]

"Members of various religious and ethnic groups, primarily but not exclusively of Eastern, Middle, and Southern European ancestry, such as Jews, Catholics, Italians, Greeks, and Slavic groups, continue to be excluded from executive, middle-management, and other job levels because of discrimination based upon their religion and/or national origin."


[Footnote 33]

E.g., P. Roberts, supra, n 31, at 75; G. Abbott, supra, n 31, at 270-271. See generally n 31, supra.

[Footnote 34]

In the view of MR. JUSTICE BRENAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN, the pliable notion of "stigma" is the crucial element in analyzing racial classifications, see, e.g., post at 438 U. S. 361, 438 U. S. 362. The Equal Protection Clause is not framed in terms of "stigma." Certainly the word has no clearly defined constitutional meaning. It reflects a subjective judgment that is standardless. All state-imposed classifications that rearrange burdens and benefits on the basis of race are likely to be viewed with deep resentment by the individuals burdened. The denial to innocent persons of equal rights and opportunities may outrage those so deprived, and therefore may be perceived as invidious. These individuals are likely to find little comfort in the notion that the deprivation they are asked to endure is merely the price of membership in the dominant majority, and that its imposition is inspired by the supposedly benign purpose of aiding others. One should not lightly dismiss the inherent unfairness of, and the perception of mistreatment that accompanies, a system of allocating benefits and privileges on the basis of skin color and ethnic origin. Moreover, MR. JUSTICE BRENAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN offer no principle for deciding whether
preferential classifications reflect a benign remedial purpose or a malevolent stigmatic classification, since they are willing in this case to accept mere post hoc declarations by an isolated state entity -- a medical school faculty -- unadorned by particularized findings of past discrimination, to establish such a remedial purpose.

[Footnote 35]

Professor Bickel noted the self-contradiction of that view:

"The lesson of the great decisions of the Supreme Court and the lesson of contemporary history have been the same for at least a generation -- discrimination on the basis of race is illegal, immoral, unconstitutional, inherently wrong, and destructive of democratic society. Now this is to be unlearned, and we are told that this is not a matter of fundamental principle, but only a matter of whose ox is gored. Those for whom racial equality was demanded are to be more equal than others. Having found support in the Constitution for equality, they now claim support for inequality under the same Constitution."


[Footnote 36]

As I am in agreement with the view that race may be taken into account as a factor in an admissions program, I agree with my Brothers BRENNAN, WHITE, MARSHALL, and BLACKMUN that the portion of the judgment that would proscribe all consideration of race must be reversed. See 438 U. S. infra. But I disagree with much that is said in their opinion.

They would require, as a justification for a program such as petitioner's, only two findings: (i) that there has been some form of discrimination against the preferred minority groups by "society at large," post at 438 U. S. 369 (it being conceded that petitioner had no history of discrimination), and (ii) that "there is reason to believe" that the disparate impact sought to be rectified by the program is the "product" of such discrimination:

"If it was reasonable to conclude -- as we hold that it was -- that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, then there is a reasonable likelihood that, but for pervasive racial discrimination, respondent would have failed to qualify for admission even in the absence of Davis' special admissions program."


The breadth of this hypothesis is unprecedented in our constitutional system. The first step is easily taken. No one denies the regrettable fact that there has been societal
discrimination in this country against various racial and ethnic groups. The second step, however, involves a speculative leap: but for this discrimination by society at large, Bakke "would have failed to qualify for admission" because Negro applicants -- nothing is said about Asians, cf., e.g., post at 438 U. S. 374 n. 57 -- would have made better scores. Not one word in the record supports this conclusion, and the authors of the opinion offer no standard for courts to use in applying such a presumption of causation to other racial or ethnic classifications. This failure is a grave one, since, if it may be concluded on this record that each of the minority groups preferred by the petitioner's special program is entitled to the benefit of the presumption, it would seem difficult to determine that any of the dozens of minority groups that have suffered "societal discrimination" cannot also claim it in any area of social intercourse. See 438 U. S. infra.

[Footnote 37]

Mr. Justice Douglas has noted the problems associated with such inquiries:

"The reservation of a proportion of the law school class for members of selected minority groups is fraught with . . . dangers, for one must immediately determine which groups are to receive such favored treatment and which are to be excluded, the proportions of the class that are to be allocated to each, and even the criteria by which to determine whether an individual is a member of a favored group. [Cf. Plessy v. Ferguson, 163 U. S. 537, 163 U. S. 549, 163 U. S. 552 (1896).] There is no assurance that a common agreement can be reached, and first the schools, and then the courts, will be buffeted with the competing claims. The University of Washington included Filipinos, but excluded Chinese and Japanese; another school may limit its program to blacks, or to blacks and Chicanos. Once the Court sanctioned racial preferences such as these, it could not then wash its hands of the matter, leaving it entirely in the discretion of the school, for then we would have effectively overruled Sweatt v. Painter, 339 U. S. 629, and allowed imposition of a 'zero' allocation. But what standard is the Court to apply when a rejected applicant of Japanese ancestry brings suit to require the University of Washington to extend the same privileges to his group? The Committee might conclude that the population of Washington is now 2% Japanese, and that Japanese also constitute 2% of the Bar, but that, had they not been handicapped by a history of discrimination, Japanese would now constitute 5% of the Bar, or 20%. Or, alternatively, the Court could attempt to assess how grievously each group has suffered from discrimination, and allocate proportions accordingly; if that were the standard, the current University of Washington policy would almost surely fall, for there is no Western State which can claim that it has always treated Japanese and Chinese in a fair and evenhanded manner. See, e.g., Yick Wo v. Hopkins, 118 U. S. 356; Terrace v. Thompson, 263 U. S. 197; Oyama v. California, 332 U. S. 633. This Court has not sustained a racial classification since the wartime cases of Korematsu v. United States, 323 U. S. 214, and Hirabayashi v. United States, 320 U. S. 81, involving curfews and relocations imposed upon Japanese-Americans."

"Nor, obviously, will the problem be solved if, next year, the Law School included only Japanese and Chinese, for then Norwegians and Swedes, Poles and Italians, Puerto
Ricans and Hungarians, and all other groups which form this diverse Nation would have just complaints."


[Footnote 38]


[Footnote 39]

Petitioner cites three lower court decisions allegedly deviating from this general rule in school desegregation cases: *Offermann v. Nitzkowski*, 378 F.2d 22 (CA2 1967); *Wanner v. County School Board*, 357 F.2d 452 (CA4 1966); *Springfield School Committee v. Barksdale*, 348 F.2d 261 (CA1 1965). Of these, *Wanner* involved a school system held to have been *de jure* segregated and enjoined from maintaining segregation; racial districting was deemed necessary. 357 F.2d 454. *Cf. United Jewish Organizations v. Carey*, 430 U. S. 144 (1977). In *Barksdale* and *Offermann*, courts did approve voluntary districting designed to eliminate discriminatory attendance patterns. In neither, however, was there any showing that the school board planned extensive pupil transportation that might threaten liberty or privacy interests. *See Keyes v. School District No. 1*, 413 U. S. 189, 413 U. S. 240-250 (1973) (POWELL, J., concurring in part and dissenting in part). Nor were white students deprived of an equal opportunity for education.

Respondent's position is wholly dissimilar to that of a pupil bused from his neighborhood school to a comparable school in another neighborhood in compliance with a desegregation decree. Petitioner did not arrange for respondent to attend a different medical school in order to desegregate Davis Medical School; instead, it denied him admission, and may have deprived him altogether of a medical education.

[Footnote 40]


[Footnote 41]
This case does not call into question congressionally authorized administrative actions, such as consent decrees under Title VII or approval of reapportionment plans under § 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1970 ed., Supp. V). In such cases, there has been detailed legislative consideration of the various indicia of previous constitutional or statutory violations, e.g., South Carolina v. Katzenbach, 383 U. S. 301, 383 U. S. 308-310 (1966) (§ 5), and particular administrative bodies have been charged with monitoring various activities in order to detect such violations and formulate appropriate remedies. See Hampton v. Mow Sun Wong, 426 U. S. 88, 426 U. S. 103 (1976).

Furthermore, we are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. Katzenbach v. Morgan, 384 U. S. 641 (1966); Jones v. Alfred H. Mayer Co., 392 U. S. 409 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures.

Petitioner also cites our decision in Morton v. Mancari, 417 U. S. 535 (1974), for the proposition that the State may prefer members of traditionally disadvantaged groups. In Mancari, we approved a hiring preference for qualified Indians in the Bureau of Indian Affairs of the Department of the Interior (BIA). We observed in that case, however, that the legal status of the BIA is sui generis. Id. at 417 U. S. 554. Indeed, we found that the preference was not racial at all, but

"an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to . . . groups . . . whose lives and activities are governed by the BIA in a unique fashion."

Ibid.

A number of distinct subgoals have been advanced as falling under the rubric of "compensation for past discrimination." For example, it is said that preferences for Negro applicants may compensate for harm done them personally, or serve to place them at economic levels they might have attained but for discrimination against their forebears. Greenawalt, supra, n 25, at 581-586. Another view of the "compensation" goal is that it serves as a form of reparation by the "majority" to a victimized group as a whole. B. Bittker, The Case for Black Reparations (1973). That justification for racial or ethnic preference has been subjected to much criticism. E. Greenawalt, supra, n 25, at 581; Posner, supra, n 25, at 16-17, and n. 33. Finally, it has been argued that ethnic preferences "compensate" the group by providing examples of success whom other
members of the group will emulate, thereby advancing the group's interest and society's interest in encouraging new generations to overcome the barriers and frustrations of the past. Redish, *supra*, n. 25, at 391. For purposes of analysis these subgoals need not be considered separately.

Racial classifications in admissions conceivably could serve a fifth purpose, one which petitioner does not articulate: fair appraisal of each individual's academic promise in the light of some cultural bias in grading or testing procedures. To the extent that race and ethnic background were considered only to the extent of curing established inaccuracies in predicting academic performance, it might be argued that there is no "preference" at all. Nothing in this record, however, suggests either that any of the quantitative factors considered by the Medical School were culturally biased, or that petitioner's special admissions program was formulated to correct for any such biases. Furthermore, if race or ethnic background were used solely to arrive at an unbiased prediction of academic success, the reservation of fixed numbers of seats would be inexplicable.

[Footnote 44]

MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN misconceive the scope of this Court's holdings under Title VII when they suggest that "disparate impact" alone is sufficient to establish a violation of that statute and, by analogy, other civil rights measures. See *post* at 438 U. S. 363-366, and n. 42. That this was not the meaning of Title VII was made quite clear in the seminal decision in this area, *Griggs v. Duke Power Co.*, 401 U. S. 424 (1971):

"*Discriminatory preference* for any group, minority or majority, is precisely and only what Congress has proscribed. What is required by Congress is the removal of *artificial, arbitrary, and unnecessary* barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification."

*Id.* at 401 U. S. 431 (emphasis added). Thus, disparate impact is a basis for relief under Title VII only if the practice in question is not founded on "business necessity," *ibid.*, or lacks "a manifest relationship to the employment in question," *id.* at 401 U. S. 432. See also *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 411 U. S. 802-803, 411 U. S. 805-806 (1973). Nothing in this record -- as opposed to some of the general literature cited by MR. JUSTICE BRENNAN, MR JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR. JUSTICE BLACKMUN -- even remotely suggests that the disparate impact of the general admissions program at Davis Medical School, resulting primarily from the sort of disparate test scores and grades set forth in n 7, *supra*, is without educational justification.

Moreover, the presumption in *Griggs* -- that disparate impact without any showing of business justification established the existence of discrimination in violation of the statute -- was based on legislative determinations, wholly absent here, that past discrimination
had handicapped various minority groups to such an extent that disparate impact could be traced to identifiable instances of past discrimination:

"[Congress sought] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."


"the Act does not command that any person be hired simply because he was formerly the subject of discrimination, or because he is a member of a minority group."

401 U.S. at 401 U.S. 430-431. Indeed, § 703(j) of the Act makes it clear that preferential treatment for an individual or minority group to correct an existing "imbalance" may not be required under Title VII. 42 U.S.C. § 2000e-2(j). Thus, Title VII principles support the proposition that findings of identified discrimination must precede the fashioning of remedial measures embodying racial classifications.

[Footnote 45]

For example, the University is unable to explain its selection of only the four favored groups -- Negroes, Mexican-Americans, American Indians, and Asians -- for preferential treatment. The inclusion of the last group is especially curious in light of the substantial numbers of Asians admitted through the regular admissions process. See also n 37, supra.

[Footnote 46]

The only evidence in the record with respect to such underservice is a newspaper article. Record 473.

[Footnote 47]

It is not clear that petitioner's two-track system, even if adopted throughout the country, would substantially increase representation of blacks in the medical profession. That is the finding of a recent study by Sleeth & Mishell, Black Under-Representation in United States Medical Schools, 297 New England J. of Med. 1146 (1977). Those authors maintain that the cause of black underrepresentation lies in the small size of the national pool of qualified black applicants. In their view, this problem is traceable to the poor premedical experiences of black undergraduates, and can be remedied effectively only by developing remedial programs for black students before they enter college.
The president of Princeton University has described some of the benefits derived from a diverse student body:

"[A] great deal of learning occurs informally. It occurs through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. As a wise graduate of ours observed in commenting on this aspect of the educational process, 'People do not learn very much when they are surrounded only by the likes of themselves.'"

"* * * *"

"In the nature of things, it is hard to know how, and when, and even if, this informal 'learning through diversity' actually occurs. It does not occur for everyone. For many, however, the unplanned, casual encounters with roommates, fellow sufferers in an organic chemistry class, student workers in the library, teammates on a basketball squad, or other participants in class affairs or student government can be subtle and yet powerful sources of improved understanding and personal growth."


Graduate admissions decisions, like those at the undergraduate level, are concerned with "assessing the potential contributions to the society of each individual candidate following his or her graduation -- contributions defined in the broadest way to include the doctor and the poet, the most active participant in business or government affairs and the keenest critic of all things organized, the solitary scholar and the concerned parent."

Id. at 10.

"While race is not, in and of itself, a consideration in determining basic qualifications, and while there are obviously significant differences in background and experience among applicants of every race, in some situations, race can be helpful information in enabling the admission officer to understand more fully what a particular candidate has accomplished -- and against what odds. Similarly, such factors as family circumstances and previous educational opportunities may be relevant, either in conjunction with race or ethnic background (with which they may be associated) or on their own."


For an illuminating discussion of such flexible admissions systems, see Manning, *supra*, n 50, at 57-59.

[Footnote 52]

The denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program. Nowhere in the opinion of MR. JUSTICE BRENNAN, MR JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR JUSTICE BLACKMUN is this denial even addressed.

[Footnote 53]

Universities, like the prosecutor in *Swain*, may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process. If an applicant can establish that the institution does not adhere to a policy of individual comparisons, or can show that a systematic exclusion of certain groups results, the presumption of legality might be overcome, creating the necessity of proving legitimate educational purpose.

There also are strong policy reasons that correspond to the constitutional distinction between petitioner's preference program and one that assures a measure of competition among all applicants. Petitioner's program will be viewed as inherently unfair by the public generally, as well as by applicants for admission to state universities. Fairness in individual competition for opportunities, especially those provided by the State, is a widely cherished American ethic. Indeed, in a broader sense, an underlying assumption of the rule of law is the worthiness of a system of justice based on fairness to the individual. As Mr. Justice Frankfurter declared in another connection, "[j]ustice must satisfy the appearance of justice." *Offutt v. United States*, 348 U. S. 11, 348 U. S. 14 (1954).

[Footnote 54]
There is no occasion for remanding the case to permit petitioner to reconstruct what might have happened if it had been operating the type of program described as legitimate in 438 U. S. 284-287 (1977). In Mt. Healthy, there was considerable doubt whether protected First Amendment activity had been the "but for" cause of Doyle's protested discharge. Here, in contrast, there is no question as to the sole reason for respondent's rejection -- purposeful racial discrimination in the form of the special admissions program. Having injured respondent solely on the basis of an unlawful classification, petitioner cannot now hypothesize that it might have employed lawful means of achieving the same result. See Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. at 429 U. S. 265-266. No one can say how -- or even if -- petitioner would have operated its admissions process if it had known that legitimate alternatives were available. Nor is there a record revealing that legitimate alternative grounds for the decision existed, as there was in Mt. Healthy. In sum, a remand would result in fictitious recasting of past conduct.

[Footnote 55]

This statement appears in the Appendix to the Brief for Columbia University, Harvard University, Stanford University, and the University of Pennsylvania, as Amici Curiae.

Opinion of MR. JUSTICE BRENNAN, MR. JUSTICE WHITE, MR. JUSTICE MARSHALL, and MR, JUSTICE BLACKMUN, concurring in the judgment in part and dissenting in part.

The Court today, in reversing in part the judgment of the Supreme Court of California, affirms the constitutional power of Federal and State Governments to act affirmatively to achieve equal opportunity for all. The difficulty of the issue presented -- whether government may use race-conscious programs to redress the continuing effects of past discrimination --

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and the mature consideration which each of our Brethren has brought to it have resulted in many opinions, no single one speaking for the Court. But this should not and must not mask the central meaning of today's opinions: Government may take race into account when it acts not to demean or insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative, or administrative bodies with competence to act in this area.

THE CHIEF JUSTICE and our Brothers STEWART, REHNQUIST, and STEVENS, have concluded that Title VI of the Civil Rights Act of 1964, 78 Stat. 252, as amended, 42 U.S.C. § 2000d et seq., prohibits programs such as that at the Davis Medical School. On this statutory theory alone, they would hold that respondent Allan Bakke's rights have been violated, and that he must, therefore, be admitted to the Medical School. Our Brother POWELL, reaching the Constitution, concludes that, although race may be taken into account in university admissions, the particular special admissions program used by
petitioner, which resulted in the exclusion of respondent Bakke, was not shown to be necessary to achieve petitioner's stated goals. Accordingly, these Members of the Court form a majority of five affirming the judgment of the Supreme Court of California insofar as it holds that respondent Bakke "is entitled to an order that he be admitted to the University." 18 Cal.3d 34, 64, 553 P.2d 1152, 1172 (1976).

We agree with MR. JUSTICE POWELL that, as applied to the case before us, Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself. We also agree that the effect of the California Supreme Court's affirmance of the judgment of the Superior Court of California would be to prohibit the University from establishing in the future affirmative action programs that take race into account. See ante at 438 U. S. 271 n. Since we conclude that the affirmative admissions program at the Davis Medical School is constitutional, we would reverse the judgment below in all respects. MR. JUSTICE POWELL agrees that some uses of race in university admissions are permissible and, therefore, he joins with us to make five votes reversing the judgment below insofar as it prohibits the University from establishing race-conscious programs in the future. [Footnote 2/1]

I

Our Nation was founded on the principle that "all Men are created equal." Yet candor requires acknowledgment that the Framers of our Constitution, to forge the 13 Colonies into one Nation, openly compromised this principle of equality with its antithesis: slavery. The consequences of this compromise are well known, and have aptly been called our "American Dilemma." Still, it is well to recount how recent the time has been, if it has yet come, when the promise of our principles has flowered into the actuality of equal opportunity for all regardless of race or color.

The Fourteenth Amendment, the embodiment in the Constitution of our abiding belief in human equality, has been the law of our land for only slightly more than half its 200 years. And for half of that half, the Equal Protection Clause of the Amendment was largely moribund, so that, as late as 1927, Mr. Justice Holmes could sum up the importance of that Clause by remarking that it was the "last resort of constitutional arguments." Buck v. Bell, 274 U. S. 200, 274 U. S. 208 (1927). Worse than desuetude, the Clause was early turned against those whom it was intended to set free, condemning them to a "separate but equal" [Footnote 2/2] status before the law, a status always separate but seldom equal. Not until 1954 -- only 24 years ago -- was this odious doctrine interred by our decision in Brown v. Board of Education, 347 U. S. 483 (Brown

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and its progeny, \[Footnote\ 2/3\] which proclaimed that separate schools and public facilities of all sorts were inherently unequal and forbidden under our Constitution. Even then, inequality was not eliminated with "all deliberate speed." \textit{Brown v. Board of Education}, 349 U. S. 294, 349 U. S. 301 (1955). In 1968 [Footnote 2/4] and again in 1971, [Footnote 2/5] for example, we were forced to remind school boards of their obligation to eliminate racial discrimination root and branch. And a glance at our docket [Footnote 2/6] and at dockets of lower courts will show that, even today, officially sanctioned discrimination is not a thing of the past.

Against this background, claims that law must be "colorblind" or that the datum of race is no longer relevant to public policy must be seen as aspiration, rather than as description of reality. This is not to denigrate aspiration; for reality rebukes us that race has too often been used by those who would stigmatize and oppress minorities. Yet we cannot -- and, as we shall demonstrate, need not under our Constitution or Title VI, which merely extends the constraints of the Fourteenth Amendment to private parties who receive federal funds -- let color blindness become myopia which masks the reality that many "created equal" have been treated within our lifetimes as inferior both by the law and by their fellow citizens.

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II

The threshold question we must decide is whether Title VI of the Civil Rights Act of 1964 bars recipients of federal funds from giving preferential consideration to disadvantaged members of racial minorities as part of a program designed to enable such individuals to surmount the obstacles imposed by racial discrimination. [Footnote 2/7] We join Parts I and V-C of our Brother POWELL's opinion, and three of us agree with his conclusion in Part II that this case does not require us to resolve the question whether there is a private right of action under Title VI. [Footnote 2/8]

In our view, Title VI prohibits only those uses of racial criteria that would violate the Fourteenth Amendment if employed by a State or its agencies; it does not bar the preferential treatment of racial minorities as a means of remediying past societal discrimination to the extent that such action is consistent with the Fourteenth Amendment. The legislative history of Title VI, administrative regulations interpreting the statute, subsequent congressional and executive action, and the prior decisions of this Court compel this conclusion. None of these sources lends support to the proposition that Congress intended to bar all race-conscious efforts to extend the benefits of federally financed programs to minorities who have been historically excluded from the full benefits of American life.

\textit{A}
The history of Title VI -- from President Kennedy's request that Congress grant executive departments and agencies authority to cut off federal funds to programs that discriminate against Negroes through final enactment of legislation incorporating his proposals -- reveals one fixed purpose: to give the Executive Branch of Government clear authority to terminate federal funding of private programs that use race as a means of disadvantaging minorities in a manner that would be prohibited by the Constitution if engaged in by government.

This purpose was first expressed in President Kennedy's June 19, 1963, message to Congress proposing the legislation that subsequently became the Civil Rights Act of 1964. [Footnote 2/9]

Representative Celler, the Chairman of the House Judiciary Committee, and the floor manager of the legislation in the House, introduced Title VI in words unequivocally expressing the intent to provide the Federal Government with the means of assuring that its funds were not used to subsidize racial discrimination inconsistent with the standards imposed by the Fourteenth and Fifth Amendments upon state and federal action.

"The bill would offer assurance that hospitals financed by Federal money would not deny adequate care to Negroes. It would prevent abuse of food distribution programs whereby Negroes have been known to be denied food surplus supplies when white persons were given such food. It would assure Negroes the benefits now accorded only white students in programs of higher education financed by Federal funds. It would, in short, assure the existing right to equal treatment in the enjoyment of Federal funds. It would not destroy any rights of private property or freedom of association."

110 Cong.Rec. 1519 (1964). It was clear to Representative Celler that Title VI, apart from the fact that it reached all federally funded activities even in the absence of sufficient state or federal control to invoke the Fourteenth or Fifth Amendments, was not placing new substantive limitations upon the use of racial criteria, but rather was designed to extend to such activities "the existing right to equal treatment" enjoyed by Negroes under those Amendments, and he later specifically defined the purpose of Title VI in this way:

"In general, it seems rather anomalous that the Federal Government should aid and abet discrimination on the basis of race, color, or national origin by granting money..."
and other kinds of financial aid. It seems rather shocking, moreover, that, while we have on the one hand the 14th Amendment, which is supposed to do away with discrimination, since it provides for equal protection of the laws, on the other hand, we have the Federal Government aiding and abetting those who persist in practicing racial discrimination."

"It is for these reasons that we bring forth title VI. The enactment of title VI will serve to override specific provisions of law which contemplate Federal assistance to racially segregated institutions."

_Id._ at 2467. Representative Celler also filed a memorandum setting forth the legal basis for the enactment of Title VI which reiterated the theme of his oral remarks:

"In exercising its authority to fix the terms on which Federal funds will be disbursed . . . . Congress clearly has power to legislate so as to insure that the Federal Government does not become involved in a violation of the Constitution."

_Id._ at 1528.

Other sponsors of the legislation agreed with Representative Celler that the function of Title VI was to end the Federal Government's complicity in conduct, particularly the segregation or exclusion of Negroes, inconsistent with the standards to be found in the antidiscrimination provisions of the Constitution. Representative Lindsay, also a member of the Judiciary Committee, candidly acknowledged, in the course of explaining why Title VI was necessary, that it did not create any new standard of equal treatment beyond that contained in the Constitution:

"Both the Federal Government and the States are under constitutional mandates not to discriminate. Many have raised the question as to whether legislation is required at all. Does not the Executive already have the power in the distribution of Federal funds to apply those conditions which will enable the Federal Government itself to live up to the mandate of the Constitution and to require

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States and local government entities to live up to the Constitution, most especially the 5th and 14th amendments?"

_Id._ at 2467. He then explained that legislation was needed to authorize the termination of funding by the Executive Branch because existing legislation seemed to contemplate the expenditure of funds to support racially segregated institutions. _Ibid._ The views of Representatives Celler and Lindsay concerning the purpose and function of Title VI were shared by other sponsors and proponents of the legislation in the House. [Footnote 2/10] Nowhere is there any suggestion that Title VI was intended to terminate federal funding for any reason other than consideration of race or national origin by the recipient institution in a manner inconsistent with the standards incorporated in the Constitution.
The Senate's consideration of Title VI reveals an identical understanding concerning the purpose and scope of the legislation. Senator Humphrey, the Senate floor manager, opened the Senate debate with a section-by-section analysis of the Civil Rights Act in which he succinctly stated the purpose of Title VI:

"The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. In many instances, the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. This is clearly so wherever Federal funds go to a State agency which engages in racial discrimination. It may also be so where Federal funds go to support private, segregated institutions, under the decision in Simkins v. Moses H. Cone Memorial Hospital, 323 F.2d 959 (C.A. 4, 1963), [cert. denied, 376 U.S. 938 (1964)]. In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation."

Id. at 6544. Senator Humphrey, in words echoing statements in the House, explained that legislation was needed to accomplish this objective because it was necessary to eliminate uncertainty concerning the power of federal agencies to terminate financial assistance to programs engaging in racial discrimination in the face of various federal statutes which appeared to authorize grants to racially segregated institutions. Ibid. Although Senator Humphrey realized that Title VI reached conduct which, because of insufficient governmental action, might be beyond the reach of the Constitution, it was clear to him that the substantive standard imposed by the statute was that of the Fifth and Fourteenth Amendments. Senate supporters of Title VI repeatedly expressed agreement with Senator Humphrey's description of the legislation as providing the explicit authority and obligation to apply the standards of the Constitution to all recipients of federal funds. Senator Ribicoff described the limited function of Title VI:

"Basically, there is a constitutional restriction against discrimination in the use of Federal funds; and title VI simply spells out the procedure to be used in enforcing that restriction."

Id. at 13333. Other strong proponents of the legislation in the Senate repeatedly expressed their intent to assure that federal funds would only be spent in accordance with constitutional standards. See remarks of Senator Pastore, id. at 7057, 7062; Senator Clark, id. at 5243; Senator Allott, id. at 12675, 12677. [Footnote 2/11]
Respondent's contention that Congress intended Title VI to bar affirmative action programs designed to enable minorities disadvantaged by the effects of discrimination to participate in federally financed programs is also refuted by an examination of the type of conduct which Congress thought it was prohibiting by means of Title VI. The debates reveal that the legislation was motivated primarily by a desire to eradicate a very specific evil: federal financial support of programs which disadvantaged Negroes by excluding them from participation or providing them with separate facilities. Again and again supporters of Title VI emphasized that the purpose of the statute was to end segregation in federally funded activities and to end other discriminatory uses of race disadvantaging Negroes. Senator Humphrey set the theme in his speech presenting Title VI to the Senate:

"Large sums of money are contributed by the United States each year for the construction, operation, and maintenance of segregated schools."

"* * * *"

"Similarly, under the Hill-Burton Act, Federal grants are made to hospitals which admit whites only or Negroes only. . . ."

"In higher education also, a substantial part of the Federal grants to colleges, medical schools and so forth, in the South is still going to segregated institutions."

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"Nor is this all. In several States, agricultural extension services, supported by Federal funds, maintain racially segregated offices for Negroes and whites. . . ."

". . . Vocational training courses, supported with Federal funds, are given in segregated schools and institutions and often limit Negroes to training in less skilled occupations. In particular localities it is reported that Negroes have been cut off from relief rolls, or denied surplus agricultural commodities, or otherwise deprived of the benefit of federally assisted programs, in retaliation for their participation in voter registration drives, sit-in demonstrations and the like."

Id. at 6543-6544. See also the remarks of Senator Pastore (id. at 7054-7055); Senator Ribicoff (id. at 7064-7065); Senator Clark (id. at 5243, 9086); Senator Javits (id. at 6050, 7102). [Footnote 2/12]

The conclusion to be drawn from the foregoing is clear. Congress recognized that Negroes, in some cases with congressional acquiescence, were being discriminated against in the administration of programs and denied the full benefits of activities receiving federal financial support. It was aware that there were many federally funded programs and institutions which discriminated against minorities in a manner inconsistent with the standards of the Fifth and Fourteenth Amendments, but whose activities might
not involve sufficient state or federal action so as to be in violation of these Amendments. Moreover, Congress believed that it was questionable whether the Executive Branch possessed legal authority to terminate the funding of activities on the ground that they discriminated racially against Negroes in a manner violative of the standards contained in the Fourteenth and Fifth

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Amendments. Congress' solution was to end the Government's complicity in constitutionally forbidden racial discrimination by providing the Executive Branch with the authority and the obligation to terminate its financial support of any activity which employed racial criteria in a manner condemned by the Constitution.

Of course, it might be argued that the Congress which enacted Title VI understood the Constitution to require strict racial neutrality or color blindness, and then enshrined that concept as a rule of statutory law. Later interpretation and clarification of the Constitution to permit remedial use of race would then not dislodge Title VI's prohibition of race-conscious action. But there are three compelling reasons to reject such a hypothesis.

First, no decision of this Court has ever adopted the proposition that the Constitution must be colorblind. See infra at 438 U. S. 355-356.

Second, even if it could be argued in 1964 that the Constitution might conceivably require color blindness, Congress surely would not have chosen to codify such a view unless the Constitution clearly required it. The legislative history of Title VI, as well as the statute itself, reveals a desire to induce voluntary compliance with the requirement of nondiscriminatory treatment. [Footnote 2/13] See § 602 of the Act, 42 U.S.C. § 2000d-1 (no funds shall be terminated unless and until it has been "determined that compliance cannot be secured by voluntary means"); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 1, p. 25 (1963); 110 Cong Rec. 13700 (1964) (Sen. Pastore); id. at 6546 (Sen. Humphrey). It is inconceivable that Congress intended to encourage voluntary efforts to eliminate the evil of racial discrimination while at the same time forbidding the voluntary use of race-conscious remedies to cure acknowledged or obvious statutory violations. Yet a reading of Title VI as prohibiting all action predicated upon race which adversely

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affects any individual would require recipients guilty of discrimination to await the imposition of such remedies by the Executive Branch. Indeed, such an interpretation of Title VI would prevent recipients of federal funds from taking race into account even when necessary to bring their programs into compliance with federal constitutional requirements. This would be a remarkable reading of a statute designed to eliminate constitutional violations, especially in light of judicial decisions holding that, under certain circumstances, the remedial use of racial criteria is not only permissible, but is constitutionally required to eradicate constitutional violations. For example, in Board of Education v. Swann, 402 U. S. 43 (1971), the Court held that a statute forbidding the
assignment of students on the basis of race was unconstitutional because it would hinder the implementation of remedies necessary to accomplish the desegregation of a school system:

"Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be considered in formulating a remedy."

*Id.* at 402 U. S. 46. Surely Congress did not intend to prohibit the use of racial criteria when constitutionally required or to terminate the funding of any entity which implemented such a remedy. It clearly desired to encourage all remedies, including the use of race, necessary to eliminate racial discrimination in violation of the Constitution, rather than requiring the recipient to await a judicial adjudication of unconstitutionality and the judicial imposition of a racially oriented remedy.

Third, the legislative history shows that Congress specifically eschewed any static definition of discrimination in favor of broad language that could be shaped by experience, administrative necessity, and evolving judicial doctrine. Although it is clear from the debates that the supporters of Title VI intended to ban uses of race prohibited by the Constitution and, more specifically, the maintenance of segregated facilities, they never precisely defined the term "discrimination," or what constituted an exclusion from participation or a denial of benefits on the ground of race. This failure was not lost upon its opponents. Senator Ervin complained:

"The word 'discrimination,' as used in this reference, has no contextual explanation whatever, other than the provision that the discrimination 'is to be against' individuals participating in or benefiting from federally assisted programs and activities on the ground specified. With this context, the discrimination condemned by this reference occurs only when an individual is treated unequally or unfairly because of his race, color, religion, or national origin. What constitutes unequal or unfair treatment? Section 601 and section 602 of title VI do not say. They leave the determination of that question to the executive department or agencies administering each program, without any guideline whatever to point out what is the congressional intent."

110 Cong.Rec. 5612 (1964). See also remarks of Representative Abernethy (*id.* at 1619); Representative Dowdy (*id.* at 1632); Senator Talmadge (*id.* at 5251); Senator Sparkman (*id.* at 6052). Despite these criticisms, the legislation's supporters refused to include in the statute or even provide in debate a more explicit definition of what Title VI prohibited.

The explanation for this failure is clear. Specific definitions were undesirable, in the views of the legislation's principal backers, because Title VI's standard was that of the Constitution, and one that could and should be administratively and judicially applied. *See* remarks of Senator Humphrey (*id.* at 5253, 6553); Senator Ribicoff (*id.* at 7057,
Congress' consideration of Title VI on providing the Executive Branch with considerable flexibility in interpreting and applying the prohibition against racial discrimination. Attorney General Robert Kennedy testified that regulations had not been written into the legislation itself because the rules and regulations defining discrimination might differ from one program to another, so that the term would assume different meanings in different contexts. This determination to preserve flexibility in the administration of Title VI was shared by the legislation's supporters. When Senator Johnston offered an amendment that would have expressly authorized federal grantees to take race into account in placing children in adoptive and foster homes, Senator Pastore opposed the amendment, which was ultimately defeated by a 56-29 vote, on the ground that federal administrators could be trusted to act reasonably, and that there was no danger that they would prohibit the use of racial criteria under such circumstances. Id. at 13695.

Congress' resolve not to incorporate a static definition of discrimination into Title VI is not surprising. In 1963 and 1964, when Title VI was drafted and debated, the courts had only recently applied the Equal Protection Clause to strike down public racial discrimination in America, and the scope of that Clause's nondiscrimination principle was in a state of flux and rapid evolution. Many questions, such as whether the Fourteenth Amendment barred only \textit{de jure} discrimination or, in at least some circumstances, reached \textit{de facto} discrimination, had not yet received an authoritative judicial resolution. The congressional debate reflects an awareness of the evolutionary change that constitutional law in the area of racial discrimination was undergoing in 1964. [Footnote 2/16]

In sum, Congress' equating of Title VI's prohibition with the commands of the Fifth and Fourteenth Amendments, its refusal precisely to define that racial discrimination which it intended to prohibit, and its expectation that the statute would be administered in a flexible manner, compel the conclusion that Congress intended the meaning of the statute's prohibition to evolve with the interpretation of the commands of the Constitution. Thus, any claim that the use of racial criteria is barred by the plain language of the statute must fail in light of the remedial purpose of Title VI and its legislative history. The cryptic nature of the language employed in Title VI merely reflects Congress' concern with the then-prevailing use of racial standards as a means of excluding or disadvantaging Negroes and its determination to prohibit absolutely such discrimination. We have recently held that,
"""[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no rule of law which forbids its use, however clear the words may appear on `superficial examination.'""

Train v. Colorado Public Interest Research Group, 426 U. S. 1, 426 U. S. 10 (1976), quoting United States v. American Trucking Assns., 310 U. S. 534, 310 U. S. 544-544 (1940). This is especially so when, as is the case here, the literal application of what is believed to be the plain language of the statute, assuming that it is so plain, would lead to results in direct conflict with Congress' unequivocally expressed legislative purpose. [Footnote 2/17]

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B

Section 602 of Title VI, 42 U.S.C. § 2000d-1, instructs federal agencies to promulgate regulations interpreting Title VI. These regulations, which, under the terms of the statute, require Presidential approval, are entitled to considerable deference in construing Title VI. See, e.g., 414 U. S. 369 (1973); Red Lion Broadcasting Co. v. FCC, 395 U. S. 367, 395 U. S. 381 (1969). Consequently, it is most significant that the Department of Health, Education, and Welfare (HEW), which provides much of the federal assistance to institutions of higher education, has adopted regulations requiring affirmative measures designed to enable racial minorities which have been previously discriminated against by a federally funded institution or program to overcome the effects of such actions and authorizing the voluntary undertaking of affirmative action programs by federally funded institutions that have not been guilty of prior discrimination in order to overcome the effects of conditions which have adversely affected the degree of participation by persons of a particular race.

Title 45 FR § 80.3(b)(6)(i) (1977) provides:

"In administering a program regarding which the recipient has previously discriminated against persons on the ground of race, color, or national origin, the recipient must take affirmative action to overcome the effects of prior discrimination."

Title 45 CFR § 80.5(i) (1977) elaborates upon this requirement:

"In some situations, even though past discriminatory practices attributable to a recipient or applicant have been abandoned, the consequences of such practices continue to impede the full availability of a benefit. If the efforts required of the applicant or recipient under § 80.6(d), to provide information as to the availability of the program or activity and the rights of beneficiaries under this regulation, have failed to overcome these consequences,
it will become necessary under the requirement stated in (i) of § 80.3(b)(6) for such applicant or recipient to take additional steps to make the benefits fully available to racial and nationality groups previously subject to discrimination. This action might take the form, for example, of special arrangements for obtaining referrals or making selections which will insure that groups previously subjected to discrimination are adequately served."

These regulations clearly establish that, where there is a need to overcome the effects of past racially discriminatory or exclusionary practices engaged in by a federally funded institution, race-conscious action is not only permitted, but required, to accomplish the remedial objectives of Title VI. [Footnote 2/18] Of course, there is no evidence that the Medical School has been guilty of past discrimination, and consequently these regulations would not compel it to employ a program of preferential admissions in behalf of racial minorities. It would be difficult to explain from the language of Title I, however, much less from its legislative history, why the statute compels race-conscious remedies where a recipient institution has engaged in past discrimination, but prohibits such remedial action where racial minorities, as a result of the effects of past discrimination imposed by entities other than the recipient, are excluded from the benefits of federally funded programs. HEW was fully aware of the incongruous nature of such an interpretation of Title VI.

Title 45 CFR § 80.3(b)(6)(ii) (1977) provides:

"Even in the absence of such prior discrimination, a recipient, in administering a program, may take affirmative action to overcome the effects of conditions which resulted in limiting participation by persons of a particular race, color, or national origin."

An explanatory regulation explicitly states that the affirmative action which § 80.3(b)(6)(ii) contemplates includes the use of racial preferences:

"Even though an applicant or recipient has never used discriminatory policies, the services and benefits of the program or activity it administers may not, in fact, be equally available to some racial or nationality groups. In such circumstances, an applicant or recipient may properly give special consideration to race, color, or national origin to make the benefits of its program more widely available to such groups, not then being adequately served. For example, where a university is not adequately serving members of a particular racial or nationality group, it may establish special recruitment policies to make its program better known and more readily available to such group, and take other steps to provide that group with more adequate service."
45 CFR § 80.5(j) (1977) This interpretation of Title VI is fully consistent with the statute's emphasis upon voluntary remedial action and reflects the views of an agency [Footnote 2/19] responsible for achieving its objectives. [Footnote 2/20]

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The Court has recognized that the construction of a statute by those charged with its execution is particularly deserving of respect where Congress has directed its attention to the administrative construction and left it unaltered. Cf. Red Lion Broadcasting Co. v. FCC, 395 U.S. at 395 U. S. 381; Zemel v. Rusk, 381 U. S. 1, 381 U. S. 11-12 (1965). Congress recently took just this kind of action when it considered an amendment to the Departments of Labor and Health, Education, and Welfare appropriation bill for 1978, which would have restricted significantly the remedial use of race in programs funded by the appropriation. The amendment, as originally submitted by Representative Ashbrook, provided that

"[n]one of the funds appropriated in this Act may be used to initiate, carry out or enforce any program of affirmative action or any other system of quotas or goals in regard to admission policies or employment practices which encourage or require any discrimination on the basis of race, creed, religion, sex or age."

123 Cong.Rec.

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19715 (1977). In support of the measure, Representative Ashbrook argued that the 1964 Civil Rights Act never authorized the imposition of affirmative action, and that this was a creation of the bureaucracy. Id. at 19722. He explicitly stated, however, that he favored permitting universities to adopt affirmative action programs giving consideration to racial identity, but opposed the imposition of such programs by the Government. Id. at 19715. His amendment was itself amended to reflect this position by only barring the imposition of race-conscious remedies by HEW:

"None of the funds appropriated in this Act may be obligated or expended in connection with the issuance, implementation, or enforcement of any rule, regulation, standard, guideline, recommendation, or order issued by the Secretary of Health, Education, and Welfare which for purposes of compliance with any ratio, quota, or other numerical requirement related to race, creed, color, national origin, or sex requires any individual or entity to take any action with respect to (1) the hiring or promotion policies or practices of such individual or entity, or (2) the admissions policies or practices of such individual or entity."

Id. at 19722. This amendment was adopted by the House. Ibid. The Senate bill, however, contained no such restriction upon HEW's authority to impose race-conscious remedies, and the Conference Committee, upon the urging of the Secretary of HEW, deleted the House provision from the bill. [Footnote 2/21] More significant for present purposes,
however, is the fact that even the proponents of imposing limitations upon HEW's implementation of Title VI did not challenge the right of federally funded educational institutions voluntarily to extend preferences to racial minorities.

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Finally, congressional action subsequent to the passage of Title VI eliminates any possible doubt about Congress' views concerning the permissibility of racial preferences for the purpose of assisting disadvantaged racial minorities. It confirms that Congress did not intend to prohibit, and does not now believe that Title VI prohibits, the consideration of race as part of a remedy for societal discrimination even where there is no showing that the institution extending the preference has been guilty of past discrimination nor any judicial finding that the particular beneficiaries of the racial preference have been adversely affected by societal discrimination.

Just last year, Congress enacted legislation [Footnote 2/22] explicitly requiring that no grants shall be made

"for any local public works project unless the applicant gives satisfactory assurance to the Secretary [of Commerce] that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."

The statute defines the term "minority business enterprise" as

"a business, at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members."

The term "minority group members" is defined in explicitly racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts." Although the statute contains an exemption from this requirement "to the extent that the Secretary determines otherwise," this escape clause was provided only to deal with the possibility that certain areas of the country might not contain sufficient qualified "minority business enterprises" to permit compliance with the quota provisions of the legislation. [Footnote 2/23]

The legislative history of this race-conscious legislation reveals that it represents a deliberate attempt to deal with

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the excessive rate of unemployment among minority citizens and to encourage the development of viable minority controlled enterprises. [Footnote 2/24] It was believed that such a "set-aside" was required in order to enable minorities, still "new on the scene" and "relatively small," to compete with larger and more established companies which
would always be successful in underbidding minority enterprises. 123 Cong.Rec. 5327 (1977) (Rep. Mitchell). What is most significant about the congressional consideration of the measure is that, although the use of a racial quota or "set-aside" by a recipient of federal funds would constitute a direct violation of Title VI if that statute were read to prohibit race-conscious action, no mention was made during the debates in either the House or the Senate of even the possibility that the quota provisions for minority contractors might in any way conflict with or modify Title VI. It is inconceivable that such a purported conflict would have escaped congressional attention through an inadvertent failure to recognize the relevance of Title VI. Indeed, the Act of which this affirmative action provision is a part also contains a provision barring discrimination on the basis of sex which states that this prohibition

"will be enforced through agency provisions and rules similar to those already established, with respect to racial and other discrimination under Title VI of the Civil Rights Act of 1964."

42 U.S.C. § 6709 (1976 ed.). Thus Congress, was fully aware of the applicability of Title VI to the funding of public works projects. Under these circumstances, the enactment of the 10% "set-aside" for minority enterprises reflects a congressional judgment that the remedial use of race is permissible under Title VI. We have repeatedly recognized that subsequent legislation reflecting an interpretation of an earlier Act is entitled to great weight in determining the meaning of the earlier statute. *Red Lion Broadcasting Co. v. FCC*, 395 U.S. at 395 U. S. 380–381;

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C

Prior decisions of this Court also strongly suggest that Title VI does not prohibit the remedial use of race where such action is constitutionally permissible. In *Lau v. Nichols*, 414 U. S. 563 (1974), the Court held that the failure of the San

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Francisco school system to provide English language instruction to students of Chinese ancestry who do not speak English, or to provide them with instruction in Chinese, constituted a violation of Title VI. The Court relied upon an HEW regulation which stipulates that a recipient of federal funds "may not . . . utilize criteria or methods of administration which have the effect of subjecting individuals to discrimination" or have

"the effect of defeating or substantially impairing accomplishment of the objectives of the program as respect individuals of a particular race, color, or national origin."
45 CFR § 80.3(b)(2) (1977). It interpreted this regulation as requiring San Francisco to extend the same educational benefits to Chinese-speaking students as to English-speaking students, even though there was no finding or allegation that the city's failure to do so was a result of a purposeful design to discriminate on the basis of race.

*Lau* is significant in two related respects. First, it indicates that, in at least some circumstances, agencies responsible for the administration of Title VI may require recipients who have not been guilty of any constitutional violations to depart from a policy of color blindness and to be cognizant of the impact of their actions upon racial minorities. Secondly, *Lau* clearly requires that institutions receiving federal funds be accorded considerable latitude in voluntarily undertaking race-conscious action designed to remedy the exclusion of significant numbers of minorities from the benefits of federally funded programs. Although this Court has not yet considered the question, presumably, by analogy to our decisions construing Title VII, a medical school would not be in violation of Title VI under *Lau* because of the serious underrepresentation of racial minorities in its student body as long as it could demonstrate that its entrance requirements correlated sufficiently with the performance of minority students in medical school and the medical profession. [Footnote 2/26] It would be inconsistent with *Lau* and the emphasis of Title VI and the HEW regulations on voluntary action, however, to require that an institution wait to be adjudicated to be in violation of the law before being permitted to voluntarily undertake corrective action based upon a good faith and reasonable belief that the failure of certain racial minorities to satisfy entrance requirements is not a measure of their ultimate performance as doctors, but a result of the lingering effects of past societal discrimination.

We recognize that *Lau*, especially when read in light of our subsequent decision in *Washington v. Davis*, 46 U. S. 229 (1976), which rejected the general proposition that governmental action is unconstitutional solely because it has a racially disproportionate impact, may be read as being predicated upon the view that, at least under some circumstances, Title VI proscribes conduct which might not be prohibited by the Constitution. Since we are now of the opinion, for the reasons set forth above, that Title VI's standard, applicable alike to public and private recipients of federal funds, is no broader than the Constitution's, we have serious doubts concerning the correctness of what appears to be the premise of that decision. However, even accepting *Lau*'s implication that impact alone is, in some contexts, sufficient to establish a *prima facie* violation of Title VI, contrary to our view that Title VI's definition of racial discrimination is absolutely coextensive with the Constitution's, this would not assist the respondent.
in the least. First, for the reasons discussed supra at 438 U. S. 336-350, regardless of whether Title VI's prohibitions extend beyond the Constitution's, the evidence fails to establish, and, indeed, compels the rejection of, the proposition that Congress intended to prohibit recipients of federal funds from voluntarily employing race-conscious measures to eliminate the effects of past societal discrimination against racial minorities such as Negroes. Secondly, Lau itself, for the reasons set forth in the immediately preceding paragraph, strongly supports the view that voluntary race-conscious remedial action is permissible under Title VI. If discriminatory racial impact alone is enough to demonstrate at least a prima facie Title VI violation, it is difficult to believe that the Title would forbid the Medical School from attempting to correct the racially exclusionary effects of its initial admissions policy during the first two years of the School's operation.

The Court has also declined to adopt a "colorblind" interpretation of other statutes containing nondiscrimination provisions similar to that contained in Title VI. We have held under Title VII that, where employment requirements have a disproportionate impact upon racial minorities, they constitute a statutory violation, even in the absence of discriminatory intent, unless the employer is able to demonstrate that the requirements are sufficiently related to the needs of the job. [Footnote 2/27] More significantly, the Court has required that preferences be given by employers to members of racial minorities as a remedy for past violations of Title VII, even where there has been no finding that the employer has acted with a discriminatory intent. [Footnote 2/28] Finally, we have construed the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. (1970 ed. and Supp. V), which contains a provision barring any voting procedure or qualification that denies or abridges "the right of any citizen of the United States to vote on account of race or color," as permitting States to voluntarily take race into account in a way that fairly represents the voting strengths of different racial groups in order to comply with the commands of the statute, even where the result is a gain for one racial group at the expense of others. [Footnote 2/29]

These prior decisions are indicative of the Court's unwillingness to construe remedial statutes designed to eliminate discrimination against racial minorities in a manner which would impede efforts to attain this objective. There is no justification for departing from this course in the case of Title VI and frustrating the clear judgment of Congress that race-conscious remedial action is permissible.

We turn, therefore, to our analysis of the Equal Protection Clause of the Fourteenth Amendment.
III

A

The assertion of human equality is closely associated with the proposition that differences in color or creed, birth or status, are neither significant nor relevant to the way in which persons should be treated. Nonetheless, the position that such factors must be "constitutionally an irrelevance," Edwards v. California, 314 U. S. 160, 314 U. S. 185 (1941) (Jackson, J., concurring), summed up by the shorthand phrase "[o]ur Constitution is color-blind," Plessy v. Ferguson, 163 U. S. 537, 163 U. S. 559 (1896) (Harlan, J., dissenting), has never been adopted by this Court as the proper meaning of the Equal Protection Clause. Indeed, we have expressly rejected this proposition on a number of occasions.

Our cases have always implied that an "overriding statutory purpose," McLaughlin v. Florida, 379 U. S. 184, 379 U. S. 192 (1984), could be found that would justify racial classifications. See, e.g., ibid.; Loving v. Virginia, 388 U. S. 1, 388 U. S. 11 (1967); Korematsu v. United States, 323 U. S. 214, 323 U. S. 216 (1944); Hirabayashi v. United States, 320 U. S. 81, 320 U. S. 100-101 (1943). More recently, in McDaniel v. Barresi, 402 U. S. 39 (1971) this Court unanimously reversed the Georgia Supreme Court which had held that a desegregation plan voluntarily adopted by a local school board, which assigned students on the basis of race, was per se invalid because it was not colorblind. And in North Carolina Board of Education v. Swann, we held, again unanimously, that a statute mandating colorblind school assignment plans could not stand "against the background of segregation," since such a limit on remedies would "render illusory the promise of Brown [I]." 402 U.S. at 402 U. S. 45-46.

We conclude, therefore, that racial classifications are not per se invalid under the Fourteenth Amendment. Accordingly, we turn to the problem of articulating what our role should be in reviewing state action that expressly classifies by race.

B

Respondent argues that racial classifications are always suspect, and, consequently, that this Court should weigh the importance of the objectives served by Davis' special admissions program to see if they are compelling. In addition, he asserts that this Court must inquire whether, in its judgment, there are alternatives to racial classifications which would suit Davis' purposes. Petitioner, on the other hand, states that our proper role is simply to accept petitioner's determination that the racial classifications used by its program are reasonably related to what it tells us are its benign
purposes. We reject petitioner's view, but, because our prior cases are in many respects inapposite to that before us now, we find it necessary to define with precision the meaning of that inexact term, "strict scrutiny."

Unquestionably we have held that a government practice or statute which restricts "fundamental rights" or which contains "suspect classifications" is to be subjected to "strict scrutiny," and can be justified only if it furthers a compelling government purpose and, even then, only if no less restrictive alternative is available. [Footnote 2/30] See, e.g., San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 411 U. S. 16-17 (1973); Dunn v. Blumstein, 405 U. S. 330 (1972). But no fundamental right is involved here. See San Antonio, supra at 422 U. S. 29-36. Nor do whites, as a class, have any of the "traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Id. at 422 U. S. 28; see United States v. Carolene Products Co., 304 U. S. 144, 304 U. S. 152 n. 4 (1938). [Footnote 2/31]

Moreover, if the University's representations are credited, this is not a case where racial classifications are "irrelevant, and therefore prohibited." Hirabayashi, supra at 320 U. S. 100. Nor has anyone suggested that the University's purposes contravene the cardinal principle that racial classifications that stigmatize -- because they are drawn on the presumption that one race is inferior to another or because they put the weight of government behind racial hatred and separatism -- are invalid without more. See Yick Wo v. Hopkins, 118 U. S. 356, 118 U. S. 374 (1886); [Footnote 2/32] accord, Strauder v. West Virginia, 100 U. S. 303, 100 U. S. 308 (1880); Korematsu v. United States, supra at 323 U. S. 223; Oyama v. California, 332 U. S. 633, 332 U. S. 663 (1948) (Murphy, J., concurring); Brown I, 347 U. S. 483 (1954); McLaughlin v. Florida, supra, at 379 U. S. 191-192; Loving v. Virginia, supra, at 388 U. S. 11-12; Reitman v. Mulkey, 387 U. S. 369, 387 U. S. 375-376 (1967); United Jewish Organizations v. Carey, 430 U. S. 144, 430 U. S. 165 (1977) (UJO) (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.); id. at 430 U. S. 169 (opinion concurring in part). [Footnote 2/33]

On the other hand, the fact that this case does not fit neatly into our prior analytic framework for race cases does not mean that it should be analyzed by applying the very loose rational basis standard of review that is the very least that is always applied in equal protection cases. [Footnote 2/34]

"[T]he mere recitation of a benign, compensatory purpose is not an automatic shield
which protects against any inquiry into the actual purpose underlying a statutory scheme.”


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First, race, like, "gender-based classifications, too often [has] been inexcusably utilized to stereotype and stigmatize politically powerless segments of society." *Kahn v. Shevin,* 416 U. S. 351, 416 U. S. 357 (1974) (dissenting opinion). While a carefully tailored statute designed to remedy past discrimination could avoid these vices, see *Califano v. Webster,* supra; *Schlesinger v. Ballard,* 419 U. S. 498 (1975); *Kahn v. Shevin,* supra, we nonetheless have recognized that the line between honest and thoughtful appraisal of the effects of past discrimination and paternalistic stereotyping is not so clear, and that a statute based on the latter is patently capable of stigmatizing all women with a badge of inferiority. Cf. *Schlesinger v. Ballard,* supra at 419 U. S. 508; *UJO,* supra at 430 U. S. 174, and n. 3 (opinion concurring in part); *Califano v. Goldfarb,* 430 U. S. 199, 430 U. S. 223 (1977) (STEVENS, J., concurring in judgment). See also *Stanton v. Stanton,* 421 U. S. 7, 421 U. S. 14-15 (1975). State programs designed ostensibly to ameliorate the effects of past racial discrimination obviously create the same hazard of stigma, since they may promote racial separatism and reinforce the views of those who believe that members of racial minorities are inherently incapable of succeeding on their own. See *UJO,* supra at 430 U. S. 172 (opinion concurring in part); *ante* at 438 U. S. 298 (opinion of POWELL, J.).

Second, race, like gender and illegitimacy, see *Weber v. Aetna Casualty & Surety Co.,* 406 U. S. 164 (1972), is an immutable characteristic which its possessors are powerless to escape or set aside. While a classification is not per se invalid because it divides classes on the basis of an immutable characteristic, see *supra* at 438 U. S. 355-356, it is nevertheless true that such divisions are contrary to our deep belief that "legal burdens should bear some relationship to individual responsibility or wrongdoing," *Weber,* supra at 406 U. S. 175; *Frontiero v. Richardson,* 411 U. S. 677, 411 U. S. 686 (1973) (opinion of BRENNAN, WHITE, and MARSHALL, JJ.), and that advancement sanctioned, sponsored, or approved by the State should ideally be based on
individual merit or achievement, or at the least on factors within the control of an individual. See UJO, 430 U.S. at 430 U. S. 173 (opinion concurring in part); Kotch v. Board of River Port Pilot Comm'rs, 330 U. S. 552, 330 U. S. 566 (1947) (Rutledge, J., dissenting).

Because this principle is so deeply rooted, it might be supposed that it would be considered in the legislative process and weighed against the benefits of programs preferring individuals because of their race. But this is not necessarily so: the

"natural consequence of our governing processes [may well be] that the most 'discrete and insular' of whites . . . will be called upon to bear the immediate, direct costs of benign discrimination."

UJO, supra at 430 U. S. 174 (opinion concurring in part). Moreover, it is clear from our cases that there are limits beyond which majorities may not go when they classify on the basis of immutable characteristics. See, e.g., Weber, supra. Thus, even if the concern for individualism is weighed by the political process, that weighing cannot waive the personal rights of individuals under the Fourteenth Amendment. See Lucas v. Colorado General Assembly, 377 U. S. 713, 377 U. S. 736 (1964).

In sum, because of the significant risk that racial classifications established for ostensibly benign purposes can be misused, causing effects not unlike those created by invidious classifications, it is inappropriate to inquire only whether there is any conceivable basis that might sustain such a classification. Instead, to justify such a classification, an important and articulated purpose for its use must be shown. In addition, any statute must be stricken that stigmatizes any group or that singles out those least well represented in the political process to bear the brunt of a benign program. Thus, our review under the Fourteenth Amendment should be

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strict -- not "strict' in theory and fatal in fact," [Footnote 2/36] because it is stigma that causes fatality -- but strict and searching nonetheless.

IV

Davis' articulated purpose of remedying the effects of past societal discrimination is, under our cases, sufficiently important to justify the use of race-conscious admissions programs where there is a sound basis for concluding that minority underrepresentation is substantial and chronic, and that the handicap of past discrimination is impeding access of minorities to the Medical School.

A
At least since *Green v. County School Board*, 391 U. S. 430 (1968), it has been clear that a public body which has itself been adjudged to have engaged in racial discrimination cannot bring itself into compliance with the Equal Protection Clause simply by ending its unlawful acts and adopting a neutral stance. Three years later, *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U. S. 1 (1971), and its companion cases, *Davis v. School Comm'rs of Mobile County*, 402 U. S. 33 (1971); *McDaniel v. Barresi*, 402 U. S. 39 (1971); and *North Carolina Board of Education v. Swann*, 402 U. S. 43 (1971), reiterated that racially neutral remedies for past discrimination were inadequate where consequences of past discriminatory acts influence or control present decisions. See, e.g., *Charlotte-Mecklenburg*, supra at 402 U. S. 28. And the Court further held both that courts could enter desegregation orders which assigned students and faculty by reference to race, *Charlotte-Mecklenburg*, supra; *Davis*, supra; *United States v. Montgomery County Board of Ed.*, 395 U. S. 225 (1969), and that local school boards could voluntarily adopt desegregation plans which made express reference to race if this was necessary to remedy the effects of past discrimination. *McDaniel v. Barresi*, supra. Moreover, we stated that school boards, even in the absence of a judicial finding of past discrimination, could voluntarily adopt plans which assigned students with the end of creating racial pluralism by establishing fixed ratios of black and white students in each school. *Charlotte-Mecklenburg*, supra at 402 U. S. 16. In each instance, the creation of unitary school systems, in which the effects of past discrimination had been "eliminated root and branch," *Green*, supra at 391 U. S. 438, was recognized as a compelling social goal justifying the overt use of race.

Finally, the conclusion that state educational institutions may constitutionally adopt admissions programs designed to avoid exclusion of historically disadvantaged minorities, even when such programs explicitly take race into account, finds direct support in our cases construing congressional legislation designed to overcome the present effects of past discrimination. Congress can and has outlawed actions which have a disproportionately adverse and unjustified impact upon members of racial minorities and has required or authorized race-conscious action to put individuals disadvantaged by such impact in the position they otherwise might have enjoyed. See *Franks v. Bowman Transportation Co.*, 424 U. S. 747 (1976); *Teamsters v. United States*, 431 U. S. 324 (1977). Such relief does not require as a predicate proof that recipients of preferential advancement have been individually discriminated against; it is enough that each recipient is within a general class of persons likely to have been the victims of discrimination. See *id.* at 431 U. S. 357-362. Nor is it an objection to such relief that preference for minorities will upset the settled expectations of nonminorities. See *Franks*, supra. In addition, we have held that Congress, to remove barriers to equal opportunity, can and has required employers to use test criteria that fairly reflect the qualifications of minority applicants.
vis-a-vis nonminority applicants, even if this means interpreting the qualifications of an applicant in light of his race. See Albemarle Paper Co. v. Moody, 422 U. S. 405, 422 U. S. 435 (1975). [Footnote 2/37]

These cases cannot be distinguished simply by the presence of judicial findings of discrimination, for race-conscious remedies have been approved where such findings have not been made. McDaniel v. Barresi, supra; UJO; see Califano v. Webster, 430 U. S. 313 (1977); Schlesinger v. Ballard, 419 U. S. 498 (1975); Kahn v. Shevin, 416 U. S. 351 (1974). See also Katzenbach v. Morgan, 384 U. S. 641 (1966). Indeed, the requirement of a judicial determination of a constitutional or statutory violation as a predicate for race-conscious remedial actions would be self-defeating. Such a requirement would severely undermine efforts to achieve voluntary compliance with the requirements of law. And our society and jurisprudence have always stressed the value of voluntary efforts to further the objectives of the law. Judicial intervention is a last resort to achieve cessation of illegal conduct or the remedying of its effects, rather than a prerequisite to action. [Footnote 2/38]

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Nor can our cases be distinguished on the ground that the entity using explicit racial classifications itself had violated § 1 of the Fourteenth Amendment or an antidiscrimination regulation, for again race-conscious remedies have been approved where this is not the case. See UJO, 430 U. S. at 430 U. S. 157 (opinion of WHITE, J., joined by BRENNAN, BLACKMUN, and STEVENS, JJ.); [Footnote 2/39] id. at 430 U. S. 167 (opinion of WHITE, J., joined by REHNQUIST and STEVENS, JJ.); [Footnote 2/40] cf. Califano v. Webster, supra, at 430 U. S. 317; Kahn v. Shevin, supra. Moreover, the presence or absence of past discrimination by universities or employers is largely irrelevant to resolving respondent's constitutional claims. The claims of those burdened by the race-conscious actions of a university or employer who has never been adjudged in violation of an antidiscrimination law are not any more or less entitled to deference than the claims of the burdened nonminority workers in Franks v. Bowman Transportation Co., supra, in which the employer had violated Title VII, for, in each case, the employees are innocent of past discrimination. And, although it might be argued that, where an employer has violated an antidiscrimination law, the expectations of nonminority workers are themselves products of discrimination and hence "tainted," see Franks, supra at 424 U. S. 776, and therefore more easily upset, the same argument can be made with respect to respondent. If it was reasonable to conclude -- as we hold that it was -- that the failure of minorities to qualify for admission at Davis under regular procedures was due principally to the effects of past discrimination, than there is a reasonable likelihood that, but for pervasive racial discrimination,

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respondent would have failed to qualify for admission even in the absence of Davis' special admissions program. [Footnote 2/41]
Thus, our cases under Title VII of the Civil Rights Act have held that, in order to achieve minority participation in previously segregated areas of public life, Congress may require or authorize preferential treatment for those likely disadvantaged by societal racial discrimination. Such legislation has been sustained even without a requirement of findings of intentional racial discrimination by those required or authorized to accord preferential treatment, or a case-by-case determination that those to be benefited suffered from racial discrimination. These decisions compel the conclusion that States also may adopt race-conscious programs designed to overcome substantial, chronic minority underrepresentation where there is reason to believe that the evil addressed is a product of past racial discrimination. [Footnote 2/42]

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Title VII was enacted pursuant to Congress' power under the Commerce Clause and § 5 of the Fourteenth Amendment. To the extent that Congress acted under the Commerce Clause power, it was restricted in the use of race in governmental decisionmaking by the equal protection component of the Due Process Clause of the Fifth Amendment precisely to the same extent as are the States by § 1 of the Fourteenth Amendment. [Footnote 2/43]
Therefore, to the extent that Title VII rests on the Commerce Clause power, our decisions such a Franks and

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Teamsters v. United States, 431 U. S. 324 (1977), implicitly recognize that the affirmative use of race is consistent with the equal protection component of the Fifth Amendment, and therefore with the Fourteenth Amendment. To the extent that Congress acted pursuant to § 5 of the Fourteenth Amendment, those cases impliedly recognize that Congress was empowered under that provision to accord preferential treatment to victims of past discrimination in order to overcome the effects of segregation, and we see no reason to conclude that the States cannot voluntarily accomplish under § 1 of the Fourteenth Amendment what Congress under § 5 of the Fourteenth Amendment validly may authorize or compel either the States or private persons to do. A contrary position would conflict with the traditional understanding recognizing the competence of the States to initiate measures consistent with federal policy in the absence of congressional preemption of the subject matter. Nothing whatever in the legislative history of either the Fourteenth Amendment or the Civil Rights Acts even remotely suggests that the States are foreclosed from furthering the fundamental purpose of equal opportunity to which the Amendment and these Acts are addressed. Indeed, voluntary initiatives by the States to achieve the national goal of equal opportunity have been recognized to be essential to its attainment. "To use the Fourteenth Amendment as a sword against such State power would stultify that Amendment." Railway Mail Assn. v. Corsi, 326 U. S. 88, 326 U. S. 98 (1945) (Frankfurter, J., concurring). [Footnote 2/44] We therefore

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conclude that Davis' goal of admitting minority students disadvantaged by the
effects of past discrimination is sufficiently important to justify use of race-
conscious admissions criteria.

B

Properly construed, therefore, our prior cases unequivocally show that a state
government may adopt race-conscious programs if the purpose of such
programs is to remove the disparate racial impact its actions might otherwise have, and if
there is reason to believe that the disparate impact is itself the product of past
discrimination, whether its own or that of society at large. There is no question that
Davis' program is valid under this test.

Certainly, on the basis of the undisputed factual submissions before this Court, Davis had
a sound basis for believing that the problem of underrepresentation of minorities was
substantial and chronic, and that the problem was attributable to handicaps imposed on
minority applicants by past and present racial discrimination. Until at least 1973, the
practice of medicine in this country was, in fact, if not in law, largely the prerogative of
whites. [Footnote 2/45] In 1950, for example, while Negroes

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classified 10% of the total population, Negro physicians constituted only 2.2% of the
total number of physicians. [Footnote 2/46] The overwhelming majority of these,
moreover, were educated in two predominantly Negro medical schools, Howard and
Meharry. [Footnote 2/47] By 1970, the gap between the proportion of Negroes in
medicine and their proportion in the population had widened; the number of Negroes
employed in medicine remained frozen at 2.2% [Footnote 2/48] while the Negro
population had increased to 11.1%. [Footnote 2/49] The number of Negro admittees to
predominantly white medical schools, moreover, had declined in absolute numbers
during the years 1955 to 1964. Odegaard 19.

Moreover, Davis had very good reason to believe that the national pattern of
underrepresentation of minorities in medicine would be perpetuated if it retained a single
admissions standard. For example, the entering classes in 1968 and 1969, the years in
which such a standard was used, included only 1 Chicano and 2 Negroes out of the 50
admittees for each year. Nor is there any relief from this pattern of underrepresentation in
the statistics for the regular admissions program in later years. [Footnote 2/50]

Davis clearly could conclude that the serious and persistent underrepresentation of
minorities in medicine depicted by these statistics is the result of handicaps under which
minority applicants labor as a consequence of a background of deliberate, purposeful
discrimination against minorities in education

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and in society generally, as well as in the medical profession. From the inception of our national life, Negroes have been subjected to unique legal disabilities impairing access to equal educational opportunity. Under slavery, penal sanctions were imposed upon anyone attempting to educate Negroes.

[Footnote 2/51] After enactment of the Fourteenth Amendment the States continued to deny Negroes equal educational opportunity, enforcing a strict policy of segregation that itself stamped Negroes as inferior, Brown I, 347 U. S. 483 (1954), that relegated minorities to inferior educational institutions, [Footnote 2/52] and that denied them intercourse in the mainstream of professional life necessary to advancement. See Sweatt v. Painter, 339 U. S. 629 (1950). Segregation was not limited to public facilities, moreover, but was enforced by criminal penalties against private action as well. Thus, as late as 1908, this Court enforced a state criminal conviction against a private college for teaching Negroes together with whites. Berea College v. Kentucky, 211 U. S. 45. See also Plessy v. Ferguson, 163 U. S. 537 (1896).

Green v. County School Board, 391 U. S. 430 (1968), gave explicit recognition to the fact that the habit of discrimination and the cultural tradition of race prejudice cultivated by centuries of legal slavery and segregation were not immediately dissipated when Brown I, supra, announced the constitutional principle that equal educational opportunity and participation in all aspects of American life could not be denied on the basis of race. Rather, massive official and private resistance prevented, and to a lesser extent still prevents, attainment of equal opportunity in education at all levels and in the professions. The generation of minority students applying to Davis Medical School since it opened in 1968 -- most of whom were born before or about the time Brown I was decided -- clearly have been victims of this discrimination. Judicial decrees recognizing discrimination in public education in California testify to the fact of widespread discrimination suffered by California-born minority applicants; [Footnote 2/53] many minority group members living in California, moreover, were born and reared in school districts in Southern States segregated by law.

[Footnote 2/54] Since separation of schoolchildren by race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone,"

Brown I, supra at 347 U. S. 494, the conclusion is inescapable that applicants to medical school must be few indeed who endured the effects of de jure segregation, the resistance to Brown I, or the equally debilitating pervasive private discrimination fostered by our long history of official discrimination, cf. Reitman v. Mulkey, 387 U. S. 369 (1967), and yet come to the starting line with an education equal to whites. [Footnote 2/55]

Moreover, we need not rest solely on our own conclusion that Davis had sound reason to believe that the effects of past discrimination were handicapping minority applicants to the Medical School, because the Department of Health, Education, and Welfare, the
expert agency charged by Congress with promulgating regulations enforcing Title VI of the Civil Rights Act of 1964, see supra at 438 U. S. 341-343, has also reached the conclusion that race may be taken into account in situations where a failure to do so would limit participation by minorities in federally funded programs, and regulations promulgated by the Department expressly contemplate that appropriate race-conscious programs may be adopted by universities to remedy unequal access to university programs caused by their own or by past societal discrimination. See supra at 438 U. S. 344-345, discussing 45 CFR §§ 80.3(b)(6)(ii) and 80.5(j) (1977). It cannot be questioned that, in the absence of the special admissions program, access of minority students to the Medical School would be severely limited and, accordingly, race-conscious admissions would be deemed an appropriate response under these federal regulations. Moreover, the Department's regulatory policy is not one that has gone unnoticed by Congress. See supra at 438 U. S. 346-347. Indeed, although an amendment to an appropriations bill was introduced just last year that would have prevented the Secretary of Health, Education, and Welfare from mandating race-conscious programs in university admissions, proponents of this measure, significantly, did not question the validity of voluntary implementation of race-conscious admissions criteria. See ibid. In these circumstances, the conclusion implicit in the regulations -- that the lingering effects of past discrimination continue to make race-conscious remedial programs appropriate means for ensuring equal educational opportunity in universities -- deserves considerable judicial deference. See, e.g., Katzenbach v. Morgan, 384 U. S. 641 (1966); UJO, 430 U.S. at 430 U. S. 175-178 (opinion concurring in part). [Footnote 2/56]

C

The second prong of our test -- whether the Davis program stigmatizes any discrete group or individual and whether race is reasonably used in light of the program's objectives -- is clearly satisfied by the Davis program.

It is not even claimed that Davis' program in any way operates to stigmatize or single out any discrete and insular, or even any identifiable, nonminority group. Nor will harm comparable to that imposed upon racial minorities by exclusion or separation on grounds of race be the likely result of the program. It does not, for example, establish an exclusive preserve for minority students apart from and exclusive of whites. Rather, its purpose is to overcome the effects of segregation by bringing the races together. True, whites are excluded from participation in the special admissions program, but this fact only operates to reduce the number of whites to be admitted in the regular admissions program in order to permit admission of a reasonable percentage -- less than their proportion of the
California population [Footnote 2/57] -- of otherwise underrepresented qualified minority applicants. [Footnote 2/58]

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Nor was Bakke in any sense stamped as inferior by the Medical School's rejection of him. Indeed, it is conceded by all that he satisfied those criteria regarded by the school as generally relevant to academic performance better than most of the minority members who were admitted. Moreover, there is absolutely no basis for concluding that Bakke's rejection as a result of Davis' use of racial preference will affect him throughout his life in the same way as the segregation of the Negro schoolchildren in Brown I would have affected them. Unlike discrimination against racial minorities, the use of racial preferences for remedial purposes does not inflict a pervasive injury upon individual whites in the sense that, wherever they go or whatever they do, there is a significant likelihood that they will be treated as second-class citizens because of their color. This distinction does not mean that the exclusion of a white resulting from the preferential use of race is not sufficiently serious to require justification; but it does mean that the injury inflicted by such a policy is not distinguishable from disadvantages caused by a wide range of government actions, none of which has ever been thought impermissible for that reason alone.

In addition, there is simply no evidence that the Davis program discriminates intentionally or unintentionally against any minority group which it purports to benefit. The program does not establish a quota in the invidious sense of a ceiling on the number of minority applicants to be admitted. Nor can the program reasonably be regarded as stigmatizing the program's beneficiaries or their race as inferior. The Davis program does not simply advance less qualified applicants; rather, it compensates applicants, who it is uncontested are fully qualified to study medicine, for educational disadvantages which it was reasonable to conclude were a product of state-fostered discrimination. Once admitted, these students must satisfy the same degree requirements as regularly admitted students; they are taught by the same faculty in the same classes; and their performance is evaluated by the same standards by which regularly admitted students are judged. Under these circumstances, their performance and degrees must be regarded equally with the regularly admitted students with whom they compete for standing. Since minority graduates cannot justifiably be regarded as less well qualified than nonminority graduates by virtue of the special admissions program, there is no reasonable basis to conclude that minority graduates at schools using such programs would be stigmatized as inferior by the existence of such programs.

We disagree with the lower courts' conclusion that the Davis program's use of race was unreasonable in light of its objectives. First, as petitioner argues, there are no practical
means by which it could achieve its ends in the foreseeable future without the use of race-conscious measures. With respect to any factor (such as poverty or family educational background) that may be used as a substitute for race as an indicator of past discrimination, whites greatly outnumber racial minorities simply because whites make up a far larger percentage of the total population, and therefore far outnumber minorities in absolute terms at every socioeconomic level. [Footnote 2/59] For example, of a class of recent medical school applicants from families with less than $10,000 income, at least 71% were white. [Footnote 2/60] Of all 1970 families headed by a

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person not a highschool graduate which included related children under 18, 80% were white and 20% were racial minorities. [Footnote 2/61] Moreover, while race is positively correlated with differences in GPA and MCAT scores, economic disadvantage is not. Thus, it appears that economically disadvantaged whites do not score less well than economically advantaged whites, while economically advantaged blacks score less well than do disadvantaged whites. [Footnote 2/62] These statistics graphically illustrate that the University's purpose to integrate its classes by compensating for past discrimination could not be achieved by a general preference for the economically disadvantaged or the children of parents of limited education unless such groups were to make up the entire class.

Second, the Davis admissions program does not simply equate minority status with disadvantage. Rather, Davis considers on an individual basis each applicant's personal history to determine whether he or she has likely been disadvantaged by racial discrimination. The record makes clear that only minority applicants likely to have been isolated from the mainstream of American life are considered in the special program; other minority applicants are eligible only through the regular admissions program. True, the procedure by which disadvantage is detected is informal, but we have never insisted that educators conduct their affairs through adjudicatory proceedings, and such insistence here is misplaced. A case-by-case inquiry into the extent to which each individual applicant has been affected, either directly or indirectly, by racial discrimination, would seem to be, as a practical matter, virtually impossible, despite the fact that there are excellent reasons for concluding that such effects generally exist. When individual measurement is impossible or extremely impractical, there is nothing to prevent a State

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from using categorical means to achieve its ends, at least where the category is closely related to the goal. Cf. Gaston County v. United States, 395 U. S. 285, 395 U. S. 25-296 (1969); Katzenbach v. Morgan, 384 U. S. 641 (1966). And it is clear from our cases that specific proof that a person has been victimized by discrimination is not a necessary predicate to offering him relief where the probability of victimization is great. See Teamsters v. United States, 431 U. S. 324 (1977).
Finally, Davis' special admissions program cannot be said to violate the Constitution simply because it has set aside a predetermined number of places for qualified minority applicants, rather than using minority status as a positive factor to be considered in evaluating the applications of disadvantaged minority applicants. For purposes of constitutional adjudication, there is no difference between the two approaches. In any admissions program which accords special consideration to disadvantaged racial minorities, a determination of the degree of preference to be given is unavoidable, and any given preference that results in the exclusion of a white candidate is no more or less constitutionally acceptable than a program such as that at Davis. Furthermore, the extent of the preference inevitably depends on how many minority applicants the particular school is seeking to admit in any particular year, so long as the number of qualified minority applicants exceeds that number. There is no sensible, and certainly no constitutional, distinction between, for example, adding a set number of points to the admissions rating of disadvantaged minority applicants as an expression of the preference with the expectation that this will result in the admission of an approximately determined number of qualified minority applicants and setting a fixed number of places for such applicants, as was done here.

[Footnote 2/63]

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The "Harvard" program, see ante at 438 U. S. 316-318, as those employing it readily concede, openly and successfully employs a racial criterion for the purpose of ensuring that some of the scarce places in institutions of higher education are allocated to disadvantaged minority students. That the Harvard approach does not also make public the extent of the preference and the precise workings of the system, while the Davis program employs a specific, openly stated number, does not condemn the latter plan for purposes of Fourteenth Amendment adjudication. It may be that the Harvard plan is more acceptable to the public than is the Davis "quota." If it is, any State, including California, is free to adopt it in preference to a less acceptable alternative, just as it is generally free, as far as the Constitution is concerned, to abjure granting any racial preferences in its admissions program. But there is no basis for preferring a particular preference program simply because, in achieving the same goals that the Davis Medical School is pursuing, it proceeds in a manner that is not immediately apparent to the public.

V

Accordingly, we would reverse the judgment of the Supreme Court of California holding the Medical School's special admissions program unconstitutional and directing respondent's admission, as well as that portion of the judgment enjoining the Medical School from according any consideration to race in the admissions process.

[Footnote 2/1]
We also agree with MR. JUSTICE POWELL that a plan like the "Harvard" plan, see ante at 438 U. S. 316-318, is constitutional under our approach, at least so long as the use of race to achieve an integrated student body is necessitated by the lingering effects of past discrimination.

[Footnote 2/2]

See Plessy v. Ferguson, 163 U. S. 537 (1896).

[Footnote 2/3]


[Footnote 2/4]


[Footnote 2/5]


[Footnote 2/6]


[Footnote 2/7]

Section 601 of Title VI provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."


[Footnote 2/8]

MR. JUSTICE WHITE believes we should address the "private right of action" issue. Accordingly, he has filed a separate opinion stating his view that there is no private right of action under Title VI. See post, p. 438 U. S. 379.
"Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. Direct discrimination by Federal, State or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious; and it should not be necessary to resort to the courts to prevent each individual violation. Congress and the Executive have their responsibilities to uphold the Constitution also. . . ."

"Many statutes providing Federal financial assistance, however, define with such precision both the Administrator's role and the conditions upon which specified amounts shall be given to designated recipients that the amount of administrative discretion remaining -- which might be used to withhold funds if discrimination were not ended -- is, at best, questionable. No administrator has the unlimited authority to invoke the Constitution in opposition to the mandate of the Congress. Nor would it always be helpful to require unconditionally -- as is often proposed -- the withdrawal of all Federal funds from programs urgently needed by Negroes as well as whites, for this may only penalize those who least deserve it without ending discrimination."

"Instead of permitting this issue to become a political device often exploited by those opposed to social or economic progress, it would be better at this time to pass a single comprehensive provision making it clear that the Federal Government is not required, under any statute, to furnish any kind of financial assistance -- by way of grant, loan, contract, guaranty, insurance, or otherwise -- to any program or activity in which racial discrimination occurs. This would not permit the Federal Government to cut off all Federal aid of all kinds as a means of punishing an area for the discrimination occurring therein -- but it would clarify the authority of any administrator with respect to Federal funds or financial assistance and discriminatory practices."


See, e.g., 110 Cong.Rec. 2732 (1964) (Rep. Dawson); id. at 2481-2482 (Rep. Ryan); id. at 2766 (Rep. Matzunaga); id. at 2595 (Rep. Donahue).

There is also language in 42 U.S.C. § 2000d-5, enacted in 1966, which supports the conclusion that Title VI's standard is that of the Constitution. Section 2000d-5 provides that,

"for the purpose of determining whether a local educational agency is in compliance with [Title VI], compliance by such agency with a final order or judgment of a Federal court for the desegregation of the school or school system operated by such agency shall be
deemed to be compliance with [Title VI], insofar as the matters covered in the order or judgment are concerned."

This provision was clearly intended to avoid subjecting local educational agencies simultaneously to the jurisdiction of the federal courts and the federal administrative agencies in connection with the imposition of remedial measures designed to end school segregation. Its inclusion reflects the congressional judgment that the requirements imposed by Title VI are identical to those imposed by the Constitution as interpreted by the federal courts.

[Footnote 2/12]

As has already been seen, the proponents of Title VI in the House were motivated by the identical concern. See remarks of Representative Celler (110 Cong.Rec. 2467 (1964)); Representative Ryan (id. at 1643, 2481-2482); H.R.Rep. No. 914, 88th Cong., 1st Sess., pt. 2, Additional Views of Seven Representatives 2425 (1963).

[Footnote 2/13]

See separate opinion of MR. JUSTICE WHITE, post at 438 U. S. 382-383, n. 2.

[Footnote 2/14]

These remarks also reflect the expectations of Title VI's proponents that the application of the Constitution to the conduct at the core of their concern -- the segregation of Negroes in federally funded programs and their exclusion from the full benefits of such programs -- was clear. See supra at 438 U. S. 333-336; infra at 438 U. S. 340-342, n. 17.

[Footnote 2/15]


[Footnote 2/16]

See, e.g., 110 Cong.Rec. 6544, 13820 (1964) (Sen. Humphrey); id. at 6050 (Sen. Javits); id. at 12677 (Sen. Allott).

[Footnote 2/17]

Our Brother STEVENS finds support for a colorblind theory of Title VI in its legislative history, but his interpretation gives undue weight to a few isolated passages from among the thousands of pages of the legislative history of Title VI. See id. at 6547 (Sen. Humphrey); id. at 6047, 7055 (Sen. Pastore); id. at 12675 (Sen. Allott); id. at 6561 (Sen. Kuchel). These fragmentary comments fall far short of supporting a congressional intent
to prohibit a racially conscious admissions program designed to assist those who are likely to have suffered injuries from the effects of past discrimination.

In the first place, these statements must be read in the context in which they were made. The concern of the speakers was far removed from the incidental injuries which may be inflicted upon nonminorities by the use of racial preferences. It was rather with the evil of the segregation of Negroes in federally financed programs and, in some cases, their arbitrary exclusion on account of race from the benefits of such programs. Indeed, in this context, there can be no doubt that the Fourteenth Amendment does command color blindness, and forbids the use of racial criteria. No consideration was given by these legislators, however, to the permissibility of racial preference designed to redress the effects of injuries suffered as a result of one's color. Significantly, one of the legislators, Senator Pastore, and perhaps also Senator Kuchel, who described Title VI as proscribing decisionmaking based upon skin color, also made it clear that Title VI does not outlaw the use of racial criteria in all circumstances. See supra at 438 U. S. 339-340; 110 Cong.Rec. 6562 (1964). See also id. at 2494 (Rep. Celler). Moreover, there are many statements in the legislative history explicitly indicating that Congress intended neither to require nor to prohibit the remedial use of racial preferences where not otherwise required or prohibited by the Constitution. Representative MacGregor addressed directly the problem of preferential treatment:

"Your mail and mine, your contacts and mine with our constituents, indicates a great degree of misunderstanding about this bill. People complain about racial 'balancing' in the public schools, about open occupancy in housing, about preferential treatment or quotas in employment. There is a mistaken belief that Congress is legislating in these areas in this bill. When we drafted this bill, we excluded these issues largely because the problems raised by these controversial questions are more properly handled at a governmental level close to the American people and by communities and individuals themselves. The Senate has spelled out our intentions more specifically."

Id. at 15893. Other legislators explained that the achievement of racial balance in elementary and secondary schools where there had been no segregation by law was not compelled by Title VI, but was rather left to the judgment of state and local communities. See, e.g., id. at 10920 (Sen. Javits); id. at 5807, 5266 (Sen. Keating); id. at 13821 (Sens. Humphrey and Saltonstall). See also id. at 6562 (Sen. Kuchel); id. at 13695 (Sen. Pastore).

Much the same can be said of the scattered remarks to be found in the legislative history of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. (1970 ed. and Supp. V), which prohibits employment discrimination on the basis of race in terms somewhat similar to those contained in Title VI, see 42 U.S.C. § 2000e-2(a)(1) (unlawful "to fail or refuse to hire" any applicant "because of such individual's race, color, religion, sex, or national origin. . . . "), to the effect that any deliberate attempt by an employer to maintain a racial balance is not required by the statute, and might in fact violate it. See, e.g., 110 Cong.Rec. 7214 (1964) (Sens. Clark and Case); id. at 6549 (Sen. Humphrey); id. at 2560 (Rep. Goodell). Once again, there is no indication that Congress intended to
bar the voluntary use of racial preferences to assist minorities to surmount the obstacles imposed by the remnants of past discrimination. Even assuming that Title VII prohibits employers from deliberately maintaining a particular racial composition in their workforce as an end in itself, this does not imply, in the absence of any consideration of the question, that Congress intended to bar the use of racial preferences as a tool for achieving the objective of remedying past discrimination or other compelling ends. The former may well be contrary to the requirements of the Fourteenth Amendment (where state action is involved), while the latter presents very different constitutional considerations. Indeed, as discussed infra at 438 U. S. 353, this Court has construed Title VII as requiring the use of racial preferences for the purpose of hiring and advancing those who have been adversely affected by past discriminatory employment practices, even at the expense of other employees innocent of discrimination. Franks v. Bowman Transportation Co., 424 U. S. 747, 424 U. S. 767-768 (1976). Although Title VII clearly does not require employers to take action to remedy the disadvantages imposed upon racial minorities by hands other than their own, such an objective is perfectly consistent with the remedial goals of the statute. See id. at 424 U. S. 762-770; Albemarle Paper Co. v. Moody, 422 U. S. 405, 422 U. S. 418 (1975). There is no more indication in the legislative history of Title VII than in that of Title VI that Congress desired to prohibit such affirmative action to the extent that it is permitted by the Constitution, yet judicial decisions as well as subsequent executive and congressional action clearly establish that Title VII does not forbid race-conscious remedial action. See infra at 438 U. S. 353-355, and n. 28.

[Footnote 2/18]
HEW has stated that the purpose of these regulations is
"to specify that affirmative steps to make services more equitably available are not prohibited and that such steps are required when necessary to overcome the consequences of prior discrimination."

36 Fed.Reg. 23494 (1971). Other federal agencies which provide financial assistance pursuant to Title VI have adopted similar regulations. See Supplemental Brief for United States as Amicus Curiae 16 n. 14.

[Footnote 2/19]
Moreover, the President has delegated to the Attorney General responsibility for coordinating the enforcement of Title VI by federal departments and agencies, and has directed him to "assist the departments and agencies in accomplishing effective implementation." Exec.Order No. 11764, 3 CFR 849 (1971-1975 Comp.). Accordingly, the views of the Solicitor General, as well as those of HEW, that the use of racial preferences for remedial purposes is consistent with Title VI are entitled to considerable respect.
HEW administers at least two explicitly race-conscious programs. Details concerning them may be found in the Office of Management and Budget, 1977 Catalogue of Federal Domestic Assistance 205-206, 401-402. The first program, No. 13.375, "Minority Biomedical Support," has as its objectives:

"To increase the number of ethnic minority faculty, students, and investigators engaged in biomedical research. To broaden the opportunities for participation in biomedical research of ethnic minority faculty, students, and investigators by providing support for biomedical research programs at eligible institutions."

Eligibility for grants under this program is limited to (1) four-year colleges, universities, and health professional schools with over 50% minority enrollments; (2) four-year institutions with significant but not necessarily over 50% minority enrollment provided they have a history of encouragement and assistance to minorities; (3) two-year colleges with 50% minority enrollment; and (4) American Indian Tribal Councils. Grants made pursuant to this program are estimated to total $9,711,000 for 1977.

The second program, No. 13.880, entitled "Minority Access To Research Careers," has as its objective to "assist minority institutions to train greater numbers of scientists and teachers in health related fields." Grants under this program are made directly to individuals and to institutions for the purpose of enabling them to make grants to individuals.

In addition to the enactment of the 10% quota provision discussed supra, Congress has also passed other Acts mandating race-conscious measures to overcome disadvantages.
experienced by racial minorities. Although these statutes have less direct bearing upon the meaning of Title VI, they do demonstrate that Congress believes race-conscious remedial measures to be both permissible and desirable under at least some circumstances. This, in turn, undercuts the likelihood that Congress intended to limit voluntary efforts to implement similar measures. For example, § 7(a) of the National Science Foundation Authorization Act, 1977, provides:

"The Director of the National Science Foundation shall initiate an intensive search for qualified women, members of minority groups, and handicapped individuals to fill executive level positions in the National Science Foundation. In carrying out the requirement of this subsection, the Director shall work closely with organizations which have been active in seeking greater recognition and utilization of the scientific and technical capabilities of minorities, women, and handicapped individuals. The Director shall improve the representation of minorities, women, and handicapped individuals on advisory committees, review panels, and all other mechanisms by which the scientific community provides assistance to the Foundation."

90 Stat. 2056, note following 42 U.S.C. 1873 (1976 ed.). Perhaps more importantly, the Act also authorizes the funding of Minority Centers for Graduate Education. Section 7(C)(2) of the Act, 90 Stat. 2056, requires that these Centers:

"(A) have substantial minority student enrollment;"

"(B) are geographically located near minority population centers;"

"(C) demonstrate a commitment to encouraging and assisting minority students, researchers, and faculty;"

"* * * *"

"(F) will serve as a regional resource in science and engineering for the minority community which the Center is designed to serve; and"

"(G) will develop joint educational programs with nearby undergraduate institutions of higher education which have a substantial minority student enrollment."

Once again, there is no indication in the legislative history of this Act or elsewhere that Congress saw any inconsistency between the race-conscious nature of such legislation and the meaning of Title VI. And, once again, it is unlikely in the extreme that a Congress which believed that it had commanded recipients of federal funds to be absolutely colorblind would itself expend federal funds in such a race-conscious manner. See also the Railroad Revitalization and Regulatory Reform Act of 1976, 45 U.S.C. § 801 et seq. (1976 ed.), 49 U.S.C. § 1657a et seq. (1976 ed.); the Emergency School Aid Act, 20 U.S.C. § 1601 et seq. (1976 ed.).


"It is not correct to say that Title VII prohibits employers from making race or national origin a factor for consideration at any stage in the process of obtaining employees. The legal definition of discrimination is an evolving one, but it is now well recognized in judicial opinions that the obligation of nondiscrimination, whether imposed by statute or by the Constitution, does not require and, in some circumstances, may not permit, obliviousness or indifference to the racial consequences of alternative courses of action which involve the application of outwardly neutral criteria."

42 Op.Att'y Gen. 405, 411 (1969). The federal courts agreed. See, e.g., Contractors Assn. of Eastern Pa. v. Secretary of Labor, 442 F.2d 159 (CA3), cert. denied, 404 U.S. 854 (1971) (which also held, 442 F.2d 173, that race-conscious affirmative action was permissible under Title VI); Southern Illinois Builders Assn. v. Ogilvie, 471 F.2d 680 (CA7 1972). Moreover, Congress, in enacting the 1972 amendments to Title VII, explicitly considered and rejected proposals to alter Exec.Order No. 11246 and the prevailing judicial interpretations of Title VII as permitting, and in some circumstances requiring, race-conscious action. See Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 U.Chic.L.Rev. 723, 747-757 (1972). The section-by-section analysis of the 1972 amendments to Title VII undertaken by the Conference Committee Report on H.R. 1746 reveals a resolve to accept the then (as now) prevailing judicial interpretations of the scope of Title VII:
"In any area where the new law does not address itself, or in any areas where a specific contrary intent is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII."


[Footnote 2/29]


[Footnote 2/30]

We do not pause to debate whether our cases establish a "two-tier" analysis, a "sliding scale" analysis, or something else altogether. It is enough for present purposes that strict scrutiny is applied at least in some cases.

[Footnote 2/31]

Of course, the fact that whites constitute a political majority in our Nation does not necessarily mean that active judicial scrutiny of racial classifications that disadvantage whites is inappropriate. *Cf. Castaneda v. Partida*, 430 U. S. 482, 430 U. S. 499-500 (1977); id. at 430 U. S. 501 (MARSHALL, J., concurring).

[Footnote 2/32]

"[T]he conclusion cannot be resisted, that no reason for [the refusal to issue permits to Chinese] exists except hostility to the race and nationality to which the petitioners belong. . . . The discrimination is, therefore, illegal. . . ."

[Footnote 2/33]

Indeed, even in *Plessy v. Ferguson*, the Court recognized that a classification by race that presumed one race to be inferior to another would have to be condemned. See 163 U. S. at 163 U. S. 544-551.

[Footnote 2/34]

Paradoxically, petitioner's argument is supported by the cases generally thought to establish the "strict scrutiny" standard in race cases, *Hirabayashi v. United States*, 320 U. S. 81 (1943), and *Korematsu v. United States*, 323 U. S. 214 (1944). In *Hirabayashi*, for example, the Court, responding to a claim that a racial classification was rational, sustained a racial classification solely on the basis of a conclusion in the double negative that it could not say that facts which might have been available "could afford no ground
for differentiating citizens of Japanese ancestry from other groups in the United States." 320 U.S. at 320 U. S. 101. A similar mode of analysis was followed in Korematsu, see 323 U.S. at 323 U. S. 224, even though the Court stated there that racial classifications were "immediately suspect," and should be subject to "the most rigid scrutiny." Id. at 323 U. S. 216.

[Footnote 2/35]

We disagree with our Brother POWELL's suggestion, ante at 438 U. S. 303, that the presence of "rival groups which can claim that they, too, are entitled to preferential treatment" distinguishes the gender cases or is relevant to the question of scope of judicial review of race classifications. We are not asked to determine whether groups other than those favored by the Davis program should similarly be favored. All we are asked to do is to pronounce the constitutionality of what Davis has done.

But, were we asked to decide whether any given rival group -- German-Americans for example -- must constitutionally be accorded preferential treatment, we do have a "principled basis," ante at 438 U. S. 296, for deciding this question, one that is well established in our cases: the Davis program expressly sets out four classes which receive preferred status. Ante at 438 U. S. 274. The program clearly distinguishes whites, but one cannot reason from this a conclusion that German-Americans, as a national group, are singled out for invidious treatment. And even if the Davis program had a differential impact on German-Americans, they would have no constitutional claim unless they could prove that Davis intended invidiously to discriminate against German-Americans. See Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U. S. 252, 429 U. S. 264-265 (1977); Washington v. Davis, 426 U. S. 229, 426 U. S. 238-241 (1976). If this could not be shown, then "the principle that calls for the closest scrutiny of distinctions in laws denying fundamental rights . . . is inapplicable," Katzenbach v. Morgan, 384 U. S. 641, 384 U. S. 657 (1966), and the only question is whether it was rational for Davis to conclude that the groups it preferred had a greater claim to compensation than the groups it excluded. See ibid.; San Antonio Independent School District v. Rodriguez, 411 U. S. 1, 411 U. S. 38-39 (1973) (applying Katzenbach test to state action intended to remove discrimination in educational opportunity). Thus, claims of rival groups, although they may create thorny political problems, create relatively simple problems for the courts.

[Footnote 2/36]


[Footnote 2/37]

In Albemarle, we approved "differential validation" of employment tests. See 422 U.S. at 422 U. S. 435. That procedure requires that an employer must ensure that a test score of, for example, 50 for a minority job applicant means the same thing as a score of 50 for a nonminority applicant. By implication, were it determined that a test score of 50 for a
minority corresponded in "potential for employment" to a 60 for whites, the test could not be used consistently with Title VII unless the employer hired minorities with scores of 50 even though he might not hire nonminority applicants with scores above 50 but below 60. Thus, it is clear that employers, to ensure equal opportunity, may have to adopt race-conscious hiring practices.

[Footnote 2/38]

Indeed, Titles VI and VII of the Civil Rights Act of 1964 put great emphasis on voluntarism in remedial action. See supra at 438 U. S. 336-338. And, significantly, the Equal Employment Opportunity Commission has recently proposed guidelines authorizing employers to adopt racial preferences as a remedial measure where they have a reasonable basis for believing that they might otherwise be held in violation of Title VII. See 42 Fed.Reg. 64826 (1977).

[Footnote 2/39]

"[T]he [Voting Rights] Act's prohibition . . . is not dependent upon proving past unconstitutional apportionments. . . ."

[Footnote 2/40]

"[T]he State is [not] powerless to minimize the consequences of racial discrimination by voters when it is regularly practiced at the polls."

[Footnote 2/41]

Our cases cannot be distinguished by suggesting, as our Brother POWELL does, that in none of them was anyone deprived of "the relevant benefit." Ante at 438 U. S. 304. Our school cases have deprived whites of the neighborhood school of their choice; our Title VII cases have deprived nondiscriminating employees of their settled seniority expectations; and UJO deprived the Hassidim of bloc-voting strength. Each of these injuries was constitutionally cognizable as is respondent's here.

[Footnote 2/42]

We do not understand MR. JUSTICE POWELL to disagree that providing a remedy for past racial prejudice can constitute a compelling purpose sufficient to meet strict scrutiny. See ante at 438 U. S. 305. Yet, because petitioner is a corporation administering a university, he would not allow it to exercise such power in the absence of "judicial, legislative, or administrative findings of constitutional or statutory violations." Ante at 438 U. S. 307. While we agree that reversal in this case would follow a fortiori had Davis been guilty of invidious racial discrimination or if a federal statute mandated that universities refrain from applying any admissions policy that had a disparate and unjustified racial impact, see, e.g., McDaniel v. Barresi, 402 U. S. 39 (1971); Franks v.
Bowman Transportation Co., 424 U. S. 747 (1976), we do not think it of constitutional significance that Davis has not been so adjudged.

Generally, the manner in which a State chooses to delegate governmental functions is for it to decide. Cf. Sweezy v. New Hampshire, 354 U. S. 234, 354 U. S. 256 (1957) (Frankfurter, J., concurring in result). California, by constitutional provision, has chosen to place authority over the operation of the University of California in the Board of Regents. See Cal.Const., Art. 9, § 9(a). Control over the University is to be found not in the legislature, but rather in the Regents who have been vested with full legislative (including policymaking), administrative, and adjudicative powers by the citizens of California. See ibid.; Ishimatsu v. Regents, 266 Cal.App.2d 854, 863-864, 72 Cal.Rptr. 756, 762-763 (1968); Goldberg v. Regents, 248 Cal.App.2d 867, 874, 57 Cal.Rptr. 463, 468 (1967); 30 Op.Cal.Atty. Gen. 162, 166 (1957) (“The Regents, not the legislature, have the general rulemaking or policymaking power in regard to the University”). This is certainly a permissible choice, see Sweezy, supra, and we, unlike our Brother POWELL, find nothing in the Equal Protection Clause that requires us to depart from established principle by limiting the scope of power the Regents may exercise more narrowly than the powers that may constitutionally be wielded by the Assembly.

Because the Regents can exercise plenary legislative and administrative power, it elevates form over substance to insist that Davis could not use race-conscious remedial programs until it had been adjudged in violation of the Constitution or an antidiscrimination statute. For, if the Equal Protection Clause required such a violation as a predicate, the Regents could simply have promulgated a regulation prohibiting disparate treatment not justified by the need to admit only qualified students, and could have declared Davis to have been in violation of such a regulation on the basis of the exclusionary effect of the admissions policy applied during the first two years of its operation. See infra at 438 U. S. 370.

[Footnote 2/43]


[Footnote 2/44]

Railway Mail Assn. held that a state statute forbidding racial discrimination by certain labor organizations did not abridge the Association’s due process rights secured by the Fourteenth Amendment, because that result

"would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color."
326 U.S. at 326 U. S. 94. That case thus established the principle that a State voluntarily could go beyond what the Fourteenth Amendment required in eliminating private racial discrimination.

[Footnote 2/45]

According to 89 schools responding to a questionnaire sent to 112 medical schools (all of the then-accredited medical schools in the United States except Howard and Meharry), substantial efforts to admit minority students did not begin until 1968. That year was the earliest year of involvement for 34% of the schools; an additional 66% became involved during the years 1969 to 1973. See C. Odegaard, Minorities in Medicine: From Receptive Passivity to Positive Action, 1966-1976, p. 19 (1977) (hereinafter Odegaard). These efforts were reflected in a significant increase in the percentage of minority M.D. graduates. The number of American Negro graduates increased from 2.2% in 1970 to 3.3% in 1973 and 5.0% in 1975. Significant percentage increases in the number of Mexican-American, American Indian, and mainland Puerto Rican graduates were also recorded during those years. Id. at 40.

The statistical information cited in this and the following notes was compiled by Government officials or medical educators, and has been brought to our attention in many of the briefs. Neither the parties nor the amici challenge the validity of the statistics alluded to in our discussion.

[Footnote 2/46]

D. Reitzes, Negroes and Medicine, pp. xxvii, 3 (1958).

[Footnote 2/47]

Between 1955 and 1964, for example, the percentage of Negro physicians graduated in the United States who were trained at these schools ranged from 69.0% to 75.8%. See Odegaard 19.

[Footnote 2/48]


[Footnote 2/49]


[Footnote 2/50]

See ante at 438 U. S. 276 n. 6 (opinion of POWELL, J.).


For example, over 40% of American-born Negro males aged 20 to 24 residing in California in 1970 were born in the South, and the statistic for females was over 48%. These statistics were computed from data contained in Census, supra, 438 U. S. 49, pt. 6, California, Tables 139, 140.


Congress and the Executive have also adopted a series of race-conscious programs, each predicated on an understanding that equal opportunity cannot be achieved by neutrality, because of the effects of past and present discrimination. See supra at 438 U. S. 348-349.

Negroes and Chicanos alone constitute approximately 22% of California's population. This percentage was computed from data contained in Census, supra, 438 U. S. 49, pt. 6, California, sec. 1,6-4, and Table 139.

The constitutionality of the special admissions program is buttressed by its restriction to only 16% of the positions in the Medical School, a percentage less than that of the minority population in California, see ibid., and to those minority applicants deemed
qualified for admission and deemed likely to contribute to the Medical School and the medical profession. Record 67. This is consistent with the goal of putting minority applicants in the position they would have been in if not for the evil of racial discrimination. Accordingly, this case does not raise the question whether even a remedial use of race would be unconstitutional if it admitted unqualified minority applicants in preference to qualified applicants or admitted, as a result of preferential consideration, racial minorities in numbers significantly in excess of their proportional representation in the relevant population. Such programs might well be inadequately justified by the legitimate remedial objectives. Our allusion to the proportional percentage of minorities in the population of the State administering the program is not intended to establish either that figure or that population universe as a constitutional benchmark. In this case, even respondent, as we understand him, does not argue that, if the special admissions program is otherwise constitutional, the allotment of 16 places in each entering class for special admittees is unconstitutionally high.

[Footnote 2/59]


[Footnote 2/60]

This percentage was computed from data presented in B. Waldman, Economic and Racial Disadvantage as Reflected in Traditional Medical School Selection Factors: A Study of 1976 Applicants to U.S. Medical Schools 34 (Table A-15), 42 (Table A-23) (Association of American Medical Colleges 1977).

[Footnote 2/61]

This figure was computed from data contained in Census, supra, 438 U. S. 49, pt. 1, United States Summary, Table 209.

[Footnote 2/62]

See Waldman, supra, 438 U. S. 60, at 10-14 (Figures 1-5).

[Footnote 2/63]

The excluded white applicant, despite MR. JUSTICE POWELL's contention to the contrary, ante at 438 U. S. 318 n. 52, receives no more or less "individualized consideration" under our approach than under his.

MR. JUSTICE WHITE.
I write separately concerning the question of whether Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq., provides for a private cause of action. Four Justices are apparently of the view that such a private cause of action exists, and four Justices assume it for purposes of this case. I am unwilling merely to assume an affirmative answer. If, in fact, no private cause of action exists, this Court and the lower courts as well are without jurisdiction to consider respondent's Title VI claim. As I see it, if we are not obliged to do so, it is at least advisable to address this threshold jurisdictional issue. See United States v. Griffin, 303 U. S. 226, 303 U. S. 229 (1938). [Footnote 3/1] Furthermore, just as it is inappropriate to address constitutional issues without determining whether statutory grounds urged before us are dispositive, it is at least questionable practice to adjudicate a novel and difficult statutory issue without first considering whether we have jurisdiction to decide it. Consequently, I address the question of whether respondent may bring suit under Title VI.

A private cause of action under Title VI, in terms both of

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the Civil Rights Act as a whole and that Title, would not be "consistent with the underlying purposes of the legislative scheme," and would be contrary to the legislative intent. Cort v. Ash, 422 U. S. 66, 422 U. S. 78 (1975). Title II, 42 U.S.C. § 2000a et seq., dealing with public accommodations, and Title VII, 42 U.S.C. § 2000e et seq. (1970 ed. and Supp. V), dealing with employment, proscribe private discriminatory conduct that, as of 1964, neither the Constitution nor other federal statutes had been construed to forbid. Both Titles carefully provided for private actions as well as for official participation in enforcement. Title III, 42 U.S.C. § 2000b et seq., and Title IV, 42 U.S.C. § 2000c et seq. (1970 ed and Supp. V), dealing with public facilities and public education, respectively, authorize suits by the Attorney General to eliminate racial discrimination in these areas. Because suits to end discrimination in public facilities and public education were already available under 42 U.S.C. § 1983, it was, of course, unnecessary to provide for private actions under Titles III and IV. But each Title carefully provided that its provisions for public actions would not adversely affect preexisting private remedies. § § 2000b-2 and 2000c-8.

The role of Title VI was to terminate federal financial support for public and private institutions or programs that discriminated on the basis of race. Section 601, 42 U.S.C. § 2000d, imposed the proscription that no person, on the grounds of race, color, or national origin, was to be excluded from or discriminated against under any program or activity receiving federal financial assistance. But there is no express provision for private actions to enforce Title VI, and it would be quite incredible if Congress, after so carefully attending to the matter of private actions in other Titles of the Act, intended silently to create a private cause of action to enforce Title VI.
It is also evident from the face of § 602, 42 U.S.C. § 2000d-1, that Congress intended the departments and agencies
to define and to refine, by rule or regulation, the general proscription of § 601, subject only to judicial review of agency action in accordance with established procedures. Section 602 provides for enforcement: every federal department or agency furnishing financial support is to implement the proscription by appropriate rule or regulation, each of which requires approval by the President. Termination of funding as a sanction for noncompliance is authorized, but only after a hearing and after the failure of voluntary means to secure compliance. Moreover, termination may not take place until the department or agency involved files with the appropriate committees of the House and Senate a full written report of the circumstances and the grounds for such action and 30 days have elapsed thereafter. Judicial review was provided, at least for actions terminating financial assistance.

Termination of funding was regarded by Congress as a serious enforcement step, and the legislative history is replete with assurances that it would not occur until every possibility for conciliation had been exhausted. [Footnote 3/2] To allow a private individual to sue to cut off funds under Title VI would compromise these assurances and short-circuit the procedural preconditions provided in Title VI. If the Federal Government may not cut off funds except pursuant to an agency rule, approved by the President, and presented to the appropriate committee of Congress for a layover period, and after voluntary means to achieve compliance have failed, it is inconceivable that Congress intended to permit individuals to circumvent these administrative prerequisites themselves.

Furthermore, although Congress intended Title VI to end federal financial support for racially discriminatory policies of not only public but also private institutions and programs, it is extremely unlikely that Congress, without a word indicating that it intended to do so, contemplated creating an independent, private statutory cause of action against all private, as well as public, agencies that might be in violation of the section. There is no doubt that Congress regarded private litigation as an important tool to attack discriminatory practices. It does not at all follow, however, that Congress anticipated new private actions under Title VI itself. Wherever a discriminatory program was a public undertaking, such as a public school, private remedies were already available under other statutes, and a private remedy under Title VI was unnecessary. Congress was well aware of this fact. Significantly, there was frequent reference to Simkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 059 (CA4 1963),
cert. denied, 376 U.S. 938 (1964), throughout the congressional deliberations. See, e.g., 110 Cong.Rec. 654 (1964) (Sen. Humphrey). Simkins held that, under appropriate circumstances, the operation of a private hospital with "massive use of public funds and extensive state-federal sharing in the common plan" constituted "state action" for the purposes of the Fourteenth Amendment. 323 F.2d 967. It was unnecessary, of course, to create a Title VI private action against private discriminators where they were already within the reach of existing private remedies. But when they were not -- and Simkins carefully disclaimed holding that "every subvention by the federal or state government automatically involves the beneficiary in state action,"

Footnote 3/3 ibid. [Footnote 3/3] -- it is difficult

to believe that Congress silently created a private remedy to terminate conduct that previously had been entirely beyond the reach of federal law.

For those who believe, contrary to my views, that Title VI was intended to create a stricter standard of colorblindness than the Constitution itself requires, the result of no private cause of action follows even more readily. In that case, Congress must be seen to have banned degrees of discrimination, as well as types of discriminators, not previously reached by law. A Congress careful enough to provide that existing private causes of action would be preserved (in Titles III and IV) would not leave for inference a vast new extension of private enforcement power. And a Congress so exceptionally concerned with the satisfaction of procedural preliminaries before confronting fund recipients with the choice of a cutoff or of stopping discriminating would not permit private parties to pose precisely that same dilemma in a greatly widened category of cases with no procedural requirements whatsoever.

Significantly, in at least three instances, legislators who played a major role in the passage of Title VI explicitly stated that a private right of action under Title VI does not exist. [Footnote 3/4]

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As an "indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one," Cort v. Ash, 422 U.S. at 422 U. S. 78, clearer statements cannot be imagined, and under Cort, "an explicit purpose to deny such cause of action [is] controlling." Id. at 422 U. S. 82. Senator Keating, for example, proposed a private "right to sue" for the "person suffering from discrimination"; but the Department of Justice refused to include it, and the Senator acquiesced. [Footnote 3/5] These are not neutral, ambiguous statements. They indicate the absence of a legislative intent to create a private remedy. Nor do any of these statements make nice distinctions between a private cause of action to enjoin discrimination and one to cut off funds, as MR. JUSTICE STEVENS and the three Justices who join his opinion apparently would. See post at 438 U. S. 419-420, n. 26. Indeed, it would be odd if they did, since the practical effect of either type of
private cause of action would be identical. If private suits to enjoin conduct allegedly violative of § 601 were permitted, recipients of federal funds would be presented with the choice of either ending what the court, rather than the agency, determined to be a discriminatory practice within the meaning of Title VI or refusing federal funds, and thereby escaping from the statute's jurisdictional predicate. [Footnote 3/6] This is precisely the same choice as would confront recipients if suit were brought to cut off funds. Both types of actions would equally jeopardize the administrative processes so carefully structured into the law.

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This Court has always required

"that the inference of such a private cause of action not otherwise authorized by the statute must be consistent with the evident legislative intent and, of course, with the effectuation of the purposes intended to be served by the Act."


Because each of my colleagues either has a different view or assumes a private cause of action, however, the merits of the Title VI issue must be addressed. My views in that regard, as well as my views with respect to the equal protection issue, are included in the joint opinion that my Brothers BRENNAN, MARSHALL, and BLACKMUN and I have filed. [Footnote 3/7]

[Footnote 3/1]

It is also clear from Griffin that "lack of jurisdiction . . . touching the subject matter of the litigation cannot be waived by the parties . . ." 303 U.S. at 303 U. S. 229. See also Mount Healthy City Bd. of Ed. v. Doyle, 429 U. S. 274, 429 U. S. 278 (1977); Louisville & Nashville R. Co. v. Mottley, 211 U. S. 149, 211 U. S. 152 (1908); Mansfield, C. & L. M. R. Co. v. Swan, 111 U. S. 379, 111 U. S. 382 (1884).

In Lau v. Nichols, 414 U. S. 563 (1974), we did adjudicate a Title VI claim brought by a class of individuals. But the existence of a private cause of action was not at issue. In addition, the understanding of MR. JUSTICE STEWART's concurring opinion, which observed that standing was not being contested, was that the standing alleged by petitioners was as third-party beneficiaries of the funding contract between the Department of Health, Education, and Welfare and the San Francisco United School District, a theory not alleged by the present respondent. Id. at 414 U. S. 571 n. 2.

Furthermore, the plaintiffs in Lau alleged jurisdiction under 42 U.S.C. § 1983, rather than directly under the provisions of Title VI, as does the plaintiff in this case. Although the
Court undoubtedly had an obligation to consider the jurisdictional question, this is surely not the first instance in which the Court has bypassed a jurisdictional problem not presented by the parties. Certainly the Court's silence on the jurisdictional question, when considered in the context of the indifference of the litigants to it and the fact that jurisdiction was alleged under § 1983, does not foreclose a reasoned conclusion that Title VI affords no private cause of action.

[Footnote 3/2]

"Yet, before that principle [that 'Federal funds are not to be used to support racial discrimination'] is implemented to the detriment of any person, agency, or State, regulations giving notice of what conduct is required must be drawn up by the agency administering the program. . . . Before such regulations become effective, they must be submitted to and approved by the President."

"Once having become effective, there is still a long road to travel before any sanction whatsoever is imposed. Formal action to compel compliance can only take place after the following has occurred: first, there must be an unsuccessful attempt to obtain voluntary compliance; second, there must be an administrative hearing; third, a written report of the circumstances and the grounds for such action must be filed with the appropriate committees of the House and Senate; and fourth, 30 days must have elapsed between such filing and the action denying benefits under a Federal program. Finally, even that action is by no means final, because it is subject to judicial review, and can be further postponed by judicial action granting temporary relief pending review in order to avoid irreparable injury. It would be difficult indeed to concoct any additional safeguards to incorporate in such a procedure."


"[T]he authority to cut off funds is hedged about with a number of procedural restrictions. . . . [There follow details of the preliminary steps.]

"In short, title VI is a reasonable, moderate, cautious, carefully worked out solution to a situation that clearly calls for legislative action."

Id. at 6544 (Sen. Humphrey).

"Actually, no action whatsoever can be taken against anyone until the Federal agency involved has advised the appropriate person of his failure to comply with nondiscrimination requirements and until voluntary efforts to secure compliance have failed."

Id. at 1519 (Rep. Celler) (emphasis added). See also remarks of Sen. Ribicoff (id. at 7066-7067); Sen. Proxmire (id. at 8345); en. Kuchel (id. at 6562). These safeguards were incorporated into 42 U.S.C. § 2000d-1.
This Court has never held that the mere receipt of federal or state funds is sufficient to make the recipient a federal or state actor. In *Norwood v. Harrison*, 413 U. S. 455 (1973), private schools that received state aid were held subject to the Fourteenth Amendment's ban on discrimination, but the Court's test required "tangible financial aid" with a "significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 413 U. S. 466.

The mandate of *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 365 U. S. 722 (1961), to sift facts and weigh circumstances of governmental support in each case to determine whether private or state action was involved, has not been abandoned for an automatic rule based on receipt of funds.

Contemporaneous with the congressional debates on the Civil Rights Act was this Court's decision in *Griffin v. School Board*, 377 U. S. 218 (1964). Tuition grants and tax concessions were provided for parents of students in private schools which discriminated racially. The Court found sufficient state action, but carefully limited its holding to the circumstances presented:

"[C]losing the Prince Edward schools and meanwhile contributing to the support of the private segregated white schools that took their place denied petitioners the equal protection of the laws."

*Id.* at 377 U. S. 232.

Hence, neither at the time of the enactment of Title VI nor at the present time, to the extent this Court has spoken, has mere receipt of state funds created state action. Moreover, *Simkins* has not met with universal approval among the United States Courts of Appeals. See cases cited in *Greco v. Orange Memorial Hospital Corp.*, 423 U. S. 1000, 1004 (1975) (WHITE, J., dissenting from denial of certiorari).

"Nowhere in this section do you find a comparable right of legal action for a person who feels he has been denied his rights to participate in the benefits of Federal funds. Nowhere. Only those who have been cut off can go to court and present their claim."


"[A] good case could be made that a remedy is provided for the State or local official who is practicing discrimination, but none is provided for the victim of the discrimination."

*Id.* at 6562 (Sen. Kuchel).
"Parenthetically, while we favored the inclusion of the right to sue on the part of the agency, the State, or the facility which was deprived of Federal funds, we also favored the inclusion of a provision granting the right to sue to the person suffering from discrimination. This was not included in the bill. However, both the Senator from Connecticut and I are grateful that our other suggestions were adopted by the Justice Department."

_Id._ at 7065 (Sen. Keating).

[Footnote 3/5]

_Ibid._

[Footnote 3/6]

As Senator Ribicoff stated:

"Sometimes those eligible for Federal assistance may elect to reject such aid, unwilling to agree to a nondiscrimination requirement. If they choose that course, the responsibility is theirs."

_Id._ at 7067.

[Footnote 3/7]

I also join Parts I, III-A, and V-C of MR. JUSTICE POWELL's opinion.

MR. JUSTICE MARSHALL.

I agree with the judgment of the Court only insofar as it permits a university to consider the race of an applicant in making admissions decisions. I do not agree that petitioner's admissions program violates the Constitution. For it must be remembered that, during most of the past 200 years, the Constitution, as interpreted by this Court, did not prohibit the most ingenious and pervasive forms of discrimination against the Negro. Now, when a State acts to remedy the effects of that legacy of discrimination, I cannot believe that this same Constitution stands as a barrier.

I

_A_

Three hundred and fifty years ago, the Negro was dragged to this country in chains to be sold into slavery. Uprooted from his homeland and thrust into bondage for forced labor,
the slave was deprived of all legal rights. It was unlawful to teach him to read; he could be sold away from his family and friends at the whim of his master; and killing or maiming him was not a crime. The system of slavery brutalized and dehumanized both master and slave. [Footnote 4/1]

The denial of human rights was etched into the American Colonies' first attempts at establishing self-government. When the colonists determined to seek their independence from England, they drafted a unique document cataloguing their grievances against the King and proclaiming as "self-evident" that "all men are created equal" and are endowed "with certain unalienable Rights," including those to "Life, Liberty and the pursuit of Happiness." The self-evident truths and the unalienable rights were intended, however, to apply only to white men. An earlier draft of the Declaration of Independence, submitted by Thomas Jefferson to the Continental Congress, had included among the charges against the King that

"[h]e has waged cruel war against human nature itself, violating its most sacred rights of life and liberty in the persons of a distant people who never offended him, captivating and carrying them into slavery in another hemisphere, or to incur miserable death in their transportation thither."

Franklin 88. The Southern delegation insisted that the charge be deleted; the colonists themselves were implicated in the slave trade, and inclusion of this claim might have made it more difficult to justify the continuation of slavery once the ties to England were severed. Thus, even as the colonists embarked on a course to secure their own freedom and equality, they ensured perpetuation of the system that deprived a whole race of those rights.

The implicit protection of slavery embodied in the Declaration of Independence was made explicit in the Constitution, which treated a slave as being equivalent to three-fifths of a person for purposes of apportioning representatives and taxes among the States. Art. I, § 2. The Constitution also contained a clause ensuring that the "Migration or Importation" of slaves into the existing States would be legal until at least 1808, Art. I, § 9, and a fugitive slave clause requiring that, when a slave escaped to another State, he must be returned on the claim of the master, Art. IV, § 2. In their declaration of the principles that were to provide the cornerstone of the new Nation, therefore, the Framers made it plain that "we the people," for whose protection the Constitution was designed, did not include those whose skins were the wrong color. As Professor John Hope Franklin has observed, Americans

"proudly accepted the challenge and responsibility of their new political freedom by establishing the machinery and safeguards that insured the continued enslavement of blacks."
The individual States likewise established the machinery to protect the system of slavery through the promulgation of the Slave Codes, which were designed primarily to defend the property interest of the owner in his slave. The position of the Negro slave as mere property was confirmed by this Court in @ 60 U. S. 451. The Court further concluded that Negroes were not intended to be included as citizens under the Constitution, but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior that they had no rights which the white man was bound to respect . . . ."

Id. at 60 U. S. 407.

B

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value."

@ 83 U. S. 70 (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to reenslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and, finally, the white primary.

Congress responded to the legal disabilities being imposed
in the Southern States by passing the Reconstruction Acts and the Civil Rights Acts. Congress also responded to the needs of the Negroes at the end of the Civil War by establishing the Bureau of Refugees, Freedmen, and Abandoned Lands, better known as the Freedmen's Bureau, to supply food, hospitals, land, and education to the newly freed slaves. Thus, for a time, it seemed as if the Negro might be protected from the continued denial of his civil rights, and might be relieved of the disabilities that prevented him from taking his place as a free and equal citizen.

That time, however, was short-lived. Reconstruction came to a close, and, with the assistance of this Court, the Negro was rapidly stripped of his new civil rights. In the words of C. Vann Woodward:

"By narrow and ingenious interpretation [the Supreme Court's] decisions over a period of years had whittled away a great part of the authority presumably given the government for protection of civil rights."

Woodward 139.

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. See, e.g., Slaughter-House Cases, supra; United States v. Reese, 92 U. S. 214 (1876); United States v. Cruikshank, 92 U. S. 542 (1876). Then, in the notorious Civil Rights Cases, 109 U. S. 3 (1883), the Court strangled Congress' efforts to use its power to promote racial equality. In those cases, the Court invalidated sections of the Civil Rights Act of 1875 that made it a crime to deny equal access to "inns, public conveyances, theatres and other places of public amusement." Id. at 109 U. S. 10. According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. Id. at 109 U. S. 24-25.

"When a man has emerged from slavery, and, by the aid of beneficent legislation, has shaken off the inseparable concomitants of that state," the Court concluded,

"there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws. . . ."
Id. at 109 U. S. 25. As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws, but instead

"sought to accomplish in reference to that race . . . -- what had already been done in every State of the Union for the white race -- to secure and protect rights belonging to them as freemen and citizens; nothing more."

Id. at 109 U. S. 61.

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in Plessy v. Ferguson, 163 U. S. 537 (1896). In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended

"to abolish distinctions based upon color, or to enforce social, as distinguished from political, equality, or a commingling of the two races upon terms unsatisfactory to either."

Id. at 163 U. S. 544. Ignoring totally the realities of the positions of the two races, the Court remarked:

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it."

Id. at 163 U. S. 551.

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. He noted that the "real meaning" of the legislation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." Id. at 163 U. S. 560. He expressed his fear that, if like laws were enacted in other States, "the effect would be in the highest degree mischievous." Id. at 163 U. S. 563. Although slavery would have disappeared, the States would retain the power

"to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens. . . ."

Ibid.
The fears of Mr. Justice Harlan were soon to be realized. In the wake of *Plessy*, many States expanded their Jim Crow laws, which had, up until that time, been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for Negroes and whites, which required that textbooks used by children of one race be kept separate from those used by the other, and which required that Negro and white prostitutes be kept in separate districts. In 1898, after *Plessy*, the Charlestown News and Courier printed a parody of Jim Crow laws:

"'If there must be Jim Crow cars on the railroads, there should be Jim Crow cars on the street railways. Also on all passenger boats. . . . If there are to be Jim Crow cars, moreover, there should be Jim Crow waiting saloons at all stations, and Jim Crow eating houses. . . . There should be Jim Crow sections of the jury box, and a separate Jim Crow dock and witness stand in every court -- and a Jim Crow Bible for colored witnesses to kiss.'"

Woodward 68. The irony is that, before many years had passed, with the exception of the Jim Crow witness stand,

"all the improbable applications of the principle suggested by the editor in derision had been put into practice -- down to and including the Jim Crow Bible."

*Id.* at 69.

Nor were the laws restricting the rights of Negroes limited

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solely to the Southern States. In many of the Northern States, the Negro was denied the right to vote, prevented from serving on juries, and excluded from theaters, restaurants, hotels, and inns. Under President Wilson, the Federal Government began to require segregation in Government buildings; desks of Negro employees were curtained off; separate bathrooms and separate tables in the cafeterias were provided; and even the galleries of the Congress were segregated. When his segregationist policies were attacked, President Wilson responded that segregation was "*not humiliating, but a benefit,*" and that he was "*rendering [the Negroes] more safe in their possession of office, and less likely to be discriminated against.*" *Kluger* 91.

The enforced segregation of the races continued into the middle of the 20th century. In both World Wars, Negroes were, for the most part, confined to separate military units; it was not until 1948 that an end to segregation in the military was ordered by President Truman. And the history of the exclusion of Negro children from white public schools is too well known and recent to require repeating here. That Negroes were deliberately excluded from public graduate and professional schools -- and thereby denied the opportunity to become doctors, lawyers, engineers, and the like is also well established. It
is, of course, true that some of the Jim Crow laws (which the decisions of this Court had helped to foster) were struck down by this Court in a series of decisions leading up to Brown v. Board of Education, 347 U. S. 483 (1954). See, e.g., Morgan v. Virginia, 328 U. S. 373 (1946); Sweatt v. Painter, 339 U. S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U. S. 637 (1950). Those decisions, however, did not automatically end segregation, nor did they move Negroes from a position of legal inferiority to one of equality. The legacy of years of slavery and of years of second-class citizenship in the wake of emancipation could not be so easily eliminated.

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II

The position of the Negro today in America is the tragic but inevitable consequence of centuries of unequal treatment. Measured by any benchmark of comfort or achievement, meaningful equality remains a distant dream for the Negro.

A Negro child today has a life expectancy which is shorter by more than five years than that of a white child. [Footnote 4/2] The Negro child's mother is over three times more likely to die of complications in childbirth, [Footnote 4/3] and the infant mortality rate for Negroes is nearly twice that for whites. [Footnote 4/4] The median income of the Negro family is only 60% that of the median of a white family, [Footnote 4/5] and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites. [Footnote 4/6]

When the Negro child reaches working age, he finds that America offers him significantly less than it offers his white counterpart. For Negro adults, the unemployment rate is twice that of whites, [Footnote 4/7] and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. [Footnote 4/8] A Negro male who completes four years of college can expect a median annual income of merely $110 more than a white male who has only a high school diploma. [Footnote 4/9] Although Negroes represent 11.5% of the population, [Footnote 4/10] they are only 1.2% of the lawyers and judges, 2% of the physicians, 2.3% of the dentists, 1.1% of the engineers and 2.6% of the college and university professors. [Footnote 4/11]

The relationship between those figures and the history of unequal treatment afforded to the Negro cannot be denied. At every point from birth to death, the impact of the past is reflected in the still disfavored position of the Negro.

In light of the sorry history of discrimination and its devastating impact on the lives of Negroes, bringing the Negro into the mainstream of American life should be a state
interest of the highest order. To fail to do so is to ensure that America will forever remain a divided society.

III

I do not believe that the Fourteenth Amendment requires us to accept that fate. Neither its history nor our past cases lend any support to the conclusion that a university may not remedy the cumulative effects of society's discrimination by giving consideration to race in an effort to increase the number and percentage of Negro doctors.

A

This Court long ago remarked that

"in any fair and just construction of any section or phrase of these [Civil War] amendments, it is necessary to look to the purpose which we have said was the pervading spirit of them all, the evil which they were designed to remedy. . . ."

Slaughter-House Cases, 16 Wall. at 83 U. S. 72. It is plain that the Fourteenth Amendment was not intended to prohibit measures designed to remedy the effects of the Nation's past treatment of Negroes. The Congress that passed the Fourteenth Amendment is the same Congress that passed the 1866 Freedmen's Bureau Act, an Act that provided many of its benefits only to Negroes. Act of July 16, 1866, ch. 200, 14 Stat. 173; see supra at 438 U. S. 391. Although the Freedmen's Bureau legislation provided aid for refugees, thereby including white persons within some of the relief measures, 14 Stat. 174; see also Act of Mar. 3, 1865, ch. 90, 13 Stat. 507, the bill was regarded, to the dismay of many Congressmen, as "solely and entirely for the freedmen, and to the exclusion of all other persons. . . ." Cong.Globe, 39th Cong., 1st Sess., 544 (1866) (remarks of Rep. Taylor). See also id. at 634-635 (remarks of Rep. Ritter); id. at App. 78, 80-81 (remarks of Rep. Chandler). Indeed, the bill was bitterly opposed on the ground that it "undertakes to make the negro in some respects . . . superior. . . ., and gives them favors that the poor white boy in the North cannot get." Id. at 401 (remarks of Sen. McDougall). See also id. at 319 (remarks of Sen. Hendricks); id. at 362 (remarks of Sen. Saulsbury); id. at 397 (remarks of Sen. Willey); id. at 544 (remarks of Rep. Taylor). The bill's supporters defended it not by rebutting the claim of special treatment, but by pointing to the need for such treatment:

"The very discrimination it makes between 'destitute and suffering' negroes and destitute and suffering white paupers proceeds upon the distinction that, in the omitted case, civil rights and immunities are already sufficiently protected by the possession of political power, the absence of which in the case provided for necessitates governmental protection."
Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. Id. at 421, 688. President Johnson vetoed this bill, and also a subsequent bill that contained some modifications; one of his principal objections to both bills was that they gave special benefits to Negroes. 8 Messages and Papers of the Presidents 3596, 3599, 3620, 3623 (1897). Rejecting the concerns of the President and the bill's opponents, Congress overrode the President's second veto. Cong.Globe, 39th Cong., 1st Sess., 3842, 3850 (1866).

Since the Congress that considered and rejected the objections to the 1866 Freedmen's Bureau Act concerning special relief to Negroes also proposed the Fourteenth Amendment, it is inconceivable that the Fourteenth Amendment was intended to prohibit all race-conscious relief measures. It "would be a distortion of the policy manifested in that amendment, which was adopted to prevent state legislation designed to perpetuate discrimination on the basis of race or color,"

Railway Mail Assn. v. Corsi, 326 U. S. 88, 326 U. S. 94 (1945), to hold that it barred state action to remedy the effects of that discrimination. Such a result would pervert the intent of the Framers by substituting abstract equality for the genuine equality the Amendment was intended to achieve.

B

As has been demonstrated in our joint opinion, this Court's past cases establish the constitutionality of race-conscious remedial measures. Beginning with the school desegregation cases, we recognized that, even absent a judicial or legislative finding of constitutional violation, a school board constitutionally could consider the race of students in making school assignment decisions. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U. S. 1, 402 U. S. 16 (1971); McDaniel v. Barresi, 402 U. S. 39, 402 U. S. 41 (1971). We noted, moreover, that a "flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. As we have held in Swann, the Constitution does not compel any particular degree of..."
racial balance or mixing, but when past and continuing constitutional violations are found, some ratios are likely to be useful as starting points in shaping a remedy. An absolute prohibition against use of such a device -- even as a starting point -- contravenes the implicit command of *Green v. County School Board*, 391 U. S. 430 (1968), that all reasonable methods be available to formulate an effective remedy."


Only last Term, in *United Jewish Organizations v. Carey*, 430 U. S. 144 (1977), we upheld a New York reapportionment plan that was deliberately drawn on the basis of race to enhance the electoral power of Negroes and Puerto Ricans; the plan had the effect of diluting the electoral strength of the Hasidic Jewish community. We were willing in *UJO* to sanction the remedial use of a racial classification even though it disadvantaged otherwise "innocent" individuals. In another case last Term, *Califano v. Webster*, 430 U. S. 313 (1977), the Court upheld a provision in the Social Security laws that discriminated against men because its purpose was "the permissible one of redressing our society's longstanding disparate treatment of women." Id. at 430 U. S. 317, quoting *Califano v. Goldfarb*, 430 U. S. 199, 430 U. S. 209 n. 8 (1977) (plurality opinion). We thus recognized the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications.

Nothing in those cases suggests that a university cannot similarly act to remedy past discrimination. [Footnote 4/12] It is true that,

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in both *UJO* and *Webster*, the use of the disfavored classification was predicated on legislative or administrative action, but in neither case had those bodies made findings that there had been constitutional violations or that the specific individuals to be benefited had actually been the victims of discrimination. Rather, the classification in each of those cases was based on a determination that the group was in need of the remedy because of some type of past discrimination. There is thus ample support for the conclusion that a university can employ race-conscious measures to remedy past societal discrimination without the need for a finding that those benefited were actually victims of that discrimination.

IV

While I applaud the judgment of the Court that a university may consider race in its admissions process, it is more than a little ironic that, after several hundred years of class-based discrimination against Negroes, the Court is unwilling to hold that a class-based remedy for that discrimination is permissible. In declining to so hold, today's judgment ignores the fact that, for several hundred years, Negroes have been discriminated against
not as individuals, but rather solely because of the color of their skins. It is unnecessary in 20th-century America to have individual Negroes demonstrate that they have been victims of racial discrimination; the racism of our society has been so pervasive that none, regardless of wealth or position, has managed to escape its impact. The experience of Negroes in America has been different in kind, not just in degree, from that of other ethnic groups. It is not merely the history of slavery alone, but also that a whole people were marked as inferior by the law. And that mark has endured. The dream of America as the great melting pot has not been realized for the Negro; because of his skin color, he never even made it into the pot.

These differences in the experience of the Negro make it difficult for me to accept that Negroes cannot be afforded greater protection under the Fourteenth Amendment where it is necessary to remedy the effects of past discrimination. In the Civil Rights Cases, supra, the Court wrote that the Negro emerging from slavery must cease "to be the special favorite of the laws." 109 U.S. at 109 U. S. 25; see supra at 438 U. S. 392. We cannot, in light of the history of the last century, yield to that view. Had the Court, in that decision and others, been willing to "do for human liberty and the fundamental rights of American citizenship what it did . . . for the protection of slavery and the rights of the masters of fugitive slaves," 109 U.S. at 109 U. S. 53 (Harlan, J., dissenting), we would not need now to permit the recognition of any "special wards."

Most importantly, had the Court been willing in 1896, in Plessy v. Ferguson, to hold that the Equal Protection Clause forbids differences in treatment based on race, we would not be faced with this dilemma in 1978. We must remember, however, that the principle that the "Constitution is colorblind" appeared only in the opinion of the lone dissenter. 163 U.S. at 163 U. S. 559. The majority of the Court rejected the principle of color blindness, and for the next 60 years, from Plessy to Brown v. Board of Education, ours was a Nation where, by law, an individual could be given "special" treatment based on the color of his skin.

It is because of a legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available to him or her, we must be willing
to take steps to open those doors. I do not believe that anyone can truly look into America's past and still find that a remedy for the effects of that past is impermissible.

It has been said that this case involves only the individual, Bakke, and this University. I doubt, however, that there is a computer capable of determining the number of persons and institutions that may be affected by the decision in this case. For example, we are told by the Attorney General of the United States that at least 27 federal agencies have adopted regulations requiring recipients of federal funds to take

"affirmative action to overcome the effects of conditions which resulted in limiting participation . . . by persons of a particular race, color, or national origin."

Supplemental Brief for United States as Amicus Curiae 16 (emphasis added). I cannot even guess the number of state and local governments that have set up affirmative action programs, which may be affected by today's decision.

I fear that we have come full circle. After the Civil War, our Government started several "affirmative action" programs. This Court, in the Civil Rights Cases and Plessy v. Ferguson, destroyed the movement toward complete equality. For almost a century, no action was taken, and this nonaction was with the tacit approval of the courts. Then we had Brown v. Board of Education and the Civil Rights Acts of Congress, followed by numerous affirmative action programs. Now, we have this Court again stepping in, this time to stop affirmative action programs of the type used by the University of California.

[Footnote 4/1]


[Footnote 4/2]


[Footnote 4/3]

Id. at 70 (Table 102).

[Footnote 4/4]

Ibid.
[Footnote 4/5]

U.S. Dept. of Commerce, Bureau of the Census, Current Population Reports, Series P-60, No. 107, p. 7 (1977) (Table 1).

[Footnote 4/6]

*Id.* at 20 (Table 14).

[Footnote 4/7]


[Footnote 4/8]


[Footnote 4/9]


[Footnote 4/10]


[Footnote 4/11]

*Id.* at 407-408 (Table 662) (based on 1970 census).

[Footnote 4/12]

Indeed, the action of the University finds support in the regulations promulgated under Title VI by the Department of Health, Education, and Welfare and approved by the President, which authorize a federally funded institution to take affirmative steps to overcome past discrimination against groups even where the institution was not guilty of prior discrimination. 45 CFR § 80.3(b)(6)(ii) (1977).

MR. JUSTICE BLACKMUN.

I participate fully, of course, in the opinion, *ante* p. 438 U. S. 324, that bears the names of my Brothers BRENNAN, WHITE, MARSHALL, and myself. I add only some general observations that hold particular significance for me, and then a few comments on equal protection.
At least until the early 1970's, apparently only a very small number, less than 2%, of the physicians, attorneys, and medical and law students in the United States were members of what we now refer to as minority groups. In addition, approximately three-fourths of our Negro physicians were trained at only two medical schools. If ways are not found to remedy that situation, the country can never achieve its professed goal of a society that is not race-conscious.

I yield to no one in my earnest hope that the time will come when an "affirmative action" program is unnecessary and is, in truth, only a relic of the past. I would hope that we could reach this stage within a decade, at the most. But the story of Brown v. Board of Education, 347 U. S. 483 (1954), decided almost a quarter of a century ago, suggests that that hope is a slim one. At some time, however, beyond any period of what some would claim is only transitional inequality, the United States must and will reach a stage of maturity where action along this line is no longer necessary. Then persons will be regarded as persons, and discrimination of the type we address today will be an ugly feature of history that is instructive, but that is behind us.

The number of qualified, indeed highly qualified, applicants for admission to existing medical schools in the United States far exceeds the number of places available. Wholly apart from racial and ethnic considerations, therefore, the selection process inevitably results in the denial of admission to many qualified persons, indeed, to far more than the number of those who are granted admission. Obviously, it is a denial to the deserving. This inescapable fact is brought into sharp focus here because Allan Bakke is not himself charged with discrimination, and yet is the one who is disadvantaged, and because the Medical School of the University of California at Davis itself is not charged with historical discrimination.

One theoretical solution to the need for more minority members in higher education would be to enlarge our graduate schools. Then all who desired and were qualified could enter, and talk of discrimination would vanish. Unfortunately, this is neither feasible nor realistic. The vast resources that apparently would be required simply are not available. And the need for more professional graduates, in the strict numerical sense, perhaps has not been demonstrated at all.

There is no particular or real significance in the 84-16 division at Davis. The same theoretical, philosophical, social, legal, and constitutional considerations would necessarily apply to the case if Davis' special admissions program had focused on any lesser number, that is, on 12 or 8 or 4 places or, indeed, on only 1.
It is somewhat ironic to have us so deeply disturbed over a program where race is an element of consciousness, and yet to be aware of the fact, as we are, that institutions of higher learning, albeit more on the undergraduate than the graduate level, have given conceded preferences up to a point to those possessed of athletic skills, to the children of alumni, to the affluent who may bestow their largess on the institutions, and to those having connections with celebrities, the famous, and the powerful.

Programs of admission to institutions of higher learning are basically a responsibility for academicians and for administrators and the specialists they employ. The judiciary, in contrast, is ill-equipped and poorly trained for this. The administration and management of educational institutions are beyond the competence of judges and are within the special competence of educators, provided always that the educators perform within legal and constitutional bounds. For me, therefore, interference by the judiciary must be the rare exception, and not the rule.

II

I, of course, accept the propositions that (a) Fourteenth Amendment rights are personal; (b) racial and ethnic distinctions,

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where they are stereotypes, are inherently suspect and call for exacting judicial scrutiny; (c) academic freedom is a special concern of the First Amendment; and (d) the Fourteenth Amendment has expanded beyond its original 1868 concept, and now is recognized to have reached a point where, as MR. JUSTICE POWELL states, ante at 438 U. S. 293, quoting from the Court's opinion in McDonald v. Santa Fe Trail Transp. Co., 427 U. S. 273, 427 U. S. 296 (1976), it embraces a "broader principle."

This enlargement does not mean for me, however, that the Fourteenth Amendment has broken away from its moorings and its original intended purposes. Those original aims persist. And that, in a distinct sense, is what "affirmative action," in the face of proper facts, is all about. If this conflicts with idealistic equality, that tension is original Fourteenth Amendment tension, constitutionally conceived and constitutionally imposed, and it is part of the Amendment's very nature until complete equality is achieved in the area. In this sense, constitutional equal protection is a shield.

I emphasize in particular that the decided cases are not easily to be brushed aside. Many, of course, are not precisely on point, but neither are they off point. Racial factors have been given consideration in the school desegregation cases, in the employment cases, in Lau v. Nichols, 414 U. S. 563 (1974), and in United Jewish Organizations v. Carey, 430 U. S. 144 (1977). To be sure, some of these may be "distinguished" on the ground that victimization was directly present. But who is to say that victimization is not present for some members of today's minority groups, although it is of a lesser and perhaps different degree. The petitioners in United Jewish Organizations certainly complained bitterly of
their reapportionment treatment, and I rather doubt that they regard the "remedy" there imposed as one that was "to improve" the group's ability to participate, as MR. JUSTICE POWELL describes it, ante at 438 U. S. 305. And surely, in Lau v. Nichols, we looked to ethnicity.

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I am not convinced, as MR. JUSTICE POWELL seems to be, that the difference between the Davis program and the one employed by Harvard is very profound, or constitutionally significant. The line between the two is a thin and indistinct one. In each, subjective application is at work. Because of my conviction that admission programs are primarily for the educators, I am willing to accept the representation that the Harvard program is one where good faith in its administration is practiced, as well as professed. I agree that such a program, where race or ethnic background is only one of many factors, is a program better formulated than Davis' two-track system. The cynical, of course, may say that, under a program such as Harvard's, one may accomplish covertly what Davis concedes it does openly. I need not go that far, for, despite its two-track aspect, the Davis program, for me, is within constitutional bounds, though perhaps barely so. It is surely free of stigma, and, as in United Jewish Organizations, I am not willing to infer a constitutional violation.

It is worth noting, perhaps, that governmental preference has not been a stranger to our legal life. We see it in veterans' preferences. We see it in the aid-to-the-handicapped programs. We see it in the progressive income tax. We see it in the Indian programs. We may excuse some of these on the ground that they have specific constitutional protection or, as with Indians, that those benefited are wards of the Government. Nevertheless, these preferences exist, and may not be ignored. And in the admissions field, as I have indicated, educational institutions have always used geography, athletic ability, anticipated financial largess, alumni pressure, and other factors of that kind.

I add these only as additional components on the edges of the central question as to which I join my Brothers BRENNAN, WHITE, and MARSHALL in our more general approach. It is gratifying to know that the Court at least finds it constitutional for an academic institution to take race and ethnic background into consideration as one factor, among many, in

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the administration of its admissions program. I presume that that factor always has been there, though perhaps not conceded or even admitted. It is a fact of life, however, and a part of the real world of which we are all a part. The sooner we get down the road toward accepting and being a part of the real world, and not shutting it out and away from us, the sooner will these difficulties vanish from the scene.

I suspect that it would be impossible to arrange an affirmative action program in a racially neutral way and have it successful. To ask that this be so is to demand the
impossible. In order to get beyond racism, we must first take account of race. There is no other way. And in order to treat some persons equally, we must treat them differently. We cannot -- we dare not -- let the Equal Protection Clause perpetuate racial supremacy.

So the ultimate question, as it was at the beginning of this litigation, is: among the qualified, how does one choose?

A long time ago, as time is measured for this Nation, a Chief Justice, both wise and far-sighted, said:

"In considering this question, then, we must never forget, that it is a constitution we are expounding."

@ 17 U. S. 407 (1819) (emphasis in original). In the same opinion, the Great Chief Justice further observed:

"Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

Id. at 17 U. S. 421. More recently, one destined to become a Justice of this Court observed:

"The great generalities of the constitution have a content and a significance that vary from age to age."


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And an educator who became a President of the United States said:

"But the Constitution of the United States is not a mere lawyers' document: it is a vehicle of life, and its spirit is always the spirit of the age."

W. Wilson, Constitutional Government in the United States 69 (1911).

These precepts of breadth and flexibility and ever-present modernity are basic to our constitutional law. Today, again, we are expounding a Constitution. The same principles that governed McCulloch's case in 1819 govern Bakke's case in 1978. There can be no other answer.

MR. JUSTICE STEVENS, with whom THE CHIEF JUSTICE, MR. JUSTICE STEWART, and MR. JUSTICE REHNQUIST join, concurring in the judgment in part and dissenting in part.
It is always important at the outset to focus precisely on the controversy before the Court. [Footnote 5/1] It is particularly important to do so in this case, because correct identification of the issues will determine whether it is necessary or appropriate to express any opinion about the legal status of any admissions program other than petitioner's.

I

This is not a class action. The controversy is between two specific litigants. Allan Bakke challenged petitioner's special admissions program, claiming that it denied him a place in medical school because of his race in violation of the Federal and California Constitutions and of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. The California Supreme Court upheld his challenge and ordered him admitted. If the state court was correct in its view that the University's special program was illegal, and that Bakke was therefore unlawfully excluded from the Medical School because of his race, we should affirm its judgment, regardless of our views about the legality of admissions programs that are not now before the Court.

The judgment as originally entered by the trial court contained four separate paragraphs, two of which are of critical importance. [Footnote 5/2] Paragraph 3 declared that the University's special admissions program violated the Fourteenth Amendment, the State Constitution, and Title VI. The trial court did not order the University to admit Bakke, because it concluded that Bakke had not shown that he would have been admitted if there had been no special program. Instead, in paragraph 2 of its judgment, it ordered the University to consider Bakke's application for admission without regard to his race or the race of any other applicant. The order did not include any broad prohibition against any use of race in the admissions process; its terms were clearly limited to the University's consideration of Bakke's application. [Footnote 5/3] Because the University has since been ordered to admit Bakke, paragraph 2 of the trial court's order no longer has any significance.

The California Supreme Court, in a holding that is not challenged, ruled that the trial court incorrectly placed the burden on Bakke of showing that he would have been admitted in the absence of discrimination. The University then conceded "that it [could] not meet the burden of proving that the special admissions program did not result in Mr. Bakke's failure to be admitted." [Footnote 5/4] Accordingly, the California Supreme Court directed the trial court to enter judgment ordering Bakke's admission. [Footnote 5/5] Since that order superseded paragraph
2 of the trial court's judgment, there is no outstanding injunction forbidding any consideration of racial criteria in processing applications.

It is therefore perfectly clear that the question whether race can ever be used as a factor in an admissions decision is not an issue in this case, and that discussion of that issue is inappropriate. [Footnote 5/6]

II

Both petitioner and respondent have asked us to determine the legality of the University's special admissions program by reference to the Constitution. Our settled practice, however, is to avoid the decision of a constitutional issue if a case can be fairly decided on a statutory ground.

"If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable."

Spector Motor Co. v. McLaughlin, 323 U. S. 101, 323 U. S. 105. [Footnote 5/7] The more important the issue, the more force there is to this doctrine. [Footnote 5/8] In this case, we are presented with a constitutional question of undoubted and unusual importance. Since, however, a dispositive statutory claim was raised at the very inception of this case, and squarely decided in the portion of the trial court judgment affirmed by the California Supreme Court, it is our plain duty to confront it. Only if petitioner should prevail on the statutory issue would it be necessary to decide whether the University's admissions program violated the Equal Protection Clause of the Fourteenth Amendment.

III

Section 601 of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000d, provides:

"No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

The University, through its special admissions policy, excluded Bakke from participation in its program of medical education because of his race. The University also acknowledges that it was, and still is, receiving federal financial assistance. [Footnote 5/9] The plain language of the statute therefore requires affirmance of the judgment below. A different result
cannot be justified unless that language misstates the actual intent of the Congress that enacted the statute or the statute is not enforceable in a private action. Neither conclusion is warranted.

Title VI is an integral part of the far-reaching Civil Rights Act of 1964. No doubt, when this legislation was being debated, Congress was not directly concerned with the legality of "reverse discrimination" or "affirmative action" programs. Its attention was focused on the problem at hand, the "glaring . . . discrimination against Negroes which exists throughout our Nation," [Footnote 5/10] and, with respect to Title VI, the federal funding of segregated facilities. [Footnote 5/11] The genesis of the legislation, however, did not limit the breadth of the solution adopted. Just as Congress responded to the problem of employment discrimination by enacting a provision that protects all races, see McDonald v. Santa Fe Trail Transp. Co., 427 U. S. 273, 427 U. S. 279, [Footnote 5/12] so, too, its answer to the problem of federal funding of segregated facilities stands as a broad prohibition against the exclusion of any individual from a federally funded program "on the ground of race." In the words of the House Report, Title VI stands for

"the general principle that no person . . . be excluded from participation . . . on the ground of race, color, or national origin under any program or activity receiving Federal financial assistance."

H.R.Rep. No. 914, 88th

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Cong., 1st Sess. pt. 1, p. 25 (1963) (emphasis added). This same broad view of Title VI and § 601 was echoed throughout the congressional debate and was stressed by every one of the major spokesmen for the Act. [Footnote 5/13]

Petitioner contends, however, that exclusion of applicants on the basis of race does not violate Title VI if the exclusion carries with it no racial stigma. No such qualification or limitation of § 601's categorical prohibition of "exclusion" is justified by the statute or its history. The language of the entire section is perfectly clear; the words that follow "excluded from" do not modify or qualify the explicit outlawing of any exclusion on the stated grounds.

The legislative history reinforces this reading. The only suggestion that § 601 would allow exclusion of nonminority applicants came from opponents of the legislation, and then only by way of a discussion of the meaning of the word "discrimination." [Footnote 5/14] The opponents feared that the term "discrimination"

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would be read as mandating racial quotas and "racially balanced" colleges and universities, and they pressed for a specific definition of the term in order to avoid this
possibility. [Footnote 5/15] In response, the proponents of the legislation gave repeated assurances that the Act would be "colorblind" in its application. [Footnote 5/16] Senator Humphrey, the Senate floor manager for the Act, expressed this position as follows:

"[T]he word 'discrimination' has been used in many a court case. What it really means in the bill is a distinction in treatment . . . given to different individuals because of their different race, religion or national origin. . . ."

"The answer to this question [what was meant by 'discrimination'] is that if race is not a factor, we do not have to worry about discrimination because of race. . . . The Internal Revenue Code does not provide that colored people do not have to pay taxes, or that they can pay their taxes 6 months later than everyone else."


"[I]f we started to treat Americans as Americans, not as fat ones, thin ones, short ones, tall ones, brown ones, green ones, yellow ones, or white ones, but as Americans. If we did that, we would not need to worry about discrimination."

_Id._ at 5866.

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In giving answers such as these, it seems clear that the proponents of Title VI assumed that the Constitution itself required a colorblind standard on the part of government, [Footnote 5/17] but that does not mean that the legislation only codifies an existing constitutional prohibition. The statutory prohibition against discrimination in federally funded projects contained in § 601 is more than a simple paraphrasing of what the Fifth or Fourteenth Amendment would require. The Act's proponents plainly considered Title VI consistent with their view of the Constitution, and they sought to provide an effective weapon to implement that view. [Footnote 5/18] As a distillation of what the supporters of the Act believed the Constitution demanded of State and Federal Governments, § 601 has independent force, with language and emphasis in addition to that found in the Constitution. [Footnote 5/19]

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As with other provisions of the Civil Rights Act, Congress' expression of it policy to end racial discrimination may independently proscribe conduct that the Constitution does not. [Footnote 5/20] However, we need not decide the congruence -- or lack of congruence -- of the controlling statute and the Constitution

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since the meaning of the Title VI ban on exclusion is crystal clear: race cannot be the basis of excluding anyone from participation in a federally funded program.

In short, nothing in the legislative history justifies the conclusion that the broad language of § 601 should not be given its natural meaning. We are dealing with a distinct statutory prohibition, enacted at a particular time with particular concerns in mind; neither its language nor any prior interpretation suggests that its place in the Civil Rights Act, won after long debate, is simply that of a constitutional appendage. [Footnote 5/21] In unmistakable terms, the Act prohibits the exclusion of individuals from federally funded programs because of their race. [Footnote 5/22] As succinctly phrased during the Senate debate, under Title VI, it is not "permissible to say 'yes' to one person, but to say 'no' to another person, only because of the color of his skin." [Footnote 5/23]

Belatedly, however, petitioner argues that Title VI cannot be enforced by a private litigant. The claim is unpersuasive in the context of this case. Bakke requested injunctive and declaratory relief under Title VI; petitioner itself then joined

issue on the question of the legality of its program under Title VI by asking for a declaratory judgment that it was in compliance with the statute. [Footnote 5/24] Its view during state court litigation was that a private cause of action does exist under Title VI. Because petitioner questions the availability of a private cause of action for the first time in this Court, the question is not properly before us. See McGoldrick v. Compagnie Generale Transatlantique, 309 U. S. 430, 309 U. S. 434. Even if it were, petitioner's original assumption is in accord with the federal courts' consistent interpretation of the Act. To date, the courts, including this Court, have unanimously concluded or assumed that a private action may be maintained under Title VI. [Footnote 5/25] The United States has taken the same position; in its amicus curiae brief directed to this specific issue, it concluded that such a remedy is clearly available. [Footnote 5/26]

and Congress has repeatedly enacted legislation predicated on the assumption that Title VI may be enforced in a private action. [Footnote 5/27] The conclusion that an individual may maintain a private cause of action is amply supported in the legislative history of Title VI itself. [Footnote 5/28] In short, a fair consideration of petitioner's tardy attack on the propriety of Bakke's suit under Title VI requires that it be rejected.
The University's special admissions program violated Title VI of the Civil Rights Act of 1964 by excluding Bakke from the Medical School because of his race. It is therefore our duty to affirm the judgment ordering Bakke admitted to the University.

Accordingly, I concur in the Court's judgment insofar as it affirms the judgment of the Supreme Court of California. To the extent that it purports to do anything else, I respectfully dissent.

[Footnote 5/1]

Four Members of the Court have undertaken to announce the legal and constitutional effect of this Court's judgment. See opinion of JUSTICES BRENNAN, WHITE, MARSHALL, and BLACKMUN, ante at 438 U. S. 324-325. It is hardly necessary to state that only a majority can speak for the Court or determine what is the "central meaning" of any judgment of the Court.

[Footnote 5/2]

The judgment first entered by the trial court read, in its entirety, as follows:

"IT IS HEREBY ORDERED, ADJUDGED AND DECREED:"

"1. Defendant, the Regents of the University of California, have judgment against plaintiff, Allan Bakke, denying the mandatory injunction requested by plaintiff ordering his admission to the University of California at Davis Medical School;"

"2. That plaintiff is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission;"

"3. Cross-defendant Allan Bakke have judgment against cross-complaint, the Regents of the University of California, declaring that the special admissions program at the University of California at Davis Medical School violates the Fourteenth Amendment to the United States Constitution, Article 1, Section 21 of the California Constitution, and the Federal Civil Rights Act [42 U.S.C. § 2000d];"

"4. That plaintiff have and recover his court costs incurred herein in the sum of $217.35."

App. to Pet. for Cert. 120a.

[Footnote 5/3]

In paragraph 2, the trial court ordered that
"plaintiff [Bakke] is entitled to have his application for admission to the medical school considered without regard to his race or the race of any other applicant, and defendants are hereby restrained and enjoined from considering plaintiff's race or the race of any other applicant in passing upon his application for admission."

See 438 U. S. 2, supra, (emphasis added). The only way in which this order can be broadly read as prohibiting any use of race in the admissions process, apart from Bakke's application, is if the final "his" refers to "any other applicant." But the consistent use of the pronoun throughout the paragraph to refer to Bakke makes such a reading entirely unpersuasive, as does the failure of the trial court to suggest that it was issuing relief to applicants who were not parties to the suit.

[Footnote 5/4]

Appendix B to Application for Stay A19-A20.

[Footnote 5/5]

18 Cal.3d 34, 64, 553 P.2d 1152, 1172 (1976). The judgment of the Supreme Court of the State of California affirms only paragraph 3 of the trial court's judgment. The Supreme Court's judgment reads as follows:

"IT IS ORDERED, ADJUDGED, AND DECREED by the Court that the judgment of the Superior Court[,] County of Yolo[,] in the above-entitled cause, is hereby affirmed insofar as it determines that the special admission program is invalid; the judgment is reversed insofar as it denies Bakke an injunction ordering that he be admitted to the University, and the trial court is directed to enter judgment ordering Bakke to be admitted. 'Bakke shall recover his costs on these appeals.'"

[Footnote 5/6]

"This Court . . . reviews judgments, not statements in opinions." Black v. Cutter Laboratories, 351 U. S. 292, 351 U. S. 297.

[Footnote 5/7]

"From Hayburn's Case, 2 Dall. 409, to Alma Motor Co. v. Timken-Detroit Axle Co. [, 329 U. S. 129,] and the Hatch Act case [United Public Workers v. Mitchell, 330 U. S. 75,] decided this term, this Court has followed a policy of strict necessity in disposing of constitutional issues. The earliest exemplifications, too well known for repeating the history here, arose in the Court's refusal to render advisory opinions and in applications of the related jurisdictional policy drawn from the case and controversy limitation. U.S.Const., Art. III. . . ."
"The policy, however, has not been limited to jurisdictional determinations. For, in addition,"

"the Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."

"Thus, as those rules were listed in support of the statement quoted, constitutional issues affecting legislation will not be determined in friendly, nonadversary proceedings; in advance of the necessity of deciding them; in broader terms than are required by the precise facts to which the ruling is to be applied; if the record presents some other ground upon which the case may be disposed of; at the instance of one who fails to show that he is injured by the statute's operation, or who has availed himself of its benefits; or if a construction of the statute is fairly possible by which the question may be avoided."


[Footnote 5/8]

The doctrine reflects both our respect for the Constitution as an enduring set of principles and the deference we owe to the Legislative and Executive Branches of Government in developing solutions to complex social problems. See A. Bickel, The Least Dangerous Branch 131 (1962).

[Footnote 5/9]

Record 29.

[Footnote 5/10]


[Footnote 5/11]

It is apparent from the legislative history that the immediate object of Title VI was to prevent federal funding of segregated facilities. See, e.g., 110 Cong.Rec. 1521 (1964) (remarks of Rep. Celler); id. at 6544 (remarks of Sen. Humphrey).

[Footnote 5/12]

In McDonald v. Santa Fe Trail Transp. Co., the Court held that "Title VII prohibits racial discrimination against . . . white petitioners . . . upon the same standards as would be applicable were they Negroes. . . ." 427 U.S. at 427 U. S. 280. Quoting from our earlier decision in Griggs v Duke Power Co., 401 U. S. 424, 401 U. S. 431, the Court reaffirmed
the principle that the statute "prohibit[s] [d]iscriminatory preference for any [racial] group, minority or majority." 427 U.S. at 427 U. S. 279 (emphasis in original).

[Footnote 5/13]

See, e.g., 110 Cong.Rec. 1520 (1964) (remarks of Rep. Celler); id. at 5864 (remarks of Sen. Humphrey); id. at 6561 (remarks of Sen. Kuchel); id. at 7055 (remarks of Sen. Pastore). (Representative Celler and Senators Humphrey and Kuchel were the House and Senate floor managers for the entire Civil Rights Act, and Senator Pastore was the majority Senate floor manager for Title VI.)

[Footnote 5/14]

Representative Abernethy's comments were typical:

"Title VI has been aptly described as the most harsh and unprecedented proposal contained in the bill. . . ."

"It is aimed toward eliminating discrimination in federally assisted programs. It contains no guideposts and no yardsticks as to what might constitute discrimination in carrying out federally aided programs and projects. . . ."

"* * * *"

"Presumably, the college would have to have a 'racially balanced' staff from the dean's office to the cafeteria. . . ."

"The effect of this title, if enacted into law, will interject race as a factor in every decision involving the selection of an individual. . . . The concept of 'racial imbalance' would hover like a black cloud over every transaction. . . ."

Id. at 1619. See also, e.g., id. at 5611-5613 (remarks of Sen. Ervin); id. at 9083 (remarks of Sen. Gore).

[Footnote 5/15]

E.g., id. at 5863, 5874 (remarks of Sen. Eastland).

[Footnote 5/16]

See, e.g., id. at 8364 (remarks off Sen. Proxmire) ("Taxes are collected from whites and Negroes, and they should be expended without discrimination"); id. at 7055 (remarks of Sen. Pastore) ("[Title VI] will guarantee that the money collected by colorblind tax collectors will be distributed Federal and State administrators who are equally colorblind"); and id. at 6543 (remarks of Sen. Humphrey) ("Simple justice requires that
public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination'\) (quoting from President Kennedy's Message to Congress, June 19, 1963).

[Footnote 5/17]

See, e.g., 110 Cong.Rec. 5253 (1964) (remarks of Sen. Humphrey); and id. at 7102 (remarks of Sen. Javits). The parallel between the prohibitions of Title VI and those of the Constitution was clearest with respect to the immediate goal of the Act -- an end to federal funding of "separate but equal" facilities.

[Footnote 5/18]

"As in Monroe v. Pape, 365 U. S. 167, we have no occasion here to"

"reach the constitutional question whether Congress has the power to make municipalities liable for acts of its officers that violate the civil rights of individuals."

"365 U.S. at 365 U. S. 191. For in interpreting the statute, it is not our task to consider whether Congress was mistaken in 1871 in its view of the limit of its power over municipalities; rather, we must construe the statute in light of the impressions under which Congress did, in fact, act, see Ries v. Lynskey, 452 F.2d 175."


[Footnote 5/19]

Both Title VI and Title VII express Congress' belief that, in the long struggle to eliminate social prejudice and the effects of prejudice, the principle of individual equality, without regard to race or religion, was one on which there could be a "meeting of the minds" among all races and a common national purpose. See Los Angeles Dept. of Water & Power v. Manhart, 435 U. S. 702, 435 U. S. 709 ("[T]he basic policy of the statute [Title VII] requires that we focus on fairness to individuals, rather than fairness to classes"). This same principle of individual fairness is embodied in Title VI.

"The basic fairness of title VI is so clear that I find it difficult to understand why it should create any opposition. . . ."

"* * * *"

"Private prejudices, to be sure, cannot be eliminated overnight. However, there is one area where no room at all exists for private prejudices. That is the area of governmental conduct. As the first Mr. Justice Harlan said in his prophetic dissenting opinion in Plessy v. Ferguson, 163 U. S. 537, 163 U. S. 559:"
"Our Constitution is color-blind."

"So -- I say to Senators -- must be our Government. . . ."

"Title VI closes the gap between our purposes as a democracy and our prejudices as individuals. The cuts of prejudice need healing. The costs of prejudice need understanding. We cannot have hostility between two great parts of our people without tragic loss in our human values. . . ."

"Title VI offers a place for the meeting of our minds as to Federal money."

110 Cong.Rec. 7063-7064 (1964) (remarks of Sen. Pastore). Of course, one of the reasons marshaled in support of the conclusion that Title VI was "noncontroversial" was that its prohibition was already reflected in the law. See ibid. (remarks of Sen. Pell and Sen. Pastore).

[Footnote 5/20]

For example, private employers now under duties imposed by Title VII were wholly free from the restraints imposed by the Fifth and Fourteenth Amendments which are directed only to governmental action.

In *Lau v. Nichols*, 414 U. S. 563, the Government's brief stressed that

"the applicability of Title VI . . . does not depend upon the outcome of the equal protection analysis. . . . [T]he statute independently proscribes the conduct challenged by petitioners, and provides a discrete basis for injunctive relief."


[Footnote 5/21]

As explained by Senator Humphrey, § 601 expresses a principle imbedded in the constitutional and moral understanding of the times.

"The purpose of title VI is to make sure that funds of the United States are not used to support racial discrimination. In many instances, the practices of segregation or discrimination, which title VI seeks to end, are unconstitutional. . . . In all cases, such discrimination is contrary to national policy, and to the moral sense of the Nation. Thus, title VI is simply designed to insure that Federal funds are spent in accordance with the Constitution and the moral sense of the Nation."
110 Cong.Rec. 6544 (1964) (emphasis added).

[Footnote 5/22]

Petitioner's attempt to rely on regulations issued by HEW for a contrary reading of the statute is unpersuasive. Where no discriminatory policy was in effect, HEW's example of permissible "affirmative action" refers to "special recruitment policies." 45 CFR § 80.5(j) (1977). This regulation, which was adopted in 1973, sheds no light on the legality of the admissions program that excluded Bakke in this case.

[Footnote 5/23]


[Footnote 5/24]

Record 30-31.

[Footnote 5/25]

See, e.g., Lau v. Nichols, supra; Bossier Parish School Board v. Lemon, 370 F.2d 847 (CA5 1967), cert. denied, 388 U.S. 911; Uzzell v. Friday, 547 F.2d 847 (CA4 1977), cert. pending, No. 77-635; Serna v. Portales, 499 F.2d 1147 (CA10 1974); cf. Chambers v. Omaha Public School District, 536 F.2d 222, 225 n. 2 (CA8 1976) (indicating doubt over whether a money judgment can be obtained under Title VI). Indeed, the Government's brief in Lau v. Nichols, supra, succinctly expressed this common assumption: "It is settled that petitioners ... have standing to enforce Section 601,..." Brief for United States as Amicus Curiae in Lau v. Nichols, O.T. 1973, No. 72-6520, p. 13 n. 5.

[Footnote 5/26]

Supplemental Brief for United States as Amicus Curiae 24-34. The Government's supplemental brief also suggests that there may be a difference between a private cause of action brought to end a particular discriminatory practice and such an action brought to cut off federal funds. Id. at 28-30. Section 601 is specifically addressed to personal rights, while § 602 -- the fund cutoff provision -- establishes "an elaborate mechanism for governmental enforcement by federal agencies." Supplemental Brief, supra at 28 (emphasis added). Arguably, private enforcement of this "elaborate mechanism" would not fit within the congressional scheme, see separate opinion of MR. JUSTICE WHITE, ante at 438 U. S. 380-383. But Bakke did not seek to cut off the University's federal funding; he sought admission to medical school. The difference between these two courses of action is clear and significant. As the Government itself states:
"[T]he grant of an injunction or a declaratory judgment in a private action would not be inconsistent with the administrative program established by Section 602. . . . A declaratory judgment or injunction against future discrimination would not raise the possibility that funds would be terminated, and it would not involve bringing the forces of the Executive Branch to bear on state programs; it therefore would not implicate the concern that led to the limitations contained in Section 602."

Supplemental Brief, supra at 30 n. 25.

The notion that a private action seeking injunctive or declaratory judgment relief is inconsistent with a federal statute that authorizes termination of funds has clearly been rejected by this Court in prior cases. See Rosado v. Wyman, 397 U. S. 397, 397 U. S. 420.

[Footnote 5/27]


[Footnote 5/28]

Framing the analysis in terms of the four-part Cort v. Ash test, see 422 U. S. 66, 422 U. S. 78, it is clear that all four parts of the test are satisfied. (1) Bakke's status as a potential beneficiary of a federally funded program definitely brings him within the "class for whose especial benefit the statute was enacted," ibid. (emphasis in original). (2) A cause of action based on race discrimination has not been "traditionally relegated to state law." Ibid. (3) While a few excerpts from the voluminous legislative history suggest that Congress did not intend to create a private cause of action, see opinion of MR. JUSTICE POWELL, ante at 438 U. S. 283 n. 18, an examination of the entire legislative history makes it clear that Congress had no intention to foreclose a private right of action. (4) There is ample evidence that Congress considered private causes of action to be consistent with, if not essential to, the legislative scheme. See, e.g., remarks of Senator Ribicoff:

"We come then to the crux of the dispute -- how this right [to participate in federally funded programs without discrimination] should be protected. And even this issue becomes clear upon the most elementary analysis. If Federal funds are to be dispensed on a nondiscriminatory basis, the only possible remedies must fall into one of two categories: first, action to end discrimination; or second, action to end the payment of funds. Obviously action to end discrimination is preferable, since that reaches the objective of extending the funds on a nondiscriminatory basis. But if the discrimination
persists and cannot be effectively terminated, how else can the principle of nondiscrimination be vindicated except by nonpayment of funds?"

110 Cong.Rec. 7065 (1964). See also id. at 5090, 6543, 6544 (remarks of Sen. Humphrey); id. at 7103, 12719 (remarks of Sen. Javits); id. at 7062, 7063 (remarks of Sen. Pastore).

The congressional debates thus show a clear understanding that the principle embodied in § 601 involves personal federal rights that administrative procedures would not, for the most part, be able to protect. The analogy to the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. (1970 ed. and Supp. V), is clear. Both that Act and Title VI are broadly phrased in terms of personal rights ("no person shall be denied . . ."); both Acts were drafted with broad remedial purposes in mind; and the effectiveness of both Acts would be "severely hampered" without the existence of a private remedy to supplement administrative procedures. See Allen v. State Bd. of Elections, 393 U. S. 544, 393 U. S. 556. In Allen, of course, this Court found a private right of action under the Voting Rights Act.
A pregnant single woman (Roe) brought a class action challenging the constitutionality of the Texas criminal abortion laws, which proscribe procuring or attempting an abortion except on medical advice for the purpose of saving the mother's life. A licensed physician (Hallford), who had two state abortion prosecutions pending against him, was permitted to intervene. A childless married couple (the Does), the wife not being pregnant, separately attacked the laws, basing alleged injury on the future possibilities of contraceptive failure, pregnancy, unpreparedness for parenthood, and impairment of the wife's health. A three-judge District Court, which consolidated the actions, held that Roe and Hallford, and members of their classes, had standing to sue and presented justiciable controversies. Ruling that declaratory, though not injunctive, relief was warranted, the court declared the abortion statutes void as vague and overbroadly infringing those plaintiffs' Ninth and Fourteenth Amendment rights. The court ruled the Does' complaint not justiciable. Appellants directly appealed to this Court on the injunctive rulings, and appellee cross-appealed from the District Court's grant of declaratory relief to Roe and Hallford.
1. While 28 U.S.C. § 1253 authorizes no direct appeal to this Court from the grant or denial of declaratory relief alone, review is not foreclosed when the case is properly before the Court on appeal from specific denial of injunctive relief and the arguments as to both injunctive and declaratory relief are necessarily identical. P. 410 U. S. 123.

2. Roe has standing to sue; the Does and Hallford do not. Pp. 410 U. S. 123-129.

(a) Contrary to appellee's contention, the natural termination of Roe's pregnancy did not moot her suit. Litigation involving pregnancy, which is "capable of repetition, yet evading review," is an exception to the usual federal rule that an actual controversy must exist at review stages, and not simply when the action is initiated. Pp. 410 U. S. 124-125.


(c) The Does' complaint, based as it is on contingencies, any one or more of which may not occur, is too speculative to present an actual case or controversy. Pp. 410 U. S. 127-129.

3. State criminal abortion laws, like those involved here, that except from criminality only a life-saving procedure on the mother's behalf without regard to the stage of her pregnancy and other interests involved violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy, including a woman's qualified right to terminate her pregnancy. Though the State cannot override that right, it has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life, each of which interests grows and reaches a "compelling" point at various stages of the woman's approach to term. Pp. 410 U. S. 147-164.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician. Pp. 410 U. S. 163, 410 U. S. 164.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health. Pp. 410 U. S. 163, 410 U. S. 164.
(c) For the stage subsequent to viability the State, in promoting its interest in the potentiality of human life, may, if it chooses, regulate, and even proscribe, abortion except where necessary, in appropriate medical judgment, for the preservation of the life or health of the mother. Pp. 410 U. S. 163-164; 410 U. S. 164-165.

4. The State may define the term "physician" to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined. P. 410 U. S. 165.

5. It is unnecessary to decide the injunctive relief issue, since the Texas authorities will doubtless fully recognize the Court's ruling

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that the Texas criminal abortion statutes are unconstitutional. P. 410 U. S. 166.


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MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This Texas federal appeal and its Georgia companion, Doe v. Bolton, post, p. 410 U. S. 179, present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast, and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.
In addition, population growth, pollution, poverty, and racial overtones tend to complicate and not to simplify the problem.

Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection. We seek earnestly to do this, and, because we do, we have inquired into, and in this opinion place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries. We bear in mind, too, Mr. Justice Holmes' admonition in his now-vindicated dissent in *Lochner v. New York*, 198 U. S. 45, 198 U. S. 76 (1905):

"[The Constitution] is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States."

I

The Texas statutes that concern us here are Arts. 1191-1194 and 1196 of the State's Penal Code. [Footnote 1] These make it a crime to "procure an abortion," as therein defined, or to attempt one, except with respect to "an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Similar statutes are in existence in a majority of the States. [Footnote 2]

II

Texas first enacted a criminal abortion statute in 1854. Texas Laws 1854, c. 49, § 1, set forth in 3 H. Gammel, Laws of Texas 1502 (1898). This was soon modified into language that has remained substantially unchanged to the present time. See Texas Penal Code of 1857, c. 7, Arts. 531-536; G. Paschal, Laws of Texas, Arts. 2192-2197 (1866); Texas Rev.Stat., c. 8, Arts. 536-541 (1879); Texas Rev.Crim.Stat., Arts. 1071-1076 (1911). The final article in each of these compilations provided the same exception, as does the present Article 1196, for an abortion by "medical advice for the purpose of saving the life of the mother." [Footnote 3]
Jane Roe, [Footnote 4] a single woman who was residing in Dallas County, Texas, instituted this federal action in March 1970 against the District Attorney of the county. She sought a declaratory judgment that the Texas criminal abortion statutes were unconstitutional on their face, and an injunction restraining the defendant from enforcing the statutes.

Roe alleged that she was unmarried and pregnant; that she wished to terminate her pregnancy by an abortion "performed by a competent, licensed physician, under safe, clinical conditions"; that she was unable to get a "legal" abortion in Texas because her life did not appear to be threatened by the continuation of her pregnancy; and that she could not afford to travel to another jurisdiction in order to secure a legal abortion under safe conditions. She claimed that the Texas statutes were unconstitutionally vague and that they abridged her right of personal privacy, protected by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments. By an amendment to her complaint, Roe purported to sue "on behalf of herself and all other women" similarly situated.

James Hubert Hallford, a licensed physician, sought and was granted leave to intervene in Roe's action. In his complaint, he alleged that he had been arrested previously for violations of the Texas abortion statutes, and that two such prosecutions were pending against him. He described conditions of patients who came to him seeking abortions, and he claimed that for many cases he, as a physician, was unable to determine whether they fell within or outside the exception recognized by Article 1196. He alleged that, as a consequence, the statutes were vague and uncertain, in violation of the Fourteenth Amendment, and that they violated his own and his patients' rights to privacy in the doctor-patient relationship and his own right to practice medicine, rights he claimed were guaranteed by the First, Fourth, Fifth, Ninth, and Fourteenth Amendments.

John and Mary Doe, [Footnote 5] a married couple, filed a companion complaint to that of Roe. They also named the District Attorney as defendant, claimed like constitutional deprivations, and sought declaratory and injunctive relief. The Does alleged that they were a childless couple; that Mrs. Doe was suffering from a "neural-chemical" disorder; that her physician had "advised her to avoid pregnancy until such time as her condition has materially improved" (although a pregnancy at the present time would not present "a serious risk" to her life); that, pursuant to medical advice, she had discontinued use of birth control pills; and that, if she should become pregnant, she would want to terminate the pregnancy by an abortion performed by a competent, licensed physician under safe, clinical conditions. By an amendment to their complaint, the Does purported to sue "on behalf of themselves and all couples similarly situated."
The two actions were consolidated and heard together by a duly convened three-judge district court. The suits thus presented the situations of the pregnant single woman, the childless couple, with the wife not pregnant,

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and the licensed practicing physician, all joining in the attack on the Texas criminal abortion statutes. Upon the filing of affidavits, motions were made for dismissal and for summary judgment. The court held that Roe and members of her class, and Dr. Hallford, had standing to sue and presented justiciable controversies, but that the Does had failed to allege facts sufficient to state a present controversy, and did not have standing. It concluded that, with respect to the requests for a declaratory judgment, abstention was not warranted. On the merits, the District Court held that the

"fundamental right of single women and married persons to choose whether to have children is protected by the Ninth Amendment, through the Fourteenth Amendment,"

and that the Texas criminal abortion statutes were void on their face because they were both unconstitutionally vague and constituted an overbroad infringement of the plaintiffs' Ninth Amendment rights. The court then held that abstention was warranted with respect to the requests for an injunction. It therefore dismissed the Does' complaint, declared the abortion statutes void, and dismissed the application for injunctive relief. 314 F.Supp. 1217, 1225 (ND Tex.1970).

The plaintiffs Roe and Doe and the intervenor Hallford, pursuant to 28 U.S.C. § 1253, have appealed to this Court from that part of the District Court's judgment denying the injunction. The defendant District Attorney has purported to cross-appeal, pursuant to the same statute, from the court's grant of declaratory relief to Roe and Hallford. Both sides also have taken protective appeals to the United States Court of Appeals for the Fifth Circuit. That court ordered the appeals held in abeyance pending decision here. We postponed decision on jurisdiction to the hearing on the merits. 402 U.S. 941 (1971)

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It might have been preferable if the defendant, pursuant to our Rule 20, had presented to us a petition for certiorari before judgment in the Court of Appeals with respect to the granting of the plaintiffs' prayer for declaratory relief. Our decisions in Mitchell v. Donovan, 398 U. S. 427 (1970), and Gunn v. University Committee, 399 U. S. 383 (1970), are to the effect that § 1253 does not authorize an appeal to this Court from the grant or denial of declaratory relief alone. We conclude, nevertheless, that those decisions do not foreclose our review of both the injunctive and the declaratory aspects of a case of this kind when it is properly here, as this one is, on appeal under 1253 from specific denial of injunctive relief, and the arguments as to both aspects are necessarily identical. See Carter v. Jury Comm'n, 396 U. S. 320 (1970); Florida Lime Growers v. Jacobsen, 362 U. S. 73, 362 U. S. 80-81 (1960). It would be destructive of time and energy for all concerned were we to rule otherwise. Cf. Doe v. Bolton, post, p. 410 U. S. 179.
IV

We are next confronted with issues of justiciability, standing, and abstention. Have Roe and the Does established that "personal stake in the outcome of the controversy," *Baker v. Carr*, 369 U. S. 186, 369 U. S. 204 (1962), that insures that "the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution,"

*Flast v. Cohen*, 392 U. S. 83, 392 U. S. 101 (1968), and *Sierra Club v. Morton*, 405 U. S. 727, 405 U. S. 732 (1972)? And what effect did the pendency of criminal abortion charges against Dr. Hallford in state court have upon the propriety of the federal court's granting relief to him as a plaintiff-intervenor?

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A. *Jane Roe*. Despite the use of the pseudonym, no suggestion is made that Roe is a fictitious person. For purposes of her case, we accept as true, and as established, her existence; her pregnant state, as of the inception of her suit in March 1970 and as late as May 21 of that year when she filed an alias affidavit with the District Court; and her inability to obtain a legal abortion in Texas.

Viewing Roe's case as of the time of its filing and thereafter until as late a May, there can be little dispute that it then presented a case or controversy and that, wholly apart from the class aspects, she, as a pregnant single woman thwarted by the Texas criminal abortion laws, had standing to challenge those statutes. *Abele v. Markle*, 452 F.2d 1121, 1125 (CA2 1971); *Crossen v. Breckenridge*, 446 F.2d 833, 838-839 (CA6 1971); *Poe v. Menghini*, 339 F. Supp. 986, 990-991 (Kan.1972). *See Truax v. Raich*, 239 U. S. 33 (1915). Indeed, we do not read the appellee's brief as really asserting anything to the contrary. The "logical nexus between the status asserted and the claim sought to be adjudicated," *Flast v. Cohen*, 392 U. S. at 392 U. S. 102, and the necessary degree of contentiousness, *Golden v. Zwickler*, 394 U. S. 103 (1969), are both present.

The appellee notes, however, that the record does not disclose that Roe was pregnant at the time of the District Court hearing on May 22, 1970, [*Footnote 6*] or on the following June 17 when the court's opinion and judgment were filed. And he suggests that Roe's case must now be moot because she and all other members of her class are no longer subject to any 1970 pregnancy.

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The usual rule in federal cases is that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated. *United States v. Munsingwear, Inc.*, 340 U. S. 36 (1950); *Golden v. Zwickler, supra*; *SEC v. Medical Committee for Human Rights*, 404 U. S. 403 (1972).
But when, as here, pregnancy is a significant fact in the litigation, the normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. Pregnancy often comes more than once to the same woman, and in the general population, if man is to survive, it will always be with us. Pregnancy provides a classic justification for a conclusion of nonmootness. It truly could be "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. ICC*, 219 U. S. 498, 219 U. S. 515 (1911). *See Moore v. Ogilvie*, 394 U. S. 814, 394 U. S. 816 (1969); *Carroll v. Princess Anne*, 393 U. S. 175, 393 U. S. 178-179 (1968); *United States v. W. T. Grant Co.*, 345 U. S. 629, 345 U. S. 632-633 (1953).

We, therefore, agree with the District Court that Jane Roe had standing to undertake this litigation, that she presented a justiciable controversy, and that the termination of her 1970 pregnancy has not rendered her case moot.

**B. Dr. Hallford.** The doctor's position is different. He entered Roe's litigation as a plaintiff-intervenor, alleging in his complaint that he:

"[I]n the past has been arrested for violating the Texas Abortion Laws and at the present time stands charged by indictment with violating said laws in the Criminal District Court of Dallas County, Texas to-wit: (1) The State of Texas vs. James H. Hallford, No. C-69-5307-IH, and (2) The State of Texas vs. James H. Hallford, No. C-692524-H. In both cases, the defendant is charged with abortion. . . ."

In his application for leave to intervene, the doctor made like representations as to the abortion charges pending in the state court. These representations were also repeated in the affidavit he executed and filed in support of his motion for summary judgment.

Dr. Hallford is, therefore, in the position of seeking, in a federal court, declaratory and injunctive relief with respect to the same statutes under which he stands charged in criminal prosecutions simultaneously pending in state court. Although he stated that he has been arrested in the past for violating the State's abortion laws, he makes no allegation of any substantial and immediate threat to any federally protected right that cannot be asserted in his defense against the state prosecutions. Neither is there any allegation of harassment or bad faith prosecution. In order to escape the rule articulated in the cases cited in the next paragraph of this opinion that, absent harassment and bad faith, a defendant in a pending state criminal case cannot affirmatively challenge in federal court the statutes under which the State is prosecuting him, Dr. Hallford seeks to distinguish his status as a present state defendant from his status as a "potential future defendant," and to assert only the latter for standing purposes here.
We see no merit in that distinction. Our decision in *Samuels v. Mackell*, 401 U. S. 66 (1971), compels the conclusion that the District Court erred when it granted declaratory relief to Dr. Hallford instead of refraining from so doing. The court, of course, was correct in refusing to grant injunctive relief to the doctor. The reasons supportive of that action, however, are those expressed in *Samuels v. Mackell*, supra, and in *Younger v.*

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Dr. Hallford's complaint in intervention, therefore, is to be dismissed. [Footnote 7] He is remitted to his defenses in the state criminal proceedings against him. We reverse the judgment of the District Court insofar as it granted Dr. Hallford relief and failed to dismiss his complaint in intervention.

C. The Does. In view of our ruling as to Roe's standing in her case, the issue of the Does' standing in their case has little significance. The claims they assert are essentially the same as those of Roe, and they attack the same statutes. Nevertheless, we briefly note the Does' posture.

Their pleadings present them as a childless married couple, the woman not being pregnant, who have no desire to have children at this time because of their having received medical advice that Mrs. Doe should avoid pregnancy, and for "other highly personal reasons." But they "fear . . . they may face the prospect of becoming

parents." And if pregnancy ensues, they "would want to terminate" it by an abortion. They assert an inability to obtain an abortion legally in Texas and, consequently, the prospect of obtaining an illegal abortion there or of going outside Texas to some place where the procedure could be obtained legally and competently.

We thus have as plaintiffs a married couple who have, as their asserted immediate and present injury, only an alleged "detrimental effect upon [their] marital happiness" because they are forced to "the choice of refraining from normal sexual relations or of endangering Mary Doe's health through a possible pregnancy." Their claim is that, sometime in the future, Mrs. Doe might become pregnant because of possible failure of contraceptive measures, and, at that time in the future, she might want an abortion that might then be illegal under the Texas statutes.

This very phrasing of the Does' position reveals its speculative character. Their alleged injury rests on possible future contraceptive failure, possible future pregnancy, possible
future unpreparedness for parenthood, and possible future impairment of health. Any one or more of these several possibilities may not take place, and all may not combine. In the Does' estimation, these possibilities might have some real or imagined impact upon their marital happiness. But we are not prepared to say that the bare allegation of so indirect an injury is sufficient to present an actual case or controversy. *Younger v. Harris*, 401 U.S. at 401 U. S. 41-42; *Golden v. Zwickler*, 394 U.S. at 394 U. S. 109-110; *Abele v. Markle*, 452 F.2d 1124-1125; *Crossen v. Breckenridge*, 446 F.2d 839. The Does' claim falls far short of those resolved otherwise in the cases that the Does urge upon us, namely, *Investment Co. Institute v. Camp*, 401 U. S. 617 (1971); *Data Processing Service v. Camp*, 397 U. S. 150 (1970);


The Does therefore are not appropriate plaintiffs in this litigation. Their complaint was properly dismissed by the District Court, and we affirm that dismissal.

V

The principal thrust of appellant's attack on the Texas statutes is that they improperly invade a right, said to be possessed by the pregnant woman, to choose to terminate her pregnancy. Appellant would discover this right in the concept of personal "liberty" embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see *Griswold v. Connecticut*, 381 U. S. 479 (1965); *Eisenstadt v. Baird*, 405 U. S. 438 (1972); *id.* at 405 U. S. 460 (WHITE, J., concurring in result); or among those rights reserved to the people by the Ninth Amendment, *Griswold v. Connecticut*, 381 U.S. at 381 U. S. 486 (Goldberg, J., concurring). Before addressing this claim, we feel it desirable briefly to survey, in several aspects, the history of abortion, for such insight as that history may afford us, and then to examine the state purposes and interests behind the criminal abortion laws.

VI

It perhaps is not generally appreciated that the restrictive criminal abortion laws in effect in a majority of States today are of relatively recent vintage. Those laws, generally proscribing abortion or its attempt at any time during pregnancy except when necessary to preserve the pregnant woman's life, are not of ancient or even of common law origin. Instead, they derive from statutory changes effected, for the most part, in the latter half of the 19th century.
1. Ancient attitudes. These are not capable of precise determination. We are told that, at the time of the Persian Empire, abortifacients were known, and that criminal abortions were severely punished. [Footnote 8] We are also told, however, that abortion was practiced in Greek times as well as in the Roman Era, [Footnote 9] and that "it was resorted to without scruple." [Footnote 10] The Ephesian, Soranos, often described as the greatest of the ancient gynecologists, appears to have been generally opposed to Rome's prevailing free-abortion practices. He found it necessary to think first of the life of the mother, and he resorted to abortion when, upon this standard, he felt the procedure advisable. [Footnote 11] Greek and Roman law afforded little protection to the unborn. If abortion was prosecuted in some places, it seems to have been based on a concept of a violation of the father's right to his offspring. Ancient religion did not bar abortion. [Footnote 12]

2. The Hippocratic Oath. What then of the famous Oath that has stood so long as the ethical guide of the medical profession and that bears the name of the great Greek (460(?)-377(?) B. C.), who has been described as the Father of Medicine, the "wisest and the greatest practitioner of his art," and the "most important and most complete medical personality of antiquity," who dominated the medical schools of his time, and who typified the sum of the medical knowledge of the past? [Footnote 13] The Oath varies somewhat according to the particular translation, but in any translation the content is clear:

"I will give no deadly medicine to anyone if asked, nor suggest any such counsel; and in like manner, I will not give to a woman a pessary to produce abortion," [Footnote 14]

or

"I will neither give a deadly drug to anybody if asked for it, nor will I make a suggestion to this effect. Similarly, I will not give to a woman an abortive remedy." [Footnote 15]

Although the Oath is not mentioned in any of the principal briefs in this case or in Doe v. Bolton, post, p. 410 U. S. 179, it represents the apex of the development of strict ethical concepts in medicine, and its influence endures to this day. Why did not the authority of Hippocrates dissuade abortion practice in his time and that of Rome? The late Dr. Edelstein provides us with a theory: [Footnote 16] The Oath was not uncontested even in Hippocrates' day; only the Pythagorean school of philosophers frowned upon the related act of suicide. Most Greek thinkers, on the other hand, commended abortion, at least prior to viability. See Plato, Republic, V, 461; Aristotle, Politics, VII, 1335b 25. For the Pythagoreans, however, it was a matter of dogma. For them, the embryo was animate from the moment of conception, and abortion meant destruction of a living being. The abortion clause of the Oath, therefore, "echoes Pythagorean doctrines,"
and "[i]n no other stratum of Greek opinion were such views held or proposed in the same spirit of uncompromising austerity." [Footnote 17]

Dr. Edelstein then concludes that the Oath originated in a group representing only a small segment of Greek opinion, and that it certainly was not accepted by all ancient physicians. He points out that medical writings down to Galen (A.D. 130-200) "give evidence of the violation of almost every one of its injunctions." [Footnote 18] But with the end of antiquity, a decided change took place. Resistance against suicide and against abortion became common. The Oath came to be popular. The emerging teachings of Christianity were in agreement with the Pythagorean ethic. The Oath "became the nucleus of all medical ethics," and "was applauded as the embodiment of truth." Thus, suggests Dr. Edelstein, it is "a Pythagorean manifesto, and not the expression of an absolute standard of medical conduct." [Footnote 19]

This, it seems to us, is a satisfactory and acceptable explanation of the Hippocratic Oath's apparent rigidity. It enables us to understand, in historical context, a long-accepted and revered statement of medical ethics.

3. The common law. It is undisputed that, at common law, abortion performed before "quickening" -- the first recognizable movement of the fetus in utero, appearing usually from the 16th to the 18th week of pregnancy [Footnote 20] -- was not an indictable offense. [Footnote 21] The absence of a common law crime for pre-quickening abortion appears to have developed from a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins. These disciplines variously approached the question in terms of the point at which the embryo or fetus became "formed" or recognizably human, or in terms of when a "person" came into being, that is, infused with a "soul" or "animated." A loose consensus evolved in early English law that these events occurred at some point between conception and live birth. [Footnote 22] This was "mediate animation." Although

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Christian theology and the canon law came to fix the point of animation at 40 days for a male and 80 days for a female, a view that persisted until the 19th century, there was otherwise little agreement about the precise time of formation or animation. There was agreement, however, that, prior to this point, the fetus was to be regarded as part of the mother, and its destruction, therefore, was not homicide. Due to continued uncertainty about the precise time when animation occurred, to the lack of any empirical basis for the 40-80-day view, and perhaps to Aquinas' definition of movement as one of the two first principles of life, Bracton focused upon quickening as the critical point. The significance
of quickening was echoed by later common law scholars, and found its way into the received common law in this country.

Whether abortion of a quick fetus was a felony at common law, or even a lesser crime, is still disputed. Bracton, writing early in the 13th century, thought it homicide. [Footnote 23] But the later and predominant view, following the great common law scholars, has been that it was, at most, a lesser offense. In a frequently cited

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passage, Coke took the position that abortion of a woman "quick with childe" is "a great misprision, and no murder." [Footnote 24] Blackstone followed, saying that, while abortion after quickening had once been considered manslaughter (though not murder), "modern law" took a less severe view. [Footnote 25] A recent review of the common law precedents argues, however, that those precedents contradict Coke, and that even post-quickening abortion was never established as a common law crime. [Footnote 26] This is of some importance, because, while most American courts ruled, in holding or dictum, that abortion of an unquickened fetus was not criminal under their received common law, [Footnote 27] others followed Coke in stating that abortion of a quick fetus was a "misprision," a term they translated to mean "misdemeanor." [Footnote 28] That their reliance on Coke on this aspect of the law was uncritical and, apparently in all the reported cases, dictum (due probably to the paucity of common law prosecutions for post-quickening abortion), makes it now appear doubtful that abortion was ever firmly established as a common law crime even with respect to the destruction of a quick fetus.

4. The English statutory law. England's first criminal abortion statute, Lord Ellenborough's Act, 43 Geo. 3, c. 58, came in 1803. It made abortion of a quick fetus, § 1, a capital crime, but, in § 2, it provided lesser penalties for the felony of abortion before quickening, and thus preserved the "quickening" distinction. This contrast was continued in the general revision of 1828, 9 Geo. 4, c. 31, § 13. It disappeared, however, together with the death penalty, in 1837, 7 Will. 4 & 1 Vict., c. 85. § 6, and did not reappear in the Offenses Against the Person Act of 1861, 24 & 25 Vict., c. 100, § 59, that formed the core of English anti-abortion law until the liberalizing reforms of 1967. In 1929, the Infant Life (Preservation) Act, 19 & 20 Geo. 5, c. 34, came into being. Its emphasis was upon the destruction of "the life of a child capable of being born alive." It made a willful act performed with the necessary intent a felony. It contained a proviso that one was not to be

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found guilty of the offense
"unless it is proved that the act which caused the death of the child was not done in good faith for the purpose only of preserving the life of the mother."

A seemingly notable development in the English law was the case of *Rex v. Bourne*, [1939] 1 K.B. 687. This case apparently answered in the affirmative the question whether an abortion necessary to preserve the life of the pregnant woman was excepted from the criminal penalties of the 1861 Act. In his instructions to the jury, Judge Macnaghten referred to the 1929 Act, and observed that that Act related to "the case where a child is killed by a willful act at the time when it is being delivered in the ordinary course of nature." *Id.* at 691. He concluded that the 1861 Act's use of the word "unlawfully," imported the same meaning expressed by the specific proviso in the 1929 Act, even though there was no mention of preserving the mother's life in the 1861 Act. He then construed the phrase "preserving the life of the mother" broadly, that is, "in a reasonable sense," to include a serious and permanent threat to the mother's health, and instructed the jury to acquit Dr. Bourne if he had acted in a good faith belief that the abortion was necessary for this purpose. *Id.* at 693-694. The jury did acquit.

Recently, Parliament enacted a new abortion law. This is the Abortion Act of 1967, 15 & 16 Eliz. 2, c. 87. The Act permits a licensed physician to perform an abortion where two other licensed physicians agree (a)

"that the continuance of the pregnancy would involve risk to the life of the pregnant woman, or of injury to the physical or mental health of the pregnant woman or any existing children of her family, greater than if the pregnancy were terminated,"

or (b)

"that there is a substantial risk that, if the child were born it would suffer from such physical or mental abnormalities as

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to be seriously handicapped."

The Act also provides that, in making this determination, "account may be taken of the pregnant woman's actual or reasonably foreseeable environment." It also permits a physician, without the concurrence of others, to terminate a pregnancy where he is of the good faith opinion that the abortion "is immediately necessary to save the life or to prevent grave permanent injury to the physical or mental health of the pregnant woman."

5. *The American law.* In this country, the law in effect in all but a few States until mid-19th century was the preexisting English common law. Connecticut, the first State to enact abortion legislation, adopted in 1821 that part of Lord Ellenborough's Act that related to a woman "quick with child." [*Footnote 29*] The death penalty was not imposed. Abortion before quickening was made a crime in that State only in 1860. [*Footnote 30*] In
1828, New York enacted legislation [Footnote 31] that, in two respects, was to serve as a model for early anti-abortion statutes. First, while barring destruction of an unquickened fetus as well as a quick fetus, it made the former only a misdemeanor, but the latter second-degree manslaughter. Second, it incorporated a concept of therapeutic abortion by providing that an abortion was excused if it "shall have been necessary to preserve the life of such mother, or shall have been advised by two physicians to be necessary for such purpose."

By 1840, when Texas had received the common law, [Footnote 32] only eight American States had statutes dealing with abortion. [Footnote 33] It was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening, but were lenient with it before quickening. Most punished attempts equally with completed abortions. While many statutes included the exception for an abortion thought by one or more physicians to be necessary to save the mother's life, that provision soon disappeared, and the typical law required that the procedure actually be necessary for that purpose. Gradually, in the middle and late 19th century, the quickening distinction disappeared from the statutory law of most States and the degree of the offense and the penalties were increased. By the end of the 1950's, a large majority of the jurisdictions banned abortion, however and whenever performed, unless done to save or preserve the life of the mother. [Footnote 34] The exceptions, Alabama and the District of Columbia, permitted abortion to preserve the mother's health. [Footnote 35] Three States permitted abortions that were not "unlawfully" performed or that were not "without lawful justification," leaving interpretation of those standards to the courts. [Footnote 36] In the past several years, however, a trend toward liberalization of abortion statutes has resulted in adoption, by about one-third of the States, of less stringent laws, most of them patterned after the ALI Model Penal Code, § 230.3, [Footnote 37] set forth as Appendix B to the opinion in *Doe v. Bolton, post, p. 410 U. S. 205*. It is thus apparent that, at common law, at the time of the adoption of our Constitution, and throughout the major portion of the 19th century, abortion was viewed with less disfavor than under most American statutes currently in effect. Phrasing it another way, a woman enjoyed a substantially broader right to terminate a pregnancy than she does in most States today. At least with respect to the early stage of pregnancy, and very possibly without such a limitation, the opportunity
to make this choice was present in this country well into the 19th century. Even later, the law continued for some time to treat less punitively an abortion procured in early pregnancy.

6. The position of the American Medical Association. The anti-abortion mood prevalent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.

An AMA Committee on Criminal Abortion was appointed in May, 1857. It presented its report, 12 Trans. of the Am. Med. Assn. 778 (1859), to the Twelfth Annual Meeting. That report observed that the Committee had been appointed to investigate criminal abortion "with a view to its general suppression." It deplored abortion and its frequency and it listed three causes of "this general demoralization":

"The first of these causes is a widespread popular ignorance of the true character of the crime -- a belief, even among mothers themselves, that the foetus is not alive till after the period of quickening."

"The second of the agents alluded to is the fact that the profession themselves are frequently supposed careless of foetal life. . . ."

"The third reason of the frightful extent of this crime is found in the grave defects of our laws, both common and statute, as regards the independent and actual existence of the child before birth, as a living being. These errors, which are sufficient in most instances to prevent conviction, are based, and only based, upon mistaken and exploded medical dogmas. With strange inconsistency, the law fully acknowledges the foetus in utero and its inherent rights, for civil purposes; while personally and as criminally affected, it fails to recognize it,

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and to its life as yet denies all protection."

*Id.* at 776. The Committee then offered, and the Association adopted, resolutions protesting "against such unwarrantable destruction of human life," calling upon state legislatures to revise their abortion laws, and requesting the cooperation of state medical societies "in pressing the subject." *Id.* at 28, 78.

In 1871, a long and vivid report was submitted by the Committee on Criminal Abortion. It ended with the observation,

"We had to deal with human life. In a matter of less importance, we could entertain no compromise. An honest judge on the bench would call things by their proper names. We could do no less."
"be unlawful and unprofessional for any physician to induce abortion or premature labor without the concurrent opinion of at least one respectable consulting physician, and then always with a view to the safety of the child -- if that be possible,"

and calling

"the attention of the clergy of all denominations to the perverted views of morality entertained by a large class of females -- aye, and men also, on this important question."

Except for periodic condemnation of the criminal abortionist, no further formal AMA action took place until 1967. In that year, the Committee on Human Reproduction urged the adoption of a stated policy of opposition to induced abortion except when there is "documented medical evidence" of a threat to the health or life of the mother, or that the child "may be born with incapacitating physical deformity or mental deficiency," or that a pregnancy "resulting from legally established statutory or forcible rape or incest may constitute a threat to the mental or physical health of the patient," two other physicians "chosen because of their recognized professional competence have examined the patient and have concurred in writing," and the procedure "is performed in a hospital accredited by the Joint Commission on Accreditation of Hospitals." The providing of medical information by physicians to state legislatures in their consideration of legislation regarding therapeutic abortion was "to be considered consistent with the principles of ethics of the American Medical Association." This recommendation was adopted by the House of Delegates. Proceedings of the AMA House of Delegates 40-51 (June 1967).

In 1970, after the introduction of a variety of proposed resolutions and of a report from its Board of Trustees, a reference committee noted "polarization of the medical profession on this controversial issue"; division among those who had testified; a difference of opinion among AMA councils and committees; "the remarkable shift in testimony" in six months, felt to be influenced "by the rapid changes in state laws and by the judicial decisions which tend to make abortion more freely available; " and a feeling "that this trend will continue." On June 25, 1970, the House of Delegates adopted preambles and most of the resolutions proposed by the reference committee. The preambles emphasized "the best interests of the patient," "sound clinical judgment," and "informed patient consent," in contrast to "mere acquiescence to the patient's demand." The resolutions asserted that abortion is a medical procedure that should be performed by a licensed physician in an accredited hospital only after consultation with two other physicians and in conformity with state law, and that no party to the procedure should be required to violate personally held moral principles. [Footnote 38] Proceedings
of the AMA House of Delegates 220 (June 1970). The AMA Judicial Council rendered a complementary opinion. [Footnote 39]

7. The position of the American Public Health Association. In October, 1970, the Executive Board of the APHA adopted Standards for Abortion Services. These were five in number:

"a. Rapid and simple abortion referral must be readily available through state and local public health departments, medical societies, or other nonprofit organizations."

"b. An important function of counseling should be to simplify and expedite the provision of abortion services; it should not delay the obtaining of these services."

"c. Psychiatric consultation should not be mandatory. As in the case of other specialized medical services, psychiatric consultation should be sought for definite indications, and not on a routine basis."

"d. A wide range of individuals from appropriately trained, sympathetic volunteers to highly skilled physicians may qualify as abortion counselors."

"e. Contraception and/or sterilization should be discussed with each abortion patient."

"Recommended Standards for Abortion Services, 61 Am.J.Pub.Health 396 (1971). Among factors pertinent to life and health risks associated with abortion were three that 'are recognized as important': "

"a. the skill of the physician,"

"b. the environment in which the abortion is performed, and above all"

"c. the duration of pregnancy, as determined by uterine size and confirmed by menstrual history."

_Id_. at 397.

It was said that "a well equipped hospital" offers more protection "to cope with unforeseen difficulties than an office or clinic without such resources. . . . The factor of gestational age is of overriding importance."
Thus, it was recommended that abortions in the second trimester and early abortions in the presence of existing medical complications be performed in hospitals as inpatient procedures. For pregnancies in the first trimester, abortion in the hospital with or without overnight stay "is probably the safest practice." An abortion in an extramural facility, however, is an acceptable alternative "provided arrangements exist in advance to admit patients promptly if unforeseen complications develop." Standards for an abortion facility were listed. It was said that, at present, abortions should be performed by physicians or osteopaths who are licensed to practice and who have "adequate training." Id. at 398.

8. The position of the American Bar Association. At its meeting in February, 1972, the ABA House of Delegates approved, with 17 opposing votes, the Uniform Abortion Act that had been drafted and approved the preceding August by the Conference of Commissioners on Uniform State Laws. 58 A.B.A.J. 380 (1972). We set forth the Act in full in the margin. [Footnote 40] The

Opinion of the Court Conference has appended an enlightening Prefatory Note. [Footnote 41]

VII

Three reasons have been advanced to explain historically the enactment of criminal abortion laws in the 19th century and to justify their continued existence.

It has been argued occasionally that these laws were the product of a Victorian social concern to discourage illicit sexual conduct. Texas, however, does not advance this justification in the present case, and it appears that no court or commentator has taken the argument seriously. [Footnote 42] The appellants and amici contend, moreover, that this is not a proper state purpose, at all and suggest that, if it were, the Texas statutes are overbroad in protecting it, since the law fails to distinguish between married and unwed mothers.

A second reason is concerned with abortion as a medical procedure. When most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman. [Footnote 43] This was particularly true prior to the
development of antisepsis. Antiseptic techniques, of course, were based on discoveries by Lister, Pasteur, and others first announced in 1867, but were not generally accepted and employed until about the turn of the century. Abortion mortality was high. Even after 1900, and perhaps until as late as the development of antibiotics in the 1940's, standard modern techniques such as dilation and curettage were not nearly so safe as they are today. Thus, it has been argued that a State's real concern in enacting a criminal abortion law was to protect the pregnant woman, that is, to restrain her from submitting to a procedure that placed her life in serious jeopardy.

Modern medical techniques have altered this situation. Appellants and various amici refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth. Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain.

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The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient. This interest obviously extends at least to the performing physician and his staff, to the facilities involved, to the availability of after-care, and to adequate provision for any complication or emergency that might arise. The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in regulating the conditions under which abortions are performed. Moreover, the risk to the woman increases as her pregnancy continues. Thus, the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.

The third reason is the State's interest -- some phrase it in terms of duty -- in protecting prenatal life. Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth. In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least potential life is involved, the State may assert interests beyond the protection of the pregnant woman alone.

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Parties challenging state abortion laws have sharply disputed in some courts the contention that a purpose of these laws, when enacted, was to protect prenatal life. [Footnote 46] Pointing to the absence of legislative history to support the contention, they claim that most state laws were designed solely to protect the woman. Because medical advances have lessened this concern, at least with respect to abortion in early pregnancy, they argue that with respect to such abortions the laws can no longer be justified by any state interest. There is some scholarly support for this view of original purpose. [Footnote 47] The few state courts called upon to interpret their laws in the late 19th and early 20th centuries did focus on the State's interest in protecting the woman's health, rather than in preserving the embryo and fetus. [Footnote 48] Proponents of this view point out that in many States, including Texas, [Footnote 49] by statute or judicial interpretation, the pregnant woman herself could not be prosecuted for self-abortion or for cooperating in an abortion performed upon her by another. [Footnote 50] They claim that adoption of the "quickening" distinction through received common law and state statutes tacitly recognizes the greater health hazards inherent in late abortion and impliedly repudiates the theory that life begins at conception.

It is with these interests, and the eight to be attached to them, that this case is concerned.

VIII

The Constitution does not explicitly mention any right of privacy. In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. v. Botsford, 141 U. S. 250, 141 U. S. 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment, Stanley v. Georgia, 394 U. S. 557, 394 U. S. 564 (1969); in the Fourth and Fifth Amendments, Terry v. Ohio, 392 U. S. 1, 392 U. S. 8-9 (1968), Katz v. United States, 389 U. S. 347, 389 U. S. 350 (1967), Boyd v. United States, 116 U. S. 616 (1886), see Olmstead v. United States, 277 U. S. 438, 277 U. S. 478 (1928) (Brandeis, J., dissenting); in the penumbras of the Bill of Rights, Griswold v. Connecticut, 381 U. S. at 381 U. S. 484-485; in the Ninth Amendment, id. at 381 U. S. 486 (Goldberg, J., concurring); or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment, see Meyer v. Nebraska, 262 U. S. 390, 262 U. S. 399 (1923). These decisions make it clear that only personal rights that can be deemed "fundamental" or "implicit in the concept of ordered liberty," Palko v. Connecticut, 302 U. S. 319, 302 U. S. 325 (1937), are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, Loving v. Virginia, 388 U. S. 1, 388 U. S. 12 (1967); procreation, Skinner v. Oklahoma, 316 U. S. 535, 316 U. S. 541-542 (1942); contraception, Eisenstadt v. Baird, 405 U. S. at 405 U. S. 453-454; id. at 405 U. S. 460, 405 U. S. 463-465

This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation.

On the basis of elements such as these, appellant and some amici argue that the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses. With this we do not agree. Appellant's arguments that Texas either has no valid interest at all in regulating the abortion decision, or no interest strong enough to support any limitation upon the woman's sole determination, are unpersuasive. The Court's decisions recognizing a right of privacy also acknowledge that some state regulation in areas protected by that right is appropriate. As noted above, a State may properly assert important interests in safeguarding health, in maintaining medical standards, and in protecting potential life. At some point in pregnancy, these respective interests become sufficiently compelling to sustain regulation of the factors that govern the abortion decision. The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some amici that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past. *Jacobson v. Massachusetts*, 197 U. S. 11 (1905) (vaccination); *Buck v. Bell*, 274 U. S. 200 (1927) (sterilization).

We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified, and must be considered against important state interests in regulation.
We note that those federal and state courts that have recently considered abortion law challenges have reached the same conclusion. A majority, in addition to the District Court in the present case, have held state laws unconstitutional, at least in part, because of vagueness or because of overbreadth and abridgment of rights.  


Although the results are divided, most of these courts have agreed that the right of privacy, however based, is broad enough to cover the abortion decision; that the right, nonetheless, is not absolute, and is subject to some limitations; and that, at some point, the state interests as to protection of health, medical standards, and prenatal life, become dominant. We agree with this approach.

In the recent abortion cases cited above, courts have recognized these principles. Those striking down state laws have generally scrutinized the State's interests in protecting health and potential life, and have concluded that neither interest justified broad limitations on the reasons for which a physician and his pregnant patient might decide that she should have an abortion in the early stages of pregnancy. Courts sustaining state laws have held that the State's determinations to protect health or prenatal life are dominant and constitutionally justifiable.

IX

The District Court held that the appellee failed to meet his burden of demonstrating that the Texas statute's infringement upon Roe's rights was necessary to support a compelling state interest, and that, although the appellee presented "several compelling justifications for state presence in the area of abortions," the statutes outstripped these justifications and swept "far beyond any areas of compelling state interest." 314 F.Supp. at 1222-1223. Appellant and appellee both contest that holding. Appellant, as has been indicated, claims an absolute right that bars any state imposition of criminal penalties in the area. Appellee argues that the State's determination to recognize and protect prenatal life from and after conception constitutes a compelling state interest. As noted above, we do not agree fully with either formulation.

A. The appellee and certain amici argue that the fetus is a "person" within the language and meaning of the Fourteenth Amendment. In support of this, they outline at length and in detail the well known facts of fetal development. If this suggestion of personhood is established, the appellant's case, of course, collapses,

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for the fetus' right to life would then be guaranteed specifically by the Amendment. The appellant conceded as much on reargument. [Footnote 51] On the other hand, the appellee conceded on reargument [Footnote 52] that no case could be cited that holds that a fetus is a person within the meaning of the Fourteenth Amendment.

The Constitution does not define "person" in so many words. Section 1 of the Fourteenth Amendment contains three references to "person." The first, in defining "citizens," speaks of "persons born or naturalized in the United States." The word also appears both in the Due Process Clause and in the Equal Protection Clause. "Person" is used in other places in the Constitution: in the listing of qualifications for Representatives and Senators, Art. I, § 2, cl. 2, and § 3, cl. 3; in the Apportionment Clause, Art. I, § 2, cl. 3; [Footnote 53] in the Migration and Importation provision, Art. I, § 9, cl. 1; in the Emolument Clause, Art. I, § 9, cl. 8; in the Electors provisions, Art. II, § 1, cl. 2, and the superseded cl. 3; in the provision outlining qualifications for the office of President, Art. II, § 1, cl. 5; in the Extradition provisions, Art. IV, § 2, cl. 2, and the superseded Fugitive Slave Clause 3; and in the Fifth, Twelfth, and Twenty-second Amendments, as well as in §§ 2 and 3 of the Fourteenth Amendment. But in nearly all these instances, the use of the word is such
that it has application only post-natally. None indicates, with any assurance, that it has any possible pre-natal application. [Footnote 54]

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All this, together with our observation, supra, that, throughout the major portion of the 19th century, prevailing legal abortion practices were far freer than they are today, persuades us that the word "person," as used in the Fourteenth Amendment, does not include the unborn. [Footnote 55] This is in accord with the results reached in those few cases where the issue has been squarely presented. McGarvey v. Magee-Womens Hospital, 340 F.Supp. 751 (WD Pa.1972); Byrn v. New York City Health & Hospitals Corp., 31 N.Y.2d 194, 286 N.E.2d 887 (1972), appeal docketed, No. 72-434; Abele v. Markle, 351 F.Supp. 224 (Conn.1972), appeal docketed, No. 72-730. Cf. Cheaney v. State, ___ Ind. at ___, 285 N.E.2d at 270; Montana v. Rogers, 278 F.2d 68, 72 (CA7 1960), aff'd sub nom. Montana v. Kennedy, 366 U. S. 308 (1961); Keeler v. Superior Court, 2 Cal.3d 619, 470 P.2d 617 (1970); State v. Dickinson, 28

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Ohio St.2d 65, 275 N.E.2d 599 (1971). Indeed, our decision in United States v. Vuitch, 402 U. S. 62 (1971), inferentially is to the same effect, for we there would not have indulged in statutory interpretation favorable to abortion in specified circumstances if the necessary consequence was the termination of life entitled to Fourteenth Amendment protection.

This conclusion, however, does not of itself fully answer the contentions raised by Texas, and we pass on to other considerations.

B. The pregnant woman cannot be isolated in her privacy. She carries an embryo and, later, a fetus, if one accepts the medical definitions of the developing young in the human uterus. See Dorland's Illustrated Medical Dictionary 478-479, 547 (24th ed.1965). The situation therefore is inherently different from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education, with which Eisenstadt and Griswold, Stanley, Loving, Skinner, and Pierce and Meyer were respectively concerned. As we have intimated above, it is reasonable and appropriate for a State to decide that, at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman's privacy is no longer sole and any right of privacy she possesses must be measured accordingly.

Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.
It should be sufficient to note briefly the wide divergence of thinking on this most sensitive and difficult question. There has always been strong support for the view that life does not begin until live birth. This was the belief of the Stoics. [Footnote 56] It appears to be the predominant, though not the unanimous, attitude of the Jewish faith. [Footnote 57] It may be taken to represent also the position of a large segment of the Protestant community, insofar as that can be ascertained; organized groups that have taken a formal position on the abortion issue have generally regarded abortion as a matter for the conscience of the individual and her family. [Footnote 58] As we have noted, the common law found greater significance in quickening. Physician and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes "viable," that is, potentially able to live outside the mother's womb, albeit with artificial aid. [Footnote 59] Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks. [Footnote 60] The Aristotelian theory of "mediate animation," that held sway throughout the Middle Ages and the Renaissance in Europe, continued to be official Roman Catholic dogma until the 19th century, despite opposition to this "ensoulment" theory from those in the Church who would recognize the existence of life from the moment of conception. [Footnote 61] The latter is now, of course, the official belief of the Catholic Church. As one brief amicus discloses, this is a view strongly held by many non-Catholics as well, and by many physicians. Substantial problems for precise definition of this view are posed, however, by new embryological data that purport to indicate that conception is a "process" over time, rather than an event, and by new medical techniques such as menstrual extraction, the "morning-after" pill, implantation of embryos, artificial insemination, and even artificial wombs. [Footnote 62]

In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth, or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth. For example, the traditional rule of tort law denied recovery for prenatal injuries even though the child was born alive. [Footnote 63] That rule has been changed in almost every jurisdiction. In most States, recovery is said to be permitted only if the fetus was viable, or at least quick, when the injuries were sustained, though few courts have squarely so held. [Footnote 64] In a recent development, generally opposed by the commentators, some States permit the parents of a stillborn child to maintain an action for wrongful death because of prenatal injuries. [Footnote 65] Such an action, however, would appear to be one to vindicate the parents' interest and is thus consistent
with the view that the fetus, at most, represents only the potentiality of life. Similarly, unborn children have been recognized as acquiring rights or interests by way of inheritance or other devolution of property, and have been represented by guardians ad litem. [Footnote 66] Perfection of the interests involved, again, has generally been contingent upon live birth. In short, the unborn have never been recognized in the law as persons in the whole sense.

X

In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake. We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a nonresident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes "compelling."

With respect to the State's important and legitimate interest in the health of the mother, the "compelling" point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 410 U. S. 149, that, until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health. Examples of permissible state regulation in this area are requirements as to the qualifications of the person who is to perform the abortion; as to the licensure of that person; as to the facility in which the procedure is to be performed, that is, whether it must be a hospital or may be a clinic or some other place of less-than-hospital status; as to the licensing of the facility; and the like.

This means, on the other hand, that, for the period of pregnancy prior to this "compelling" point, the attending physician, in consultation with his patient, is free to determine, without regulation by the State, that, in his medical judgment, the patient's pregnancy should be terminated. If that decision is reached, the judgment may be effectuated by an abortion free of interference by the State.

With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion
during that period, except when it is necessary to preserve the life or health of the mother.

Measured against these standards, Art. 1196 of the Texas Penal Code, in restricting legal abortions to those "procured or attempted by medical advice for the purpose of saving the life of the mother," sweeps too broadly. The statute makes no distinction between abortions performed early in pregnancy and those performed later, and it limits to a single reason, "saving" the mother's life, the legal justification for the procedure. The statute, therefore, cannot survive the constitutional attack made upon it here.

This conclusion makes it unnecessary for us to consider the additional challenge to the Texas statute asserted on grounds of vagueness. See United States v. Vuitch, 402 U.S. at 402 U.S. 67-72.

XI

To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.

2. The State may define the term "physician," as it has been employed in the preceding paragraphs of this Part XI of this opinion, to mean only a physician currently licensed by the State, and may proscribe any abortion by a person who is not a physician as so defined.
In *Doe v. Bolton, post*, p. 410 U. S. 179, procedural requirements contained in one of the modern abortion statutes are considered. That opinion and this one, of course, are to be read together. [Footnote 67]

This holding, we feel, is consistent with the relative weights of the respective interests involved, with the lessons and examples of medical and legal history, with the lenity of the common law, and with the demands of the profound problems of the present day. The decision leaves the State free to place increasing restrictions on abortion as the period of pregnancy lengthens, so long as those restrictions are tailored to the recognized state interests. The decision vindicates the right of the physician to administer medical treatment according to his professional judgment up to the points where important state interests provide compelling justifications for intervention. Up to those points, the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician. If an individual practitioner abuses the privilege of exercising proper medical judgment, the usual remedies, judicial and intra-professional, are available.

XII

Our conclusion that Art. 1196 is unconstitutional means, of course, that the Texas abortion statutes, as a unit, must fall. The exception of Art. 1196 cannot be struck down separately, for then the State would be left with a statute proscribing all abortion procedures no matter how medically urgent the case.

Although the District Court granted appellant Roe declaratory relief, it stopped short of issuing an injunction against enforcement of the Texas statutes. The Court has recognized that different considerations enter into a federal court's decision as to declaratory relief, on the one hand, and injunctive relief, on the other. *Zwickler v. Koota*, 389 U. S. 241, 389 U. S. 252-255 (1967); *Dombrowski v. Pfister*, 380 U. S. 479 (1965). We are not dealing with a statute that, on its face, appears to abridge free expression, an area of particular concern under *Dombrowski* and refined in *Younger v. Harris*, 401 U. S. at 401 U. S. 50.

We find it unnecessary to decide whether the District Court erred in withholding injunctive relief, for we assume the Texas prosecutorial authorities will give full credence to this decision that the present criminal abortion statutes of that State are unconstitutional.

The judgment of the District Court as to intervenor Hallford is reversed, and Dr. Hallford's complaint in intervention is dismissed. In all other respects, the judgment
of the District Court is affirmed. Costs are allowed to the appellee.

*It is so ordered.*

[For concurring opinion of MR. CHIEF JUSTICE BURGER, see post, p. 410 U. S. 207.]

[For concurring opinion of MR. JUSTICE DOUGLAS, see post, p. 410 U. S. 209.]

[For dissenting opinion of MR. JUSTICE WHITE, see post, p. 410 U. S. 221.]

[Footnote 1]

"Article 1191. Abortion"

"If any person shall designedly administer to a pregnant woman or knowingly procure to be administered with her consent any drug or medicine, or shall use towards her any violence or means whatever externally or internally applied, and thereby procure an abortion, he shall be confined in the penitentiary not less than two nor more than five years; if it be done without her consent, the punishment shall be doubled. By 'abortion' is meant that the life of the fetus or embryo shall be destroyed in the woman's womb or that a premature birth thereof be caused."

"Art. 1192. Furnishing the means"

"Whoever furnishes the means for procuring an abortion knowing the purpose intended is guilty as an accomplice."

"Art. 1193. Attempt at abortion"

"If the means used shall fail to produce an abortion, the offender is nevertheless guilty of an attempt to produce abortion, provided it be shown that such means were calculated to produce that result, and shall be fined not less than one hundred nor more than one thousand dollars."

"Art. 1194. Murder in producing abortion"

"If the death of the mother is occasioned by an abortion so produced or by an attempt to effect the same it is murder."

"Art. 1196. By medical advice"

"Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother."
The foregoing Articles, together with Art. 1195, compose Chapter 9 of Title 15 of the Penal Code. Article 1195, not attacked here, reads:

"Art. 1195. Destroying unborn child"

"Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."

[Footnote 2]


[Footnote 3]

Long ago, a suggestion was made that the Texas statutes were unconstitutionally vague because of definitional deficiencies. The Texas Court of Criminal Appeals disposed of that suggestion peremptorily, saying only,

"It is also insisted in the motion in arrest of judgment that the statute is unconstitutional and void in that it does not sufficiently define or describe the offense of abortion. We do not concur in respect to this question."

Jackson v. State, 55 Tex.Cr.R. 79, 89, 115 S.W. 262, 268 (1908). The same court recently has held again that the State's abortion statutes are not unconstitutionally vague or overbroad. Thompson v. State (Ct.Crim.App. Tex.1971), appeal docketed, No. 71-1200. The court held that "the State of Texas has a compelling interest to protect fetal life"; that
Art. 1191 "is designed to protect fetal life"; that the Texas homicide statutes, particularly Art. 1205 of the Penal Code, are intended to protect a person "in existence by actual birth," and thereby implicitly recognize other human life that is not "in existence by actual birth"; that the definition of human life is for the legislature and not the courts; that Art. 1196 "is more definite than the District of Columbia statute upheld in [402 U. S.] Vuitch" (402 U.S. 62); and that the Texas statute "is not vague and indefinite or overbroad." A physician's abortion conviction was affirmed.


[Footnote 4]

The name is a pseudonym.

[Footnote 5]

These names are pseudonyms.

[Footnote 6]

The appellee twice states in his brief that the hearing before the District Court was held on July 22, 1970. Brief for Appellee 13. The docket entries, App. 2, and the transcript, App. 76, reveal this to be an error. The July date appears to be the time of the reporter's transcription. See App. 77.

[Footnote 7]

We need not consider what different result, if any, would follow if Dr. Hallford's intervention were on behalf of a class. His complaint in intervention does not purport to assert a class suit, and makes no reference to any class apart from an allegation that he "and others similarly situated" must necessarily guess at the meaning of Art. 1196. His application for leave to intervene goes somewhat further, for it asserts that plaintiff Roe does not adequately protect the interest of the doctor "and the class of people who are physicians . . . [and] the class of people who are . . . patients . . . ." The leave application, however, is not the complaint. Despite the District Court's statement to the contrary, 314 F.Supp. at 1225, we fail to perceive the essentials of a class suit in the Hallford complaint.

[Footnote 8]

A. Castiglioni, A History of Medicine 84 (2d ed.1947), E. Krumbhaar, translator and editor (hereinafter Castiglioni).


Edelstein 12; Ricci 113-114, 118-119; Noonan 5.

Edelstein 13-14

Castiglioni 148.

Id. at 154.

Edelstein 3.

Id. at 12, 15-18.

Id. at 18; Lader 76.
Edelstein 63.

[Footnote 19]

Id. at 64.

[Footnote 20]


[Footnote 21]


[Footnote 22]

Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male and 80 to 90 days for a female. See, for example, Aristotle, Hist.Anim. 7.3.583b; Gen.Anim. 2.3.736, 2.5.741; Hippocrates, Lib. de Nat.Puer., No. 10. Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.

The theological debate was reflected in the writings of St. Augustine, who made a distinction between embryo inanimatus, not yet endowed with a soul, and embryo animatus. He may have drawn upon Exodus 21:22. At one point, however, he expressed the view that human powers cannot determine the point during fetal development at which the critical change occurs. See Augustine, De Origine Animae 4.4 (Pub.Law 44.527). See also W. Reany, The Creation of the Human Soul, c. 2 and 83-86 (1932); Huser, The Crime of Abortion in Canon Law 15 (Catholic Univ. of America, Canon Law Studies No. 162, Washington, D.C.1942).

Galen, in three treatises related to embryology, accepted the thinking of Aristotle and his followers. Quay 426-427. Later, Augustine on abortion was incorporated by Gratian into the Decretum, published about 1140. Decretum Magistri Gratiani 2.32.2.7 to 2.32.2.10, in 1 Corpus Juris Canonici 1122, 1123 (A. Friedburg, 2d ed. 1879). This Decretal and the Decretals that followed were recognized as the definitive body of canon law until the new Code of 1917.
For discussions of the canon law treatment, see Means I, pp. 411-412; Noonan 20-26; Quay 426-430; see also J. Noonan, Contraception: A History of Its Treatment by the Catholic Theologians and Canonists 18-29 (1965).

[Footnote 23]

Bracton took the position that abortion by blow or poison was homicide "if the foetus be already formed and animated, and particularly if it be animated." 2 H. Bracton, De Legibus et Consuetudinibus Angliae 279 (T. Twiss ed. 1879), or, as a later translation puts it, "if the foetus is already formed or quickened, especially if it is quickened," 2 H. Bracton, On the Laws and Customs of England 341 (S. Thorne ed.1968). See Quay 431; see also 2 Fleta 661 (Book 1, c. 23) (Selden Society ed.1955).

[Footnote 24]

E. Coke, Institutes III *50.

[Footnote 25]

1 W. Blackstone, Commentaries *129-130.

[Footnote 26]

Means, The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?, 17 N.Y.L.F. 335 (1971) (hereinafter Means II). The author examines the two principal precedents cited marginally by Coke, both contrary to his dictum, and traces the treatment of these and other cases by earlier commentators. He concludes that Coke, who himself participated as an advocate in an abortion case in 1601, may have intentionally misstated the law. The author even suggests a reason: Coke's strong feelings against abortion, coupled with his determination to assert common law (secular) jurisdiction to assess penalties for an offense that traditionally had been an exclusively ecclesiastical or canon law crime. See also Lader 78-79, who notes that some scholars doubt that the common law ever was applied to abortion; that the English ecclesiastical courts seem to have lost interest in the problem after 1527; and that the preamble to the English legislation of 1803, 43 Geo. 3, c. 58, § 1, referred to in the text, infra at 410 U. S. 136, states that "no adequate means have been hitherto provided for the prevention and punishment of such offenses."

[Footnote 27]

Commonwealth v. Bangs, 9 Mass. 387, 388 (1812); Commonwealth v. Parker, 50 Mass. (9 Metc.) 263, 265-266 (1845); State v. Cooper, 22 N.J.L. 52, 58 (1849); Abrams v. Foshee, 3 Iowa 274, 278-280 (1856); Smith v. Gaffard, 31 Ala. 45, 51 (1857); Mitchell v. Commonwealth, 78 Ky. 204, 210 (1879); Eggart v. State, 40 Fla. 527, 532, 25 So. 144,

[Footnote 28]

See Smith v. State, 33 Me. 48, 55 (1851); Evans v. People, 49 N.Y. 86, 88 (1872); Lamb v. State, 67 Md. 524, 533, 10 A. 208 (1887).

[Footnote 29]

Conn.Stat., Tit. 20, § 14 (1821).

[Footnote 30]


[Footnote 31]

N.Y.Rev.Stat., pt. 4, c. 1, Tit. 2, Art. 1, § 9, p. 661, and Tit. 6, § 21, p. 694 (1829).

[Footnote 32]

Act of Jan. 20, 1840, § 1, set forth in 2 H. Gammel, Laws of Texas 177-178 (1898); see Grigsby v. Reib, 105 Tex. 597, 600, 153 S.W. 1124, 1125 (1913).

[Footnote 33]

The early statutes are discussed in Quay 435-438. See also Lader 85-88; Stern 85-86; and Means II 37376.

[Footnote 34]

Criminal abortion statutes in effect in the States as of 1961, together with historical statutory development and important judicial interpretations of the state statutes, are cited and quoted in Quay 447-520. See Comment, A Survey of the Present Statutory and Case Law on Abortion: The Contradictions and the Problems, 1972 U.Ill.L.F. 177, 179, classifying the abortion statutes and listing 25 States as permitting abortion only if necessary to save or preserve the mother's life.

[Footnote 35]


By the end of 1970, four other States had repealed criminal penalties for abortions performed in early pregnancy by a licensed physician, subject to stated procedural and health requirements. Alaska Stat. § 11.15.060 (1970); Haw.Rev.Stat. § 453-16 (Supp. 1971); N.Y.Penal Code § 125.05, subd. 3 (Supp. 1972-1973); Wash.Rev.Code §§ 9.02.060 to 9.02.080 (Supp. 1972). The precise status of criminal abortion laws in some States is made unclear by recent decisions in state and federal courts striking down existing state laws, in whole or in part.

"Whereas, Abortion, like any other medical procedure, should not be performed when contrary to the best interests of the patient since good medical practice requires due consideration for the patient's welfare, and not mere acquiescence to the patient's demand; and"

"Whereas, The standards of sound clinical judgment, which, together with informed patient consent, should be determinative according to the merits of each individual case; therefore be it"

"RESOLVED, That abortion is a medical procedure and should be performed only by a duly licensed physician and surgeon in an accredited hospital acting only after consultation with two other physicians chosen because of their professional competency and in conformance with standards of good medical practice and the Medical Practice Act of his State; and be it further"
"RESOLVED, That no physician or other professional personnel shall be compelled to perform any act which violates his good medical judgment. Neither physician, hospital, nor hospital personnel shall be required to perform any act violative of personally held moral principles. In these circumstances, good medical practice requires only that the physician or other professional personnel withdraw from the case so long as the withdrawal is consistent with good medical practice."


[Footnote 39]

"The Principles of Medical Ethics of the AMA do not prohibit a physician from performing an abortion that is performed in accordance with good medical practice and under circumstances that do not violate the laws of the community in which he practices."

"In the matter of abortions, as of any other medical procedure, the Judicial Council becomes involved whenever there is alleged violation of the Principles of Medical Ethics as established by the House of Delegates."

[Footnote 40]

"UNIFORM ABORTION ACT"

"SECTION 1. [Abortion Defined; When Authorized.]

'(a) 'Abortion' means the termination of human pregnancy with an intention other than to produce a live birth or to remove a dead fetus."

'(b) An abortion may be performed in this state only if it is performed: 

'(1) by a physician licensed to practice medicine [or osteopathy] in this state or by a physician practicing medicine [or osteopathy] in the employ of the government of the United States or of this state, [and the abortion is performed] [in the physician's office or in a medical clinic, or] in a hospital approved by the [Department of Health] or operated by the United States, this state, or any department, agency, [or political subdivision of either;] or by a female upon herself upon the advice of the physician; and"

'(2) within [20] weeks after the commencement of the pregnancy [or after [20] weeks only if the physician has reasonable cause to believe (i) there is a substantial risk that continuance of the pregnancy would endanger the life of the mother or would gravely impair the physical or mental health of the mother, (ii) that the child would be born with grave physical or mental defect, or (iii) that the pregnancy resulted from rape or incest, or illicit intercourse with a girl under the age of 16 years]."
"SECTION 2. [Penalty.] Any person who performs or procures an abortion other than authorized by this Act is guilty of a [felony] and, upon conviction thereof, may be sentenced to pay a fine not exceeding [$1,000] or to imprisonment [in the state penitentiary] not exceeding [5 years], or both."

"SECTION 3. [Uniformity of Interpretation.] This Act shall be construed to effectuate its general purpose to make uniform the law with respect to the subject of this Act among those states which enact it."

"SECTION 4. [Short Title.] This Act may be cited as the Uniform Abortion Act."

"SECTION 5. [Severability.] If any provision of this Act or the application thereof to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are severable."

"SECTION 6. [Repeal.] The following acts and parts of acts are repealed: "

"(1)"

"(2)"

"(3)"

"SECTION 7. [Time of Taking Effect.] This Act shall take effect _________."

[Footnote 41]

"This Act is based largely upon the New York abortion act following a review of the more recent laws on abortion in several states and upon recognition of a more liberal trend in laws on this subject. Recognition was given also to the several decisions in state and federal courts which show a further trend toward liberalization of abortion laws, especially during the first trimester of pregnancy."

"Recognizing that a number of problems appeared in New York, a shorter time period for 'unlimited' abortions was advisable. The time period was bracketed to permit the various states to insert a figure more in keeping with the different conditions that might exist among the states. Likewise, the language limiting the place or places in which abortions may be performed was also bracketed to account for different conditions among the states. In addition, limitations on abortions after the initial 'unlimited' period were placed in brackets so that individual states may adopt all or any of these reasons, or place further restrictions upon abortions after the initial period."

"This Act does not contain any provision relating to medical review committees or prohibitions against sanctions imposed upon medical personnel refusing to participate in abortions because of religious or other similar reasons, or the like. Such provisions, while
related, do not directly pertain to when, where, or by whom abortions may be performed; however, the Act is not drafted to exclude such a provision by a state wishing to enact the same."

[Footnote 42]


[Footnote 43]

See C. Haagensen & W. Lloyd, A Hundred Years of Medicine 19 (1943).

[Footnote 44]


[Footnote 45]


[Footnote 46]


[Footnote 47]

See discussions in Means I and Means II.

[Footnote 48]

See, e.g., *State v. Murphy*, 27 N.J.L. 112, 114 (1858).


Tr. of Oral Rearg. 20-21.

Tr. of Oral Rearg. 24.

We are not aware that in the taking of any census under this clause, a fetus has ever been counted.

When Texas urges that a fetus is entitled to Fourteenth Amendment protection as a person, it faces a dilemma. Neither in Texas nor in any other State are all abortions prohibited. Despite broad proscription, an exception always exists. The exception contained in Art. 1196, for an abortion procured or attempted by medical advice for the purpose of saving the life of the mother, is typical. But if the fetus is a person who is not to be deprived of life without due process of law, and if the mother's condition is the sole determinant, does not the Texas exception appear to be out of line with the Amendment's command?

There are other inconsistencies between Fourteenth Amendment status and the typical abortion statute. It has already been pointed out, supra, that, in Texas, the woman is not a principal or an accomplice with respect to an abortion upon her. If the fetus is a person, why is the woman not a principal or an accomplice? Further, the penalty for criminal abortion specified by Art. 1195 is significantly less than the maximum penalty
for murder prescribed by Art. 1257 of the Texas Penal Code. If the fetus is a person, may the penalties be different?

[Footnote 55]

Cf. the Wisconsin abortion statute, defining "unborn child" to mean "a human being from the time of conception until it is born alive," Wis.Stat. § 940.04(6) (1969), and the new Connecticut statute, Pub.Act No. 1 (May 1972 special session), declaring it to be the public policy of the State and the legislative intent "to protect and preserve human life from the moment of conception."

[Footnote 56]

Edelstein 16.

[Footnote 57]


[Footnote 58]

Amicus Brief for the American Ethical Union et al. For the position of the National Council of Churches and of other denominations, see Lader 99-101.

[Footnote 59]


[Footnote 60]

Hellman & Pritchard, supra, n 59, at 493.

[Footnote 61]

For discussions of the development of the Roman Catholic position, see D. Callahan, Abortion: Law, Choice, and Morality 409-447 (1970); Noonan 1.

[Footnote 62]


[Footnote 67] Neither in this opinion nor in Doe v. Bolton, post, 410 U. S. 179, do we discuss the father's rights, if any exist in the constitutional context, in the abortion decision. No paternal right has been asserted in either of the cases, and the Texas and the Georgia statutes on their face take no cognizance of the father. We are aware that some statutes recognize the father under certain circumstances. North Carolina, for example, N.C.Gen.Stat. § 14-45.1 (Supp. 1971), requires written permission for the abortion from the husband when the woman is a married minor, that is, when she is less than 18 years of age, 41 N.C.A.G. 489 (1971); if the woman is an unmarried minor, written permission from the parents is required. We need not now decide whether provisions of this kind are constitutional.

MR. JUSTICE STEWART, concurring.

In 1963, this Court, in Ferguson v. Skrupa, 372 U. S. 726, purported to sound the death knell for the doctrine of substantive due process, a doctrine under which many state laws had in the past been held to violate the Fourteenth Amendment. As Mr. Justice Black's opinion for the Court in Skrupa put it:
"We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws."

*Id.* at 372 U. S. 730. [Footnote 2/1]

Barely two years later, in *Griswold v. Connecticut*, 381 U. S. 479, the Court held a Connecticut birth control law unconstitutional. In view of what had been so recently said in *Skrupa*, the Court's opinion in *Griswold* understandably did its best to avoid reliance on the Due Process Clause of the Fourteenth Amendment as the ground for decision. Yet the Connecticut law did not violate any provision of the Bill of Rights, nor any other specific provision of the Constitution. [Footnote 2/2] So it was clear to me then, and it is equally clear to me now, that the *Griswold* decision can be rationally understood only as a holding that the Connecticut statute substantively invaded the "liberty" that is protected by the Due Process Clause of the Fourteenth Amendment. [Footnote 2/3] As so understood, *Griswold* stands as one in a long line of pre-*Skrupa* cases decided under the doctrine of substantive due process, and I now accept it as such.


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As Mr. Justice Harlan once wrote:

"[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable
and sensitive judgment must, that certain interests require particularly
careful scrutiny of the state needs asserted to justify their abridgment."

_Poe v. Ullman_, 367 U. S. 497, 367 U. S. 543 (opinion dissenting from
dismissal of appeal) (citations omitted). In the words of Mr. Justice
Frankfurter,

"Great concepts like . . . 'liberty' . . . were purposely left to gather meaning
from experience. For they relate to the whole domain of social and economic fact, and the
statesmen who founded this Nation knew too well that only a stagnant society remains
unchanged."

(dissenting opinion).

Several decisions of this Court make clear that freedom of personal choice in matters of
marriage and family life is one of the liberties protected by the Due Process Clause of the
Fourteenth Amendment. _Loving v. Virginia_, 388 U. S. 1, 388 U. S. 12; _Griswold v.
Connecticut_, supra; _Pierce v. Society of Sisters_, supra; _Meyer v. Nebraska_, supra. See
also _Prince v. Massachusetts_, 321 U. S. 158, 321 U. S. 166; _Skinner v. Oklahoma_, 316 U.
S. 535, 316 U. S. 541. As recently as last Term, in _Eisenstadt v. Baird_, 405 U. S. 438, 405
U. S. 453, we recognized

"the right of the individual, married or single, to be free from unwarranted governmental
intrusion into matters so fundamentally affecting a person

as the decision whether to bear or beget a child."

That right necessarily includes the right of a woman to decide whether or not to terminate
her pregnancy.

"Certainly the interests of a woman in giving of her physical and emotional self during
pregnancy and the interests that will be affected throughout her life by the birth and
raising of a child are of a far greater degree of significance and personal intimacy than the
right to send a child to private school protected in _Pierce v. Society of Sisters_, 268 U. S.
510 (1925), or the right to teach a foreign language protected in _Meyer v. Nebraska_, 262
U. S. 390 (1923)."


Clearly, therefore, the Court today is correct in holding that the right asserted by Jane
Roe is embraced within the personal liberty protected by the Due Process Clause of the
Fourteenth Amendment.
It is evident that the Texas abortion statute infringes that right directly. Indeed, it is difficult to imagine a more complete abridgment of a constitutional freedom than that worked by the inflexible criminal statute now in force in Texas. The question then becomes whether the state interests advanced to justify this abridgment can survive the "particularly careful scrutiny" that the Fourteenth Amendment here requires.

The asserted state interests are protection of the health and safety of the pregnant woman, and protection of the potential future human life within her. These are legitimate objectives, amply sufficient to permit a State to regulate abortions as it does other surgical procedures, and perhaps sufficient to permit a State to regulate abortions more stringently, or even to prohibit them in the late stages of pregnancy. But such legislation is not before us, and I think the Court today has thoroughly demonstrated that these state interests cannot constitutionally support the broad abridgment of personal liberty worked by the existing Texas law. Accordingly, I join the Court's opinion holding that that law is invalid under the Due Process Clause of the Fourteenth Amendment.

[Footnote 2/1]

Only Mr. Justice Harlan failed to join the Court's opinion, 372 U.S. at 372 U. S. 733.

[Footnote 2/2]

There is no constitutional right of privacy, as such.

"[The Fourth] Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's General right to privacy -- his right to be let alone by other people -- is, like the protection of his property and of his very life, left largely to the law of the individual States."


[Footnote 2/3]

This was also clear to Mr. Justice Black, 381 U.S. at 381 U. S. 507 (dissenting opinion); to Mr. Justice Harlan, 381 U.S. at 381 U. S. 499 (opinion concurring in the judgment); and to MR. JUSTICE WHITE, 381 U.S. at 381 U. S. 502 (opinion concurring in the judgment). See also Mr. Justice Harlan's thorough and thoughtful opinion dissenting from dismissal of the appeal in Poe v. Ullman, 367 U. S. 497, 367 U. S. 522

MR. JUSTICE REHNQUIST, dissenting.
The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.

I

The Court's opinion decides that a State may impose virtually no restriction on the performance of abortions during the first trimester of pregnancy. Our previous decisions indicate that a necessary predicate for such an opinion is a plaintiff who was in her first trimester of pregnancy at some time during the pendency of her lawsuit. While a party may vindicate his own constitutional rights, he may not seek vindication for the rights of others. *Moose Lodge v. Irvis*, 407 U. S. 163 (1972); *Sierra Club v. Morton*, 405 U. S. 727 (1972). The Court's statement of facts in this case makes clear, however, that the record in no way indicates the presence of such a plaintiff. We know only that plaintiff Roe at the time of filing her complaint was a pregnant woman; for aught that appears in this record, she may have been in her last trimester of pregnancy as of the date the complaint was filed.

Nothing in the Court's opinion indicates that Texas might not constitutionally apply its proscription of abortion as written to a woman in that stage of pregnancy. Nonetheless, the Court uses her complaint against the Texas statute as a fulcrum for deciding that States may impose virtually no restrictions on medical abortions performed during the first trimester of pregnancy. In deciding such a hypothetical lawsuit, the Court departs from the longstanding admonition that it should never "formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U. S. 33, 113 U. S. 39 (1885). See also *Ashwander v. TVA*, 297 U. S. 288, 297 U. S. 345 (1936) (Brandeis, J., concurring).

II

Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case. Texas, by the statute here challenged, bars the performance of a medical abortion by a licensed physician on a plaintiff such as Roe. A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy. *Katz v. United States*, 389 U. S. 347 (1967).
If the Court means by the term "privacy" no more than that the claim of a person to be free from unwanted state regulation of consensual transactions may be a form of "liberty" protected by the Fourteenth Amendment, there is no doubt that similar claims have been upheld in our earlier decisions on the basis of that liberty. I agree with the statement of MR. JUSTICE STEWART in his concurring opinion that the "liberty," against deprivation of which without due process the Fourteenth Amendment protects, embraces more than the rights found in the Bill of Rights. But that liberty is not guaranteed absolutely against deprivation, only against deprivation without due process of law. The test traditionally applied in the area of social and economic legislation is whether or not a law such as that challenged has a rational relation to a valid state objective. *Williamson v. Lee Optical Co.*, 348 U. S. 483, 348 U. S. 491 (1955). The Due Process Clause of the Fourteenth Amendment undoubtedly does place a limit, albeit a broad one, on legislative power to enact laws such as this. If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective under the test stated in *Williamson, supra*. But the Court's sweeping invalidation of any restrictions on abortion during the first trimester is impossible to justify under that standard, and the conscious weighing of competing factors that the Court's opinion apparently substitutes for the established test is far more appropriate to a legislative judgment than to a judicial one.

The Court eschews the history of the Fourteenth Amendment in its reliance on the "compelling state interest" test. *See Weber v. Aetna Casualty & Surety Co.*, 406 U. S. 164, 406 U. S. 179 (1972) (dissenting opinion). But the Court adds a new wrinkle to this test by transposing it from the legal considerations associated with the Equal Protection Clause of the Fourteenth Amendment to this case arising under the Due Process Clause of the Fourteenth Amendment. Unless I misapprehend the consequences of this transplanting of the "compelling state interest test," the Court's opinion will accomplish the seemingly impossible feat of leaving this area of the law more confused than it found it.

While the Court's opinion quotes from the dissent of Mr. Justice Holmes in *Lochner v. New York*, 198 U. S. 45, 198 U. S. 74 (1905), the result it reaches is more closely attuned to the majority opinion of Mr. Justice Peckham in that case. As in *Lochner* and similar cases applying substantive due process standards to economic and social welfare legislation, the adoption of the compelling state interest standard will inevitably require this Court to examine the legislative policies and pass on the wisdom of these policies in the very process of deciding whether a particular state interest put forward may or may not be "compelling." The decision here to break pregnancy into three distinct terms and to outline the permissible restrictions the State may impose in each one, for example,
partakes more of judicial legislation than it does of a determination of the
intent of the drafters of the Fourteenth Amendment.

The fact that a majority of the States reflecting, after all, the majority
sentiment in those States, have had restrictions on abortions for at least a
century is a strong indication, it seems to me, that the asserted right to an
abortion is not "so rooted in the traditions and conscience of our people as to
be ranked as fundamental," Snyder v. Massachusetts, 291 U. S. 97, 291 U. S.
105 (1934). Even today, when society's views on abortion are changing, the
very existence of the debate is evidence that the "right" to an abortion is not so
universally accepted as the appellant would have us believe.

To reach its result, the Court necessarily has had to find within the scope of the
Fourteenth Amendment a right that was apparently completely unknown to the drafters of
the Amendment. As early as 1821, the first state law dealing directly with abortion was
enacted by the Connecticut Legislature. Conn.Stat., Tit. 22, §§ 14, 16. By the time of the
adoption of the Fourteenth Amendment in 1868, there were at least 36 laws enacted by state or territorial legislatures
limiting abortion. [Footnote 3/1] While many States have amended or updated

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their laws, 21 of the laws on the books in 1868 remain in effect today. [Footnote 3/2] Indeed, the Texas statute struck down today was, as the majority notes, first enacted in 1857,

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and "has remained substantially unchanged to the present time." Ante at 410 U. S. 119.

There apparently was no question concerning the validity of this provision or of any of
the other state statutes when the Fourteenth Amendment was adopted. The only
conclusion possible from this history is that the drafters did not intend to have the
Fourteenth Amendment withdraw from the States the power to legislate with respect to
this matter.

III

Even if one were to agree that the case that the Court decides were here, and that the
enunciation of the substantive constitutional law in the Court's opinion were proper, the
actual disposition of the case by the Court is still difficult to justify. The Texas statute is
struck down in toto, even though the Court apparently concedes that, at later periods of
pregnancy Texas might impose these selfsame statutory limitations on abortion. My understanding of past practice is that a statute found

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to be invalid as applied to a particular plaintiff, but not unconstitutional as a whole, is not simply "struck down" but is, instead, declared unconstitutional as applied to the fact situation before the Court. *Yick Wo v. Hopkins*, 118 U. S. 356 (1886); *Street v. New York*, 394 U. S. 576 (1969).

For all of the foregoing reasons, I respectfully dissent.

[Footnote 3/1]

Jurisdictions having enacted abortion laws prior to the adoption of the Fourteenth Amendment in 1868:


21. Mississippi -- Miss.Code, c. 64, §§ 8, 9, p. 958 (1848).


[Footnote 3/2]

Abortion laws in effect in 1868 and still applicable as of August, 1970:

1. Arizona (1865).

2. Connecticut (1860).

3. Florida (1868).

4. Idaho (1863).

5. Indiana (1838).

6. Iowa (1843)

7. Maine (1840).

8. Massachusetts (1845).


10. Minnesota (1851).

11. Missouri (1835).

12. Montana (1864).

15. New Jersey (1849).
16. Ohio (1841).
17. Pennsylvania (1860).
18. Texas (1859).
20. West Virginia (1863).
21. Wisconsin (1858).
TEXAS V. JOHNSON, 491 U. S. 397 (1989)

U.S. Supreme Court


Texas v. Johnson

No. 88-155

Argued March 21, 1989

Decided June 21, 1989

491 U.S. 397

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Syllabus

During the 1984 Republican National Convention, respondent Johnson participated in a political demonstration to protest the policies of the Reagan administration and some Dallas-based corporations. After a march through the city streets, Johnson burned an American flag while protesters chanted. No one was physically injured or threatened with injury, although several witnesses were seriously offended by the flag burning. Johnson was convicted of desecration of a venerated object in violation of a Texas statute, and a state court of appeals affirmed. However, the Texas Court of Criminal Appeals reversed, holding that the State, consistent with the First Amendment, could not punish Johnson for burning the flag in these circumstances. The court first found that Johnson's burning of the flag was expressive conduct protected by the First Amendment. The court concluded that the State could not criminally sanction flag desecration in order to preserve the flag as a symbol of national unity. It also held that the statute did not meet the State's goal of preventing breaches of the peace, since it was not drawn narrowly enough to encompass only those flag burnings that would likely result in a serious disturbance, and since the flag burning in this case did not threaten such a reaction. Further, it stressed that another Texas statute prohibited breaches of the peace and could be used to prevent disturbances without punishing this flag desecration.

Held: Johnson's conviction for flag desecration is inconsistent with the First Amendment. Pp. 491 U. S. 402-420.
(a) Under the circumstances, Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment. The State conceded that the conduct was expressive. Occurring as it did at the end of a demonstration coinciding with the Republican National Convention, the expressive, overtly political nature of the conduct was both intentional and overwhelmingly apparent. Pp. 491 U. S. 402-406.

(b) Texas has not asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression and would therefore permit application of the test set forth in United States v. O'Brien, 391 U. S. 367, whereby an important governmental interest in regulating nonspeech can justify incidental limitations on First Amendment freedoms when speech and nonspeech elements are combined in the same course of conduct. An interest in preventing breaches of the peace is not implicated on this record. Expression may not be prohibited on the basis that an audience that takes serious offense to the expression may disturb the peace, since the Government cannot assume that every expression of a provocative idea will incite a riot, but must look to the actual circumstances surrounding the expression. Johnson's expression of dissatisfaction with the Federal Government's policies also does not fall within the class of "fighting words" likely to be seen as a direct personal insult or an invitation to exchange fisticuffs. This Court's holding does not forbid a State to prevent "imminent lawless action" and, in fact, Texas has a law specifically prohibiting breaches of the peace. Texas' interest in preserving the flag as a symbol of nationhood and national unity is related to expression in this case and, thus, falls outside the O'Brien test. Pp. 491 U. S. 406-410.

(c) The latter interest does not justify Johnson's conviction. The restriction on Johnson's political expression is content based, since the Texas statute is not aimed at protecting the physical integrity of the flag in all circumstances, but is designed to protect it from intentional and knowing abuse that causes serious offense to others. It is therefore subject to "the most exacting scrutiny." Boos v. Barry, 485 U. S. 312. The Government may not prohibit the verbal or nonverbal expression of an idea merely because society finds the idea offensive or disagreeable, even where our flag is involved. Nor may a State foster its own view of the flag by prohibiting expressive conduct relating to it, since the Government may not permit designated symbols to be used to communicate a limited set of messages. Moreover, this Court will not create an exception to these principles protected by the First Amendment for the American flag alone. Pp. 491 U. S. 410-422.

755 S.W.2d 92, affirmed.

BRENNAN, J., delivered the opinion of the Court, in which MARSHALL, BLACKMUN, SCALIA, and KENNEDY, JJ., joined. KENNEDY, J., filed a concurring opinion, post, p. 491 U. S. 420. REHNQUIST, C.J., filed a dissenting opinion, in which
After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.

I

While the Republican National Convention was taking place in Dallas in 1984, respondent Johnson participated in a political demonstration dubbed the "Republican War Chest Tour." As explained in literature distributed by the demonstrators and in speeches made by them, the purpose of this event was to protest the policies of the Reagan administration and of certain Dallas-based corporations. The demonstrators marched through the Dallas streets, chanting political slogans and stopping at several corporate locations to stage "die-ins" intended to dramatize the consequences of nuclear war. On several occasions they spray-painted the walls of buildings and overturned potted plants, but Johnson himself took no part in such activities. He did, however, accept an American flag handed to him by a fellow protestor who had taken it from a flagpole outside one of the targeted buildings.

The demonstration ended in front of Dallas City Hall, where Johnson unfurled the American flag, doused it with kerosene, and set it on fire. While the flag burned, the protesters chanted, "America, the red, white, and blue, we spit on you." After the demonstrators dispersed, a witness to the flag burning collected the flag's remains and buried them in his backyard. No one was physically injured or threatened with injury, though several witnesses testified that they had been seriously offended by the flag burning.

Of the approximately 100 demonstrators, Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object in violation of Tex.Penal Code Ann. § 42.09(a)(3) (1989). [Footnote 1] After a trial, he was convicted, sentenced to one year in prison, and fined $2,000. The Court of Appeals for the Fifth District of Texas at Dallas affirmed Johnson's conviction, 706 S.W.2d 120 (1986), but the Texas Court of Criminal Appeals reversed, 755 S.W.2d 92 (1988), holding that the State could not, consistent with the First Amendment, punish Johnson for burning the flag in these circumstances.
The Court of Criminal Appeals began by recognizing that Johnson's conduct was symbolic speech protected by the First Amendment:

"Given the context of an organized demonstration, speeches, slogans, and the distribution of literature, anyone who observed appellant's act would have understood the message that appellant intended to convey. The act for which appellant was convicted was clearly 'speech' contemplated by the First Amendment."

_Id._ at 95. To justify Johnson's conviction for engaging in symbolic speech, the State asserted two interests: preserving the flag as a symbol of national unity and preventing breaches of the peace. The Court of Criminal Appeals held that neither interest supported his conviction.

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Acknowledging that this Court had not yet decided whether the Government may criminally sanction flag desecration in order to preserve the flag's symbolic value, the Texas court nevertheless concluded that our decision in _West Virginia Board of Education v. Barnette_, 319 U. S. 624 (1943), suggested that furthering this interest by curtailing speech was impermissible. "Recognizing that the right to differ is the centerpiece of our First Amendment freedoms," the court explained,

"a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent."

755 S.W.2d at 97. Noting that the State had not shown that the flag was in "grave and immediate danger," _Barnette, supra_, at 639, of being stripped of its symbolic value, the Texas court also decided that the flag's special status was not endangered by Johnson's conduct. 755 S.W.2d at 97.

As to the State's goal of preventing breaches of the peace, the court concluded that the flag desecration statute was not drawn narrowly enough to encompass only those flag burnings that were likely to result in a serious disturbance of the peace. And in fact, the court emphasized, the flag burning in this particular case did not threaten such a reaction. "Serious offense' occurred," the court admitted,

"but there was no breach of peace, nor does the record reflect that the situation was potentially explosive. One cannot equate 'serious offense' with incitement to breach the peace."

_Id._ at 96. The court also stressed that another Texas statute, Tex.Penal Code Ann. § 42.01 (1989), prohibited breaches of the peace. Citing _Boos v. Barry_, 485 U. S. 312 (1988), the
court decided that § 42.01 demonstrated Texas' ability to prevent disturbances of the peace without punishing this flag desecration. 755 S.W.2d at 96.

Because it reversed Johnson's conviction on the ground that § 42.09 was unconstitutional as applied to him, the state court did not address Johnson's argument that the statute was, on its face, unconstitutionally vague and overbroad. We granted certiorari, 488 U.S. 907 (1988), and now affirm.

II

Johnson was convicted of flag desecration for burning the flag, rather than for uttering insulting words. [Footnote 2] This fact somewhat complicates our consideration of his conviction under the First Amendment. We must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction. See, e.g., Spence v. Washington, 418 U. S. 405, 418 U. S. 409-411 (1974). If his conduct was expressive, we next decide whether the State's regulation is related to the suppression of free expression. See, e.g., United States v. O'Brien, 391 U. S. 367, 391 U. S. 377 (1968); Spence, supra, at 418 U. S. 414, n. 8. If the State's regulation is not related to expression, then the less stringent standard we announced in United States v. O'Brien for regulations of noncommunicative conduct controls. See O'Brien, supra, at 391 U. S. 377. If it is, then we are outside of O'Brien's test, and we must ask whether this interest justifies Johnson's conviction under a more demanding standard. [Footnote 3] See Spence, supra, at 418 U. S. 411. A third possibility is that the State's asserted interest is simply not implicated on these facts, and, in that event, the interest drops out of the picture. See 418 U. S. at 418 U. S. 414, n. 8.

The First Amendment literally forbids the abridgment only of "speech," but we have long recognized that its protection does not end at the spoken or written word. While we have rejected "the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,"
United States v. O'Brien, supra, at 391 U. S. 376, we have acknowledged that conduct may be "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments," Spence, supra, at 418 U. S. 409.

In deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, we have asked whether

"[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."


Especially pertinent to this case are our decisions recognizing the communicative nature of conduct relating to flags. Attaching a peace sign to the flag, Spence, supra, at 418 U. S. 409-410; refusing to salute the flag, Barnette, 319 U.S. at 319 U. S. 632; and displaying a red flag, Stromberg v. California, 283 U. S. 359,

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283 U. S. 368-369 (1931), we have held, all may find shelter under the First Amendment. See also Smith v. Goguen, 415 U. S. 566, 415 U. S. 588 (1974) (WHITE, J., concurring in judgment) (treating flag "contemptuously" by wearing pants with small flag sewn into their seat is expressive conduct). That we have had little difficulty identifying an expressive element in conduct relating to flags should not be surprising. The very purpose of a national flag is to serve as a symbol of our country; it is, one might say, "the one visible manifestation of two hundred years of nationhood." Id. at 415 U. S. 603 (REHNQUIST, J., dissenting). Thus, we have observed:

"[T]he flag salute is a form of utterance. Symbolism is a primitive but effective way of communicating ideas. The use of an emblem or flag to symbolize some system, idea, institution, or personality, is a shortcut from mind to mind. Causes and nations, political parties, lodges and ecclesiastical groups seek to knit the loyalty of their followings to a flag or banner, a color or design."

Barnette, supra, at 319 U. S. 632. Pregnant with expressive content, the flag as readily signifies this Nation as does the combination of letters found in "America."
We have not automatically concluded, however, that any action taken with respect to our flag is expressive. Instead, in characterizing such action for First Amendment purposes, we have considered the context in which it occurred. In *Spence*, for example, we emphasized that Spence's taping of a peace sign to his flag was "roughly simultaneous with and concedesly triggered by the Cambodian incursion and the Kent State tragedy." 418 U.S. at 418 U. S. 410. The State of Washington had conceded, in fact, that Spence's conduct was a form of communication, and we stated that "the State's concession is inevitable on this record." *Id.* at 418 U. S. 409.

The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, Tr. of Oral Arg. 4, and this concession seems to us as prudent as was Washington's in *Spence*. Johnson burned an American flag as part -- indeed, as the culmination -- of a political demonstration that coincided with the convening of the Republican Party and its renomination of Ronald Reagan for President. The expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent. At his trial, Johnson explained his reasons for burning the flag as follows:

"The American Flag was burned as Ronald Reagan was being renominated as President. And a more powerful statement of symbolic speech, whether you agree with it or not, couldn't have been made at that time. It's quite a just position [juxtaposition]. We had new patriotism and no patriotism."

5 Record 656. In these circumstances, Johnson's burning of the flag was conduct "sufficiently imbued with elements of communication," *Spence*, 418 U.S. at 418 U. S. 409, to implicate the First Amendment.

III

The government generally has a freer hand in restricting expressive conduct than it has in restricting the written or spoken word. See *O'Brien*, 391 U.S. at 391 U. S. 376-377; *Clark v. Community for Creative Non-Violence*, 468 U. S. 288, 468 U. S. 293 (1984); *Dallas v. Stanglin*, 490 U. S. 19, 490 U. S. 25 (1989). It may not, however, proscribe particular conduct *because* it has expressive elements.

"[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate basis for singling out that conduct for proscription. A law *directed* at the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."
"speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms,")

O'Brien, supra, at 391 U. S. 376, we have limited the applicability of O'Brien's relatively lenient standard to those cases in which "the governmental interest is unrelated to the suppression of free expression." Id. at 391 U. S. 377; see also Spence, 418 U.S. at 418 U. S. 414, n. 8. In stating, moreover, that O'Brien's test "in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions," Clark, supra, at 468 U. S. 298, we have highlighted the requirement that the governmental interest in question be unconnected to expression in order to come under O'Brien's less demanding rule.

In order to decide whether O'Brien's test applies here, therefore, we must decide whether Texas has asserted an interest in support of Johnson's conviction that is unrelated to the suppression of expression. If we find that an interest asserted by the State is simply not implicated on the facts before us, we need not ask whether O'Brien's test applies. See Spence, supra, at 418 U. S. 414, n. 8. The State offers two separate interests to justify this conviction: preventing breaches of the peace and preserving the flag as a symbol of nationhood and national unity. We hold that the first interest is not implicated on this record, and that the second is related to the suppression of expression.

A

Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration. [Footnote 4]

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However, no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag. Although the State stresses the disruptive behavior of the protestors during their march toward City Hall, Brief for Petitioner 34-36, it admits that "no actual breach of the peace occurred at the time of the flagburning or in response to
the flagburning." *Id.* at 34. The State's emphasis on the protestors' disorderly actions prior to arriving at City Hall is not only somewhat surprising, given that no charges were brought on the basis of this conduct, but it also fails to show that a disturbance of the peace was a likely reaction to Johnson's conduct. The only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning. *Id.* at 6-7.

The State's position, therefore, amounts to a claim that an audience that takes serious offense at particular expression is necessarily likely to disturb the peace, and that the expression may be prohibited on this basis. [Footnote 5] Our precedents do not countenance such a presumption. On the contrary, they recognize that a principal "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."


Thus, we have not permitted the government to assume that every expression of a provocative idea will incite a riot, but have instead required careful consideration of the actual circumstances surrounding such expression, asking whether the expression "is directed to inciting or producing imminent lawless action and is likely to incite or produce such action." *Brandenburg v. Ohio*, 395 U. S. 444, 395 U. S. 447 (1969) (reviewing circumstances surrounding rally and speeches by Ku Klux Klan). To accept Texas' arguments that it need only demonstrate "the potential for a breach of the peace," Brief for Petitioner 37, and that every flag burning necessarily possesses that potential, would be to eviscerate our holding in *Brandenburg*. This we decline to do.

Nor does Johnson's expressive conduct fall within that small class of "fighting words" that are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky v. New Hampshire*, 315 U. S. 568, 315 U. S. 574 (1942). No reasonable onlooker would have regarded Johnson's generalized expression of dissatisfaction with the policies of the Federal Government as a direct personal insult or

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We thus conclude that the State's interest in maintaining order is not implicated on these facts. The State need not worry that our holding will disable it from preserving the peace. We do not suggest that the First Amendment forbids a State to prevent "imminent lawless action." Brandenburg, supra, at 395 U. S. 447. And, in fact, Texas already has a statute specifically prohibiting breaches of the peace, Tex.Penal Code Ann. § 42.01 (1989), which tends to confirm that Texas need not punish this flag desecration in order to keep the peace. See Boos v. Barry, 485 U.S. at 485 U. S. 327-329.

B

The State also asserts an interest in preserving the flag as a symbol of nationhood and national unity. In Spence, we acknowledged that the government's interest in preserving the flag's special symbolic value "is directly related to expression in the context of activity" such as affixing a peace symbol to a flag. 418 U.S. at 418 U. S. 414, n. 8. We are equally persuaded that this interest is related to expression in the case of Johnson's burning of the flag. The State, apparently, is concerned that such conduct will lead people to believe either that the flag does not stand for nationhood and national unity, but instead reflects other, less positive concepts, or that the concepts reflected in the flag do not in fact exist, that is, that we do not enjoy unity as a Nation. These concerns blossom only when a person's treatment of the flag communicates some message, and thus are related "to the suppression of free expression" within the meaning of O'Brien. We are thus outside of O'Brien's test altogether.

IV

It remains to consider whether the State's interest in preserving the flag as a symbol of nationhood and national unity justifies Johnson's conviction.

As in Spence, "[w]e are confronted with a case of prosecution for the expression of an idea through activity," and "[a]ccordingly, we must examine with particular care the interests advanced by [petitioner] to support its prosecution." 418 U.S. at 418 U. S. 411. Johnson was not, we add, prosecuted for the expression of just any idea; he was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values. See, e.g., Boos v. Barry, supra, at 485 U. S. 318; Frisby v. Schultz, 487 U. S. 474, 487 U. S. 479 (1988).
Moreover, Johnson was prosecuted because he knew that his politically charged expression would cause "serious offense." If he had burned the flag as a means of disposing of it because it was dirty or torn, he would not have been convicted of flag desecration under this Texas law: federal law designates burning as the preferred means of disposing of a flag "when it is in such condition that it is no longer a fitting emblem for display," 36 U.S.C. § 176(k), and Texas has no quarrel with this means of disposal. Brief for Petitioner 45. The Texas law is thus not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others. [Footnote 6] Texas concedes as much:

"Section 42.09(b) reaches only those severe acts of physical abuse of the flag carried out in a way likely to be offensive. The statute mandates intentional or knowing abuse, that is, the kind of mistreatment that is not innocent, but rather is intentionally designed to seriously offend other individuals."

*Id.* at 44.

Whether Johnson's treatment of the flag violated Texas law thus depended on the likely communicative impact of his expressive conduct. [Footnote 7] Our decision in *Boos v. Barry*, *supra,*

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tells us that this restriction on Johnson's expression is content-based. In *Boos*, we considered the constitutionality of a law prohibiting

"the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'"

*Id.* at 485 U. S. 315. Rejecting the argument that the law was content-neutral because it was justified by "our international law obligation to shield diplomats from speech that offends their dignity," *id.* at 485 U. S. 320, we held that "[t]he emotive impact of speech on its audience is not a secondary effect"" unrelated to the content of the expression itself. *Id.* at 485 U. S. 321 (plurality opinion); see also *id.* at 485 U. S. 334 (BRENNAN, J., concurring in part and concurring in judgment).

According to the principles announced in *Boos*, Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest in preserving the special symbolic character of the flag to "the most exacting scrutiny." *Boos v. Barry*, 485 U.S. at 485 U. S. 321. [Footnote 8]
Texas argues that its interest in preserving the flag as a symbol of nationhood and national unity survives this close analysis. Quoting extensively from the writings of this Court chronicling the flag's historic and symbolic role in our society, the State emphasizes the "special place" reserved for the flag in our Nation. Brief for Petitioner 22, quoting Smith v. Goguen, 415 U.S. at 415 U. S. 601 (REHNQUIST, J., dissenting). The State's argument is not that it has an interest simply in maintaining the flag as a symbol of something, no matter what it symbolizes; indeed, if that were the State's position, it would be difficult to see how that interest is endangered by highly symbolic conduct such as Johnson's. Rather, the State's claim is that it has an interest in preserving the flag as a symbol of nationhood and national unity, a symbol with a determinate range of meanings. Brief for Petitioner 20-24. According to Texas, if one physically treats the flag in a way that would tend to cast doubt on either the idea that nationhood and national unity are the flag's referents or that national unity actually exists, the message conveyed thereby is a harmful one, and therefore may be prohibited. [Footnote 9]

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We have not recognized an exception to this principle even where our flag has been involved. In Street v. New York, 394 U. S. 576 (1969), we held that a State may not criminally punish a person for uttering words critical of the flag. Rejecting the argument that the conviction could be sustained on the ground that Street had "failed to show the respect for our national symbol which may properly be demanded of every citizen," we concluded that

"the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary,' and the 'right to differ as to things that touch the heart of the existing order,' encompass the freedom to express publicly one's opinions about our flag, including those opinions which are defiant or contemptuous."

Id. at 394 U. S. 593, quoting Barnette, 319 U.S. at 319 U. S. 642. Nor may the government, we have held, compel conduct that would evince respect for the flag.
"To sustain the compulsory flag salute, we are required to say that a Bill of Rights which guards the individual's right to speak his own mind left it open to public authorities to compel him to utter what is not in his mind."

*Id.* at 319 U. S. 634.

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In holding in *Barnette* that the Constitution did not leave this course open to the government, Justice Jackson described one of our society's defining principles in words deserving of their frequent repetition:

"If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

*Id.* at 319 U. S. 642. In *Spence*, we held that the same interest asserted by Texas here was insufficient to support a criminal conviction under a flag-misuse statute for the taping of a peace sign to an American flag.

"Given the protected character of *Spence*'s expression and in light of the fact that no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts," we held, "the conviction must be invalidated." 418 U.S. at 418 U. S. 415. See also *Goguen*, 415 U.S. at 415 U. S. 588 (WHITE, J., concurring in judgment) (to convict person who had sewn a flag onto the seat of his pants for "contemptuous" treatment of the flag would be "[t]o convict not to protect the physical integrity or to protect against acts interfering with the proper use of the flag, but to punish for communicating ideas unacceptable to the controlling majority in the legislature").

In short, nothing in our precedents suggests that a State may foster its own view of the flag by prohibiting expressive conduct relating to it. [Footnote 10] To bring its argument outside our precedents, Texas attempts to convince us that, even if its interest in preserving the flag's symbolic role does not allow it to prohibit words or some expressive conduct critical of the flag, it does permit it to forbid the outright destruction of the flag. The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here. *See supra* at 491 U. S. 402-403. In addition, both *Barnette* and *Spence* involved expressive conduct, not only verbal communication, and both found that conduct protected.
Texas' focus on the precise nature of Johnson's expression, moreover, misses the point of our prior decisions: their enduring lesson, that the government may not prohibit expression simply because it disagrees with its message, is not dependent on the particular mode in which one chooses to express an idea. [Footnote 11] If we were to hold that a State may forbid flag burning wherever it is likely to endanger the flag's symbolic role, but allow it wherever burning a flag promotes that role -- as where, for example, a person ceremoniously burns a dirty flag -- we would be saying that when it comes to impairing the flag's physical integrity, the flag itself may be used as a symbol -- as a substitute for the written or spoken word or a "short cut from mind to mind" -- only in one direction. We would be permitting a State to "prescribe what shall be orthodox" by saying that one may burn the flag to convey one's attitude toward it and its referents only if one does not endanger the flag's representation of nationhood and national unity.

We never before have held that the Government may ensure that a symbol be used to express only one view of that symbol or its referents. Indeed, in Schacht v. United States, we invalidated a federal statute permitting an actor portraying a member of one of our armed forces to "wear the uniform of that armed force if the portrayal does not tend to discredit that armed force." 398 U.S. at 398 U. S. 60, quoting 10 U.S.C. § 772(f). This proviso, we held, "which leaves Americans free to praise the war in Vietnam but can send persons like Schacht to prison for opposing it, cannot survive in a country which has the First Amendment."

Id. at 398 U. S. 63.

We perceive no basis on which to hold that the principle underlying our decision in Schacht does not apply to this case. To conclude that the government may permit designated symbols to be used to communicate only a limited set of messages would be to enter territory having no discernible or defensible boundaries. Could the government, on this theory, prohibit the burning of state flags? Of copies of the Presidential seal? Of the Constitution? In evaluating these choices under the First Amendment, how would we decide which symbols were sufficiently special to warrant this unique status? To do so, we would be forced to consult our own political preferences, and impose them on the citizenry, in the very way that the First Amendment forbids us to do. See Carey v. Brown, 447 U.S. at 447 U. S. 466-467.

There is, moreover, no indication -- either in the text of the Constitution or in our cases interpreting it -- that a separate juridical category exists for the American flag alone. Indeed, we would not be surprised to learn that the persons
who framed our Constitution and wrote the Amendment that we now construe were not known for their reverence for the Union Jack. The First Amendment does not guarantee that other concepts virtually sacred to our Nation as a whole -- such as the principle that discrimination on the basis of race is odious and destructive -- will go unquestioned in the marketplace of ideas. See Brandenburg v. Ohio, 395 U. S. 444 (1969). We decline, therefore, to create for the flag an exception to the joust of principles protected by the First Amendment.

It is not the State's ends, but its means, to which we object. It cannot be gainsaid that there is a special place reserved for the flag in this Nation, and thus we do not doubt that the government has a legitimate interest in making efforts to "preserv[e] the national flag as an unalloyed symbol of our country." Spence, 418 U. S. at 418 U. S. 412. We reject the suggestion, urged at oral argument by counsel for Johnson, that the government lacks "any state interest whatsoever" in regulating the manner in which the flag may be displayed. Tr. of Oral Arg. 38. Congress has, for example, enacted precatory regulations describing the proper treatment of the flag, see 36 U.S.C. §§ 173-177, and we cast no doubt on the legitimacy of its interest in making such recommendations. To say that the government has an interest in encouraging proper treatment of the flag, however, is not to say that it may criminally punish a person for burning a flag as a means of political protest.

"National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether, under our Constitution, compulsion as here employed is a permissible means for its achievement."


We are fortified in today's conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson's will not endanger the special role played by our flag or the feelings it inspires. To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation's attitude towards its flag. See Abrams v. United States, 250 U. S. 616, 250 U. S. 628 (1919) (Holmes, J., dissenting). Indeed, Texas' argument that the burning of an American flag "is an act having a high likelihood to cause a breach of the peace," Brief for Petitioner 31, quoting Sutherland v. DeWulf, 323 F.Supp. 740, 745 (SD Ill. 1971) (citation omitted), and its statute's implicit assumption that physical mistreatment of the flag will lead to "serious offense," tend to confirm that the flag's special role is not in danger; if it were, no one would riot or take offense because a flag had been burned.
We are tempted to say, in fact, that the flag's deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson's is a sign and source of our strength. Indeed, one of the proudest images of our flag, the one immortalized in our own national anthem, is of the bombardment it survived at Fort McHenry. It is the Nation's resilience, not its rigidity, that Texas sees reflected in the flag -- and it is that resilience that we reassert today.

The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.

"To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."


And, precisely because it is our flag that is involved, one's response to the flag-burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by -- as one witness here did -- according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.

V

Johnson was convicted for engaging in expressive conduct. The State's interest in preventing breaches of the peace does not support his conviction, because Johnson's conduct did not threaten to disturb the peace. Nor does the State's interest in preserving the flag as a symbol of nationhood and national unity justify his criminal conviction for engaging in political expression. The judgment of the Texas Court of Criminal Appeals is therefore

*Affirmed.*

[Footnote 1]

Tex.Penal Code Ann. § 42.09 (1989) provides in full:
"§ 42.09. Desecration of Venerated Object"

"(a) A person commits an offense if he intentionally or knowingly desecrates:

"(1) a public monument;"

"(2) a place of worship or burial; or"

"(3) a state or national flag."

"(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action."

"(c) An offense under this section is a Class A misdemeanor."

[Footnote 2]

Because the prosecutor's closing argument observed that Johnson had led the protestors in chants denouncing the flag while it burned, Johnson suggests that he may have been convicted for uttering critical words, rather than for burning the flag. Brief for Respondent 33-34. He relies on Street v. New York, 394 U. S. 576, 394 U. S. 578 (1969), in which we reversed a conviction obtained under a New York statute that prohibited publicly defying or casting contempt on the flag "either by words or act" because we were persuaded that the defendant may have been convicted for his words alone. Unlike the law we faced in Street, however, the Texas flag desecration statute does not on its face permit conviction for remarks critical of the flag, as Johnson himself admits. See Brief for Respondent 34. Nor was the jury in this case told that it could convict Johnson of flag desecration if it found only that he had uttered words critical of the flag and its referents.

Johnson emphasizes, though, that the jury was instructed -- according to Texas' law of parties -- that

"a person is criminally responsible for an offense committed by the conduct of another if acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense."

Brief for Respondent 2, n. 2, quoting 1 Record 49. The State offered this instruction because Johnson's defense was that he was not the person who had burned the flag. Johnson did not object to this instruction at trial, and although he challenged it on direct appeal, he did so only on the ground that there was insufficient evidence to support it. 706 S.W.2d 120, 124 (Tex.App.1986). It is only in this Court that Johnson has argued that the law-of-parties instruction might have led the jury to convict him for his words alone. Even if we were to find that this argument is properly raised here, however, we
would conclude that it has no merit in these circumstances. The instruction would not have permitted a conviction merely for the pejorative nature of Johnson's words, and those words themselves did not encourage the burning of the flag, as the instruction seems to require. Given the additional fact that "the bulk of the State's argument was premised on Johnson's culpability as a sole actor," ibid., we find it too unlikely that the jury convicted Johnson on the basis of this alternative theory to consider reversing his conviction on this ground.

[Footnote 3]

Although Johnson has raised a facial challenge to Texas' flag desecration statute, we choose to resolve this case on the basis of his claim that the statute, as applied to him, violates the First Amendment. Section 42.09 regulates only physical conduct with respect to the flag, not the written or spoken word, and although one violates the statute only if one "knows" that one's physical treatment of the flag "will seriously offend one or more persons likely to observe or discover his action," Tex.Penal Code Ann. § 42.09(b) (1989), this fact does not necessarily mean that the statute applies only to expressive conduct protected by the First Amendment. Cf. Smith v. Goguen, 415 U. S. 566, 415 U. S. 588 (1974) (WHITE, J., concurring in judgment) (statute prohibiting "contemptuous" treatment of flag encompasses only expressive conduct). A tired person might, for example, drag a flag through the mud, knowing that this conduct is likely to offend others, and yet have no thought of expressing any idea; neither the language nor the Texas courts' interpretations of the statute precludes the possibility that such a person would be prosecuted for flag desecration. Because the prosecution of a person who had not engaged in expressive conduct would pose a different case, and because this case may be disposed of on narrower grounds, we address only Johnson's claim that § 42.09, as applied to political expression like his, violates the First Amendment.

[Footnote 4]

Relying on our decision in Boos v. Barry, 485 U. S. 312 (1988), Johnson argues that this state interest is related to the suppression of free expression within the meaning of United States v. O'Brien, 391 U. S. 367 (1968). He reasons that the violent reaction to flag burnings feared by Texas would be the result of the message conveyed by them, and that this fact connects the State's interest to the suppression of expression. Brief for Respondent 12, n. 11. This view has found some favor in the lower courts. See Monroe v. State Court of Fulton County, 739 F.2d 568-575 (CA11 1984). Johnson's theory may overread Boos insofar as it suggests that a desire to prevent a violent audience reaction is "related to expression" in the same way that a desire to prevent an audience from being offended is "related to expression." Because we find that the State's interest in preventing breaches of the peace is not implicated on these facts, however, we need not venture further into this area.

[Footnote 5]
There is, of course, a tension between this argument and the State's claim that one need not actually cause serious offense in order to violate § 42.09. See Brief for Petitioner 44.

[Footnote 6]

*Cf. Smith v. Goguen,* 415 U. S. at 415 U. S. 590-591 (BLACKMUN, J., dissenting) (emphasizing that lower court appeared to have construed state statute so as to protect physical integrity of the flag in all circumstances); *id.* at 415 U. S. 597-598 (REHNQUIST, J., dissenting) (same).

[Footnote 7]

Texas suggests that Johnson's conviction did not depend on the onlookers' reaction to the flag burning, because § 42.09 is violated only when a person physically mistreats the flag in a way that he "knows" will seriously offend one or more persons likely to observe or discover his action." Tex.Penal Code Ann. § 42.09(b) (1969) (emphasis added). "The serious offense' language of the statute," Texas argues, "refers to an individual's intent and to the manner in which the conduct is effectuated, not to the reaction of the crowd." Brief for Petitioner 44. If the statute were aimed only at the actor's intent, and not at the communicative impact of his actions, however, there would be little reason for the law to be triggered only when an audience is "likely" to be present. At Johnson's trial, indeed, the State itself seems not to have seen the distinction between knowledge and actual communicative impact that it now stresses: it proved the element of knowledge by offering the testimony of persons who had in fact been seriously offended by Johnson's conduct. *Id.* at 6-7. In any event, we find the distinction between Texas' statute and one dependent on actual audience reaction too precious to be of constitutional significance. Both kinds of statutes clearly are aimed at protecting onlookers from being offended by the ideas expressed by the prohibited activity.

[Footnote 8]

Our inquiry is, of course, bounded by the particular facts of this case and by the statute under which Johnson was convicted. There was no evidence that Johnson himself stole the flag he burned, Tr. of Oral Arg. 17, nor did the prosecution or the arguments urged in support of it depend on the theory that the flag was stolen. *Ibid.* Thus, our analysis does not rely on the way in which the flag was acquired, and nothing in our opinion should be taken to suggest that one is free to steal a flag so long as one later uses it to communicate an idea. We also emphasize that Johnson was prosecuted only for flag desecration -- not for trespass, disorderly conduct, or arson.

[Footnote 9]

Texas claims that "Texas is not endorsing, protecting, avowing or prohibiting any particular philosophy." Brief for Petitioner 29. If Texas means to suggest that its asserted interest does not prefer Democrats over Socialists, or Republicans over Democrats, for
example, then it is beside the point, for Johnson does not rely on such an argument. He argues instead that the State's desire to maintain the flag as a symbol of nationhood and national unity assumes that there is only one proper view of the flag. Thus, if Texas means to argue that its interest does not prefer any viewpoint over another, it is mistaken; surely one's attitude toward the flag and its referents is a viewpoint.

[Footnote 10]

Our decision in *Halter v. Nebraska*, 205 U. S. 34 (1907), addressing the validity of a state law prohibiting certain commercial uses of the flag, is not to the contrary. That case was decided "nearly 20 years before the Court concluded that the First Amendment applies to the States by virtue of the Fourteenth Amendment." *Spence v. Washington*, 418 U. S. 405, 418 U. S. 413, n. 7 (1974). More important, as we continually emphasized in *Halter* itself, that case involved purely commercial, rather than political, speech. 205 U.S. at 205 U. S. 38, 205 U. S. 41, 205 U. S. 42, 205 U. S. 45.

Nor does *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U. S. 522, 483 U. S. 524 (1987), addressing the validity of Congress' decision to "authoriz[e] the United States Olympic Committee to prohibit certain commercial and promotional uses of the word Olympic," relied upon by THE CHIEF JUSTICE's dissent, post at 491 U. S. 429, even begin to tell us whether the government may criminally punish physical conduct towards the flag engaged in as a means of political protest.

[Footnote 11]

THE CHIEF JUSTICE's dissent appears to believe that Johnson's conduct may be prohibited and, indeed, criminally sanctioned, because "his act . . . conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways." *Post* at 491 U. S. 431. Not only does this assertion sit uneasily next to the dissent's quite correct reminder that the flag occupies a unique position in our society -- which demonstrates that messages conveyed without use of the flag are not "just as forceful[ly]" as those conveyed with it -- but it also ignores the fact that, in *Spence, supra*, we "rejected summarily" this very claim. See 418 U.S. at 418 U. S. 411, n. 4.

JUSTICE KENNEDY, concurring.

I write not to qualify the words JUSTICE BRENNAN chooses so well, for he says with power all that is necessary to explain our ruling. I join his opinion without reservation, but with a keen sense that this case, like others before us from time to time, exacts its personal toll. This prompts me to add to our pages these few remarks.

The case before us illustrates better than most that the judicial power is often difficult in its exercise. We cannot here ask another Branch to share responsibility, as when the argument is made that a statute is flawed or incomplete. For we are presented with a clear
and simple statute to be judged against a pure command of the Constitution. The outcome can be laid at no door but ours.

The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result, perhaps for fear of undermining a valued principle that dictates the decision. This is one of those rare cases.

Our colleagues in dissent advance powerful arguments why respondent may be convicted for his expression, reminding us that among those who will be dismayed by our holding will be some who have had the singular honor of carrying the flag in battle. And I agree that the flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics.

With all respect to those views, I do not believe the Constitution gives us the right to rule as the dissenting Members of the Court urge, however painful this judgment is to announce. Though symbols often are what we ourselves make of them, the flag is constant in expressing beliefs Americans share, beliefs in law and peace and that freedom which sustains the human spirit. The case here today forces recognition of the costs to which those beliefs commit us. It is poignant but fundamental that the flag protects those who hold it in contempt.

For all the record shows, this respondent was not a philosopher and perhaps did not even possess the ability to comprehend how repellent his statements must be to the Republic itself. But whether or not he could appreciate the enormity of the offense he gave, the fact remains that his acts were speech, in both the technical and the fundamental meaning of the Constitution. So I agree with the Court that he must go free.

CHIEF JUSTICE REHNQUIST, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, dissenting.

In holding this Texas statute unconstitutional, the Court ignores Justice Holmes' familiar aphorism that "a page of history is worth a volume of logic." @ 256 U. S. 349 (1921). For more than 200 years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.

At the time of the American Revolution, the flag served to unify the Thirteen Colonies at home while obtaining recognition of national sovereignty abroad. Ralph Waldo Emerson's Concord Hymn describes the first skirmishes of the Revolutionary War in these lines:
"By the rude bridge that arched the flood"

"Their flag to April's breeze unfurled,"

"Here once the embattled farmers stood"

"And fired the shot heard round the world."

During that time, there were many colonial and regimental flags, adorned with such symbols as pine trees, beavers, anchors, and rattlesnakes, bearing slogans such as "Liberty or Death," "Hope," "An Appeal to Heaven," and "Don't Tread on Me." The first distinctive flag of the Colonies was the "Grand Union Flag" -- with 13 stripes and a British flag in the left corner -- which was flown for the first time on January 2, 1776, by troops of the Continental Army around Boston. By June 14, 1777, after we declared our independence from England, the Continental Congress resolved:

"That the flag of the thirteen United States be thirteen stripes, alternate red and white: that the union be thirteen stars, white in a blue field, representing a new constellation."

8 Journal of the Continental Congress 1774-1789, p. 464 (W. Ford ed.1907). One immediate result of the flag's adoption was that American vessels harassing British shipping sailed under an authorized national flag. Without such a flag, the British could treat captured seamen as pirates and hang them summarily; with a national flag, such seamen were treated as prisoners of war.

During the War of 1812, British naval forces sailed up Chesapeake Bay and marched overland to sack and burn the city of Washington. They then sailed up the Patapsco River to invest the city of Baltimore, but to do so it was first necessary to reduce Fort McHenry in Baltimore Harbor. Francis Scott Key, a Washington lawyer, had been granted permission by the British to board one of their warships to negotiate the release of an American who had been taken prisoner. That night, waiting anxiously on the British ship, Key watched the British fleet firing on Fort McHenry. Finally, at daybreak, he saw the fort's American flag still flying; the British attack had failed. Intensely moved, he began to scribble on the back of an envelope the poem that became our national anthem:

"O say can you see by the dawn's early light"

"What so proudly we hail'd at the twilight's last gleaming,"

"Whose broad stripes & bright stars through the perilous fight"

"O'er the ramparts we watch'd, were so gallantly streaming?"

"And the rocket's red glare, the bomb bursting in air,"
"Gave proof through the night that our flag was still there,"

"O say does that star-spangled banner yet wave"

"O'er the land of the free & the home of the brave?"

The American flag played a central role in our Nation's most tragic conflict, when the North fought against the South. The lowering of the American flag at Fort Sumter was viewed as the start of the war. G. Preble, History of the Flag of the United States of America 453 (1880). The Southern States, to formalize their separation from the Union, adopted the "Stars and Bars" of the Confederacy. The Union troops marched to the sound of "Yes We'll Rally Round The Flag Boys, We'll Rally Once Again." President Abraham Lincoln refused proposals to remove from the American flag the stars representing the rebel States, because he considered the conflict not a war between two nations, but an attack by 11 States against the National Government. Id. at 411. By war's end, the American flag again flew over "an indestructible union, composed of indestructible states." @ 74 U. S. 725 (1869).

One of the great stories of the Civil War is told in John Greenleaf Whittier's poem, "Barbara Frietchie":

Up from the meadows rich with corn,

Clear in the cool September morn,

The clustered spires of Frederick stand

Green-walled by the hills of Maryland.

Round about them orchards sweep,

Apple- and peach-tree fruited deep,

Fair as a garden of the Lord

To the eyes of the famished rebel horde,

On that pleasant morn of the early fall

When Lee marched over the mountain wall, --

Over the mountains winding down,
Horse and foot, into Frederick town.
Forty flags with their silver stars,
Forty flags with their crimson bars,
Flapped in the morning wind: the sun
Of noon looked down, and saw not one.

Up rose old Barbara Frietchie then,
Bowed with her four-score years and ten;
Bravest of all in Frederick town,
She took up the flag the men hauled down;
In her attic-window the staff she set,
To show that one heart was loyal yet.
Up the street came the rebel tread,
Stonewall Jackson riding ahead.
Under his slouched hat left and right
He glanced: the old flag met his sight.
"Halt!" -- the dust-brown ranks stood fast.
"Fire!" -- out blazed the rifle-blast

It shivered the window, pane and sash;
It rent the banner with seam and gash.
Quick, as it fell, from the broken staff
Dame Barbara snatched the silken scarf;
She leaned far out on the window-sill,
And shook it forth with a royal will.
"Shoot, if you must, this old gray head,
But spare your country's flag," she said.
A shade of sadness, a blush of shame,
Over the face of the leader came;
The nobler nature within him stirred
To life at that woman's deed and word:
"Who touches a hair of yon gray head
Dies like a dog! March on!" he said.
All day long through Frederick street
Sounded the tread of marching feet:
All day long that free flag tost
Over the heads of the rebel host.
Ever its torn folds rose and fell
On the loyal winds that loved it well;
And through the hill-gaps sunset light
Shone over it with a warm good-night.
Barbara Frietchie's work is o'er,
And the Rebel rides on his raids no more.
Honor to her! and let a tear
Fall, for her sake, on Stonewall's bier.
Over Barbara Frietchie's grave,
Flag of Freedom and Union, wave!
Peace and order and beauty draw
Round thy symbol of light and law;
And ever the stars above look down
On thy stars below in Frederick town!

In the First and Second World Wars, thousands of our countrymen died on foreign soil fighting for the American cause. At Iwo Jima in the Second World War, United States Marines fought hand to hand against thousands of Japanese. By the time the Marines reached the top of Mount Suribachi, they raised a piece of pipe upright and from one end fluttered a flag. That ascent had cost nearly 6,000 American lives. The Iwo Jima Memorial in Arlington National Cemetery memorializes that event. President Franklin Roosevelt authorized the use of the flag on labels, packages, cartons, and containers intended for export as lend-lease aid, in order to inform people in other countries of the United States' assistance. Presidential Proclamation No. 2605, 58 Stat. 1126.

During the Korean War, the successful amphibious landing of American troops at Inchon was marked by the raising of an American flag within an hour of the event. Impetus for the enactment of the Federal Flag Desecration Statute in 1967 came from the impact of flag burnings in the United States on troop morale in Vietnam. Representative L. Mendel Rivers, then Chairman of the House Armed Services Committee, testified that "The burning of the flag . . . has caused my mail to increase 100 percent from the boys in Vietnam, writing me and asking me what is going on in America."

"The public act of desecration of our flag tends to undermine the morale of American troops. That this finding is true can be attested by many Members who have received correspondence from servicemen expressing their shock and disgust of such conduct."

113 Cong.Rec. 16459 (1967).

The flag symbolizes the Nation in peace as well as in war. It signifies our national presence on battleships, airplanes, military installations, and public buildings from the United States Capitol to the thousands of county courthouses and city halls throughout the country. Two flags are prominently placed in our courtroom. Countless flags are placed by the graves of loved ones each year on what was first called
Decoration Day, and is now called Memorial Day. The flag is traditionally placed on the casket of deceased members of the Armed Forces, and it is later given to the deceased's family. 10 U.S.C. §§ 1481, 1482. Congress has provided that the flag be flown at half-staff upon the death of the President, Vice President, and other government officials "as a mark of respect to their memory." 36 U.S.C. § 175(m). The flag identifies United States merchant ships, 22 U.S.C. § 454, and "[t]he laws of the Union protect our commerce wherever the flag of the country may float." United States v. Guthrie, 17 How. 284, 309 (1855).

No other American symbol has been as universally honored as the flag. In 1931, Congress declared "The Star-Spangled Banner" to be our national anthem. 36 U.S.C. § 170. In 1949, Congress declared June 14th to be Flag Day. § 157. In 1987, John Philip Sousa's "The Stars and Stripes Forever" was designated as the national march. Pub.L. 101-186, 101 Stat. 1286. Congress has also established "The Pledge of Allegiance to the Flag" and the manner of its deliverance. 36 U.S.C. § 172. The flag has appeared as the principal symbol on approximately 33 United States postal stamps and in the design of at least 43 more, more times than any other symbol. United States Postal Service, Definitive Mint Set 15 (1988).

Both Congress and the States have enacted numerous laws regulating misuse of the American flag. Until 1967, Congress left the regulation of misuse of the flag up to the States. Now, however, Title 18 U.S.C. § 700(a) provides that:

"Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both."

Congress has also prescribed, inter alia, detailed rules for the design of the flag, 4 U.S.C. § 1, the time and occasion of flag's display, 36 U.S.C. § 174, the position and manner of its display, § 175, respect for the flag, § 176, and conduct during hoisting, lowering, and passing of the flag, § 177. With the exception of Alaska and Wyoming, all of the States now have statutes prohibiting the burning of the flag. [Footnote 2/1] Most of the state statutes are patterned after the Uniform Flag Act of 1917, which in § 3 provides:

"No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield."

The American flag, then, throughout more than 200 years of our history, has come to be the visible symbol embodying our Nation. It does not represent the views of any particular political party, and it does not represent any particular political philosophy. The flag is not simply another "idea" or "point of view" competing for recognition in the marketplace of ideas. Millions and millions of Americans regard it with an almost mystical reverence, regardless of what sort of social, political, or philosophical beliefs they may have. I cannot agree that the First Amendment invalidates the Act of Congress, and the laws of 48 of the 50 States, which make criminal the public burning of the flag.

More than 80 years ago, in *Halter v. Nebraska*, 205 U. S. 34 (1907), this Court upheld the constitutionality of a Nebraska statute that forbade the use of representations of the American flag for advertising purposes upon articles of merchandise. The Court there said:

"For that flag every true American has not simply an appreciation, but a deep affection. . . . Hence, it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."

*Id.* at 41.

Only two Terms ago, in *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U. S. 522 (1987), the Court held that Congress could grant exclusive use of the word "Olympic" to the United States Olympic Committee. The Court thought that this

"restrictio[n] on expressive speech properly [was] characterized as incidental to the primary congressional purpose of encouraging and rewarding the USOC's activities."

*Id.* at 483 U. S. 536. As the Court stated,

"when a word [or symbol] acquires value 'as the result of organization and the expenditure of labor, skill, and money' by an entity, that entity constitutionally may obtain a limited property right in the word [or symbol]."

*Id.* at 483 U. S. 532, quoting @ 248 U. S. 239 (1918). Surely Congress or the States may recognize a similar interest in the flag.

But the Court insists that the Texas statute prohibiting the public burning of the American flag infringes on respondent Johnson's freedom of expression. Such freedom, of course, is not absolute. *See Schenck v. United States*, 249 U. S. 47 (1919). In *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942), a unanimous Court said:
"Allowing the broadest scope to the language and purpose of the Fourteenth Amendment, it is well understood that the right of free speech is not absolute at all times and under all circumstances. There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words -- those which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Id. at 315 U. S. 571-572 (footnotes omitted). The Court upheld Chaplinsky's conviction under a state statute that made it unlawful to "address any offensive, derisive or annoying word to any person who is lawfully in any street or other public place." Id. at 315 U. S. 569. Chaplinsky had told a local marshal, "You are a God damned racketeer" and a "damned Fascist and the whole government of Rochester are Fascists or agents of Fascists." Ibid.

Here it may equally well be said that the public burning of the American flag by Johnson was no essential part of any exposition of ideas, and at the same time it had a tendency to incite a breach of the peace. Johnson was free to make any verbal denunciation of the flag that he wished; indeed, he was

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free to burn the flag in private. He could publicly burn other symbols of the Government or effigies of political leaders. He did lead a march through the streets of Dallas, and conducted a rally in front of the Dallas City Hall. He engaged in a "die-in" to protest nuclear weapons. He shouted out various slogans during the march, including: "Reagan, Mondale which will it be? Either one means World War III"; "Ronald Reagan, killer of the hour, Perfect example of U.S. power"; and "red, white and blue, we spit on you, you stand for plunder, you will go under." Brief for Respondent 3. For none of these acts was he arrested or prosecuted; it was only when he proceeded to burn publicly an American flag stolen from its rightful owner that he violated the Texas statute.

The Court could not, and did not, say that Chaplinsky's utterances were not expressive phrases -- they clearly and succinctly conveyed an extremely low opinion of the addressee. The same may be said of Johnson's public burning of the flag in this case; it obviously did convey Johnson's bitter dislike of his country. But his act, like Chaplinsky's provocative words, conveyed nothing that could not have been conveyed and was not conveyed just as forcefully in a dozen different ways. As with "fighting words," so with flag burning, for purposes of the First Amendment: It is

"no essential part of any exposition of ideas, and [is] of such slight social value as a step to truth that any benefit that may be derived from [it] is clearly outweighed"
by the public interest in avoiding a probable breach of the peace. The highest courts of several States have upheld state statutes prohibiting the public burning of the flag on the grounds that it is so inherently inflammatory that it may cause a breach of public order. See, e.g., State v. Royal, 113 N. H. 224, 229, 305 A.2d 676, 680 (1973); State v. Waterman, 190 N.W.2d 809, 811-812 (Iowa 1971); see also State v. Mitchell, 32 Ohio App. 2d 16, 30, 288 N.E.2d 216, 226 (1972).

The result of the Texas statute is obviously to deny one in Johnson's frame of mind one of many means of "symbolic speech." Far from being a case of "one picture being worth a thousand words," flag burning is the equivalent of an inarticulate grunt or roar that, it seems fair to say, is most likely to be indulged in not to express any particular idea, but to antagonize others. Only five years ago we said in City Council of Los Angeles v. Taxpayers for Vincent, 466 U. S. 789, 466 U. S. 812 (1984), that "the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places." The Texas statute deprived Johnson of only one rather inarticulate symbolic form of protest -- a form of protest that was profoundly offensive to many -- and left him with a full panoply of other symbols and every conceivable form of verbal expression to express his deep disapproval of national policy. Thus, in no way can it be said that Texas is punishing him because his hearers -- or any other group of people -- were profoundly opposed to the message that he sought to convey. Such opposition is no proper basis for restricting speech or expression under the First Amendment. It was Johnson's use of this particular symbol, and not the idea that he sought to convey by it or by his many other expressions, for which he was punished.

Our prior cases dealing with flag desecration statutes have left open the question that the Court resolves today. In Street v. New York, 394 U. S. 576, 394 U. S. 579 (1969), the defendant burned a flag in the street, shouting "We don't need no damned flag" and, "[i]f they let that happen to Meredith, we don't need an American flag." The Court ruled that since the defendant might have been convicted solely on the basis of his words, the conviction could not stand, but it expressly reserved the question whether a defendant could constitutionally be convicted for burning the flag. Id. at 394 U. S. 581.

Chief Justice Warren, in dissent, stated:

"I believe that the States and Federal Government do have the power to protect the flag from acts of desecration and disgrace. . . . [I]t is difficult for me to imagine that, had the Court faced this issue, it would have concluded otherwise."
Id. at 394 U. S. 605. Justices Black and Fortas also expressed their personal view that a prohibition on flag burning did not violate the Constitution. See id. at 394 U. S. 610 (Black, J., dissenting) ("It passes my belief that anything in the Federal Constitution bars a State from making the deliberate burning of the American Flag an offense"); id. at 394 U. S. 615-617 (Fortas, J., dissenting) ("[T]he States and the Federal Government have the power to protect the flag from acts of desecration committed in public. . . . [T]he flag is a special kind of personality. Its use is traditionally and universally subject to special rules and regulation. . . . A person may own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions. Certainly . . . these special conditions are not per se arbitrary or beyond governmental power under our Constitution").

In Spence v. Washington, 418 U. S. 405 (1974), the Court reversed the conviction of a college student who displayed the flag with a peace symbol affixed to it by means of removable black tape from the window of his apartment. Unlike the instant case, there was no risk of a breach of the peace, no one other than the arresting officers saw the flag, and the defendant owned the flag in question. The Court concluded that the student's conduct was protected under the First Amendment, because "no interest the State may have in preserving the physical integrity of a privately owned flag was significantly impaired on these facts."

Id. at 418 U. S. 415. The Court was careful to note, however, that the defendant "was not charged under the desecration statute, nor did he permanently disfigure the flag or destroy it." Ibid.

In another related case, Smith v. Goguen, 415 U. S. 566 (1974), the appellee, who wore a small flag on the seat of his trousers, was convicted under a Massachusetts flag misuse statute that subjected to criminal liability anyone who publicly. . . . treats contemptuously the flag of the United States." Id. at 415 U. S. 568-569. The Court affirmed the lower court's reversal of appellee's conviction, because the phrase "treats contemptuously" was unconstitutionally broad and vague. Id. at 415 U. S. 576. The Court was again careful to point out that "[c]ertainly nothing prevents a legislature from defining with substantial specificity what constitutes forbidden treatment of United States flags."

Id. at 415 U. S. 581-582. See also id. at 415 U. S. 587 (WHITE, J., concurring in judgment) ("The flag is a national property, and the Nation may regulate those who would make, imitate, sell, possess, or use it. I would not question those statutes which proscribe mutilation, defacement, or burning of the flag or which otherwise protect its
physical integrity, without regard to whether such conduct might provoke violence. . . . There would seem to be little question about the power of Congress to forbid the mutilation of the Lincoln Memorial. . . . The flag is itself a monument, subject to similar protection”); id. at 415 U. S. 591 (BLACKMUN, J., dissenting) ("Goguen's punishment was constitutionally permissible for harming the physical integrity of the flag by wearing it affixed to the seat of his pants").

But the Court today will have none of this. The uniquely deep awe and respect for our flag felt by virtually all of us are bundled off under the rubric of "designated symbols," ante at 491 U. S. 417, that the First Amendment prohibits the government from "establishing." But the government has not "established" this feeling; 200 years of history have done that. The government is simply recognizing as a fact the profound regard for the American flag created by that history when it enacts statutes prohibiting the disrespectful public burning of the flag.

The Court concludes its opinion with a regrettably patronizing civics lecture, presumably addressed to the Members of both Houses of Congress, the members of the 48 state legislatures that enacted prohibitions against flag burning, and the troops fighting under that flag in Vietnam who objected to its being burned:

"The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong."

Ante at 491 U. S. 419. The Court's role as the final expositor of the Constitution is well established, but its role as a platonic guardian admonishing those responsible to public opinion as if they were truant schoolchildren has no similar place in our system of government. The cry of "no taxation without representation" animated those who revolted against the English Crown to found our Nation -- the idea that those who submitted to government should have some say as to what kind of laws would be passed. Surely one of the high purposes of a democratic society is to legislate against conduct that is regarded as evil and profoundly offensive to the majority of people -- whether it be murder, embezzlement, pollution, or flagburning.

Our Constitution wisely places limits on powers of legislative majorities to act, but the declaration of such limits by this Court "is, at all times, a question of much delicacy, which ought seldom, if ever, to be decided in the affirmative, in a doubtful case." @ 10 U. S. 128 (1810) (Marshall, C.J.). Uncritical extension of constitutional protection to the burning of the flag risks the frustration of the very purpose for which organized governments are instituted. The Court decides that the American flag is just another symbol, about which not only must opinions pro and con be tolerated, but for which the most minimal public respect may not be enjoined. The government may conscript men
into the Armed Forces where they must fight and perhaps die for the flag, but the government may not prohibit the public burning of the banner under which they fight. I would uphold the Texas statute as applied in this case.

[Footnote 2/2]

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[Footnote 2/1]


[Footnote 2/2]

In holding that the Texas statute as applied to Johnson violates the First Amendment, the Court does not consider Johnson's claims that the statute is unconstitutionally vague or overbroad. Brief for Respondent 24-30. I think those claims are without merit. In New York State Club Assn. v. City of New York, 487 U. S. 1, 487 U. S. 11 (1988), we stated that a facial challenge is only proper under the First Amendment when a statute can never be applied in a permissible manner or when, even if it may be validly applied to a particular defendant, it is so broad as to reach the protected speech of third parties. While Tex.Penal Code Ann. § 42.09 (1989)

"may not satisfy those intent on finding fault at any cost, [it is] set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with."
CSC Letter Carriers, 413 U. S. 548 413 U. S. 579 (1973). By defining "desecrate" as "deface," "damage" or otherwise "physically mistreat" in a manner that the actor knows will "seriously offend" others, § 42.09 only prohibits flagrant acts of physical abuse and destruction of the flag of the sort at issue here -- soaking a flag with lighter fluid and igniting it in public -- and not any of the examples of improper flag etiquette cited in respondent's brief.

JUSTICE STEVENS, dissenting.

As the Court analyzes this case, it presents the question whether the State of Texas, or indeed the Federal Government, has the power to prohibit the public desecration of the American flag. The question is unique. In my judgment, rules that apply to a host of other symbols, such as state flags, armbands, or various privately promoted emblems of political or commercial identity, are not necessarily controlling. Even if flagburning could be considered just another species of symbolic speech under the logical application of the rules that the Court has developed in its interpretation of the First Amendment in other contexts, this case has an intangible dimension that makes those rules inapplicable.

A country's flag is a symbol of more than "nationhood and national unity." Ante at 491 U. S. 407, 491 U. S. 410, 491 U. S. 413, and n. 9, 491 U. S. 417, 491 U. S. 420. It also signifies the ideas that characterize the society that has chosen that emblem as well as the special history that has animated the growth and power of those ideas. The fleurs-de-lis and the tricolor both symbolized "nationhood and national unity," but they had vastly different meanings. The message conveyed by some flags -- the swastika, for example -- may survive long after it has outlived its usefulness as a symbol of regimented unity in a particular nation.

So it is with the American flag. It is more than a proud symbol of the courage, the determination, and the gifts of nature that transformed 13 fledgling Colonies into a world power. It is a symbol of freedom, of equal opportunity, of religious tolerance, and of goodwill for other peoples who share our aspirations. The symbol carries its message to dissidents both at home and abroad who may have no interest at all in our national unity or survival.

The value of the flag as a symbol cannot be measured. Even so, I have no doubt that the interest in preserving that value for the future is both significant and legitimate. Conceivably, that value will be enhanced by the Court's conclusion that our national commitment to free expression is so strong that even the United States, as ultimate guarantor of that freedom, is without power to prohibit the desecration of its unique symbol. But I am unpersuaded. The creation of a federal right to post bulletin boards and graffiti on the Washington Monument might enlarge the market for free expression, but at a cost I would not pay. Similarly, in my considered judgment, sanctioning the public desecration of the flag will tarnish its value -- both for those who cherish the ideas for which it waves and for those who desire to don the robes of martyrdom by burning it.
That tarnish is not justified by the trivial burden on free expression occasioned by requiring that an available, alternative mode of expression -- including uttering words critical of the flag, see Street v. New York, 394 U. S. 576 (1969) -- be employed.

It is appropriate to emphasize certain propositions that are not implicated by this case. The statutory prohibition of flag desecration does not "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."

*West Virginia Board of Education v. Barnette*, 319 U. S. 624, 319 U. S. 642 (1943). The statute does not compel any conduct or any profession of respect for any idea or any symbol.

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Nor does the statute violate "the government's paramount obligation of neutrality in its regulation of protected communication." *Young v. American Mini Theatres, Inc.*, 427 U. S. 50, 427 U. S. 70 (1976) (plurality opinion). The content of respondent's message has no relevance whatsoever to the case. The concept of "desecration" does not turn on the substance of the message the actor intends to convey, but rather on whether those who view the act will take serious offense. Accordingly, one intending to convey a message of respect for the flag by burning it in a public square might nonetheless be guilty of desecration if he knows that others -- perhaps simply because they misperceive the intended message -- will be seriously offended. Indeed, even if the actor knows that all possible witnesses will understand that he intends to send a message of respect, he might still be guilty of desecration if he also knows that this understanding does not lessen the offense taken by some of those witnesses. Thus, this is not a case in which the fact that "it is the speaker's opinion that gives offense" provides a special "reason for according it constitutional protection," *FCC v. Pacifica Foundation*, 438 U. S. 726, 438 U. S. 745 (1978) (plurality opinion). The case has nothing to do with "disagreeable ideas," see ante at 491 U. S. 409. It involves disagreeable conduct that, in my opinion, diminishes the value of an important national asset.

The Court is therefore quite wrong in blandly asserting that respondent

"was prosecuted for his expression of dissatisfaction with the policies of this country, expression situated at the core of our First Amendment values."

*Ante* at 491 U. S. 411. Respondent was prosecuted because of the method he chose to express his dissatisfaction with those policies. Had he chosen to spraypaint -- or perhaps convey with a motion picture projector -- his message of dissatisfaction on the facade of the Lincoln Memorial, there would be no question about the power of the Government to prohibit his means of expression. The prohibition would be supported by the legitimate interest in preserving the quality of an important
national asset. Though the asset at stake in this case is intangible, given its unique value, the same interest supports a prohibition on the desecration of the American flag. *

The ideas of liberty and equality have been an irresistible force in motivating leaders like Patrick Henry, Susan B. Anthony, and Abraham Lincoln, schoolteachers like Nathan Hale and Booker T. Washington, the Philippine Scouts who fought at Bataan, and the soldiers who scaled the bluff at Omaha Beach. If those ideas are worth fighting for -- and our history demonstrates that they are -- it cannot be true that the flag that uniquely symbolizes their power is not itself worthy of protection from unnecessary desecration.

I respectfully dissent.

* The Court suggests that a prohibition against flag desecration is not content-neutral, because this form of symbolic speech is only used by persons who are critical of the flag or the ideas it represents. In making this suggestion, the Court does not pause to consider the far-reaching consequences of its introduction of disparate-impact analysis into our First Amendment jurisprudence. It seems obvious that a prohibition against the desecration of a gravesite is content-neutral even if it denies some protesters the right to make a symbolic statement by extinguishing the flame in Arlington Cemetery where John F. Kennedy is buried while permitting others to salute the flame by bowing their heads. Few would doubt that a protester who extinguishes the flame has desecrated the gravesite, regardless of whether he prefaces that act with a speech explaining that his purpose is to express deep admiration or unmitigated scorn for the late President. Likewise, few would claim that the protester who bows his head has desecrated the gravesite, even if he makes clear that his purpose is to show disrespect. In such a case, as in a flag burning case, the prohibition against desecration has absolutely nothing to do with the content of the message that the symbolic speech is intended to convey.
TINKER V. DES MOINES SCH. DIST., 393 U. S. 503 (1969)

U.S. Supreme Court


No. 21

Argued November 12, 1968 Tinker v. Des Moines Independent Community School District

Decided February 24, 1969

393 U.S. 503

CERTIORARI TO THE UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

Syllabus

Petitioners, three public school pupils in Des Moines, Iowa, were suspended from school for wearing black armbands to protest the Government's policy in Vietnam. They sought nominal damages and an injunction against a regulation that the respondents had promulgated banning the wearing of armbands. The District Court dismissed the complaint on the ground that the regulation was within the Board's power, despite the absence of any finding of substantial interference with the conduct of school activities. The Court of Appeals, sitting en banc, affirmed by an equally divided court.

Held:

1. In wearing armbands, the petitioners were quiet and passive. They were not disruptive, and did not impinge upon the rights of others. In these circumstances, their conduct was within the protection of the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth. Pp. 393 U. S. 505-506.

2. First Amendment rights are available to teachers and students, subject to application in light of the special characteristics of the school environment. Pp. 393 U. S. 506-507.
3. A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendments. Pp. 393 U. S. 507-514.

383 F.2d 988, reversed and remanded.

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MR. JUSTICE FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December, 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and, if he refused, he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired -- that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under § 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing, the District Court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. 258 F.Supp. 971 (1966). The court referred to, but expressly declined to follow, the Fifth Circuit's holding in a similar case
that the wearing of symbols like the armbands cannot be prohibited unless it "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school." *Burnside v. Byars*, 363 F.2d 744, 749 (1966). [Footnote 1]

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the District Court's decision was accordingly affirmed without opinion. 383 F.2d 988 (1967). We granted certiorari. 390 U.S. 942 (1968).

I

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. *See West Virginia v. Barnette*, 319 U. S. 624 (1943); *Stromberg v. California*, 283 U. S. 359 (1931). Cf. *Thornhill v. Alabama*, 310 U. S. 88 (1940); *Edwards v. South Carolina*, 372 U. S. 229 (1963); *Brown v. Louisiana*, 383 U. S. 131 (1966). As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to "pure speech"


First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. In *Meyer v. Nebraska*, 262 U. S. 390 (1923), and *Bartels v. Iowa*, 262 U. S. 404 (1923), this Court, in opinions by Mr. Justice McReynolds, held that the Due Process Clause of the Fourteenth Amendment prevents States from forbidding the teaching of a foreign language to young students. Statutes to this effect, the Court held, unconstitutionally interfere with the liberty of teacher, student, and parent. [Footnote 2] *See also 268 U. S. 195* (1925) (concurring opinion); *Sweezy v. New Hampshire*, 354 U. S. 234 (1957); *Shelton v. Tucker*, 364 U. S. 479, 364 U. S. 487 (1960); *Engel v. Vitale*, 370 U. S. 421 (1962); *Keyishian v. Board of Regents*, 385 U. S. 589, 385 U. S. 603 (1967); *Epperson v. Arkansas*, ante, @ p. 393 U. S. 97 (1968).

In *West Virginia v. Barnette*, supra, this Court held that, under the First Amendment, the student in public school may not be compelled to salute the flag. Speaking through Mr. Justice Jackson, the Court said:

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"The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

319 U.S. at 319 U. S. 637. On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. See Epperson v. Arkansas, supra, at 393 U. S. 104; Meyer v. Nebraska, supra, at 262 U. S. 402. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing,

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to hair style, or deportment. Cf. Ferrell v. Dallas Independent School District, 392 F.2d 697 (1968); Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923). It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to "pure speech."

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word
spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U. S. 1 (1949); and our history says that it is this sort of hazardous freedom -- this kind of openness -- that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. *Burnside v. Byars*, supra at 749.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption. [Footnote 3]

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. [Footnote 4] It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded. [Footnote 5])

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol -- black armbands worn to exhibit opposition to this Nation's involvement
in Vietnam -- was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school, as well as out of school, are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress "expressions of feelings with which they do not wish to contend." Burnside v. Byars, supra, at 749.

In Meyer v. Nebraska, supra, at 262 U. S. 402, Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." He said:

"In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest; and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution."

This principle has been repeated by this Court on numerous occasions during the intervening years. In Keyishian v. Board of Regents, 385 U. S. 589, 385 U. S. 603, MR. JUSTICE BRENNAN, speaking for the Court, said:

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' @ 364 U. S. 487. The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'"

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students.
This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others. *Burnside v. Byars, supra,* at 749. But conduct by the student, in class or out of it, which for any reason -- whether it stems from time, place, or type of behavior -- materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. *Cf. Blackwell v. Issaquena County Board of Education,* 363 F.2d 740 (C.A. 5th Cir.1966).

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle, but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school. *Cf. Hammond*

v. *South Carolina State College,* 272 F.Supp. 947 (D.C.S.C.1967) (orderly protest meeting on state college campus); *Dickey v. Alabama State Board of Education,* 273 F.Supp. 613 (D.C.M.D. Ala. 967) (expulsion of student editor of college newspaper). In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands," as one of the children called it, is no less offensive to the Constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact
occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

[Footnote 1]

In Burnside, the Fifth Circuit ordered that high school authorities be enjoined from enforcing a regulation forbidding students to wear "freedom buttons." It is instructive that, in Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (1966), the same panel on the same day reached the opposite result on different facts. It declined to enjoin enforcement of such a regulation in another high school where the students wearing freedom buttons harassed students who did not wear them, and created much disturbance.

[Footnote 2]

Hamilton v. Regents of Univ. of Cal., 293 U. S. 245 (1934), is sometimes cited for the broad proposition that the State may attach conditions to attendance at a state university that require individuals to violate their religious convictions. The case involved dismissal of members of a religious denomination from a land grant college for refusal to participate in military training. Narrowly viewed, the case turns upon the Court's conclusion that merely requiring a student to participate in school training in military "science" could not conflict with his constitutionally protected freedom of conscience. The decision cannot be taken as establishing that the State may impose and enforce any conditions that it chooses upon attendance at public institutions of learning, however violative they may be of fundamental constitutional guarantees. See, e.g., West Virginia v. Barnette, 319 U. S. 624 (1943); Dixon v. Alabama State Board of Education, 294 F.2d 150 (C.A. 5th Cir.1961); Knight v. State Board of Education, 200 F.Sup. 174 (D.C. M.D. Tenn.1961); Dickey v. Alabama State Board of Education, 273 F.Sup. 613 (D.C. M.D. Ala.1967). See also Note, Unconstitutional Conditions, 73 Harv.L.Rev. 1595 (1960); Note, Academic Freedom, 81 Harv.L.Rev. 1045 (1968).

[Footnote 3]
The only suggestions of fear of disorder in the report are these:

"A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school, and it was felt that, if any kind of a demonstration existed, it might evolve into something which would be difficult to control."

"Students at one of the high schools were heard to say they would wear armbands of other colors if the black bands prevailed."

Moreover, the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; the regulation was directed against "the principle of the demonstration" itself. School authorities simply felt that "the schools are no place for demonstrations," and if the students

"didn't like the way our elected officials were handling things, it should be handled with the ballot box, and not in the halls of our public schools."

[Footnote 4]

The District Court found that the school authorities, in prohibiting black armbands, were influenced by the fact that

"[t]he Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the armband regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D.C. A wave of draft card burning incidents protesting the war had swept the country. At that time, two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views."

258 F.Supp. at 92-973.

[Footnote 5]

After the principals' meeting, the director of secondary education and the principal of the high school informed the student that the principals were opposed to publication of his article. They reported that

"we felt that it was a very friendly conversation, although we did not feel that we had convinced the student that our decision was a just one."

[Footnote 6]
In Hammond v. South Carolina State College, 272 F.Supp. 947 (D.C. S.C. 1967), District Judge Hemphill had before him a case involving a meeting on campus of 300 students to express their views on school practices. He pointed out that a school is not like a hospital or a jail enclosure. Cf. Cox v. Louisiana, 379 U. S. 536 (1965); Adderley v. Florida, 385 U. S. 39 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. Cf. Edwards v. South Carolina, 372 U. S. 229 (1963); Brown v. Louisiana, 383 U. S. 131 (1966).

MR. JUSTICE STEWART, concurring.

Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are coextensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in Ginsberg v. New York, 390 U. S. 629. I continue to hold the view I expressed in that case:

"[A] State may permissibly determine that, at least in some precisely delineated areas, a child -- like someone in a captive audience -- is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."


MR. JUSTICE WHITE, concurring.

While I join the Court's opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinges on some valid state interest; and, second, that I do not subscribe to everything the Court of Appeals said about free speech in its opinion in Burnside v. Byars, 363 F.2d 744, 748 (C.A. 5th Cir. 1966), a case relied upon by the Court in the matter now before us.

MR. JUSTICE BLACK, dissenting.

The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools . . ." in the United States is in ultimate effect transferred to the Supreme Court. [Footnote 2/1] The Court brought
this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way "from kindergarten through high school." Here, the constitutional right to "political expression" asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker, was 11 years old and in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Christopher Eckhardt, an 11th grade pupil and a petitioner in this case. His mother is an official in the Women's International League for Peace and Freedom.

As I read the Court's opinion, it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two courts below. First, the Court concludes that the wearing of armbands is "symbolic speech," which is "akin to pure speech," and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school functions are not "unreasonably" disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decision as to which school disciplinary regulations are "reasonable."

Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment, cf., e.g., Giboney v. Empire Storage & Ice Co., 336 U. S. 490 (1949), the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech -- "symbolic" or "pure" -- and whether the courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that, under the First and Fourteenth Amendments, neither the State nor the Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In Cox v. Louisiana, 379 U. S. 536, 379 U. S. 554 (1965), for example, the Court clearly stated that the rights of free speech and assembly "do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time."
While the record does not show that any of these armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other nonprotesting students had better let them alone. There is also evidence that a teacher of mathematics had his lesson period practically "wrecked," chiefly by disputes with Mary Beth Tinker, who wore her armband for her "demonstration."

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Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene remarks or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw they would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that, if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flout orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the boards of education.

[Footnote 2/2]

The United States District Court refused to hold that the state school order violated the First and Fourteenth Amendments. 258 F.Supp. 971. Holding that the protest was akin to speech, which is protected by the First

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and Fourteenth Amendments, that court held that the school order was "reasonable," and hence constitutional. There was at one time a line of cases holding "reasonableness," as the court saw it, to be the test of a "due process" violation. Two cases upon which the Court today heavily relies for striking down this school order used this test of reasonableness, Meyer v. Nebraska, 262 U. S. 390 (1923), and Bartels v. Iowa, 262 U. S. 404 (1923). The opinions in both cases were written by Mr. Justice McReynolds; Mr. Justice Holmes, who opposed this reasonableness test, dissented from the holdings, as did Mr. Justice Sutherland. This constitutional test of reasonableness prevailed in this Court for a season. It was this test that brought on President Franklin Roosevelt's well known Court fight. His proposed legislation did not pass, but the fight left the "reasonableness" constitutional test dead on the battlefield, so much so that this Court, in Ferguson v. Skrupa, 372 U. S. 726, 372 U. S. 729, 730, after a thorough review of the old cases, was able to conclude in 1963:
"There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy."

"* * * *

"The doctrine that prevailed in *Lochner, Coppage, Adkins, Burns*, and like cases -- that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely -- has long since been discarded."

The *Ferguson* case totally repudiated the old reasonableness-due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they "shock the conscience," or that they are

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"unreasonable," "arbitrary," "irrational," "contrary to fundamental decency," or some other such flexible term without precise boundaries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like. If the majority of the Court today, by agreeing to the opinion of my Brother FORTAS, is resurrecting that old reasonableness-due process test, I think the constitutional change should be plainly, unequivocally, and forthrightly stated for the benefit of the bench and bar. It will be a sad day for the country, I believe, when the present-day Court returns to the McReynolds due process concept. Other cases cited by the Court do not, as implied, follow the McReynolds reasonableness doctrine. West Virginia v. *Barnette*, 319 U. S. 624, clearly rejecting the "reasonableness" test, held that the Fourteenth Amendment made the First applicable to the States, and that the two forbade a State to compel little school children to salute the United States flag when they had religious scruples against doing so. [Footnote 2/3] Neither *Thornhill v. Alabama*, 310 U. S. 88; *Stromberg v. California*, 283 U. S. 359; 372 U. S. 555, and *Adderley v. Florida*, 385 U. S. 39, cited by the Court as a "compare," indicating, I suppose, that these two cases are no longer the law, were not rested to the slightest extent on the Meyer and Bartels@ "reasonableness-due process-McReynolds" constitutional test.

I deny, therefore, that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." Even *Meyer* did not hold that. It makes no reference to "symbolic speech" at all; what it did was to strike down as "unreasonable," and therefore unconstitutional, a Nebraska law barring the teaching of the German language before the children reached the eighth grade. One can well agree with Mr. Justice Holmes and Mr. Justice Sutherland, as I do, that such a law was no more unreasonable than it would be to bar the teaching of Latin and Greek to pupils who have not reached the eighth grade. In fact, I think the majority's reason for invalidating the Nebraska law was that it did not like it, or, in legal jargon, that it "shocked the Court's conscience," "offended its sense of justice," or was "contrary to fundamental concepts of
the English-speaking world," as the Court has sometimes said. See, e.g.,
The truth is that a teacher of kindergarten, grammar school, or high school
pupils no more carries into a school with him a complete right to freedom of
speech and expression than an anti-Catholic or anti-Semite carries with him a
complete freedom of

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speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry
with him into the United States Senate or House, or into the Supreme Court, or any other
court, a complete constitutional right to go into those places contrary to their rules and
speak his mind on any subject he pleases. It is a myth to say that any person has a
constitutional right to say what he pleases, where he pleases, and when he pleases. Our
Court has decided precisely the opposite. See, e.g., Cox v. Louisiana, 379 U. S. 536, 379

In my view, teachers in state-controlled public schools are hired to teach there. Although
Mr. Justice McReynolds may have intimated to the contrary in Meyer v. Nebraska, supra,
certainly a teacher is not paid to go into school and teach subjects the State does not hire
him to teach as a part of its selected curriculum. Nor are public school students sent to the
schools at public expense to broadcast political or any other views to educate and inform
the public. The original idea of schools, which I do not believe is yet abandoned as
worthless or out of date, was that children had not yet reached the point of experience and
wisdom which enabled them to teach all of their elders. It may be that the Nation has
outworn the old-fashioned slogan that "children are to be seen, not heard," but one may, I
hope, be permitted to harbor the thought that taxpayers send children to school on the
premise that, at their age, they need to learn, not teach.

The true principles on this whole subject were, in my judgment, spoken by Mr. Justice
McKenna for the Court in Waugh v. Mississippi University, 237 U. S. 589, 237 U. S. 596-
597. The State had there passed a law barring students from peaceably assembling in
Greek letter fraternities and providing that students who joined them could be expelled
from school. This law would appear on the surface to run afoul of the First Amendment's

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freedom of assembly clause. The law was attacked as violative of due process and of the
privileges and immunities clause, and as a deprivation of property and of liberty under
the Fourteenth Amendment. It was argued that the fraternity made its members more
moral, taught discipline, and inspired its members to study harder and to obey better the
rules of discipline and order. This Court rejected all the "fervid" pleas of the fraternities' advocates and decided unanimously against these Fourteenth Amendment arguments.
The Court, in its next to the last paragraph, made this statement which has complete
relevance for us today:
"It is said that the fraternity to which complainant belongs is a moral and, of itself, a disciplinary, force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State, and is under the control of the State, and the enactment of the statute may have been induced by the opinion that membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions. It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity."

(Emphasis supplied.)

It was on the foregoing argument that this Court sustained the power of Mississippi to curtail the First Amendment's right of peaceable assembly. And the same reasons are equally applicable to curtailing in the States' public schools the right to complete freedom of expression. Iowa's public schools, like Mississippi's university, are operated to give students an opportunity to learn, not to talk politics by actual speech, or by "symbolic"

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speech. And, as I have pointed out before, the record amply shows that public protest in the school classes against the Vietnam war "distracted from that singleness of purpose which the State [here Iowa] desired to exist in its public educational institutions." Here, the Court should accord Iowa educational institutions the same right to determine for themselves to what extent free expression should be allowed in its schools as it accorded Mississippi with reference to freedom of assembly. But even if the record were silent as to protests against the Vietnam war distracting students from their assigned class work, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few other issues ever have. Of course, students, like other people, cannot concentrate on lesser issues when black armbands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbors. It was, of course, to distract the attention of other students that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.

Change has been said to be truly the law of life, but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquility and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens -- to be better citizens. Here a very small number of students have crisply and summarily
refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that, after the Court's holding today, some students in Iowa schools -- and, indeed, in all schools -- will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures, and destruction. They have picketed schools to force students not to cross their picket lines, and have too often violently attacked earnest but frightened students who wanted an education that the pickets did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers as they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools, rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons, in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students. I, for one, am not fully persuaded that school pupils are wise enough, even with this Court's expert help from Washington, to run the 23,390 public school systems [Footnote 2/4] in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

[Footnote 2/1]

The petition for certiorari here presented this single question:

"Whether the First and Fourteenth Amendments permit officials of state supported public schools to prohibit students from wearing symbols of political views within school premises where the symbols are not disruptive of school discipline or decorum."

[Footnote 2/2]

The following Associated Press article appeared in the Washington Evening Star, January 11, 1969, p. A-2, col. 1:
"BELLINGHAM, Mass. (AP) -- Todd R. Hennessy, 16, has filed nominating papers to run for town park commissioner in the March election."

"'I can see nothing illegal in the youth's seeking the elective office,' said Lee Ambler, the town counsel. 'But I can't overlook the possibility that, if he is elected, any legal contract entered into by the park commissioner would be void because he is a juvenile.'"

"Todd is a junior in Mount St. Charles Academy, where he has a top scholastic record."

[Footnote 2/3]

In *Cantwell v. Connecticut*, 310 U.S. 296, 310 U.S. 303-304 (1940), this Court said:

"The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus, the Amendment embraces two concepts -- freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

[Footnote 2/4]


MR. JUSTICE HARLAN, dissenting.

I certainly agree that state public school authorities, in the discharge of their responsibilities, are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time, I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns -- for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.