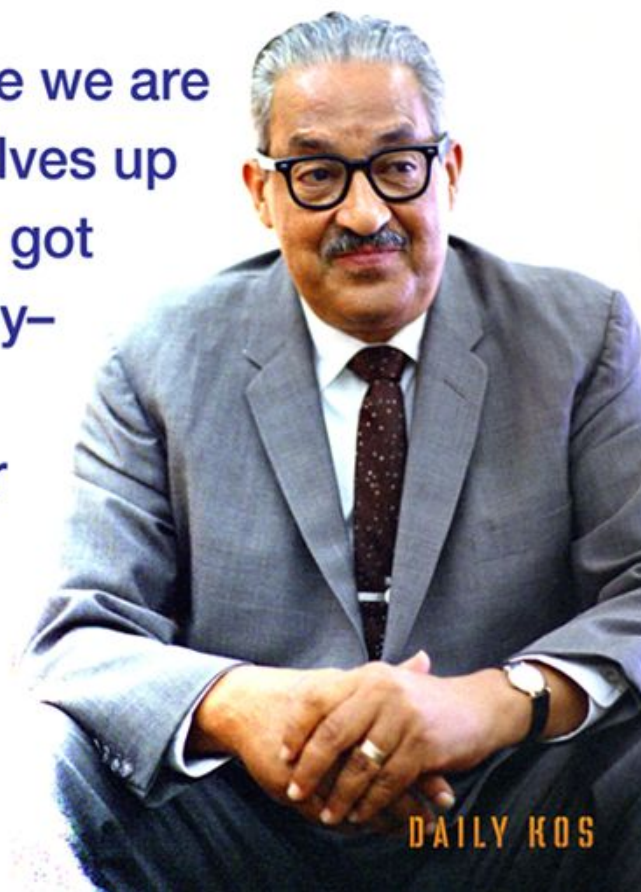




THURGOOD MARSHALL JURISPRUDENCE COURSE SYLLABUS, READING ASSIGNMENTS AND MATERIALS

“None of us got where we are solely by pulling ourselves up by our bootstraps. We got here because somebody—a parent, a teacher, an Ivy League crony or a few nuns—bent down and helped us pick up our boots.”

-Thurgood Marshall



LAW 860
SPRING 2019
GARY BLEDSOE, ACTING DEAN



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THE PROFESSORS

NAME: Gary Bledsoe

TELEPHONE:

EMAIL: gary.bledsoe@tmsl.tsu.edu

LOCATION: 231J

OFFICE HOURS: Wednesdays
3:00 p.m.-6:00 p.m.
(All other times by appointment only)

NOTE FROM THE PROFESSOR: Thurgood Marshall appeared before the court multiple times and won nearly all in very difficult time. And we should say his judicial philosophy was consistent and though he personally believed in a strong military and intelligence apparatus, he was a 100 percent progressive Judge.

NOTE FROM THE PROFESSOR: **"If you believe you can accomplish everything by "cramming" at the eleventh hour, by all means, don't lift a finger now. But you may think twice about beginning to build your ark once it has already started raining"** — Max Brooks, *The Zombie Survival Guide: Complete Protection from the Living Dead*

"By failing to prepare, you are preparing to fail." Benjamin Franklin

"Don't wish it were easier, wish you were better". Jim Rohn



COURSEBOOK AND MATERIALS

REQUIRED READING: Course Materials prepared by Professor Marcis Johnson in collaboration with Professor Gary Bledsoe

ADDITIONAL READING OF INTEREST:

Douglas Blackmon, *Slavery By Another Name*, Anchor Books, A division of Random House, Inc., 2009

Lawrence Goldstone, *Inherently Unequal: The Betrayal of Equal Rights by the Supreme Court, 1865-1903*, Bloomsbury Publishing (2011)

Rawn James, Jr., *Root and Branch*, 2010, Bloomsbury Press;

Howard Ball, *A Defiant Life, Thurgood Marshall and the Persistence of Racism in America*, Crown Publishers, Inc.;

Mark Curriden and Leroy Phillips, *Contempt of Court: The Turn of the Century Lynching That Launched a Hundred Years of Federalism*, Faber and Faber, Inc., an affiliate of Farrar, Straus and Giroux, LLC (1999);

Gilbert King, *Devil in the Grove*, HarperCollins Publishers;

John F. Blevins, *Lyons v Oklahoma, The NAACP, and Coerced Confessions Under the Hughes, Stone and Vinson Courts, 1936-1949*, 90 Va. L. Rev. 387 (2004)

Juan Williams, *Thurgood Marshall: American Revolutionary*, Three Rivers Press, NY, NY (1998)

Carl Rowan, *Dream Makers, Dream Breakers, The World of Justice Thurgood Marshall*

Ron Chernow, *Grant*



COURSE DESCRIPTION

This course formally introduces you to the Honorable Justice Thurgood Marshall, his advocacy and his jurisprudence, and where applicable, his personal life to provide context to this civil rights stalwart. The course is also designed to encourage the students' interest in civil rights and human rights advocacy in what will become a lifetime commitment to making the world a better place for all its occupants.

COURSE OBJECTIVE

To motivate students to use their intellectual talents to improve living conditions for their fellow human beings. To engage students to use higher level thinking skills to solve practical problems with a view to strong first time performance on the bar examination. To help students develop critical thinking skills needed for complex litigation.

GRADING

The grade for the course will be determined as follows:

Class Participation:	35%
Final Paper:	65%

ACCOMMODATIONS

Reasonable accommodations will be made for anyone with disabilities to effectively participate in the law school program. Reasonable accommodations may include:

1. A change in the law school program, so long as it does not alter the program's fundamental nature;
2. Structural modifications (i.e., ramps, wide doorways, accessible bathrooms);
3. Providing modified equipment (i.e., braille keyboard on a word processor); and/or
4. Providing aids such as interpreters or readers.

**PLEASE REFER TO THE STUDENT ACCOMMODATIONS HANDBOOK FOR
SPECIFIC PROCEDURES**



PARTICIPATION & ATTENDANCE

Class Participation:

Class participation is important, and you should be prepared to discuss all lessons intelligently.

Class Attendance:

Class attendance is required of all students. Excessive absence from classes may result in the following an administrative withdrawal from the course. Excessive absence is defined as any absence in excess of the permitted absence. (See below) "Absence" shall be defined as either a failure to attend class, or a failure to be present at the commencement of class.

Permitted Number of Absences

Effective spring semester 2010, the rule governing the permitted number of student absences per course per semester shall be determined by multiplying the number Two (2) by the course credit hours and then subtracting the number one (1) from the result. Based on this formula, the following number of absences has been adopted by faculty for all courses taught at the Thurgood Marshall School of Law.

Type of Course	Permitted Number of Absences
Six semester hour course	11
Five semester hour course	9
Four semester hour course	7
Three semester hour course	5
Two semester hour course	3

This rule does not relieve the student of the responsibility to drop any course the student decides not to complete after registering for the course.

Course Written Assignment

Each student will be asked to prepare a written paper of at least 20 pages in length (with double spacing and 12 point type). The deadline for submission of this paper is a required deadline.

POLICIES & PROCEDURES

Student Rules:



TEXAS SOUTHERN UNIVERSITY

THURGOOD MARSHALL SCHOOL OF LAW

It is the responsibility of each student to know the rules and regulations of Thurgood Marshall School of Law. You can access the Rules and Regulations Handbook by Visiting the “**Student Rules and Regulations 2017-2018.**” available at
http://www.tsulaw.edu/student_affairs/2017-2018_Rules_Regulations.pdf

Computers and Cell Phones:

The use of laptops, tablets, cell phones, or any other internet access/electronic device during a class session is prohibited unless specifically permitted by the professor(s). Any student violating this policy will receive a letter grade reduction.



HOLIDAY SCHEDULE



THURGOOD MARSHALL SCHOOL OF LAW

TEXAS SOUTHERN UNIVERSITY ACADEMIC CALENDAR 2018 – 2019

FALL SEMESTER 2018 (SEVENTY DAYS OF CLASSES)

Orientation	Monday-Friday	August 13-17, 2018
First Day of Class	Monday	August 20, 2018
Last Day to ADD/DROP	Wednesday	August 22, 2018
Labor Day (NO CLASSES)	Monday	September 3, 2018
<i>Purge of all unpaid course selections</i>	Wednesday	September 19, 2018
Mid Term Examinations	Mon – Fri	October 15-19, 2018
Thanksgiving Holiday	Thurs – Fri	November 22-23, 2018
Last Day of Classes	Wednesday	November 28, 2018
Last Day to Drop a Class	Wednesday	November 28, 2018
First Year Professors' Grades due	Wednesday	November 28, 2018
Reading Period (NO CLASS)	Thurs- Sun	November 29 – Dec 2, 2018
Final Examinations	Monday - Friday	December 3 -Dec. 14, 2018
Commencement Exercises	Saturday	December 15, 2018

SPRING SEMESTER 2019 (SEVENTY DAYS OF CLASSES)

School Opens	Tuesday	January 2, 2019
First Day of Class	Monday	January 14, 2019
Last Day to ADD/DROP	Wednesday	January 16, 2019
M L K Holiday (No Classes)	Monday	January 21, 2019
<i>Purge of all unpaid course selections</i>	Wednesday	February 13, 2019
Mid Term Examinations	Mon – Fri	March 4– 8, 2019
Spring Break	Mon – Fri	March 11 – 15, 2019
Spring Break (University Closed)	Mon-Wed	March 11- 13, 2018
Good Friday (No Classes)	Friday	April 19, 2019
Last Day of Classes	Tuesday	April 30, 2019
Last Day to Drop a Class	Tuesday	April 30, 2019
First Year Professors' Grades due	Tuesday	April 30, 2019
Reading Period (No Classes)	Wed – Sun	May 1 - 3, 2019
Final Examinations	Mon- Fri	May 6 – May 17, 2019
Hooding Ceremony	Friday	May 17, 2019
Commencement	Saturday	May 18, 2019

Please note that the calendar events and /or dates are subject to change.

Updated May 2018

READING ASSIGNMENTS

**ALL READING ASSIGNMENTS ARE FROM THE REQUIRED
COURSE MATERIALS (CM) EXCEPT WHERE STATED OTHERWISE**

Week One

Declaration of
Independence, the
United States
Constitution, Dred
Scott v. Sanford,
Civil Rights Cases,
109 U.S. 3 (1883)
Slaughter House
Cases, 83 U.S. 36
(1873)

Week Two

CM Pages 1-32,

Weeks Three and Four

Pages CM 33-39
Marshall Bi-centenn
ial Recognition
Speech, Elena
Kagan, For Justice
Marshall, 71 Texas
Law Review 1125,
Ross E. Davies, Five
Lessons in Lawyer-
ing from Thurgood
Marshall, 70 Okla.
Law Review 779

Judge Lynn
Adelman, The
Glorious Juris-
Prudence of
Thurgood Marshall,
7 Harvard Law and
Policy Review 113
(2013)

Week Five Early Criminal Cases

Pages CM 40-58

Week Five Early Education Cases

Pages CM 33-39,
73-81,

Week Six-Seven The Political Cases

Pages CM 58-65
Nixon v. Herndon
Nixon v. Condon
Grovey v.
Townsend
Smith v. Allwright
Terry v. Adams

Mid-Term Exams in Week Eight

Week Eight -11 The Education Cases

Brown v. Board,
Rodriguez, Cooper
v. Aaron, CM 117-
137, Cooper at 198
Participatory
Advocacy
Mendez v.
Westminister, 64 F.
Supp 544 (S.D. Cal.
1946), aff'd 161 F.
2d 774 (9th Cir.
1947, en banc).
Cooper v. Aaron

Participatory
Advocacy
Pages CM 210

The Missouri,
Maryland,
Oklahoma and
Texas Cases, Brown
v. Board of
Education
Professor Craig
Leonard Jackson,
Hebert High School
and the Brown
Aftermath, 21

Thurgood Marshall
Law Review 45
(1995-1996)

Bakke and the
Affirmative Action
Cases, CM Pages
CM 148-158
Kimberly West
Falcon, Obxcuring
Asian Penalty with
Illusions of Black
Bonus, 64 U.C.L.A.
Law Review 590
(2017)
Kimberly West-
Faulcon, Reversed
Protection: A
Discrimination Case
Gone Wild, Fisher
v. Texas, UC Irvine
Law Review, Jan.
2017 (No. 1)

Week Twelve (Restrictive Covenants, Sit-ins, Obscenity, Jury
Selection, 4th Amendment, Sodomy Laws, First
Amendment, Labor and Civil Rights

CM81-89, 89-116,
158-197

Pages CM 170-183
Marshall's Final
Dissent, Marshall's
Bi-Centiennial
Speech
Reconsidered, Pages
CM 183-end

Week 13-15 Discussion of Your Paper with Class

Final Paper Due

REQUIRED COURSE MATERIALS

Mere access to the
courthouse doors
does not by itself
assure a proper
functioning of the
adversary process.

Thurgood Marshall

WWW.STOREMYPIC.COM

INTRODUCTION

In 1972, the Texas Southern University Law School became the Thurgood Marshall School of Law in honor of the legal advocate and United States Supreme Court jurist. This course is designed to provide perspectives of this legendary jurist and to examine his body of work in the context of modern day jurisprudence.

This is a two-hour course that consists of two components,

- Part I: class room discussion/lectures, which will be covered by Acting Dean Bledsoe and
- Part II: Writing assignments which will be covered by Professor Johnson.

Setting the Stage

Most everyone is undoubtedly familiar with the term “having a seat at the table.”

Often reserved for those who are considered to have both the influence and power to make decisions and effect change, the table has become a symbol of power, negotiation and credibility through which one can forward their career, generate a sale or plot a course for enterprise success. In other words, when one is provided with a seat at the table, it represents an opportunity to be heard and to make a difference. But there is much more behind coming to the table than simply taking a seat.¹

One of the most impactful exercise of power that is brought to the seat is perspective. If all persons at the table had the same perspective, experiences, insight, then there would be no contemplation. Everyone would think, act on their thoughts and reach the same conclusions as everyone else. Of course, that is not what happens. The people who have the seat bring with them their own unique experiences, biases and history. It is the variance in perspective, based on their experiences, and their interpretation of those experiences that impact the conclusions one draws and in many cases, the decisions that are reached.

When Thurgood Marshall became the first African American who served as a justice of the United States Supreme Court, he took a seat at one of the most powerful tables in the country. And with him he would bring his own unique experiences, biases and history; some of which occurred long before he was born. Throughout his term on the bench, his unique experiences would affect his view of the cases before him, as the experiences shared by his colleagues would effect their views of the cases before them. It would however be the first time, that the seatholder at the United States Supreme Court would have the experiences of the history of enslavement, being legally declared a non-citizen, living as chattel than as a human being, the victim of excruciatingly base inhumanity, being denied access purely because of his race, subjected to serious threats of violence because he dared to challenge, the taint of poverty and of being terrorized by law enforcers and courts, of breathing while black and the non-ivy league legal education of a HBCU.

So first, we consider the magnitude of these historic experiences to get a fuller picture of how the Honorable Thurgood Marshall’s life as a man, advocate and jurist was defined and the immeasurable impact it has had on American jurisprudence and life.

¹ Roz Usheroff, What having a seat at the table really means available at <https://remarkableleader.wordpress.com/2015/03/18/what-having-a-seat-at-the-table-really-means/>

"He that stealeth a man and selleth him, or if he be found in his hand, he shall surely be put to death."
Exod[us] XXI, 16."

Scott v. Sandford
60 U.S. (19 How.) 393 (1857) (order of presentation revised)

Mr. Chief Justice TANEY delivered the opinion of the court.

...There are two leading questions presented by the record:

1. Had the Circuit Court of the United States jurisdiction to hear and determine the case between these parties? And
2. If it had jurisdiction, is the judgment it has given erroneous or not?

The plaintiff was a negro slave, belonging to Dr. Emerson, who was a surgeon in the army of the United States. In the year 1834, he took the plaintiff from the State of Missouri to the military post at Rock Island, in the State of Illinois, and held him there as a slave until the month of April or May, 1836. At the time last mentioned, said Dr. Emerson removed the plaintiff from said military post at Rock Island to the military post at Fort Snelling, situate on the west bank of the Mississippi river, in the Territory known as Upper Louisiana, acquired by the United States of France, and situate north of the latitude of thirty-six degrees thirty minutes north, and north of the State of Missouri. Said Dr. Emerson held the plaintiff in slavery at said Fort Snelling from said last-mentioned date until the year 1838.

In the year 1835, Harriet, who is named in the second count of the plaintiff's declaration, was the negro slave of Major Taliaferro, who belonged to the army of the United States. In that year, 1835, said Major Taliaferro took said Harriet to said Fort Snelling, a military post, situated as hereinbefore stated, and kept her there as a slave until the year 1836, and then sold and delivered her as a slave, at said Fort Snelling, unto the said Dr. Emerson hereinbefore named. Said Dr. Emerson held said Harriet in slavery at said Fort Snelling until the year 1838.

In the year 1836, the plaintiff and Harriet intermarried, at Fort Snelling, with the consent of Dr. Emerson, who then claimed to be their master and owner. Eliza and Lizzie, named in the third count of the plaintiff's declaration, are the fruit of that marriage. Eliza is about fourteen years old, and was born on board the steamboat *Gipse*y, north of the north line of the State of Missouri, and upon the river Mississippi. Lizzie is about seven years old, and was born in the State of Missouri, at the military post called Jefferson Barracks.

In the year 1838, said Dr. Emerson removed the plaintiff and said Harriet and their said daughter Eliza from said Fort Snelling to the State of Missouri, where they have ever since resided.

Before the commencement of this suit, said Dr. Emerson sold and conveyed the plaintiff, and Harriet, Eliza, and Lizzie, to the defendant, as slaves, and the defendant has ever since claimed to hold them, and each of them, as slaves.

In considering this part of the controversy, two questions arise: 1. Was he, together with his family, free in Missouri by reason of the stay in the territory of the United States hereinbefore mentioned? And 2. If they were not, is Scott himself free by reason of his removal to Rock Island, in the State of Illinois, as stated in the above admissions?

The plaintiff in error, who was also the plaintiff in the court below, was, with his wife and children, held as slaves by the defendant in the State of Missouri, and he brought this action in the Circuit Court of the United States for that district to assert the title of himself and his family to freedom.

The declaration is in the form usually adopted in that State to try questions of this description, and contains the averment necessary to give the court jurisdiction; that he and the defendant are citizens of different States; that is, that he is a citizen of Missouri, and the defendant a citizen of New York.

The defendant pleaded in abatement to the jurisdiction of the court, that the plaintiff was not a citizen of the State of Missouri, as alleged in his declaration, being a negro of African descent, whose ancestors were of pure African blood and who were brought into this country and sold as slaves.

To this plea the plaintiff demurred, and the defendant joined in demurrer. The court overruled the plea, and gave judgment that the defendant should answer over. And he thereupon put in sundry pleas in bar, upon which issues were joined, and at the trial the verdict and judgment were in his favor. Whereupon the plaintiff brought this writ of error.

Before we speak of the pleas in bar, it will be proper to dispose of the questions which have arisen on the plea in abatement.

That plea denies the right of the plaintiff to sue in a court of the United States, for the reasons therein stated.

If the question raised by it is legally before us, and the court should be of opinion that the facts stated in it disqualify the plaintiff from becoming a citizen, in the sense in which that word is used in the Constitution of the United States, then the judgment of the Circuit Court is erroneous, and must be reversed.

It is suggested, however, that this plea is not before us, and that, as the judgment in the court below on this plea was in favor of the plaintiff, he does not seek to reverse it, or bring it before the court for revision by his writ of error, and also that the defendant waived this defence by pleading over, and thereby admitted the jurisdiction of the court.

But, in making this objection, we think the peculiar and limited jurisdiction of courts of the United States has not been adverted to. This peculiar and limited jurisdiction has made it necessary, in these courts, to adopt different rules and principles of pleading, so far as jurisdiction is concerned, from those which regulate courts of common law in England and in the different States of the Union which have adopted the common law rules.

... In this case, the citizenship is averred, but it is denied by the defendant in the manner required by the rules of pleading, and the fact upon which the denial is based is admitted by the demurrer. And, if the

plea and demurrer, and judgment of the court below upon it, are before us upon this record, the question to be decided is whether the facts stated in the plea are sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

We think they are before us. The plea in abatement and the judgment of the court upon it are a part of the judicial proceedings in the Circuit Court and are there recorded as such, and a writ of error always brings up to the superior court the whole record of the proceedings in the court below. And in the case of the *United States v. Smith*, 11 Wheat. 171, this court said, that the case being brought up by writ of error, the whole record was under the consideration of this court. And this being the case in the present instance, the plea in abatement is necessarily under consideration, and it becomes, therefore, our duty to decide whether the facts stated in the plea are or are not sufficient to show that the plaintiff is not entitled to sue as a citizen in a court of the United States.

This is certainly a very serious question, and one that now for the first time has been brought for decision before this court. But it is brought here by those who have a right to bring it, and it is our duty to meet it and decide it.

The question is simply this: can a negro whose ancestors were imported into this country and sold as slaves become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guarantied by that instrument to the citizen, one of which rights is the privilege of suing in a court of the United States in the cases specified in the Constitution?

It will be observed that the plea applies to that class of persons only whose ancestors were negroes of the African race, and imported into this country and sold and held as slaves. The only matter in issue before the court, therefore, is, whether the descendants of such slaves, when they shall be emancipated, or who are born of parents who had become free before their birth, are citizens of a State in the sense in which the word "citizen" is used in the Constitution of the United States. And this being the only matter in dispute on the pleadings, the court must be understood as speaking in this opinion of that class only, that is, of those persons who are the descendants of Africans who were imported into this country and sold as slaves.

The situation of this population was altogether unlike that of the Indian race. The latter, it is true, formed no part of the colonial communities, and never amalgamated with them in social connections or in government. But although they were uncivilized, they were yet a free and independent people, associated together in nations or tribes and governed by their own laws. Many of these political communities were situated in territories to which the white race claimed the ultimate right of dominion. But that claim was acknowledged to be subject to the right of the Indians to occupy it as long as they thought proper, and neither the English nor colonial Governments claimed or exercised any dominion over the tribe or nation by whom it was occupied, nor claimed the right to the possession of the territory, until the tribe or nation consented to cede it. These Indian Governments were regarded and treated as foreign Governments as much so as if an ocean had separated the red man from the white, and their freedom has constantly been acknowledged, from the time of the first emigration to the English colonies to the present day, by the different Governments which succeeded each other. Treaties have been negotiated with them, and their alliance sought for in war, and the people who compose these Indian political communities have always been treated as foreigners not living under our Government. It is true that the course of events has brought

the Indian tribes within the limits of the United States under subjection to the white race, and it has been found necessary, for their sake as well as our own, to regard them as in a state of pupilage, and to legislate to a certain extent over them and the territory they occupy. But they may, without doubt, like the subjects of any other foreign Government, be naturalized by the authority of Congress, and become citizens of a State, and of the United States, and if an individual should leave his nation or tribe and take up his abode among the white population, he would be entitled to all the rights and privileges which would belong to an emigrant from any other foreign people.

We proceed to examine the case as presented by the pleadings.

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or lawmaking power, to those who formed the sovereignty and framed the Constitution. The duty of the court is to interpret the instrument they have framed with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In discussing this question, we must not confound the rights of citizenship which a State may confer within its own limits and the rights of citizenship as a member of the Union. It does not by any means follow, because he has all the rights and privileges of a citizen of a State, that he must be a citizen of the United States. He may have all of the rights and privileges of the citizen of a State and yet not be entitled to the rights and privileges of a citizen in any other State. For, previous to the adoption of the Constitution of the United States, every State had the undoubted right to confer on whomsoever it pleased the character of citizen, and to endow him with all its rights. But this character, of course, was confined to the boundaries of the State, and gave him no rights or privileges in other States beyond those secured to him by the laws of nations and the comity of States. Nor have the several States surrendered the power of conferring these rights and privileges by adopting the Constitution of the United States. Each State may still confer them upon an alien, or anyone it thinks proper, or upon any class or description of persons, yet he would not be a citizen in the sense in which that word is used in the Constitution of the United States, nor entitled to sue as such in one of its courts, nor to the privileges and immunities of a citizen in the other States. The rights which he would acquire would be restricted to the State which gave them. The Constitution has conferred on Congress the right to establish a uniform rule of naturalization, and this right is evidently exclusive, and has always been held by this court to be so. Consequently, no State, since the adoption of the Constitution, can, by naturalizing an alien, invest him with the rights and

privileges secured to a citizen of a State under the Federal Government, although, so far as the State alone was concerned, he would undoubtedly be entitled to the rights of a citizen and clothed with all the rights and immunities which the Constitution and laws of the State attached to that character.

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And, for the same reason, it cannot introduce any person or description of persons who were not intended to be embraced in this new political family which the Constitution brought into existence, but were intended to be excluded from it.

The question then arises, whether the provisions of the Constitution, in relation to the personal rights and privileges to which the citizen of a State should be entitled, embraced the negro African race, at that time in this country or who might afterwards be imported, who had then or should afterwards be made free in any State, and to put it in the power of a single State to make him a citizen of the United States and endue him with the full rights of citizenship in every other State without their consent? Does the Constitution of the United States act upon him whenever he shall be made free under the laws of a State, and raised there to the rank of a citizen, and immediately clothe him with all the privileges of a citizen in every other State, and in its own courts?

The court think the affirmative of these propositions cannot be maintained. And if it cannot, the plaintiff in error could not be a citizen of the State of Missouri within the meaning of the Constitution of the United States, and, consequently, was not entitled to sue in its courts.

It is true, every person, and every class and description of persons who were, at the time of the adoption of the Constitution, recognised as citizens in the several States became also citizens of this new political body, but none other; it was formed by them, and for them and their posterity, but for no one else. And the personal rights and privileges guaranteed to citizens of this new sovereignty were intended to embrace those only who were then members of the several State communities, or who should afterwards by birthright or otherwise become members according to the provisions of the Constitution and the principles on which it was founded. It was the union of those who were at that time members of distinct and separate political communities into one political family, whose power, for certain specified purposes, was to extend over the whole territory of the United States. And it gave to each citizen rights and privileges outside of his State which he did not before possess, and placed him in every other State upon a perfect equality with its own citizens as to rights of person and rights of property; it made him a citizen of the United States.

It becomes necessary, therefore, to determine who were citizens of the several States when the Constitution was adopted. And in order to do this, we must recur to the Governments and institutions of the thirteen colonies when they separated from Great Britain and formed new sovereignties, and took their places in the family of independent nations. We must inquire who, at that time, were recognised as the people or citizens of a State whose rights and liberties had been outraged by the English Government, and who declared their independence and assumed the powers of Government to defend their rights by force of arms.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show that neither the class of persons who had been imported as slaves nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of Independence and when the Constitution of the United States was framed and adopted. But the public history of every European nation displays it in a manner too plain to be mistaken.

They had for more than a century before been regarded as beings of an inferior order, and 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, and that the negro might justly and lawfully be reduced to slavery for his benefit. He was bought and sold, and treated as an ordinary article of merchandise and traffic whenever a profit could be made by it. This opinion was at that time fixed and universal in the civilized portion of the white race. It was regarded as an axiom in morals as well as in politics which no one thought of disputing or supposed to be open to dispute, and men in every grade and position in society daily and habitually acted upon it in their private pursuits, as well as in matters of public concern, without doubting for a moment the correctness of this opinion. And in no nation was this opinion more firmly fixed or more uniformly acted upon than by the English Government and English people. They not only seized them on the coast of Africa and sold them or held them in slavery for their own use, but they took them as ordinary articles of merchandise to every country where they could make a profit on them, and were far more extensively engaged in this commerce than any other nation in the world.

The opinion thus entertained and acted upon in England was naturally impressed upon the colonies they founded on this side of the Atlantic. And, accordingly, a negro of the African race was regarded by them as an article of property, and held, and bought and sold as such, in every one of the thirteen colonies which united in the Declaration of Independence and afterwards formed the Constitution of the United States. The slaves were more or less numerous in the different colonies as slave labor was found more or less profitable. But no one seems to have doubted the correctness of the prevailing opinion of the time.

The legislation of the different colonies furnishes positive and indisputable proof of this fact.

It would be tedious, in this opinion, to enumerate the various laws they passed upon this subject. It will be sufficient, as a sample of the legislation which then generally prevailed throughout the British colonies, to give the laws of two of them, one being still a large slaveholding State and the other the first State in which slavery ceased to exist.

The province of Maryland, in 1717, ch. 13, s. 5, passed a law declaring

"that if any free negro or mulatto intermarry with any white woman, or if any white man shall intermarry with any negro or mulatto woman, such negro or mulatto shall become a slave during life, excepting mulattoes born of white women, who, for such intermarriage, shall only become servants for seven years, to be disposed of as the justices of the county court where such marriage so happens shall think fit, to be applied by them towards the support of a public school within the said county. And any white man or white woman who shall intermarry as aforesaid with any negro or mulatto, such white man or white

woman shall become servants during the term of seven years, and shall be disposed of by the justices as aforesaid, and be applied to the uses aforesaid."

The other colonial law to which we refer was passed by Massachusetts in 1705 (chap. 6). It is entitled "An act for the better preventing of a spurious and mixed issue," &c., and it provides, that

"if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped, at the discretion of the justices before whom the offender shall be convicted."

And

"that none of her Majesty's English or Scottish subjects, nor of any other Christian nation, within this province, shall contract matrimony with any negro or mulatto; nor shall any person, duly authorized to solemnize marriage, presume to join any such in marriage, on pain of forfeiting the sum of fifty pounds; one moiety thereof to her Majesty, for and towards the support of the Government within this province, and the other moiety to him or them that shall inform and sue for the same, in any of her Majesty's courts of record within the province, by bill, plaint, or information."

...We refer to these historical facts for the purpose of showing the fixed opinions concerning that race upon which the statesmen of that day spoke and acted. It is necessary to do this in order to determine whether the general terms used in the Constitution of the United States as to the rights of man and the rights of the people was intended to include them, or to give to them or their posterity the benefit of any of its provisions.

The language of the Declaration of Independence is equally conclusive:

It begins by declaring that,

"[w]hen in the course of human events it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth the separate and equal station to which the laws of nature and nature's God entitle them, a decent respect for the opinions of mankind requires that they should declare the causes which impel them to the separation."

It then proceeds to say:

"We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among them is life, liberty, and the pursuit of happiness; that to secure these rights, Governments are instituted, deriving their just powers from the consent of the governed."

The general words above quoted would seem to embrace the whole human family, and if they were used in a similar instrument at this day would be so understood. But it is too clear for dispute that the enslaved African race were not intended to be included, and formed no part of the people who framed and adopted this declaration, for if the language, as understood in that day, would embrace them, the conduct of the distinguished men who framed the Declaration of Independence would have been utterly and flagrantly

inconsistent with the principles they asserted, and instead of the sympathy of mankind to which they so confidently appealed, they would have deserved and received universal rebuke and reprobation.

...This state of public opinion had undergone no change when the Constitution was adopted, as is equally evident from its provisions and language.

The brief preamble sets forth by whom it was formed, for what purposes, and for whose benefit and protection. It declares that it is formed by the people of the United States -- that is to say, by those who were members of the different political communities in the several States -- and its great object is declared to be to secure the blessings of liberty to themselves and their posterity. It speaks in general terms of the people of the United States, and of citizens of the several States, when it is providing for the exercise of the powers granted or the privileges secured to the citizen. It does not define what description of persons are intended to be included under these terms, or who shall be regarded as a citizen and one of the people. It uses them as terms so well understood that no further description or definition was necessary.

But there are two clauses in the Constitution which point directly and specifically to the negro race as a separate class of persons, and show clearly that they were not regarded as a portion of the people or citizens of the Government then formed.

One of these clauses reserves to each of the thirteen States the right to import slaves until the year 1808 if it thinks proper. And the importation which it thus sanctions was unquestionably of persons of the race of which we are speaking, as the traffic in slaves in the United States had always been confined to them. And by the other provision the States pledge themselves to each other to maintain the right of property of the master by delivering up to him any slave who may have escaped from his service, and be found within their respective territories. ...

No one of that race had ever migrated to the United States voluntarily; all of them had been brought here as articles of merchandise. The number that had been emancipated at that time were but few in comparison with those held in slavery, and they were identified in the public mind with the race to which they belonged, and regarded as a part of the slave population rather than the free. It is obvious that they were not even in the minds of the framers of the Constitution when they were conferring special rights and privileges upon the citizens of a State in every other part of the Union.

Indeed, when we look to the condition of this race in the several States at the time, it is impossible to believe that these rights and privileges were intended to be extended to them.

It is very true that, in that portion of the Union where the labor of the negro race was found to be unsuited to the climate and unprofitable to the master, but few slaves were held at the time of the Declaration of Independence, and when the Constitution was adopted, it had entirely worn out in one of them, and measures had been taken for its gradual abolition in several others. But this change had not been produced by any change of opinion in relation to this race, but because it was discovered from experience that slave labor was unsuited to the climate and productions of these States, for some of the States where it had ceased or nearly ceased to exist were actively engaged in the slave trade, procuring cargoes on the coast of Africa and transporting them for sale to those parts of the Union where their labor was found to be profitable and suited to the climate and productions. And this traffic was openly carried on, and fortunes accumulated by it, without reproach from the people of the States where they resided. And it can hardly

be supposed that, in the States where it was then countenanced in its worst form -- that is, in the seizure and transportation -- the people could have regarded those who were emancipated as entitled to equal rights with themselves.

And we may here again refer in support of this proposition to the plain and unequivocal language of the laws of the several States, some passed after the Declaration of Independence and before the Constitution was adopted and some since the Government went into operation.

...The ... naturalization law, which was passed at the second session of the first Congress, March 26, 1790, and confines the right of becoming citizens "*to aliens being free white persons.*"

Now the Constitution does not limit the power of Congress in this respect to white persons. And they may, if they think proper, authorize the naturalization of anyone, of any color, who was born under allegiance to another Government. But the language of the law above quoted shows that citizenship at that time was perfectly understood to be confined to the white race; and that they alone constituted the sovereignty in the Government.

Congress might, as we before said, have authorized the naturalization of Indians because they were aliens and foreigners. But, in their then untutored and savage state, no one would have thought of admitting them as citizens in a civilized community. And, moreover, the atrocities they had but recently committed, when they were the allies of Great Britain in the Revolutionary war, were yet fresh in the recollection of the people of the United States, and they were even then guarding themselves against the threatened renewal of Indian hostilities. No one supposed then that any Indian would ask for, or was capable of enjoying, the privileges of an American citizen, and the word white was not used with any particular reference to them.

Neither was it used with any reference to the African race imported into or born in this country; because Congress had no power to naturalize them, and therefore there was no necessity for using particular words to exclude them.

It would seem to have been used merely because it followed out the line of division which the Constitution has drawn between the citizen race, who formed and held the Government, and the African race, which they held in subjection and slavery and governed at their own pleasure.

Another of the early laws of which we have spoken is the first militia law, which was passed in 1792 at the first session of the second Congress. The language of this law is equally plain and significant with the one just mentioned. It directs that every "free able-bodied white male citizen" shall be enrolled in the militia. The word *white* is evidently used to exclude the African race, and the word "citizen" to exclude unnaturalized foreigners, the latter forming no part of the sovereignty, owing it no allegiance, and therefore under no obligation to defend it. The African race, however, born in the country, did owe allegiance to the Government, whether they were slave or free, but it is repudiated, and rejected from the duties and obligations of citizenship in marked language.

The third act to which we have alluded is even still more decisive; it was passed as late as 1813, 2 Stat. 809, and it provides:

"That from and after the termination of the war in which the United States are now engaged with Great Britain, it shall not be lawful to employ, on board of any public or private vessels of the United States, any person or persons except citizens of the United States, *or* persons of color, natives of the United States. "

Here the line of distinction is drawn in express words. Persons of color, in the judgment of Congress, were not included in the word citizens, and they are described as another and different class of persons, and authorized to be employed, if born in the United States.

...Upon the whole, therefore, it is the judgment of this court that it appears by the record before us that the plaintiff in error is not a citizen of Missouri in the sense in which that word is used in the Constitution, and that the Circuit Court of the United States, for that reason, had no jurisdiction in the case, and could give no judgment in it. Its judgment for the defendant must, consequently, be reversed, and a mandate issued directing the suit to be dismissed for want of jurisdiction.

Side Bar: Dred Scott did, in fact, get his freedom, but not through the courts. Irene Emerson's second husband, the abolitionist doctor Calvin Chaffee, now a Massachusetts representative, learned that his wife owned the most famous slave in America just before the court



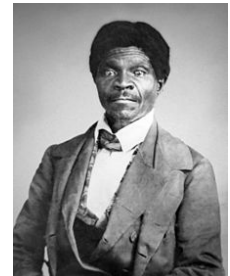
Taylor Blow

handed down its momentous decision in Scott's case on March 6, 1857. Defenders of slavery ridiculed the hypocrisy of a man who owned slaves and yet spoke out against slavery. *Since at that time a husband controlled his wife's property*, Chaffee immediately transferred ownership of Scott and his family to Taylor Blow in St. Louis; Missouri law allowed only citizens of the state to emancipate slaves there. Irene

Emerson Chaffee insisted, however, that she receive the wages the Scotts had earned during the preceding seven years, a sum of \$750 that had been tied up because of the court proceedings.

On May 26, 1857, Dred and Harriet Scott appeared in the St. Louis Circuit Court and were formally freed. Scott then took a job as a porter at Barnum's Hotel in the city and became a celebrity of sorts. Unfortunately, he did not live to enjoy his free status very long. On September 17, 1858, he died of tuberculosis and was buried in St. Louis. Harriet Scott lived until June 1876, long enough to see the Civil War and the Thirteenth Amendment finally abolish slavery in the United States.

<https://www.britannica.com/biography/Dred-Scott>



Dred Scott



Harriet Scott

Thurgood Marshall

Child hood

- Thurgood Marshal grew up in Baltimore and attended segregated public schools.
- In his teenage year he worked in Pennsylvania at worked at a hat shop.



Thurgood Marshall was born on July 2, 1908, in Baltimore, Maryland to William Canfield and Norma A. Marshall. His dad was a Pullman car waiter and amateur writer. His mother was an elementary school teacher. His older brother, Aubrey Marshall, Jr. was an eminent surgeon. Marshall grew up in segregated Baltimore, ten years after the Democratic Party took control of Baltimore's government under the slogan, "This Is a White Man's City."² According to Marshall, "We lived on a respectable street, but behind us there were back alleys where the roughnecks and the tough kids hung out. When it was time for dinner, my mother used to go to the front door and call my

brother. Then she'd do to the back door and call me."³ Marshall started school at age six; he attended Number 103, a school considered to be the "best colored elementary school in Baltimore."⁴ 1921, he entered Baltimore's Colored High and Training School, a segregated high school "that had no school library, no cafeteria, and no gym when [Marshall] arrived."⁵ "Colored High," as it was commonly known in those times, was so overcrowded that half-day sessions were held to accommodate the entire student body.

In 1925, Marshall entered Lincoln University, in Pennsylvania. Lincoln University, named after Abraham Lincoln, was known as the "Black Princeton" because it was founded and run by the same Presbyterians who ran Princeton University. The University used the same colors as Princeton and majority of its white staff were Princeton graduates. While at Lincoln, Marshall's friends "thought he never studied and he became known as a great pinochle player, a fan of cowboy movies, and a connoisseur of comic books."⁶ One friend even described him as a "harum-scarum youth, the loudest individual in the dormitory and apparently the least likely to succeed."⁷ During his second year, Marshall joined Alpha Phi Alpha, and enjoyed hazing the younger students in such an aggressive manner that he got kicked out of school, along with 25 other sophomores. The students were readmitted only after they wrote and signed a confession admitting to their behavior. Interestingly, it was his fellow classmate, Langston Hughes who would come up with this idea. Hughes would later describe Marshall as "rough and ready, loud and wrong, good natured and uncouth."⁸

² A. E. Dick Howard, *The Changing Face of the Supreme Court*, 101 Va. L. Rev. 231 (2015)

³ Roger Goldman and David Gallen, *Thurgood Marshall Justice for All* (New York: Carroll & Graf Publishers, Inc., 1992) 24.

⁴ Juan Williams, "The Higher Education of Thurgood Marshall," *The Journal of Blacks in Higher Education*, 22 (Winter 1998-1999): 82.

⁵ Id.

⁶ Id at 84

⁷ Id at 85

⁸ Id at 84



Vivian "Buster" Burey
Civil Rights Activist
February 11, 1911-
February 11, 1955 (lung
cancer)

When Marshall was 21, he met Vivian "Buster" Burey, a freshman at the University of Pennsylvania at an ice-cream parlor. They married on September 4, 1929, in Philadelphia at the First African Baptist Church. She died in 1955.

In 1930, Marshall graduated with honors and afterwards worked as a waiter to earn tuition to attend law school. When he fell short, his mother pawned her engagement and wedding rings to raise the money to ensure Marshall's enrollment at the law school would not be delayed.

Marshall initially had his sights on attending the University of Maryland Law School, but as he soon found out, only two black students had ever graduated from the law school, and since the 1890s, no black student had been admitted. Marshall was determined to get admitted but instead had to enroll at historically black Howard University in Washington, D.C. Howard University had been created in 1867 in large part to educate slaves and the descendents of slaves.



Cecelia Marshall at 88

In 1933 Thurgood Marshall graduated as valedictorian of Howard and became a civil rights activist. In 1936, Marshall worked on his first desegregation lawsuit with his mentor, Charles Hamilton Houston, against the University of Maryland law school, *Pearson v Murray* allowing Donald Murray, an African-American to be admitted in which Marshall and Houston fittingly established in Maryland's highest court that the University of Maryland School of Law could not exclude African Americans as Maryland had excluded Marshall just a few years earlier.

In 1938 he became an attorney for the NAACP and in 1940 became the NAACP's chief counsel and founder of the NAACP Legal Defense and Educational Fund. As Director-Counsel of the NAACP's Legal Defense and Educational Fund, Marshall carefully planned and executed the strategy that led to *Brown* and other significant civil rights cases. A brilliant advocate, Marshall won twenty-seven of the thirty-two cases that he argued before the Supreme Court, including *Morgan v. Virginia*, *Shelley v. Kraemer*, and *Sweatt v. Painter*.⁹

In 1955, after the death of his wife, Marshall married Cecilia Suyat Marshall, a civil rights activist and historian from Hawaii of Filipino descent.

President John F. Kennedy appointed Marshall to the U.S. Court of Appeals for the Second Circuit in 1961. He became President Lyndon B. Johnson's Solicitor General in 1965. Then in 1967 Pres. Johnson appointed him to the Supreme Court where he served until he retired in 1991. He was the first African American to serve on the nation's highest court.¹⁰

As a member of the Court, Marshall was something of an outsider. His colleagues thought that he seemed disengaged. At the same time, he sought to educate his colleagues; Justice White recalled that Marshall

⁹ Supra n. 1 at 236

¹⁰ <http://law.howard.edu/brownat50/BrownBios/BioJusticeThurgoodMarshall.html>

told the justices “things that we knew but would rather forget; and he told us much that we did not know due to the limitations of our experience.” There is little doubt that Marshall’s experiences with injustice shaped his jurisprudence. In cases like *Bounds v. Smith*, *Ake v. Oklahoma*, or his famous dissent in *United States v. Kras*, Marshall continuously defended the rights of “the least of these.”¹¹

Throughout his tenure on the bench, Marshall lent his pen and his vote to issues involving civil rights, such as affirmative action. In *Regents of University of California v. Bakke*, Marshall reviewed the history of slavery and segregation in a separate opinion:

[I]t 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.¹²

Marshall continued to defend affirmative action during his time on the Court.¹³

Do what you think is right and let the
law catch up.

Thurgood Marshall

Thurgood Marshall died of heart failure on January 24, 1993.

THE ADVOCATE



A child born to a Black mother in a state like Mississippi... has exactly the same rights as a white baby born to the wealthiest person in the United States. It's not true, but I challenge anyone to say it is not a goal worth working for.

Thurgood Marshall

¹¹ Supra n. 1 at 237

¹² Id.

¹³ Id.

Pearson, et al v. Murray
182 A. 590, 169 Md. 478, 103 A.L.R. 706 Jan. 15, 1936

Argued before Bond, C. J., and Urner, Offutt, Parke, Sloan, Mitchell, Shehan, and Johnson, JJ Charles, T. LeViness, 3d, and Wm. L. Henderson, Asst. Attys. Gen. (Herbert R. O'Connor, Atty. Gen., on the brief), for appellants. Thurgood Marshall of Baltimore, and Charles H. Houston, of Washington, D. C. (William I. Gosnell, of Baltimore, on the brief), for appellee.

Bond, Chief Judge

The officers and governing board of the University of Maryland appeal from an order for the issue of the writ of mandamus commanding them to admit a young negro, the appellee, as a student in the law school of the university. The appellee and petitioner, Murray, graduated as a bachelor of arts from Amherst College in 1934, and met the standards for admission to the law school in all other respects, but was denied admission on the sole ground of his color. He is twenty-two years of age, and is now, and has been during all his life, a resident of Baltimore City, where the law school is situated. He contests his exclusion as unauthorized by the laws of the state, or, so far as it might be considered authorized, then as a denial of equal rights because of his color, contrary to the requirement of the Fourteenth Amendment of the Constitution of the United States. The appellants reply, first, that by reason of its character and organization the law school is not a governmental agency, required by the amendment to give equal rights to students of both races. Or, if it is held that it is a state agency, it is replied that the admission of negro students is not required because the amendment permits segregation of the races for education, and it is the declared policy and the practice of the state to segregate them in schools, and that although the law school of the university is maintained for white students only, and there is no separate law school maintained for colored students, equal treatment has at the same time been accorded the negroes by statutory provisions for scholarships or aids to enable them to attend law schools outside the state. A further argument in defense is that if equal treatment has not been provided, the remedy must be found in the opening of a school for negroes, and not in their admission to this particular school attended by the whites.

The University of Maryland Law School was a private institution until the year 1920, when by statute, Acts 1920, c. 480, it was consolidated with the Maryland State College of Agriculture, then an institution of the state government. *Regents of University of Maryland v. Williams*, 9 Gill & J. 365, 31 Am.Dec. 72; *Appeal Tax Court v. Regents of University of Maryland*, 50 Md. 457. The agricultural college, during most of its career since the middle of the last century, had been a private institution, but later in that century, and during the early part of the present one, it was supported entirely from state funds, and the state owned an undivided half of its property, and after 1902 held a mortgage on the other half. A legislative enactment for the foreclosure of the mortgage of the college, "so that it become entirely a State institution," was passed in 1914 (chapter 128), and an Act of 1916 (chapter 372) provided a new corporation, to be known as the Maryland State College of Agriculture, to take the college over. All former property and powers were bestowed on the new corporation, and in accordance with the governmental character of it, the trustees were thenceforth to be appointed by the Governor of the State,

by and with the advice and consent of the Senate, powers were given and duties were prescribed by the act for them and their officers, and they were required to make to the General Assembly at each session a report of the condition of the college and the property, and of their receipts and expenditures. The Attorney General of the state was designated as their adviser and attorney. That the corporation thus created is an instrumentality or agency of the state is plain, and we do not understand it to be disputed.

...There is no escape from the conclusion that the school is now a branch or agency of the state government. The state now provides education in the law for its citizens. And in doing so it comes under the constitutional mandates applicable to the actions of the states.

The fact that the school, in its career as a private institution, was maintained for white students exclusively, would have no bearing on a question of compliance at this time. With respect to constitutional mandates it is in the situation of a new institution opened by the state. *[footnote omitted]*

As a result of the adoption of the Fourteenth Amendment to the United States Constitution, a state is required to extend to its citizens of the two races substantially equal treatment in the facilities it provides from the public funds. "It is justly held by the authorities that 'to single out a certain portion of the people by the arbitrary standard of color, and say that these shall not have rights which are possessed by others, denies them the equal protection of the laws.' * * * Such a course would be manifestly in violation of the fourteenth amendment, because it would deprive a class of persons of a right which the constitution of the state had declared that they should possess." *Clark v. Maryland Institute*, 87 Md. 643, 661, 41 A. 126, 129. Remarks quoted in argument from opinions of courts of other jurisdictions, that the educational policy of a state and its system of education are distinctly state affairs, have ordinarily been answers to demands on behalf of non-residents, and have never been meant to assert for a state freedom from the requirement of equal treatment to children of colored races. "It is distinctly a state affair. * * * But the denial to children whose parents, as well as themselves, are citizens of the United States and of this state, admittance to the common schools solely because of color or racial differences without having made provision for their education equal in all respects to that afforded persons of any other race or color, is a violation of the provisions of the Fourteenth Amendment of the Constitution of the United States." *Piper v. Big Pine School Dist.*, 193 Cal. 664, 226 P. 926, 928; *Board of Education v. Foster*, 116 Ky. 484, 76 S.W. 354, 3 Ann. Cas. 692; *Ward v. Flood*, 48 Cal. 36, 17 Am. Rep. 405.

The requirement of equal treatment would seem to be clearly enough one of equal treatment in respect to any one facility or opportunity furnished to citizens, rather than of a balance in state bounty to be struck from the expenditures and provisions for each race generally.

We take it to be clear, for instance, that a state could not be rendered free to maintain a law school exclusively for whites by maintaining at equal cost a school of technology for colored students. Expenditures of this state for the education of the latter in schools and colleges have been extensive, but, however they may compare with provisions for the whites, they would not justify the exclusion of colored citizens alone from enjoyment of any one facility furnished by the state. The courts, in all the decisions

on application of this constitutional requirement, find exclusion from any one privilege condemned.
[footnotes omitted]

Equality of treatment does not require that privileges be provided members of the two races in the same place. The state may choose the method by which equality is maintained. "In the circumstances that the races are separated in the public schools, there is certainly to be found no violation of the constitutional rights of the one race more than of the other, and we see none of either, for each, though separated from the other, is to be educated upon equal terms with that other, and both at the common public expense."
[footnotes omitted]

Separation of the races must nevertheless furnish equal treatment. The constitutional requirement cannot be dispensed with in order to maintain a school or schools for whites exclusively. That requirement comes first. ... And as no separate law school is provided by this state for colored students, the main question in the case is whether the separation can be maintained, and negroes excluded from the present school, by reason of equality of treatment furnished the latter in scholarships for studying outside the state, where law schools are open to negroes.

In 1933, an Act of Assembly, chapter 234, provided that the Regents of the University of Maryland might set aside part of the state appropriation for the Princess Anne Academy, an institution of junior college standing for negro students, now an eastern branch of the university, to establish partial scholarship at Morgan College in the state, or at institutions outside the state, for negroes qualified to take professional courses not offered them at Princess Anne Academy, but offered for white students in the university. Morgan College has no law school. None of the money necessary was appropriated for distribution under that act. By an Act of 1935, chapter 577, a Commission on Higher Education of Negroes was created and directed to administer \$10,000 included in the state budget for the years 1935-1936 and 1936-1937, for scholarships of \$200 each to negroes, to enable them to attend colleges outside the state, mainly to give the benefit of college, medical, law, and other professional courses to the colored youth of the state for whom no such facilities are available in the state. The allowance of \$200 was to defray tuition fees only. This latter act went into effect on June 1, 1935, and it appeared from evidence that by June 18, when this case was tried below, 380 negroes had sought blanks for applying for the scholarships, and 113 applications had been filled in and returned. Only 16 had then sought opportunities for graduate or professional study, only one of them for study of the law. Applications were to be received during twelve more days. That any one of the many individual applicants would receive one of the 50 or more scholarships was obviously far from assured. For a large percentage of them there was no provision. And if the petitioner should have received one there would have been, as he argues, disadvantages attached.

Howard University, in Washington, District of Columbia, provides the law school for negroes nearest to Baltimore. The yearly tuition fee there is \$135, as compared with a fee of \$203 in the day school of the University of Maryland, and \$153 in its night school. But to attend Howard University the petitioner, living in Baltimore, would be under the necessity of paying the expenses of daily travel to and fro, with some expenses while in Washington, or of removing to Washington to live during his law school education, and to pay the incidental expenses of thus living away from home; whereas in Baltimore,

living at home, he would have no traveling expenses, and comparatively small living expenses. Going to any law school in the nearest jurisdiction would, then, involve him in considerable expense even with the aid of one of the scholarships should he chance to receive one. And as the petitioner points out, he could not there have the advantages of study of the law of this state primarily, and of attendance on state courts, where he intends to practice.

The court is clear that this rather slender chance for any one applicant at an opportunity to attend an outside law school, at increased expense, falls short of providing for students of the colored race facilities substantially equal to those furnished to the whites in the law school maintained in Baltimore. The number of colored students affected by the discrimination may be comparatively small, but it cannot be said to be negligible in Baltimore City, and moreover the number seems excluded as a factor in the problem. In a case on discrimination required by a state between the races in railroad travel, the Supreme Court of the United States has said: "This argument with respect to volume of traffic seems to us to be without merit. It makes the constitutional right depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. * * * It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which, under substantially the same circumstances, is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded." *McCabe v. Atchison, T. & S. F. R. Co.*, 235 U.S. 151, 160, 35 S. Ct. 69, 71, 59 L. Ed. 169. Whether with aid in any amount it is sufficient to send the negroes outside the state for like education is a question never passed on by the Supreme Court, and we need not discuss it now.

... Compliance with the Constitution cannot be deferred at the will of the state. Whatever system it adopts for legal education now must furnish equality of treatment now. "It would, therefore, not be competent to the Legislature, while providing a system of education for the youth of the State, to exclude the petitioner and those of her race from its benefits, merely because of their African descent, and to have so excluded her would have been to deny to her the equal protection of the laws within the intent and meaning of the Constitution." *Ward v. Flood*, 48 Cal. 36, 51, 17 Am. Rep. 405. And as in Maryland now the equal treatment can be furnished only in the one existing law school, the petitioner, in our opinion, must be admitted there.

We cannot find the remedy to be that of ordering a separate school for negroes. In the case of *Cumming v. Board of Education of Richmond County*, 175 U.S. 528, 20 S. Ct. 197, 201, 44 L. Ed. 262, cited by the appellant, the question was whether a board with authority to establish separate schools, but with a limited fund available, could establish a high school for white children while expending the portion for colored children on primary schools of which the people of that race were in greater need, suspending the erection of a separate high school for them. The Supreme Court denied the remedy of suppressing the white school meanwhile, and added: "If, in some appropriate proceeding instituted directly for that purpose, the plaintiffs had sought to compel the board of education, out of the funds in its hands or under its control, to establish and maintain a high school for colored children, and if it appeared that the board's refusal to

maintain such a school was in fact an abuse of its discretion and in hostility to the colored population because of their race, different questions might have arisen in the state court." But in Maryland no officers or body of officers are authorized to establish a separate law school, there is no legislative declaration of a purpose to establish one, and the courts could not make the decision for the state and order its officers to establish one. Therefore, the erection of a separate school is not here an available alternative remedy. We do not understand that the Supreme Court was expressing any opinion on the problem as it is presented by the petitioner. See *Gong Lum v. Rice*, 275 U.S. 78, 48 S. Ct. 91, 72 L. Ed. 172.

The case, as we find it, then, is that the state has undertaken the function of education in the law, but has omitted students of one race from the only adequate provision made for it, and omitted them solely because of their color. If those students are to be offered equal treatment in the performance of the function, they must, at present, be admitted to the one school provided. And as the officers and regents are the agents of the state entrusted with the conduct of that one school, it follows that they must admit, and that the writ of mandamus requiring it would be properly directed to them. There is identity in principle and agents for the application of the constitutional requirement. *Ex parte Virginia*, 100 U.S. 339, 346, 25 L. Ed. 676.

Order affirmed.

First From Maryland U.



DONALD GAINES MURRAY

Mr. Murray received on June 4 his degree from the law school of the University of Maryland. He is the first Negro graduate of the University of Maryland and entered the law school as a result of a court case in 1935 in which attorneys retained by the N.A.A.C.P. maintained successfully in the Maryland lower court and in the Maryland court of appeals that it was a violation of the federal constitution for the state to provide graduate and professional training for white students and deny such training to Negroes. Although he entered the university in an atmosphere of strife, the faculty members and the student body were eminently fair to the only Negro enrolled and before the end of his first year Mr. Murray was on excellent terms with everyone. He was graduated twelfth in a class of thirty-seven and received congratulations upon his accomplishment from practically every one of his fellow classmates. During the commencement procession an unusual incident occurred when an aristocratic, elderly white woman spectator left her seat to shake hands with Mr. Murray as he marched in his cap and gown.

Side bar: Donald Gaines Murray, graduated law school in 1938, went on to practice law in Baltimore with the firm of Douglass, Perkins and Murray. He was involved in several subsequent cases which would lead to integration of other professional schools at the University of Maryland.

Murray was a member of the Baltimore Urban League, American Civil Liberties Union and Kappa Alpha Psi Fraternity. He retired in the early 1970s and died at the age of 72.



Marshall, Murray and Houston

**Missouri ex rel. Gaines v. Canada,
305 U.S. 337 (1938)**

Argued November 9, 1938
Decided December 12, 1938

CERTIORARI TO THE SUPREME COURT OF MISSOURI

Syllabus

1. The State of Missouri provides separate schools and universities for whites and negroes. At the state university, attended by whites, there is a course in law; at the Lincoln University, attended by negroes, there is as yet none, but it is the duty of the curators of that institution to establish one there whenever in their opinion this shall be necessary and practicable, and pending such development, they are authorized to arrange for legal education of Missouri negroes, and to pay the tuition charges therefor, at law schools in adjacent States where negroes are accepted and where the training is equal to that obtainable at the Missouri State University. Pursuant to the State's policy of separating the races in its educational institutions, the curators of the state university refused to admit a negro as a student in the law school there because of his race; whereupon he sought a mandamus, in the state courts, which was denied.

Held:

(1) That inasmuch as the curators of the state university represented the State, in carrying out its policy, their action in denying the negro admission to the law school was state action within the meaning of the Fourteenth Amendment.

(2) The action of the State in furnishing legal education within the State to whites while not furnishing legal education within the State to negroes was a discrimination repugnant to the Fourteenth Amendment.
P

If a State furnishes higher education to white residents, it is bound to furnish substantially equal advantages to negro residents, though not necessarily in the same schools.

(3) The unconstitutional discrimination is not avoided by the purpose of the State to establish a law school for negroes whenever necessary and practicable in the opinion of the curators of the University provided for negroes.

(4) Nor are the requirements of the equal protection clause satisfied by the opportunities afforded by Missouri to its negro citizens for legal education in other States.

The basic consideration here is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. By the operation of the laws of Missouri, a privilege

has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there, and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

(5) The obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities each responsible for its own laws establishing the rights and duties of persons within its borders.

(6) The fact that there is but a limited demand in Missouri for the legal education of negroes does not excuse the discrimination in favor of whites.

(7) Inasmuch as the discrimination may last indefinitely -- so long as the curators find it unnecessary and impracticable to provide facilities for the legal education of negroes within the State, the alternative of attendance at law schools in other States being provided meanwhile -- it cannot be excused as a temporary discrimination.

2. The state court decided this case upon the merits of the federal question, and not upon the propriety of remedy by mandamus. 342 Mo. 121; 113 S.W.2d 783, reversed.

CERTIORARI, *post*, p. 580, to review a judgment affirming denial of a writ of mandamus.

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

Petitioner Lloyd Gaines, a negro, was refused admission to the School of Law at the State University of Missouri. Asserting that this refusal constituted a denial by the State of the equal protection of the laws in violation of the Fourteenth Amendment of the Federal Constitution, petitioner brought this action for mandamus to compel the curators of the University to admit him. On final hearing, an alternative writ was quashed and a peremptory writ was denied by the Circuit Court. The Supreme Court of the State affirmed the judgment. 113 S.W.2d 783. We granted certiorari, October 10, 1938.

Petitioner is a citizen of Missouri. In August, 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of negroes. That University has no law school. Upon the filing of his application for admission to the law school of the University of Missouri, the registrar advised him to communicate with the president of Lincoln University, and the latter directed petitioner's attention to § 9622 of the Revised Statutes of Missouri (1929), providing as follows:

"Sec. 9622. *May arrange for attendance at university of any adjacent state -- Tuition fees.* -- Pending the full development of the Lincoln university, the board of curators shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state to take any course or to study any subjects provided for at the state university of Missouri, and which are not taught at the Lincoln university and to pay the reasonable tuition fees for such attendance; *provided that*, whenever the board of curators deem it advisable, they shall have the power to open any necessary school

or department. (Laws 1921, p. 86, § 7.)" Petitioner was advised to apply to the State Superintendent of Schools for aid under that statute. It was admitted on the trial that petitioner's "work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible."

He was refused admission upon the ground that it was "contrary to the constitution, laws and public policy of the State to admit a negro as a student in the University of Missouri." It appears that there are schools of law in connection with the state universities of four adjacent States, Kansas, Nebraska, Iowa and Illinois, where nonresident negroes are admitted.

The clear and definite conclusions of the state court in construing the pertinent state legislation narrow the issue. The action of the curators, who are representatives of the State in the management of the state university (R.S.Mo. § 9625), must be regarded as state action. The state constitution provides that separate free public schools shall be established for the education of children of African descent (Art. XI, § 3), and, by statute, separate high school facilities are supplied for colored students equal to those provided for white students (R.S.Mo. §§ 9346-9349). While there is no express constitutional provision requiring that the white and negro races be separated for the purpose of higher education, the state court, on a comprehensive review of the state statutes, held that it was intended to separate the white and negro races for that purpose also. Referring in particular to Lincoln University, the court deemed it to be clear "that the Legislature intended to bring the Lincoln University up to the standard of the University of Missouri, and give to the whites and negroes an equal opportunity for higher education -- the whites at the University of Missouri, and the negroes at Lincoln University."

Further, the court concluded that the provisions of § 9622 (above-quoted) to the effect that negro residents "may attend the university of any adjacent State with their tuition paid, pending the full development of Lincoln University," made it evident "that the Legislature did not intend that negroes and whites should attend the same university in this State." In that view, it necessarily followed that the curators of the University of Missouri acted in accordance with the policy of the State in denying petitioner admission to its School of Law upon the sole ground of his race.

In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the state court has fully recognized the obligation of the State to provide negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfill that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions. *[footnotes omitted]* Respondents' counsel has appropriately emphasized the special solicitude of the State for the higher education of negroes as shown in the establishment of Lincoln University, a state institution well conducted on a plane with the University of Missouri so far as the offered courses are concerned. It is said that Missouri is a pioneer in that field and is the only State in the Union which has established a separate university for negroes on the same basis as the state university for white students. But, commendable as is that action, the fact remains that instruction in law for negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes negroes from the advantages of the law school it has established at the University of Missouri.

It is manifest that this discrimination, if not relieved by the provisions we shall presently discuss, would constitute a denial of equal protection. That was the conclusion of the Court of Appeals of Maryland in

circumstances substantially similar in that aspect. *University of Maryland v. Murray*, 169 Md. 478, 182 A. 590. It there appeared that the State of Maryland had "undertaken the function of education in the law," but had "omitted students of one race from the only adequate provision made for it, and omitted them solely because of their color"; that, if those students were to be offered "equal treatment in the performance of the function, they must, at present, be admitted to the one school provided." *Id.*, p. 489. A provision for scholarships to enable negroes to attend colleges outside the State, mainly for the purpose of professional studies, was found to be inadequate (*Id.* pp. 485, 486), and the question "whether with aid in any amount it is sufficient to send the negroes outside the State for legal education" the Court of Appeals found it unnecessary to discuss. Accordingly, a writ of mandamus to admit the applicant was issued to the officers and regents of the University of Maryland as the agents of the State entrusted with the conduct of that institution.

The Supreme Court of Missouri in the instant case has distinguished the decision in Maryland upon the grounds -- (1) that, in Missouri, but not in Maryland, there is "a legislative declaration of a purpose to establish a law school for negroes at Lincoln University whenever necessary or practical", and (2) that, "pending the establishment of such a school, adequate provision has been made for the legal education of negro students in recognized schools outside of this State." 113 S.W.2d p. 791.

As to the first ground, it appears that the policy of establishing a law school at Lincoln University has not yet ripened into an actual establishment, and it cannot be said that a mere declaration of purpose, still unfulfilled, is enough. The provision for legal education at Lincoln is at present entirely lacking. Respondents' counsel urge that, if, on the date when petitioner applied for admission to the University of Missouri, he had instead applied to the curators of Lincoln University, it would have been their duty to establish a law school; that this "agency of the State," to which he should have applied, was "specifically charged with the mandatory duty to furnish him what he seeks." We do not read the opinion of the Supreme Court as construing the state statute to impose such a "mandatory duty" as the argument seems to assert. The state court quoted the language of § 9618, R.S.Mo.1929, set forth in the margin, making it the mandatory duty of the board of curators to establish a law school in Lincoln University "whenever necessary and practicable in their opinion." This qualification of their duty, explicitly stated in the statute, manifestly leaves it to the judgment of the curators to decide when it will be necessary and practicable to establish a law school, and the state court so construed the statute. Emphasizing the discretion of the curators, the court said:

"The statute was enacted in 1921. Since its enactment, no negro, not even appellant, has applied to Lincoln University for a law education. This fact demonstrates the wisdom of the legislature in leaving it to the judgment of the board of curators to determine when it would be necessary or practicable to establish a law school for negroes at Lincoln University. Pending that time, adequate provision is made for the legal education of negroes in the university of some adjacent State, as heretofore pointed out."

The state court has not held that it would have been the duty of the curators to establish a law school at Lincoln University for the petitioner on his application. Their duty, as the court defined it, would have been either to supply a law school at Lincoln University as provided in § 9618 or to furnish him the opportunity to obtain his legal training in another State, as provided in § 9622. Thus, the law left the curators free to adopt the latter course. The state court has not ruled or intimated that their failure or refusal to establish a law school for a very few students, still less for one student, would have been an abuse of the discretion with which the curators were entrusted. And, apparently, it was because of that

discretion, and of the postponement which its exercise in accordance with the terms of the statute would entail until necessity and practicability appeared, that the state court considered and upheld as adequate the provision for the legal education of negroes, who were citizens of Missouri, in the universities of adjacent States. We may put on one side respondent's contention that there were funds available at Lincoln University for the creation of a law department and the suggestions with respect to the number of instructors who would be needed for that purpose and the cost of supplying them. The president of Lincoln University did not advert to the existence or prospective use of funds for that purpose when he advised petitioner to apply to the State Superintendent of Schools for aid under § 9622. At best, the evidence to which argument as to available funds is addressed admits of conflicting inferences, and the decision of the state court did not hinge on any such matter. In the light of its ruling, we must regard the question whether the provision for the legal education in other States of negroes resident in Missouri is sufficient to satisfy the constitutional requirement of equal protection as the pivot upon which this case turns.

The state court stresses the advantages that are afforded by the law schools of the adjacent States -- Kansas, Nebraska, Iowa and Illinois -- which admit nonresident negroes. The court considered that these were schools of high standing where one desiring to practice law in Missouri can get "as sound, comprehensive, valuable legal education" as in the University of Missouri; that the system of education in the former is the same as that in the latter, and is designed to give the students a basis for the practice of law in any State where the Anglo-American system of law obtains; that the law school of the University of Missouri does not specialize in Missouri law, and that the course of study and the case books used in the five schools are substantially identical. Petitioner insists that, for one intending to practice in Missouri, there are special advantages in attending a law school there, both in relation to the opportunities for the particular study of Missouri law and for the observation of the local courts and also in view of the prestige of the Missouri law school among the citizens of the State, his prospective clients. Proceeding with its examination of relative advantages, the state court found that the difference in distances to be traveled afforded no substantial ground of complaint, and that there was an adequate appropriation to meet the full tuition fees which petitioner would have to pay.

We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri, a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there, and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

The equal protection of the laws is "a pledge of the protection of equal laws." *[footnote omitted]* Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be

maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities -- each responsible for its own laws establishing the rights and duties of persons within its borders. It is an obligation the burden of which cannot be cast by one State upon another, and no State can be excused from performance by what another State may do or fail to do. That separate responsibility of each State within its own sphere is of the essence of statehood maintained under our dual system. It seems to be implicit in respondents' argument that, if other States did not provide courses for legal education, it would nevertheless be the constitutional duty of Missouri, when it supplied such courses for white students, to make equivalent provision for negroes. But that plain duty would exist because it rested upon the State independently of the action of other States. We find it impossible to conclude that what otherwise would be an unconstitutional discrimination, with respect to the legal right to the enjoyment of opportunities within the State, can be justified by requiring resort to opportunities elsewhere. That resort may mitigate the inconvenience of the discrimination, but cannot serve to validate it.

Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of negroes as excusing the discrimination in favor of whites. ... It [makes] ... the constitutional right "depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor, but, if facilities are provided, substantial equality of treatment of persons traveling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a state law, a facility or convenience in the course of his journey which under substantially the same circumstances is furnished to another traveler, he may properly complain that his constitutional privilege has been invaded." *Id.* [footnote omitted]

Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity.

It is urged, however, that the provision for tuition outside the State is a temporary one -- that it is intended to operate merely pending the establishment of a law department for negroes at Lincoln University. While, in that sense, the discrimination may be termed temporary, it may nevertheless continue for an indefinite period by reason of the discretion given to the curators of Lincoln University and the alternative of arranging for tuition in other States, as permitted by the state law as construed by the state court, so long as the curators find it unnecessary and impracticable to provide facilities for the legal instruction of negroes within the State. In that view, we cannot regard the discrimination as excused by what is called its temporary character.

We do not find that the decision of the state court turns on any procedural question. The action was for mandamus, but it does not appear that the remedy would have been deemed inappropriate if the asserted federal right had been sustained. In that situation, the remedy by mandamus was found to be a proper one in *University of Maryland v. Murray, supra*. In the instant case, the state court did note that petitioner had not applied to the management of Lincoln University for legal training. But, as we have said, the state court did not rule that it would have been the duty of the curators to grant such an application, but, on the contrary, took the view, as we understand it, that the curators were entitled under the state law to refuse such an application and, in its stead, to provide for petitioner's tuition in an adjacent State. That conclusion

presented the federal question as to the constitutional adequacy of such a provision while equal opportunity for legal training within the State was not furnished, and this federal question the state court entertained and passed upon. We must conclude that, in so doing, the court denied the federal right which petitioner set up and the question as to the correctness of that decision is before us. We are of the opinion that the ruling was error, and that petitioner was entitled to be admitted to the law school of the State University in the absence of other and proper provision for his legal training within the State.

The judgment of the Supreme Court of Missouri is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion. [Emphasis added.]

Reversed. [footnotes omitted]

Side Bar: Three months after winning the case before the United States Supreme Court, on a cool, rainy night in March 1939, Lloyd Gaines threw on an overcoat and journeyed into the streets of south Chicago. On his way out, he told the door attendant that he was on a quick errand to buy some stamps. The 28-year-old Gaines was never seen or heard from again. Days would pass before anyone realized Gaines was missing. It would take another seven months before his disappearance became public. Newspapers across the country carried his photo. Anyone with information into his whereabouts was urged to contact the National Association for the Advancement of Colored People. None of those efforts produced any solid leads.



It became clear that even after the Supreme Court ruling, Gaines' fight to enter the University of Missouri was far from over. In January 1939 Missouri legislators fast-tracked a bill to provide Lincoln University with \$275,000 for the establishment of a black law school. In May of that year the bill was signed into law, and Lincoln University went about jury-rigging the now-demolished Poro Beauty College in north St. Louis into its law school.

The facility opened its doors September 21, 1939, under the condemnation of some 200 protesters who formed a picket line around the "Jim Crow" school. A total of 30 students showed up for classes that first day. Lloyd Gaines was not among them.

Lloyd Gaines *His NAACP attorneys planned to argue that the hastily thrown-together Lincoln Law School was not equal to the University of Missouri's program. In October his lawyers began taking depositions, only to realize that Gaines hadn't been heard from in months.*

In recent decades that the University of Missouri has acknowledged its role in Gaines' historic struggle. In 1995 the school established a law scholarship in his honor and later named its Black Culture Center after Gaines and another black student denied admission to the university because of her race.

For more see <https://www.riverfronttimes.com/stlouis/the-mystery-of-lloyd-gaines/Content?mode=print&oid=2479115>

Chambers et. al. v. Florida

309 U.S. 227 (1940)

Argued January 4, 1940

Decided February 12, 1940

Attorney(s) appearing for the Case

Messrs. Leon A. Ransom and S.D. McGill, with whom Mr. Thurgood Marshall was on the brief, for petitioners.

Mr. Tyrus A. Norwood, Assistant Attorney General of Florida, with whom Mr. George Couper Gibbs, Attorney General, was on the brief, for respondent.

MR. JUSTICE BLACK delivered the opinion of the Court.

The grave question presented by the petition for certiorari, granted in forma pauperis, is whether proceedings in which confessions were utilized, and which culminated in sentences of death upon four young negro men in the State of Florida, failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment.²

First. The State of Florida challenges our jurisdiction to look behind the judgments below claiming that the issues of fact upon which petitioners base their claim that due process was denied them have been finally determined because passed upon by a jury. However, use by a State of an improperly obtained confession may constitute a denial of due process of law as guaranteed in the Fourteenth Amendment.³ Since petitioners have seasonably asserted the right under the federal Constitution to have their guilt or innocence of a capital crime determined without reliance upon confessions obtained by means proscribed by the due process clause of the Fourteenth Amendment, we must determine independently whether petitioners' confessions were so obtained, by review of the facts upon which that issue necessarily turns.

Second. The record shows —

About nine o'clock on the night of Saturday, May 13, 1933, Robert Darsey, an elderly white man, was robbed and murdered in Pompano, Florida, a small town in Broward County about twelve miles from Fort Lauderdale, the County seat. The opinion of the Supreme Court of Florida affirming petitioners' conviction for this crime stated that "It was one of those crimes that induced an enraged community . . ." And, as the dissenting judge pointed out, "The murder and robbery of the elderly Mr. Darsey . . . was a most dastardly and atrocious crime. It naturally aroused great and well justified public indignation."

Between 9:30 and 10 o'clock after the murder, petitioner Charlie Davis was arrested, and within the next twenty-four hours from twenty-five to forty negroes living in the community, including petitioners Williamson, Chambers, and Woodward, were arrested without warrants and confined in the Broward

County jail, at Fort Lauderdale. On the night of the crime, attempts to trail the murderers by bloodhounds brought J.T. Williams, a convict guard, into the proceedings. From then until confessions were obtained and petitioners were sentenced, he took a prominent part. About 11 P.M. on the following Monday, May 15, the sheriff and Williams took several of the imprisoned negroes, including Williamson and Chambers, to the Dade County jail at Miami. The sheriff testified that they were taken there because he felt a possibility of mob violence and "wanted to give protection to every prisoner . . . in jail." Evidence of petitioners was that on the way to Miami a motorcycle patrolman drew up to the car in which the men were riding and the sheriff "told the cop that he had some negroes that he — [was] taking down to Miami to escape a mob." This statement was not denied by the sheriff in his testimony and Williams did not testify at all; Williams apparently has now disappeared. Upon order of Williams, petitioner Williamson was kept in the death cell of the Dade County jail. The prisoners thus spirited to Miami were returned to the Fort Lauderdale jail the next day, Tuesday.

It is clear from the evidence of both the State and petitioners that from Sunday, May 14, to Saturday, May 20, the thirty to forty negro suspects were subjected to questioning and cross questioning (with the exception that several of the suspects were in Dade County jail over one night). From the afternoon of Saturday, May 20, until sunrise of the 21st, petitioners and possibly one or two others underwent persistent and repeated questioning. The Supreme Court of Florida said the questioning "was in progress several days and all night before the confessions were secured" and referred to the last night as an "all night vigil." The sheriff who supervised the procedure of continued interrogation testified that he questioned the prisoners "in the day time all the week," but did not question them during any night before the all night vigil of Saturday, May 20, because after having "questioned them all day . . . [he] was tired." Other evidence of the State was "that the officers of Broward County were in that jail almost continually during the whole week questioning these boys, and other boys, in connection with this" case.

The process of repeated questioning took place in the jailer's quarters on the fourth floor of the jail. During the week following their arrest and until their confessions were finally acceptable to the State's Attorney in the early dawn of Sunday, May 21st, petitioners and their fellow prisoners were led one at a time from their cells to the questioning room, quizzed, and returned to their cells to await another turn. So far as appears, the prisoners at no time during the week were permitted to see or confer with counsel or a single friend or relative. When carried singly from his cell and subjected to questioning, each found himself, a single prisoner, surrounded in a fourth floor jail room by four to ten men, the county sheriff, his deputies, a convict guard, and other white officers *and citizens of the community. Emphasis added*

The testimony is in conflict as to whether all four petitioners were continually threatened and physically mistreated until they finally, in hopeless desperation and fear of their lives, agreed to confess on Sunday morning just after daylight. Be that as it may, it is certain that by Saturday, May 20th, five days of continued questioning had elicited no confession. Admittedly, a concentration of effort — directed against a small number of prisoners including petitioners — on the part of the questioners, principally the sheriff and Williams, the convict guard, began about 3:30 that Saturday afternoon. From that hour on, with only short intervals for food and rest for the questioners — "They all stayed up all night." "They bring one of them at a time backwards and forwards . . . until they confessed." And Williams was present and participating that night, during the whole of which the jail cook served coffee and sandwiches to the men who "grilled" the prisoners.

Sometime in the early hours of Sunday, the 21st, probably about 2:30 A.M., Woodward apparently "broke" — as one of the state's witnesses put it — after a fifteen or twenty minute period of questioning by Williams, the sheriff and the constable "one right after the other." The State's Attorney was awakened at his home, and called to the jail. He came, but was dissatisfied with the confession of Woodward which he took down in writing at that time, and said something like "tear this paper up, that isn't what I want, when you get something worth while call me." This same State's Attorney conducted the state's case in the circuit court below and also made himself a witness, but did not testify as to why Woodward's first alleged confession was unsatisfactory to him. The sheriff did, however:

"A. No, it wasn't false, part of it was true and part of it wasn't; Mr. Maire [the State's Attorney] said there wasn't enough. It wasn't clear enough.

". . .

"Q. . . . Was that voluntarily made at that time?

"A. Yes, sir.

"Q. It was voluntarily made that time?

"A. Yes, sir.

"Q. You didn't consider it sufficient?

"A. Mr. Maire.

"Q. Mr. Maire told you that it wasn't sufficient, so you kept on questioning him until the time you got him to make a free and voluntary confession of other matters that he hadn't included in the first?

"A. No, sir, we questioned him there and we caught him in lies.

"Q. Caught all of them telling lies?

"A. Caught every one of them lying to us that night, yes, sir.

"Q. Did you tell them they were lying?

"A. Yes, sir.

"Q. Just how would you tell them that?

"A. Just like I am talking to you.

"Q. You said 'Jack, you told me a lie'?

"A. Yes, sir."

After one week's constant denial of all guilt, petitioners "broke."

Just before sunrise, the state officials got something "worthwhile" from petitioners which the State's Attorney would "want"; again he was called; he came; in the presence of those who had carried on and witnessed the all-night questioning, he caused his questions and petitioners' answers to be stenographically reported. These are the confessions utilized by the State to obtain the judgments upon which petitioners were sentenced to death. No formal charges had been brought before the confessions. Two days thereafter, petitioners were indicted, were arraigned and Williamson and Woodward pleaded guilty; Chambers and Davis pleaded not guilty. Later the sheriff, accompanied by Williams, informed an attorney who presumably had been appointed to defend Davis that Davis wanted his plea of not guilty withdrawn. This was done, and Davis then pleaded guilty. When Chambers was tried, his conviction rested upon his confession and testimony of the other three confessors. The convict guard and the sheriff "were in the Court room sitting down in a seat." And from arrest until sentenced to death, petitioners were never — either in jail or in court — wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the sunrise confessions.

Third. The scope and operation of the Fourteenth Amendment have been fruitful sources of controversy in our constitutional history.⁸ However, in view of its historical setting and the wrongs which called it into being, the due process provision of the Fourteenth Amendment — just as that in the Fifth — has led few to doubt that it was intended to guarantee procedural standards adequate and appropriate, then and thereafter, to protect, at all times, people charged with or suspected of crime by those holding positions of power and authority. Tyrannical governments had immemorially utilized dictatorial criminal procedure and punishment to make scapegoats of the weak, or of helpless political, religious, or racial minorities and those who differed, who would not conform and who resisted tyranny. The instruments of such governments were, in the main, two. Conduct, innocent when engaged in, was subsequently made by fiat criminally punishable without legislation. And a liberty loving people won the principle that criminal punishments could not be inflicted save for that which proper legislative action had already by "the law of the land" forbidden when done. But even more was needed. From the popular hatred and abhorrence of illegal confinement, torture and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no man's life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free of prejudice, passion, excitement, and tyrannical power. Thus, as assurance against ancient evils, our country, in order to preserve "the blessings of liberty," wrote into its basic law the requirement, among others, that the forfeiture of the lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed.

The determination to preserve an accused's right to procedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes. The testimony of centuries, in governments of varying kinds over populations of different races and beliefs, stood as proof that physical and mental torture and coercion had brought about the tragically unjust sacrifices of some who were the noblest and most useful of their generations. The rack, the thumbscrew, the wheel, solitary confinement, protracted questioning and cross questioning, and other ingenious forms of entrapment of the helpless or unpopular had left their wake of mutilated bodies and shattered minds along the way to the cross, the guillotine, the stake and the hangman's noose. And they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless, and the powerless.

This requirement — of conforming to fundamental standards of procedure in criminal trials — was made operative against the States by the Fourteenth Amendment. Where one of several accused had limped into the trial court as a result of admitted physical mistreatment inflicted to obtain confessions upon which a jury had returned a verdict of guilty of murder, this Court recently declared, *Brown v. Mississippi*, that "It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process."

Here, the record develops a sharp conflict upon the issue of physical violence and mistreatment, but shows, without conflict, the dragnet methods of arrest on suspicion without warrant, and the protracted questioning and cross questioning of these ignorant young colored tenant farmers by state officers and other white citizens, in a fourth floor jail room, where as prisoners they were without friends, advisers or counselors, and under circumstances calculated to break the strongest nerves and the stoutest resistance. Just as our decision in *Brown v. Mississippi* was based upon the fact that the confessions were the result of compulsion, so in the present case, the admitted practices were such as to justify the statement that "The undisputed facts showed that compulsion was applied."

For five days petitioners were subjected to interrogations culminating in Saturday's (May 20th) all night examination. Over a period of five days they steadily refused to confess and disclaimed any guilt. The very circumstances surrounding their confinement and their questioning without any formal charges having been brought, were such as to fill petitioners with terror and frightful misgivings. Some were practical strangers in the community; three were arrested in a one-room farm tenant house which was their home; the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation. From virtually the moment of their arrest until their eventual confessions, they never knew just when any one would be called back to the fourth floor room, and there, surrounded by his accusers and others, interrogated by men who held their very lives — so far as these ignorant petitioners could know — in the balance. The rejection of petitioner Woodward's first "confession," given in the early hours of Sunday morning, because it was found wanting, demonstrates the relentless tenacity which "broke" petitioners' will and rendered them helpless to resist their accusers further. To permit human lives to be forfeited upon confessions thus obtained would make of the constitutional requirement of due process of law a meaningless symbol.

We are not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws. The Constitution proscribes such lawless means irrespective of the end. And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny. Under our constitutional system, courts stand against any winds that blow as havens of refuge for those who might otherwise suffer because they are helpless, weak, outnumbered, or because they are non-conforming victims of prejudice and public excitement. Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death. No higher duty, no more solemn responsibility, rests upon this Court, than that of translating into living law and maintaining this constitutional shield deliberately planned and inscribed for the benefit of every human being subject to our Constitution — of whatever race, creed or persuasion.

The Supreme Court of Florida was in error and its judgment is

Reversed.

[footnotes omitted]

Side Bar: One of the most serious travesties of the American criminal justice system is its history of convicting innocent defendants or defendants who are not guilty of the crimes for which they are charged and imprisoned. The National Registry of Exonerations is a project of the University of California Irvine Newkirk Center for Science & Society, University of Michigan Law School & Michigan State University College of Law. The project shows that 2,236 people have been exonerated because they were wrongfully convicted. They equate the years spent in prison to total more than 19,610 years lost. You can view that list at <https://www.law.umich.edu/special/exoneration/Pages/browse.aspx>.

A compelling and disturbing fact, as you look through the list, is that it reflects only those convictions that we are certain were wrongful and only from the period beginning from the early 1970s. What will the list look like if we go back to the periods of slavery and post 13th amendment jim crow when tyrannical injustice prevailed?

Saving the Race¹⁴

In 1940, Thurgood Marshall defended a black chauffeur charged with raping his white mistress—and exposed the racism of the North.

THE WOMAN LIMPED ALONG THE ROAD, SOAKING WET, scraped and bruised, her dress torn. Two truck drivers spotted her in the pre-dawn hours of December 11, 1940, and pulled over by the Kensico Reservoir in Westchester County, N.Y. Waiting for the police, they listened to the woman's sensational story. Eleanor Strubing told them she had been raped again and again in her Greenwich, Conn., mansion by her "Negro chauffeur-butler." The man then bound and gagged her, she said, drove to the reservoir, pushed her off a bridge, and pelted her with rocks. Strubing's sealskin coat and one shoe had been lost in the freezing water.

Police quickly found the chauffeur, Joseph Spell, back at the estate where Strubing lived with her husband, a wealthy advertising executive. After 16 hours of interrogation, a prosecutor announced that Spell had confessed. Along the East Coast, newspapers screamed the details of the "night of horror" and "lurid orgy." The New York Times reported on its front page that Spell admitted to attacking Strubing and "hurling" her off the bridge. A giant picture of Strubing reclining on the beach in a swimsuit was splashed

¹⁴ Excerpt from Daniel J. Sharfstein, *Saving the Race*, available at http://www.legalaffairs.org/issues/March-April-2005/feature_sharfstein_marapr05.msp

across the cover of The Daily News. Nine months earlier, Richard Wright had published Native Son; now Greenwich had its own Bigger Thomas.

The publicity storm triggered an emergency at the New York headquarters of the NAACP. The organization's initial concern was the tone of the news stories—"highly colored," as NAACP assistant secretary Roy Wilkins complained in a telegram to the city editor of The Daily News. In every story, Spell was immediately and repeatedly identified as the "Negro chauffeur," "the colored servant," and even "a colored man with a bad hangover." The graphic coverage of Strubing's account echoed Southern tales of rape that were used for decades to justify lynching. Rumors filtered into the NAACP that panic-stricken Westchester families were firing their black servants. Two days after the arrest, Thurgood Marshall, the organization's top lawyer, was on a train to Greenwich, committed to defending Joseph Spell "to the limit of our resources."

At 32, Marshall was spending most of his days on the road, trying cases, investigating race riots, and meeting with local NAACP branches. He jokingly called his work "that stirring saga of unselfish devotion to a great cause, 'Saving the Race,' by Thurgood Marshall." While working on Spell's case, he also defended W. D. Lyons, a black Oklahoma man who had confessed, after repeated beatings, to a triple homicide. Lyons v. Oklahoma is remembered for Marshall's skillful cross-examinations, for the jury's surprising decision to give the defendant a life sentence instead of the death penalty, and for Marshall's bitterness after the Supreme Court affirmed the defendant's conviction despite overwhelming evidence of his innocence. By contrast, The State of Connecticut v. Joseph Spell has faded with time to become a curious footnote to Marshall's career.

Yet the Spell affair reveals the underappreciated importance of the NAACP's litigation in the North. Swamped with requests for help from all over the country, the organization's lawyers targeted the South, suing over voting rights, equal pay for black teachers, and segregation in higher education. This was the road that led to the landmark desegregation case Brown v. Board of Education. Meanwhile, a small number of Northern cases served the express purpose of raising funds and recruiting new members. A week after Spell's arrest, Marshall requested a budget increase from \$4,000 to \$9,000. "We will have to spend more money on regular defense cases because these teachers' salaries cases and university cases will not continue to keep our name going," Marshall wrote his trusted adviser, NAACP board member William Hastie.

W. E. B. Du Bois, one of the NAACP's founders, thought Northern cases were more than just fundraisers. In 1934, he resigned from the organization in a huff, writing in The Crisis that the group's Southern focus was based on the "fable" that there was "little or no segregation in the North." Unless the NAACP reckoned with the prevalence of Northern discrimination, racial equality would remain out of reach. "We have by legal action steadied the foundation so that in the future, segregation must be by wish and will and not law," Du Bois wrote, "but beyond that we have not made the slightest impress on the determination of the overwhelming mass of white Americans not to treat Negroes as men."

The Spell case underscores the power of Du Bois's critique. Throughout the winter of 1940-41, the NAACP's fundraising letters to its Northern branches stressed "the large number of Negro domestics who will be directly affected by this case and will suffer unless we do all in our power to secure justice for Spell." Shut out of factory work and union jobs, thousands of African-Americans in Connecticut were forced to depend on positions in domestic service. John W. Lancaster, the head of the Bridgeport chapter of the NAACP, had graduated from Fordham University. He, too, was a chauffeur.

When Marshall reached Greenwich, he was met by Samuel Friedman, a white attorney hired by the Bridgeport NAACP. A few years older than Marshall, Friedman had practiced law with his brother, Irwin, since the 1920s. Unassuming in his dark three-piece suit and matching bow tie, his short black hair neatly combed back, Friedman was developing a reputation as a tenacious advocate with a flair for courtroom drama. Nearly 60 years after the trial, he described the Spell case in a videotaped interview with Bridgeport attorney Jacob Zeldes.

Friedman's initial reaction to Spell's arrest, based on what he had read in the newspapers, was the same as that of most white people. "I don't think you could find a man on the street that in any way had any sympathy for Spell or that believed that this was consensual, including me," he said. Bridgeport was not a hospitable city for African-Americans: A 1933 Connecticut law banning discrimination in public places was not enforced. Friedman was allowed to take Marshall to lunch at the Stratfield Hotel restaurant only because he was the hotel's lawyer.

MARSHALL TOLD HIS CO-COUNSEL THAT HE DID NOT BELIEVE A WORD of Strubing's story. It was the NAACP's policy to limit its criminal defense work to innocent clients. In one of his few comments about the case, Thurgood Marshall told Juan Williams, his biographer, that the press coverage of Spell's arrest prompted grim laughs at the NAACP. "He was supposed to have raped this woman four times in one night," Marshall recalled. ...

Still, Marshall and Friedman knew that Spell's defense would be a tough fight. The lead prosecutor, Lorin Willis, was an unreconstructed bigot. "He hated everybody," said Friedman. "If you were a Polack, if you were a Jew, if you were a wop—this was Willis. He was a no-good S.O.B., that's what he was." The prosecution refused to open its files or make witnesses available to the defense and it kept Strubing in seclusion in the five weeks between Spell's arrest and trial.

The second strike against Spell was his accuser's status as, in Marshall's words, "a member of the very highest strata of society." The Strubings were relatively new to Greenwich, but their money was old. Eleanor, known as Ellie, was the daughter of an investment banker who had been a governor of the Philadelphia Stock Exchange. Her husband's existence was charmed. After taking time off from Princeton to serve as an ambulance driver on the Western Front in World War I, John K. Strubing, Jr. returned home and quarterbacked the 1919 Tiger football squad to victory over Yale and a tie with undefeated Harvard. Adoring fans presented their "sturdy youths" with little gold footballs for their watch chains.

If the Strubings could have stepped out of an F. Scott Fitzgerald novel, then Spell belonged to Richard Wright, whose work chronicled urban and rural black poverty. Born in



↑ The Victim

Socially prominent Mrs. Eleanor Strubing (above), found wandering half-conscious early yesterday on Route 22 near Armonk, N. Y., told how she had been pulled from her shower bath by her colored chauffeur, attacked four times and finally thrown into Kensico Reservoir. He confessed last night.

Chauffeur Admits Kidnaping, Assault On Ad Man's Wife



↑ Attacks, Kidnaps Society Woman

Joseph Spell gazes out of window of Greenwich, Conn., police station after arrest in assault and kidnaping of Mrs. Eleanor Strubing (left). —Story on page 4; other pictures on page 11



'A NIGHT OF HORROR'
In this house on Round Hill Road, Greenwich, Conn., Mrs. Eleanor Strubing was attacked and then kidnaped by her colored chauffeur, who later threw her in Kensico Reservoir (below).

Lafayette, La., in 1909, Spell spent six years in the Army before being dishonorably discharged for getting drunk and stealing and smashing an officer's car. He married at 17 and split with his wife after three months. Spell never bothered to get a divorce. Thirty-one at the time of his arrest, he and his common-law wife, a childhood friend named Virgis Clark, lived in the attic of the Strubing estate. He told

Marshall and Friedman that he was also "going with" a 21-year-old White Plains High School student. Spell and Clark had worked for the Strubings as butler and cook for a little more than a month. The day before he started with the Strubings, Spell had been arrested and had received a suspended sentence for threatening to hurt a former employer unless she gave him a small loan.

Late on the fourth night after Spell's arrest, Marshall and Friedman interviewed him together at the Greenwich town jail. Spell insisted that, contrary to the prosecutor's statements, he had not confessed to rape and kidnapping, but only to having consensual sex with Strubing. Spell and Strubing agreed that on the night of December 10, Clark was asleep in the attic and John Strubing was in Cincinnati on business. At about 10 p.m., Ellie Strubing had come home from dinner with friends. She was fresh from the shower and wearing only a robe when Spell knocked on her bedroom door and asked if he could borrow some money.

According to Strubing, Spell raped her, made her get dressed, took her downstairs, bound her hands and feet, and raped her again. After forcing her to write a ransom note, Spell put Strubing in the car, cut off the bottom of her dress and gagged her with the remnant, and drove until a policeman stopped the car. The officer did not notice Strubing, whom Spell had pushed below the dashboard. Spell took her back to the house and raped her a third and possibly a fourth time. Finally, he drove to the reservoir and pitched her in.

To Friedman, Strubing's version sounded "as cockamamie . . . as you could get." Spell's recounting of events made slightly more sense to him. Spell said that when he went to Strubing's bedroom, his employer agreed to the loan, saying, "You've been nice to me,

Joseph, and you can have anything I've got." He replied that he "would like to be with her," and she walked over to her bed and turned down the cover. As Spell undressed, Strubing's pet schnauzer started barking. Afraid that Virgis Clark would wake up, the pair put on clothes and went downstairs to the living room. There, Strubing took off her "rubber pantie girdle" and lay down on the sofa with Spell, only to worry that people might see them from the window. Spell suggested they go to the garage. Off went the girdle again, and, in Spell's words, they "had business" in the car.

But when Strubing fretted about getting pregnant, the sex stopped, leaving Spell to the devices of his "pocket handkerchief." Next, he suggested a drive, and Strubing put on her fur coat. When they reached the Kensico Reservoir, she asked him to stop and then got out of the car, jumped a guardrail, and ran down an embankment. "She said that she was all right and for me to go on home," Spell told his lawyers. "I was afraid that if I went toward her, she might hurt herself." Spell left for a friend's house in White Plains and played blackjack until 5 a.m. Breaking even, he returned home and dozed off in the laundry room, where the police woke him up a few hours later.

Spell's story may not have seemed airtight to Friedman, but he felt confident enough to stand with Marshall and tell reporters that Spell was innocent. When prosecutors offered a plea bargain, Marshall wrote to Friedman, "The more I think over the possibility suggested yesterday of Spell's accepting a 'plea' the more I am convinced that he cannot accept any plea of any kind. It seems to me that he is not only innocent but is in a position where everyone else knows he is innocent. For that reason he should accept nothing other than the dropping of all charges." Although Spell risked 30 years in prison, Friedman agreed.

WHEN SPELL'S TRIAL BEGAN IN JANUARY 1941, the press converged on the Bridgeport superior court, promising readers, as the Bridgeport Herald put it, the "most sensational sex mystery in history." What followed was a re-enactment of old myths of white womanhood and black aggression that NAACP Secretary Walter White described as "expected in Mississippi, but not in Connecticut." Witness after witness emphasized how distraught Strubing appeared on the morning of December 11. The examining doctor had been forced to sedate her, they recalled, and when a black truck driver who had stopped to help approached her at the Kensico Reservoir, she had screamed to a police officer, "Protect me! Protect me! There's a colored man!"

On the second day of trial, Ellie Strubing entered the courthouse in a dark plaid coat and matching pillbox hat, attended by a doctor and a nurse. Her personal attorney happened to be chair of the state Republican Party. It was Strubing's first public appearance since the incident. According to The Daily News, she tearfully testified that Spell threatened her with a knife, choked her, forced her to write a ransom note, and raped her "while I was helpless with my hands tied." She begged him to take her silver and jewelry, but "he said he couldn't do anything with that." Close to hysterics, she told the whispering courtroom, "I'm sure he raped me three times. But I can't remember now. On a stone floor—or something. It's so confused."

The defense countered with cold facts. They pointed out that investigators had failed to find a ransom note. And Strubing had not called the police during several periods of time in which Spell left her alone. Spell stuck to the story he had told Marshall and Friedman, and Greenwich police Sgt. John Teufel backed him up. Teufel said that when he asked the doctor who examined Strubing whether he had taken a vaginal smear, the doctor answered that he "didn't find anything to take a smear of."

At trial, Friedman questioned witnesses while Marshall, satisfied with his co-counsel's performance, took notes from the second chair. During his two-day cross-examination of Strubing, Friedman combed through her story for discrepancies until she lost her temper. Once he'd shaken her out of the role of helpless victim, Friedman guided her back through her testimony. Why hadn't she called out to the policeman who stopped Spell? Friedman tied a handkerchief over his mouth, and asked Strubing if Spell had similarly gagged her. She said yes. Later, the lawyer retied the handkerchief as tight as he could and tested Strubing's claim that she could not make a sound. "I let out a shriek," he recalled. "The jurors almost jumped out of their seats!"

Marshall told Friedman that it was a relief to try a case in the North, where he could enter a courthouse through the front door without fearing for his life. But throughout the trial, anonymous hate mail filled with graphic death threats and pictures of lynchings was sent to the lawyers, the jurors, and the judge. The state's closing argument was hardly less offensive, imploring the jury to "save the women of Connecticut" from "degradation." Spell was a "lust-mad Negro" who stalked his victim "like a panther," Lorin Willis said. Strubing, by contrast, was "a chaste and virtuous woman." "Acquit Spell and you send her forth with a name and reputation shattered and ruined beyond repair," Willis told the jurors. "There is no place on this earth—no spot or hole dark enough that she can find to protect her—if he is acquitted of this crime."

Friedman skewered Strubing's "fantastic story" and "evasive answers"—"her resort to tears, her antics on the stand, her resort to every possible trick in the cards." But looking at the all-white jury, he knew that discrediting Strubing was too risky. He had to offer the jury a way to affirm Strubing's social standing and still acquit Spell. In a move that the Baltimore Afro-American described as "brilliant," Friedman appropriated the prosecution's rhetoric, explaining how he overcame his own doubts to believe in Spell's innocence. "They had this improper relationship all through the night. Joseph sees nothing wrong in it. The formality of marriage and divorce means nothing to him," Friedman argued. "But not to Mrs. Strubing. She has moral fiber and dignity. . . . She knows she has done wrong." Strubing had plunged into the water with thoughts of killing herself, Friedman surmised. "But as soon as she hit the water she was a changed woman. She was a good swimmer and she simply couldn't drown."

As jury deliberations began, NAACP Secretary White started scrambling for funds to pay for transcripts and legal fees in the event that Spell was convicted. "We should win it hands down," he wrote to the editor of the New York Age. "But, as you know all too well, one can never figure on the vagaries of the prejudices of white people." According to The Daily News, Strubing waited in her Greenwich home, "waxing floors, knitting and doing other

manual work prescribed by her doctor." After 12 hours, the jury returned with a verdict shortly before midnight: not guilty.

...By the time of the verdict, Thurgood Marshall had already left Bridgeport for the Lyons murder trial in Oklahoma. Friedman also left town, vacationing with his wife to give the neighbors a chance to cool off. "A lot of people were sore," he recalled. "I can't tell you the things they said." Spell told reporters that he would move home to Louisiana, but he only made it to East Orange, N.J. He lived there with Virgis until his death in 1968.

Despite the prosecution's prediction, Ellie never became an outcast. The Strubings retreated for several days to Philadelphia, where Main Line matrons sent telegrams to the governor of Connecticut to protest the verdict. The couple later moved east from Greenwich to Old Lyme, where John was country club president and Ellie threw perfect dinner parties. After John died in 1961, Ellie married a prominent New Haven attorney. According to a stepdaughter, Ellie remained close to the people she was friends with before the trial. Shortly after she died in 2000, her step-grandson married an African-American woman. Ellie had been invited before her death but she said she would be unable to attend the wedding.

Lyons v. Oklahoma
322 U.S. 596 (1944)

MR. JUSTICE REED delivered the opinion of the Court.

This writ brings to this Court for review a conviction obtained with the aid of a confession which furnished, if voluntary, material evidence to support the conviction. As the questioned confession followed a previous confession which was given on the same day and which was admittedly involuntary, the issue is the voluntary character of the second confession under the circumstances which existed at the time and place of its signature and, particularly, because of the alleged continued influence of the unlawful inducements which vitiated the prior confession.

The petitioner was convicted in the state district court of Choctaw County, Oklahoma, on an information charging him and another with the crime of murder. The jury fixed his punishment at life imprisonment. The conviction was affirmed by the Criminal Court of Appeals, 75 Okl.Cr. ___, 138 P.2d 142, *rehearing*, 140 P.2d 248, and this Court granted certiorari, 320 U.S. 732, upon the petitioner's representation that there had been admitted against him an involuntary confession procured under circumstances which made its use in evidence a violation of his rights under the due process clause of the Fourteenth Amendment.

Prior to Sunday, December 31, 1939, Elmer Rogers lived with his wife and three small sons in a tenant house situated a short distance northwest of Fort Towson, Choctaw County, Oklahoma. Late in the evening of that day, Mr. and Mrs. Rogers and a four year old son Elvie were murdered at their home and the house was burned to conceal the crime.

¹⁵Suspicion was directed toward the petitioner Lyons and a confederate, Van Bizzell. On January 11, 1940, Lyons was arrested by a special policeman and another officer whose exact official status is not disclosed by the record. The first formal charge that appears is at Lyons' hearing before a magistrate on January 27, 1940. Immediately after his arrest there was an interrogation of about two hours at the jail. After he had been in jail eleven days, he was again questioned, this time in the county prosecutor's office. This interrogation began about six-thirty in the evening, and, on the following morning between two and four, produced a confession. This questioning is the basis of the objection to the introduction as evidence of a second confession which was



obtained later in the day at the state penitentiary at McAlester by Warden Jess Dunn and introduced in evidence at the trial. There was also a third confession, oral, which was admitted on the trial without objection by petitioner. This was given to a guard at the penitentiary two days after the second. Only the petitioner, police, prosecuting, and penitentiary officials were present at any of these interrogations, except that a private citizen who drove the car that brought Lyons to McAlester witnessed this second confession.

Lyons is married and was twenty-one or two years of age at the time of the arrest. The extent of his education or his occupation does not appear. He signed the second confession. From the transcript of his evidence, there is no indication of a subnormal intelligence. He had served two terms in the penitentiary -- one for chicken stealing and one for burglary. Apparently he lived with various relatives.

While petitioner was competently represented before and at the trial, counsel was not supplied him until after his preliminary examination, which was subsequent to the confessions. His wife and family visited him between his arrest and the first confession. There is testimony by Lyons of physical abuse by the police officers at the time of his arrest and first interrogation on January 11th. His sister visited him in jail shortly afterwards, and testified as to marks of violence on his body and a blackened eye. Lyons says that this violence was accompanied by threats of further harm unless he confessed. This evidence was denied *in toto* by officers who were said to have participated.

Eleven days later, the second interrogation occurred. Again, the evidence of assault is conflicting. Eleven or twelve officials were in and out of the prosecutor's small office during the night. Lyons says that he again suffered assault. Denials of violence were made by all the participants accused by Lyons except the county attorney, his assistant, the jailer and a highway patrolman. Disinterested witnesses testified to statements by an investigator which tended to implicate that officer in the use of force, and the prosecutor in cross-examination used language which gave color to defendant's charge. It is not disputed that the inquiry continued until two-thirty in the morning before an oral confession was obtained, and that a pan of the victims' bones was placed in Lyon's lap by his interrogators to bring about his confession. As the confession obtained at this time was not offered in evidence, the only bearing these events have here is their tendency to show that the later confession at McAlester was involuntary.

¹⁵ W.D. Lyons, NAACP defendant, handcuffed and standing next to six arresting officers and attorneys, Hugo, Okla.] / College Studio available at <https://www.loc.gov/item/95518936/>

After the oral confession in the early morning hours of January 23, Lyons was taken to the scene of the crime and subjected to further questioning about the instruments which were used to commit the murders. He was returned to the jail about eight-thirty A.M. and left there until early afternoon. After that, the prisoner was taken to a nearby town of Antlers, Oklahoma. Later in the day, a deputy sheriff and a private citizen took the petitioner to the penitentiary. There, sometime between eight and eleven o'clock on that same evening, the petitioner signed the second confession.

When the confession which was given at the penitentiary was offered, objection was made on the ground that force was practiced to secure it and that, even if no force was then practiced, the fear instilled by the prisoner's former treatment at Hugo on his first and second interrogations continued sufficiently coercive in its effect to require the rejection of the second confession.

The judge, in accordance with Oklahoma practice and, after hearing evidence from the prosecution and the defense in the absence of the jury, first passed favorably upon its admissibility as a matter of law, *[citations omitted]*, and then, after witnesses testified before the jury as to the voluntary character of the confession, submitted the guilt or innocence of the defendant to the jury under a full instruction, approved by the Criminal Court of Appeals, to the effect that voluntary confessions are admissible against the person making them but are to be "carefully scrutinized and received with great caution" by the jury and rejected if obtained by punishment, intimidation or threats. It was added that the mere fact that a confession was made in answer to inquiries "while under arrest or in custody" does not prevent consideration of the evidence if made "freely and voluntarily." The instruction did not specifically cover the defendant's contention, embodied in a requested instruction, that the second confession sprang from the fear engendered by the treatment he had received at Hugo.

The mere questioning of a suspect while in the custody of police officers is not prohibited, either as a matter of common law or due process. *[citations omitted]* The question of how specific an instruction in a state court must be upon the involuntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment, are satisfied, and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness. The instruction given satisfies the legal requirements of the State of Oklahoma as to the particularity with which issues must be presented to its juries, *Lyons v. State*, 138 P.2d 142, 164, and in view of the scope of that instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment.

The federal question presented is whether the second confession was given under such circumstances that its use as evidence at the trial constitutes a violation of the due process clause of the Fourteenth Amendment, which requires that state criminal proceedings "shall be consistent with the fundamental principles of liberty and justice." *[citations omitted]*

No formula to determine this question by its application to the facts of a given case can be devised. *[citations omitted]* Here, improper methods were used to obtain a confession, but that confession was not used at the trial. Later, in another place and with different persons present, the accused again told the facts of the crime. Involuntary confessions, of course, may be given either simultaneously with or subsequently to unlawful pressures, force, or threats. The question of whether those confessions subsequently given are themselves voluntary depends on the inferences as to the continuing effect of the

coercive practices which may fairly be drawn from the surrounding circumstances. [citation omitted] The voluntary or involuntary character of a confession is determined by a conclusion as to whether the accused, at the time he confesses, is in possession of "mental freedom" to confess to or deny a suspected participation in a crime. [citations omitted] When conceded facts exist which are irreconcilable with such mental freedom, regardless of the contrary conclusions of the triers of fact, whether judge or jury, this Court cannot avoid responsibility for such injustice by leaving the burden of adjudication solely in other hands. But where there is a dispute as to whether the acts which are charged to be coercive actually occurred, or where different inferences may fairly be drawn from admitted facts, the trial judge and the jury are not only in a better position to appraise the truth or falsity of the defendant's assertions from the demeanor of the witnesses, but the legal duty is upon them to make the decision. [citation omitted]

Review here deals with circumstances which require examination into the possibility as to whether the judge and jury in the trial court could reasonably conclude that the McAlester confession was voluntary. The fact that there is evidence which would justify a contrary conclusion is immaterial. To triers of fact is left the determination of the truth or error of the testimony of prisoner and official alike. It is beyond question that, if the triers of fact accepted as true the evidence of the immediate events at McAlester which were detailed by Warden Dunn and the other witnesses, the verdict would be that the confession was voluntary, so that the petitioner's case rests upon the theory that the McAlester confession was the unavoidable outgrowth of the events at Hugo.

The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at trial of his subsequent confessions under all possible circumstances. The admissibility of the later confession depends upon the same test -- is it voluntary. Of course, the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. If the relation between the earlier and later confession is not so close that one must say the facts of one control the character of the other, the inference is one for the triers of fact, and their conclusion, in such an uncertain situation, that the confession should be admitted as voluntary cannot be a denial of due process. *Canty v. Alabama*, 309 U.S. 629, cannot be said to go further than to hold that the admission of confessions obtained by acts of oppression is sufficient to require a reversal of a state conviction by this Court. Our judgment there relied solely upon *Chambers v. Florida*, 309 U.S. 227. The Oklahoma Criminal Court of Appeals in the present case decided that the evidence would justify a determination that the effect of a prior coercion was dissipated before the second confession, and we agree.

Petitioner suggests a presumption that earlier abuses render subsequent confessions involuntary unless there is clear and definite evidence to overcome the presumption. We need not analyze this contention further than to say that, in this case, there is evidence for the state which, if believed, would make it abundantly clear that the events at Hugo did not bring about the confession at McAlester.

In our view, the earlier events at Hugo do not lead unescapably to the conclusion that the later McAlester confession was brought about by the earlier mistreatments. The McAlester confession was separated from the early morning statement by a full twelve hours. It followed the prisoner's transfer from the control of the sheriff's force to that of the warden. One person who had been present during a part of the time while the Hugo interrogation was in progress was present at McAlester, it is true, but he was not among those

charged with abusing Lyons during the questioning at Hugo. There was evidence from others present that Lyons readily confessed without any show of force or threats within a very short time of his surrender to Warden Dunn and after being warned by Dunn that anything he might say would be used against him and that he should not "make a statement unless he voluntarily wanted to." Lyons, as a former inmate of the institution, was acquainted with the warden. The petitioner testified to nothing in the past that would indicate any reason for him to fear mistreatment there. The fact that Lyons, a few days later, frankly admitted the killings to a sergeant of the prison guard, a former acquaintance from his own locality, under circumstances free of coercion suggests strongly that the petitioner had concluded that it was wise to make a clean breast of his guilt, and that his confession to Dunn was voluntary. The answers to the warden's questions, as transcribed by a prison stenographer, contain statements correcting and supplementing the questioner's information, and do not appear to be mere supine attempts to give the desired response to leading questions.

The Fourteenth Amendment is a protection against criminal trials in state courts conducted in such a manner as amounts to a disregard of "that fundamental fairness essential to the very concept of justice," and in a way that "necessarily prevent[s] a fair trial." *[citations omitted]* A coerced confession is offensive to basic standards of justice not because the victim has a legal grievance against the police, but because declarations procured by torture are not premises from which a civilized forum will infer guilt. The Fourteenth Amendment does not provide review of mere error in jury verdicts, even though the error concerns the voluntary character of a confession. We cannot say that an inference of guilt based in part upon Lyons' McAlester confession is so illogical and unreasonable as to deny the petitioner a fair trial.

Affirmed.

Side Bar: For many, the underlying facts of the case were compelling. To Marshall, the loss was devastating.¹⁶

"He didn't know it then, but when Thurgood Marshall boarded an Oklahoma-bound train at New York's Pennsylvania Station in January of 1941 to defend a young, black sharecropper accused of murdering a white family and burning down their home, he was just days away from the case that would fortify his commitment to overhauling the criminal justice system as he knew it. The murder trial of the sharecropper, W.D. Lyons, would be a watershed moment in Marshall's career as a lawyer, and despite the fact that he lost the case, which ultimately led to a rare and devastating defeat before the U.S. Supreme Court, the special counsel for the NAACP's Legal Defense and Educational Fund would leave Oklahoma with an unbridled hope for the future.

The Lyons trial wasn't Marshall's first criminal case. He had, in fact, already argued and won Chambers v. Florida before the Supreme Court, which ruled unanimously that coerced confessions by police are inadmissible at trial. The court's 1940 opinion, however, had

¹⁶ Gilbert King, The Awakening of Thurgood Marshall, The Xase he didn't expect to lose. And why it mattered that he did, The Marshall Project available at <https://www.themarshallproject.org/2014/11/20/the-awakening-of-thurgood-marshall>

done little to stem the tide of police beatings during the interrogation of black suspects in the Jim Crow South. Marshall and his team of LDF lawyers had their desktops piled high with capital cases in which suspects' confessions were believed to have been compelled by law enforcement officers through duress.

The case that brought Marshall to Hugo, Okla., in 1941, was one of the most extreme. On the evening of Dec. 31, 1939, Mr. and Mrs. Elmer Rogers had been attacked (by ax and shotgun) and killed in their home. Their tenant house was then doused with coal oil and set afire, and 8-year-old James Rogers managed to flee the home, carrying his baby brother, Billie Don, to safety. Four-year-old Elvie Dean Rogers perished in the blaze.

Newspapers at the time reported that officials from the Fort Towson prison camp (adjacent to the Rogers home) had allowed prisoner-trustees to go on unsupervised hunting expeditions with shotguns, and even gamble and consume alcohol with local residents. After a farmer signed an affidavit claiming that he had witnessed three convicts enter the Rogers home on the night of the murders, warden Jess Dunn promptly closed the prison camp and shuttled all convicts to the more secure state penitentiary in McAlester. A camp sergeant was soon fired amid reports that two convicts, who had lost \$90 to Rogers in a dice game earlier that evening, had been arrested after confessing to the murders. But Oklahoma Gov. Leon Chase Phillips surely sensed in the lax discipline at the prison camp the potential for a crippling political scandal. He dispatched his special investigator, Vernon Cheatwood to Fort Towson, and after Cheatwood's investigation, the two arrested convicts were released¹, and an illiterate, 21-year-old black sharecropper, W.D. Lyons, was arrested by local police.

Over the course of the next two days, Lyons was beaten senseless and told to confess to the murders. Denied sleep and food, and still groggy from the beatings, Lyons was visited in the middle of the night by the special investigator, who approached with a large black pan, which he dropped in the sharecropper's lap. "There's the bones of the baby you burned up," Cheatwood told him.

Superstitious and in fear for his life, Lyons broke down as Cheatwood grabbed him by the neck and pushed his face into the pan. Only a confession would end his agony, Lyons was told, and the young sharecropper quickly obliged. He later stated that he confessed twice because he "didn't want to be tortured anymore" and "couldn't stand any more of the beating."

In an uncharacteristically slow crawl toward justice, Lyons lingered in prison. Marshall believed that the Choctaw County attorney was "scared to try the case for a whole year" because the Fort Towson prison camp scandal might erupt again and become an issue in local elections.

By the time Marshall arrived in Hugo, word had already spread that a "nigger lawyer from New York" was on the case. The courthouse was packed with locals, and when he assumed his seat at the counsel table, Marshall wryly observed, "the building did not fall and the world did not come to an end." Still, Marshall noted that the jury was "lousy" and

there was “no chance of winning here.” He vowed to “keep [the] record straight” for the inevitable appeal².

Over the next few days, Thurgood Marshall would have a difficult time concealing his excitement over the changes he was sensing in the courtroom, and how that might play out more widely in the criminal justice system. Before the judge and prosecutor, Marshall argued to suppress Lyons’ confessions. He cross-examined local police, predicting that they might “become angry at the idea of a Negro pushing them into tight corners and making their lies so obvious.” His strategy, he noted, “worked perfect.” By noon recess, Marshall observed, the crowd in court had “about doubled,” as word began to spread that a black lawyer was putting on a great show.

Marshall called to the stand white relatives of the murder victims, eliciting testimony that Vernon Cheatwood had admitted to them that he beat Lyons “for either six or seven hours.... I haven’t even got to go to bed.” Then Marshall had a go at the governor’s special investigator himself, and by the time the lawyer was done, Cheatwood was, as one newspaper described, “shaking as though suffering from palsy.”

“Boy, did I like that,” Marshall wrote at the time, “and did the Negroes in the courtroom like that.” White people, too, were stopping Marshall in the halls, expressing support for Lyons and disdain for their local police, who had so obviously lied on the stand. The father of the murdered woman even joined the NAACP to emphasize his belief that Lyons had been framed in the killing of his daughter and her family. The young lawyer could barely contain his excitement in a letter he wrote from Oklahoma to Walter White, the executive secretary of the NAACP in New York. “You can’t imagine what it means to these people down there who have been pushed around for years to know that there is an organisation that will help them. They are really ready to do their part now. They are ready for anything³.”

“One thing this trial accomplished,” Marshall added, “the good citizens of that area have been given a lesson in Constitutional Law and the rights of Negroes which they won’t forget for some time. Law enforcement officers now know that when they beat a Negro up they might have to answer for it on the witness stand.”

Despite Marshall’s ebullience, the jury deliberated for more than five hours, ultimately returning with a guilty verdict that brought Lyons a sentence of life imprisonment. The lawyer took it in stride, noting that while the prosecutor had sought the death penalty for a heinous crime where three people were killed, “cut up with an ax and then burned,” the jury’s decision “shows clearly that they believed him innocent⁴.”

Marshall was confident that in his appeal for Lyons, he had a “sure winner under the recent U.S. Supreme Court decisions.” But he had the rug pulled from under him, suffering his very first defeat before the Supreme Court. (Marshall would lose only three of the 32 cases he argued there.) In a 6-to-3 decision that was inexplicable to him, Marshall learned that the court affirmed the conviction, ruling that Lyons’ second confession, made hours later, was obtained without coercion. Justice Frank Murphy dissented: “To conclude that

the brutality inflicted at the time of the first confession suddenly lost all of its effect in the short space of 12 hours is to close one's eyes to the realities of human nature⁶."

The decision, which Marshall openly criticized in a rare display of anger, amplified for him the harrowing and tenuous position of placing a client's fate in the hands of the Supreme Court. He was consoled only by the fact that he had managed to save Lyons from the electric chair. For years, Marshall advocated for his client's early parole, often sending his own money to Lyons at the Oklahoma State Penitentiary at McAlester. After serving twenty years of a life sentence, Lyons was finally approved for parole in February 1961⁷.

Still, the surge of money that flowed into the NAACP's New York office after the Lyons case was not lost on Marshall, and the "lesson in Constitutional Law" that he brought to that Oklahoma courtroom in 1941 left a lasting impression. Despite his successes in landmark civil rights cases involving voting rights, the desegregation of schools, and racially based restrictive covenants in real estate, Marshall would later observe that his criminal cases were even more important because "they saved lives."

...Gilbert King is the Pulitzer Prize-winning author of Devil in the Grove: Thurgood Marshall, the Groveland Boys, and the Dawn of a New America.

¹ W.D. Lyons v. State of Oklahoma, Brief on Behalf of Petitioner.

² Thurgood Marshall to Walter White, January 28, 1941, NAACP Papers, Library of Congress.

³ Oklahoma Black Dispatch, February 8, 1941.

⁴ Marshall to White, February 2, 1941, NAACP Papers, Library of Congress

⁵ Marshall to White, February 2, 1941, NAACP Papers, Library of Congress

⁶ Lyons v. State of Oklahoma, 322 U.S. 596

⁷ The Paris News, March 1, 1961.

U.S. Supreme Court
Smith v. Allwright, 321 U.S. 649 (1944)

Argued November 10, 12, 1943

Reargued January 12, 1944

Decided April 3, 1944

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Syllabus

1. The right of a citizen of the United States to vote for the nomination of candidates for the United States Senate and House of Representatives in a primary which is an integral part of the elective process is a right secured by the Federal Constitution, and this right of the citizen may not be abridged by the State on account of his race or color.

2. Whether the exclusion of citizens from voting on account of their race or color has been effected by action of the State -- rather than of individuals or of a political party -- is a question upon which the decision of the courts of the State is not binding on the federal courts, but which the latter must determine for themselves.

3. Upon examination of the statutes of Texas regulating primaries, *held*: that the exclusion of Negroes from voting in a Democratic primary to select nominees for a general election -- although, by resolution of a state convention of the party, its membership was limited to white citizens -- was State action in violation of the Fifteenth Amendment.

When, as here, primaries become a part of the machinery for choosing officials, state and federal, the same tests to determine the character of discrimination or abridgment should be applied to the primary as are applied to the general election.

4. While not unmindful of the desirability of its adhering to former decisions of constitutional questions, this Court is not constrained to follow a previous decision which, upon reexamination, is believed erroneous, particularly one which involves the application of a constitutional principle, rather than an interpretation of the Constitution to evolve the principle itself. *[citations to transcript omitted]*

131 F. 2d 593, reversed.

Certiorari, 319 U.S. 738, to review the affirmance of a judgment for the defendants in a suit for damages under 8 U.S.C. § 43.

MR. JUSTICE REED delivered the opinion of the Court.

This writ of certiorari brings here for review a claim for damages in the sum of \$5,000 on the part of petitioner, a Negro citizen of the 48th precinct of Harris County, Texas, for the refusal of respondents, election and associate election judges, respectively, of that precinct, to give petitioner a ballot or to permit him to cast a ballot in the primary election of July 27, 1940, for the nomination of Democratic candidates for the United States Senate and House of Representatives, and Governor and other state officers. The refusal is alleged to have been solely because of the race and color of the proposed voter.

The actions of respondents are said to violate §§ 31 and 43 of Title 8 of the United States Code, 8 U.S.C. §§ 31 and 43, in that petitioner was deprived of rights secured by §§ 2 and 4 of Article I and the Fourteenth, Fifteenth and Seventeenth Amendments to the United States Constitution. The suit was filed in the District Court of the United States for the Southern District of Texas, which had jurisdiction under Judicial Code § 24, subsection 14.

The District Court denied the relief sought, and the Circuit Court of Appeals quite properly affirmed its action on the authority of *Grovey v. Townsend*, 295 U. S. 45. We granted the petition for certiorari to resolve a claimed inconsistency between the decision in the *Grovey* case and that of *United States v. Classic*, 313 U. S. 299. 319 U.S. 738.

The State of Texas by its Constitution and statutes provides that every person, if certain other requirements are met which are not here in issue, qualified by residence in the district or county "shall be

deemed a qualified elector." Constitution of Texas, Article VI, § 2; Vernon's Civil Statutes (1939 ed.), Article 2955. Primary elections for United States Senators, Congressmen and state officers are provided for by Chapters Twelve and Thirteen of the statutes. Under these chapters, the Democratic Party was required to hold the primary which was the occasion of the alleged wrong to petitioner. A summary of the state statutes regulating primaries appears in the footnote. These nominations are to be made by the qualified voters of the party. Art. 3101.

The Democratic Party of Texas is held by the Supreme Court of that state to be a "voluntary association," *Bell v. Hill*, 123 Tex. 531, 534, protected by § 27 of the Bill of Rights, Art. 1, Constitution of Texas, from interference by the state except that:

"In the interest of fair methods and a fair expression by their members of their preferences in the selection of their nominees, the State may regulate such elections by proper laws." That court stated further:

"Since the right to organize and maintain a political party is one guaranteed by the Bill of Rights of this state, it necessarily follows that every privilege essential or reasonably appropriate to the exercise of that right is likewise guaranteed, including, of course, the privilege of determining the policies of the party and its membership. Without the privilege of determining the policy of a political association and its membership, the right to organize such an association would be a mere mockery. We think these rights, that is, the right to determine the membership of a political party and to determine its policies, of necessity are to be exercised by the State Convention of such party, and cannot, under any circumstances, be conferred upon a state or governmental agency."

The Democratic party, on May 24, 1932, in a state convention adopted the following resolution, which has not since been "amended, abrogated, annulled or avoided":

"Be it resolved that all white citizens of the State of Texas who are qualified to vote under the Constitution and laws of the State shall be eligible to membership in the Democratic party and, as such, entitled to participate in its deliberations."

It was by virtue of this resolution that the respondents refused to permit the petitioner to vote.

Texas is free to conduct her elections and limit her electorate as she may deem wise, save only as her action may be affected by the prohibitions of the United States Constitution or in conflict with powers delegated to and exercised by the National Government. The Fourteenth Amendment forbids a state from making or enforcing any law which abridges the privileges or immunities of citizens of the United States and the Fifteenth Amendment specifically interdicts any denial or abridgement by a state of the right of citizens to vote on account of color. Respondents appeared in the District Court and the Circuit Court of Appeals and defended on the ground that the Democratic party of Texas is a voluntary organization, with members banded together for the purpose of selecting individuals of the group representing the common political beliefs as candidates in the general election. As such a voluntary organization, it was claimed, the Democratic party is free to select its own membership and limit to whites participation in the party primary. Such action, the answer asserted, does not violate the Fourteenth, Fifteenth or Seventeenth Amendment, as officers of government cannot be chosen at primaries, and the Amendments are applicable only to general elections, where governmental officers are actually elected. Primaries, it is said, are political party affairs, handled by party, not governmental, officers. No appearance for

respondents is made in this Court. Arguments presented here by the Attorney General of Texas and the Chairman of the State Democratic Executive Committee of Texas, as *amici curiae*, urged substantially the same grounds as those advanced by the respondents.

The right of a Negro to vote in the Texas primary has been considered heretofore by this Court. The first case was *Nixon v. Herndon*, 273 U. S. 536. At that time, 1924, the Texas statute, Art. 3093a, afterwards numbered Art. 3107 (Rev.Stat.1925) declared "in no event shall a Negro be eligible to participate in a Democratic party primary election . . . in the State of Texas." Nixon was refused the right to vote in a Democratic primary, and brought a suit for damages against the election officers under R.S. § 1979 and 2004, the present §§ 43 and 31 of Title 8, U.S.C., respectively. It was urged to this Court that the denial of the franchise the Nixon violated his Constitutional rights under the Fourteenth and Fifteenth Amendments. Without consideration of the Fifteenth, this Court held that the action of Texas in denying the ballot to Negroes by statute was in violation of the equal protection clause of the Fourteenth Amendment, and reversed the dismissal of the suit.

The legislature of Texas reenacted the article, but gave the State Executive Committee of a party the power to prescribe the qualifications of its members for voting or other participation. This article remains in the statutes. The State Executive Committee of the Democratic party adopted a resolution that white Democrats and none other might participate in the primaries of that party. Nixon was refused again the privilege of voting in a primary, and again brought suit for damages by virtue of § 31, Title 8 U.S.C. This Court again reversed the dismissal of the suit for the reason that the Committee action was deemed to be State action, and invalid as discriminatory under the Fourteenth Amendment. The test was said to be whether the Committee operated as representative of the State in the discharge of the State's authority. *Nixon v. Condon*, 286 U. S. 73. The question of the inherent power of a political party in Texas "without restraint by any law to determine its own membership" was left open. *Id.*, 286 U. S. 84-85.

In *Grovey v. Townsend*, 295 U. S. 45, this Court had before it another suit for damages for the refusal in a primary of a county clerk, a Texas officer with only public functions to perform, to furnish petitioner, a Negro, an absentee ballot. The refusal was solely on the ground of race. This case differed from *Nixon v. Condon*, *supra*, in that a state convention of the Democratic party had passed the resolution of May 24, 1932, hereinbefore quoted. It was decided that the determination by the state convention of the membership of the Democratic party made a significant change from a determination by the Executive Committee. The former was party action, voluntary in character. The latter, as had been held in the *Condon* case, was action by authority of the State. The managers of the primary election were therefore declared not to be state officials in such sense that their action was state action. A state convention of a party was said not to be an organ of the state. This Court went on to announce that to deny a vote in a primary was a mere refusal of party membership, with which "the state need have no concern," *loc.cit.* 295 U. S. 55, while for a state to deny a vote in a general election on the ground of race or color violated the Constitution. Consequently, there was found no ground for holding that the county clerk's refusal of a ballot because of racial ineligibility for party membership denied the petitioner any right under the Fourteenth or Fifteenth Amendments.

Since *Grovey v. Townsend* and prior to the present suit, no case from Texas involving primary elections has been before this Court. We did decide, however, *United States v. Classic*, 313 U. S. 299. We there held that § 4 of Article I of the Constitution authorized Congress to regulate primary, as well as general, elections, 313 U.S. at 313 U. S. 316, 313 U. S. 317, "where the primary is by law made an integral part

of the election machinery." 313 U.S. at 313 U. S. 318. Consequently, in the *Classic* case, we upheld the applicability to frauds in a Louisiana primary of §§ 19 and 20 of the Criminal Code. Thereby, corrupt acts of election officers were subjected to Congressional sanctions because that body had power to protect rights of Federal suffrage secured by the Constitution in primary as in general elections. 313 U.S. at 313 U. S. 323. This decision depended, too, on the determination that, under the Louisiana statutes, the primary was a part of the procedure for choice of Federal officials. By this decision, the doubt as to whether or not such primaries were a part of "elections" subject to Federal control, which had remained unanswered since *Newberry v. United States*, 256 U. S. 232, was erased. The *Nixon* cases were decided under the equal protection clause of the Fourteenth Amendment without a determination of the status of the primary as a part of the electoral process. The exclusion of Negroes from the primaries by action of the State was held invalid under that Amendment. The fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers has a definite bearing on the permissibility under the Constitution of excluding Negroes from primaries. This is not to say that the *Classic* case cuts directly into the rationale of *Grovey v. Townsend*. This latter case was not mentioned in the opinion. *Classic* bears upon *Grovey v. Townsend* not because exclusion of Negroes from primaries is any more or less state action by reason of the unitary character of the electoral process, but because the recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state. When *Grovey v. Townsend* was written, the Court looked upon the denial of a vote in a primary as a mere refusal by a party of party membership. 295 U.S. at 295 U. S. 55. As the Louisiana statutes for holding primaries are similar to those of Texas, our ruling in *Classic* as to the unitary character of the electoral process calls for a reexamination as to whether or not the exclusion of Negroes from a Texas party primary was state action.

The statutes of Texas relating to primaries and the resolution of the Democratic party of Texas extending the privileges of membership to white citizens only are the same in substance and effect today as they were when *Grovey v. Townsend* was decided by a unanimous Court. The question as to whether the exclusionary action of the party was the action of the State persists as the determinative factor. In again entering upon consideration of the inference to be drawn as to state action from a substantially similar factual situation, it should be noted that *Grovey v. Townsend* upheld exclusion of Negroes from primaries through the denial of party membership by a party convention. A few years before, this Court refused approval of exclusion by the State Executive Committee of the party. A different result was reached on the theory that the Committee action was state authorized, and the Convention action was unfettered by statutory control. Such a variation in the result from so slight a change in form influences us to consider anew the legal validity of the distinction which has resulted in barring Negroes from participating in the nominations of candidates of the Democratic party in Texas. Other precedents of this Court forbid the abridgement of the right to vote. *United States v. Reese*, 92 U. S. 214, 92 U. S. 217; *Neal v. Delaware*, 103 U. S. 370, 103 U. S. 388; *Guinn v. United States*, 238 U. S. 347, 238 U. S. 361; *Myers v. Anderson*, 238 U. S. 368, 238 U. S. 379; *Lane v. Wilson*, 307 U. S. 268.

It may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution. *United States v. Classic*, 313 U.S. at 313 U. S. 314; *Myers v. Anderson*, 238 U. S. 368; *Ex parte Yarbrough*, 110 U. S. 651, 110 U. S. 663 *et seq.* By the terms of the Fifteenth Amendment, that right may not be abridged by any state on account of race. Under our Constitution, the great privilege of the ballot may not be denied a man by the State because of his color.

We are thus brought to an examination of the qualifications for Democratic primary electors in Texas, to determine whether state action or private action has excluded Negroes from participation. Despite Texas' decision that the exclusion is produced by private or party action, *Bell v. Hill, supra*, Federal courts must for themselves appraise the facts leading to that conclusion. It is only by the performance of this obligation that a final and uniform interpretation can be given to the Constitution, the "supreme Law of the Land." [citations omitted] Texas requires electors in a primary to pay a poll tax. Every person who does so pay and who has the qualifications of age and residence is an acceptable voter for the primary. Art. 2955. Texas requires by the law the election of the county officers of a party. These compose the county executive committee. The county chairmen so selected are members of the district executive committee and choose the chairman for the district. Precinct primary election officers are named by the county executive committee. Statutes provide for the election by the voters of precinct delegates to the county convention of a party and the selection of delegates to the district and state conventions by the county convention. The state convention selects the state executive committee. No convention may place in platform or resolution any demand for specific legislation without endorsement of such legislation by the voters in a primary. Texas thus directs the selection of all party officers.

Primary elections are conducted by the party under state statutory authority. The county executive committee selects precinct election officials and the county, district or state executive committees, respectively, canvass the returns. These party committees or the state convention certify the party's candidates to the appropriate officers for inclusion on the official ballot for the general election. No name which has not been so certified may appear upon the ballot for the general election as a candidate of a political party. No other name may be printed on the ballot which has not been placed in nomination by qualified voters who must take oath that they did not participate in a primary for the selection of a candidate for the office for which the nomination is made.

The state courts are given exclusive original jurisdiction of contested elections and of mandamus proceedings to compel party officers to perform their statutory duties.

We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party. The plan of the Texas primary follows substantially that of Louisiana, with the exception that, in Louisiana, the state pays the cost of the primary, while Texas assesses the cost against candidates. In numerous instances, the Texas statutes fix or limit the fees to be charged. Whether paid directly by the state or through state requirements, it is state action which compels. When primaries become a part of the machinery for choosing officials, state and national, as they have here, the same tests to determine the character of discrimination or abridgement should be applied to the primary as are applied to the general election. If the state requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination against Negroes, practiced by a party entrusted by Texas law with the determination of the qualifications of participants in the primary. This is state action within the meaning of the Fifteenth Amendment.

The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race. This grant to the people of the opportunity for choice is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

The privilege of membership in a party may be, as this Court said in *Grovey v. Townsend*, 295 U. S. 45, 295 U. S. 55, no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state. In reaching this conclusion, we are not unmindful of the desirability of continuity of decision in constitutional questions. However, when convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. This has long been accepted practice, and this practice has continued to this day. This is particularly true when the decision believed erroneous is the application of a constitutional principle, rather than an interpretation of the Constitution to extract the principle itself. Here, we are applying, contrary to the recent decision in *Grovey v. Townsend*, the well established principle of the Fifteenth Amendment, forbidding the abridgement by a state of a citizen's right to vote. *Grovey v. Townsend* is overruled.

Judgment reversed.

MR. JUSTICE FRANKFURTER concurs in the result. *Footnotes omitted*



Side Bar: Lonnie Smith was a well-known dentist in Houston, Texas, an officer in the Houston branch of the National Association for the Advancement of Colored People (NAACP), and a civil rights activist. Smith was born in Yoakum, Texas in 1901. He graduated from Providence Hill High School in 1919 and then attended Prairie View A & M College for two years. He earned a Doctor of Dental Surgery degree from Meharry College in Nashville, Tennessee in 1924. Smith married Janie Mae Dunn that same year and in 1925 he opened a dental practice in Galveston, Texas. Smith moved his practice to Houston in 1929. Dr. Lonnie Smith voted regularly in Houston after 1944 and went on to serve as a Democratic Precinct Committee Member in the same precinct where he was once denied a ballot. He also served as president of the A. A. Lucas chapter of the NAACP in Houston before his death in that city in 1971. The Lonnie E. Smith Public Library is located at 3624 Scott Street in Houston, Texas less than a mile from Texas Southern University. For more information see

<https://tshaonline.org/handbook/online/articles/fsm60>



Richard Randolph Grovey was born in 1889 in Brazoria County, Texas. He graduated from Moore High School at Waco in 1910 and Tillotson College at Austin in 1914. He served as principal of a rural school shortly before moving in 1917 to Houston, where he owned a successful barbershop. He started the Third Ward Civic Club with the objective of organizing professional and working-class African Americans in an effort to assert their political rights. In 1928 he joined Carter Wesley and J. Alston Atkins, the owners of Houston's black newspaper, the *Informer* (later the *Houston Informer* and *Texas Freeman*); James Nabrit, a lawyer; and others, to advance a court case against the white primary. By suing the election judge, Albert Townsend, for less than \$20 in damages they were able to avoid the higher state courts and go directly to the United States Supreme Court, which agreed to hear *Grovey v. Townsend* in January 1935. Although in April 1935 the Supreme Court ruled against Grovey, in *Smith v. Allwright* (1944) the court reversed the decision. In January 1932, the group organized the Harris

County Negro Democratic Club. See <https://tshaonline.org/handbook/online/articles/fgrat>



Dr. Lawrence Aaron Nixon was born in Marshall, Texas and graduated from Wiley College (1902) and Meharry Medical College (1906). He began his medical practice in Cameron, Texas but moved to El Paso in 1909. In 1910, he was joined in El Paso by his first wife Esther (nee Calvin) and their infant son. While practicing as a physician in El Paso, Dr. Nixon became a founder, organizer and member of Myrtle Avenue Methodist Church as well as a charter member of the El Paso branch of the National Association for the Advancement of Colored People (NAACP). A registered Democrat, Dr. Nixon challenged a 1923 state law that barred African Americans from participating in that party's electoral primaries.

<http://www.blackpast.org/aaw/nixon-lawrence-1883-1966> and see <https://tshaonline.org/handbook/online/articles/fni10>

Shelley v. Kraemer
334 U.S. 1 (1948)

Argued January 15-16, 1948

Decided May 3, 1948*

Syllabus

Private agreements to exclude persons of designated race or color from the use or occupancy of real estate for residential purposes do not violate the Fourteenth Amendment; but it is violative of the equal protection clause of the Fourteenth Amendment for state courts to enforce them. *Corrigan v. Buckley*, 271 U. S. 323, distinguished.

(a) Such private agreements, standing alone, do not violate any rights guaranteed by the Fourteenth Amendment.

(b) The actions of state courts and judicial officers in their official capacities are actions of the states within the meaning of the Fourteenth Amendment.

(c) In granting judicial enforcement of such private agreements in these cases, the states acted to deny petitioners the equal protection of the laws, contrary to the Fourteenth Amendment.

(d) The fact that state courts stand ready to enforce restrictive covenants excluding white persons from the ownership or occupancy of property covered by them does not prevent the enforcement of covenants excluding colored persons from constituting a denial of equal protection of the laws, since the rights created by § 1 of the Fourteenth Amendment are guaranteed to the individual.

(e) Denial of access to the courts to enforce such restrictive covenants does not deny equal protection of the laws to the parties to such agreements.

355 Mo. 814, 198 S.W.2d 679, and 316 Mich. 614, 25 N.W.2d 638, reversed.

No. 72. The Supreme Court of Missouri reversed a judgment of a state trial court denying enforcement of a private agreement restricting the use or occupancy of certain real estate to persons of the Caucasian race. 355 Mo. 814, 198 S.W.2d 679. This Court granted certiorari. 331 U.S. 803. *Reversed*,

No. 87. The Supreme Court of Michigan affirmed a judgment of a state trial court enjoining violation of a private agreement restricting the use or occupancy of certain real estate to persons of the Caucasian race. 316 Mich. 614, 25 N.W.2d 638. This Court granted certiorari. 331 U.S. 804. *Reversed*, [citations to the transcript omitted]

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

These cases present for our consideration questions relating to the validity of court enforcement of private agreements, generally described as restrictive covenants, which have as their purpose the exclusion of persons of designated race or color from the ownership or occupancy of real property. Basic constitutional issues of obvious importance have been raised.

The first of these cases comes to this Court on certiorari to the Supreme Court of Missouri. On February 16, 1911, thirty out of a total of thirty-nine owners of property fronting both sides of Labadie Avenue between Taylor Avenue and Cora Avenue in the city of St. Louis, signed an agreement, which was subsequently recorded, providing in part:

"... the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date, so that it shall be a condition all the time and whether recited and referred to as [*sic*] not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty-years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

The entire district described in the agreement included fifty-seven parcels of land. The thirty owners who signed the agreement held title to forty-seven parcels, including the particular parcel involved in this case. At the time the agreement was signed, five of the parcels in the district were owned by Negroes. One of those had been occupied by Negro families since 1882, nearly thirty years before the restrictive agreement was executed. The trial court found that owners of seven out of nine homes on the south side of Labadie Avenue, within the restricted district and "in the immediate vicinity" of the premises in question, had failed to sign the restrictive agreement in 1911. At the time this action was brought, four of the premises were occupied by Negroes, and had been so occupied for periods ranging from twenty-three to sixty-three years. A fifth parcel had been occupied by Negroes until a year before this suit was instituted.

On August 11, 1945, pursuant to a contract of sale, petitioners Shelley, who are Negroes, for valuable consideration received from one Fitzgerald a warranty deed to the parcel in question. The trial court found that petitioners had no actual knowledge of the restrictive agreement at the time of the purchase.

On October 9, 1945, respondents, as owners of other property subject to the terms of the restrictive covenant, brought suit in the Circuit Court of the city of St. Louis praying that petitioners Shelley be restrained from taking possession of the property and that judgment be entered divesting title out of petitioners Shelley and revesting title in the immediate grantor or in such other person as the court should direct. The trial court denied the requested relief on the ground that the restrictive agreement, upon which respondents based their action, had never become final and complete because it was the intention of the parties to that agreement that it was not to become effective until signed by all property owners in the district, and signatures of all the owners had never been obtained.

The Supreme Court of Missouri, sitting en banc, reversed and directed the trial court to grant the relief for which respondents had prayed. That court held the agreement effective and concluded that enforcement of its provisions violated no rights guaranteed to petitioners by the Federal Constitution. At the time the court rendered its decision, petitioners were occupying the property in question.

...I

Whether the equal protection clause of the Fourteenth Amendment inhibits judicial enforcement by state courts of restrictive covenants based on race or color is a question which this Court has not heretofore been called upon to consider. Only two cases have been decided by this Court which in any way have

involved the enforcement of such agreements. The first of these was the case of *Corrigan v. Buckley*, 271 U. S. 323 (1926). There, suit was brought in the courts of the District of Columbia to enjoin a threatened violation of certain restrictive covenants relating to lands situated in the city of Washington. Relief was granted, and the case was brought here on appeal. It is apparent that that case, which had originated in the federal courts and involved the enforcement of covenants on land located in the District of Columbia, could present no issues under the Fourteenth Amendment, for that Amendment, by its terms, applies only to the States. Nor was the question of the validity of court enforcement of the restrictive covenants under the Fifth Amendment properly before the Court, as the opinion of this Court specifically recognizes. The only constitutional issue which the appellants had raised in the lower courts, and hence the only constitutional issue before this Court on appeal, was the validity of the covenant agreements as such. This Court concluded that, since the inhibitions of the constitutional provisions invoked apply only to governmental action, as contrasted to action of private individuals, there was no showing that the covenants, which were simply agreements between private property owners, were invalid. Accordingly, the appeal was dismissed for want of a substantial question. Nothing in the opinion of this Court, therefore, may properly be regarded as an adjudication on the merits of the constitutional issues presented by these cases, which raise the question of the validity not of the private agreements as such, but of the judicial enforcement of those agreements.

The second of the cases involving racial restrictive covenants was *Hansberry v. Lee*, 311 U. S. 32 (1940). In that case, petitioners, white property owners, were enjoined by the state courts from violating the terms of a restrictive agreement. The state Supreme Court had held petitioners bound by an earlier judicial determination, in litigation in which petitioners were not parties, upholding the validity of the restrictive agreement, although, in fact, the agreement had not been signed by the number of owners necessary to make it effective under state law. This Court reversed the judgment of the state Supreme Court upon the ground that petitioners had been denied due process of law in being held estopped to challenge the validity of the agreement on the theory, accepted by the state court, that the earlier litigation, in which petitioners did not participate, was in the nature of a class suit. In arriving at its result, this Court did not reach the issues presented by the cases now under consideration.

It is well, at the outset, to scrutinize the terms of the restrictive agreements involved in these cases. In the Missouri case, the covenant declares that no part of the affected property shall be "occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property . . . against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian Race."

Not only does the restriction seek to proscribe use and occupancy of the affected properties by members of the excluded class, but, as construed by the Missouri courts, the agreement requires that title of any person who uses his property in violation of the restriction shall be divested. The restriction of the covenant in the Michigan case seeks to bar occupancy by persons of the excluded class. It provides that "This property shall not be used or occupied by any person or persons except those of the Caucasian race."

It should be observed that these covenants do not seek to proscribe any particular use of the affected properties. Use of the properties for residential occupancy, as such, is not forbidden. The restrictions of these agreements, rather, are directed toward a designated class of persons and seek to determine who

may and who may not own or make use of the properties for residential purposes. The excluded class is defined wholly in terms of race or color; "simply that, and nothing more."

It cannot be doubted that among the civil rights intended to be protected from discriminatory state action by the Fourteenth Amendment are the rights to acquire, enjoy, own and dispose of property. Equality in the enjoyment of property rights was regarded by the framers of that Amendment as an essential precondition to the realization of other basic civil rights and liberties which the Amendment was intended to guarantee. ...e the Fourteenth Amendment was also under consideration, provides:

"All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."

This Court has given specific recognition to the same principle. *Buchanan v. Warley*, 245 U. S. 60 (1917).

It is likewise clear that restrictions on the right of occupancy of the sort sought to be created by the private agreements in these cases could not be squared with the requirements of the Fourteenth Amendment if imposed by state statute or local ordinance. We do not understand respondents to urge the contrary. In the case of *Buchanan v. Warley*, *supra*, a unanimous Court declared unconstitutional the provisions of a city ordinance which denied to colored persons the right to occupy houses in blocks in which the greater number of houses were occupied by white persons, and imposed similar restrictions on white persons with respect to blocks in which the greater number of houses were occupied by colored persons. During the course of the opinion in that case, this Court stated:

"The Fourteenth Amendment and these statutes enacted in furtherance of its purpose operate to qualify and entitle a colored man to acquire property without state legislation discriminating against him solely because of color."

...But the present cases, ... do not involve action by state legislatures or city councils.

Here, the particular patterns of discrimination and the areas in which the restrictions are to operate are determined, in the first instance, by the terms of agreements among private individuals. Participation of the State consists in the enforcement of the restrictions so defined. The crucial issue with which we are here confronted is whether this distinction removes these cases from the operation of the prohibitory provisions of the Fourteenth Amendment.

Since the decision of this Court in the *Civil Rights Cases*, 109 U. S. 3 (1883), the principle has become firmly embedded in our constitutional law that the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States. That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.

We conclude, therefore, that the restrictive agreements, standing alone, cannot be regarded as violative of any rights guaranteed to petitioners by the Fourteenth Amendment. So long as the purposes of those agreements are effectuated by voluntary adherence to their terms, it would appear clear that there has been no action by the State, and the provisions of the Amendment have not been violated. *Cf. Corrigan v. Buckley*, *supra*.

But here there was more. These are cases in which the purposes of the agreements were secured only by judicial enforcement by state courts of the restrictive terms of the agreements. The respondents urge that judicial enforcement of private agreements does not amount to state action, or, in any event, the participation of the State is so attenuated in character as not to amount to state action within the meaning of the Fourteenth Amendment. Finally, it is suggested, even if the States in these cases may be deemed to have acted in the constitutional sense, their action did not deprive petitioners of rights guaranteed by the Fourteenth Amendment. We move to a consideration of these matters.

II

That the action of state courts and judicial officers in their official capacities is to be regarded as action of the State within the meaning of the Fourteenth Amendment is a proposition which has long been established by decisions of this Court. ... Thus, in *Virginia v. Rives*, 100 U. S. 313, 100 U. S. 318 (1880), this Court stated:

"It is doubtless true that a State may act through different agencies, either by its legislative, its executive, or its judicial authorities, and the prohibitions of the amendment extend to all action of the State denying equal protection of the laws, whether it be action by one of these agencies or by another."

In *Ex parte Virginia*, 100 U. S. 339, 100 U. S. 347 (1880), the Court observed: "A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way." In the *Civil Rights Cases*, 109 U. S. 3, 109 U. S. 11, 17 (1883), this Court pointed out that the Amendment makes void "State action of every kind" which is inconsistent with the guaranties therein contained, and extends to manifestations of "State authority in the shape of laws, customs, or judicial or executive proceedings." Language to like effect is employed no less than eighteen times during the course of that opinion.

...In *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U. S. 673, 281 U. S. 680 (1930), the Court, through Mr. Justice Brandeis, stated:

"The federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive or administrative branch of government."

...The action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend has, of course, long been regarded as a denial of the due process of law guaranteed by the Fourteenth Amendment. *[citation omitted]*

... state judicial action which have been held by this Court to violate the Amendment's commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair. It has been recognized that the action of state courts in enforcing a substantive common law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings in such cases may have been in complete accord with the most rigorous conceptions of procedural due process. *[citations omitted]*

The short of the matter is that, from the time of the adoption of the Fourteenth Amendment until the present, it has been the consistent ruling of this Court that the action of the States to which the Amendment has reference includes action of state courts and state judicial officials. Although, in construing the terms

of the Fourteenth Amendment, differences have from time to time been expressed as to whether particular types of state action may be said to offend the Amendment's prohibitory provisions, it has never been suggested that state court action is immunized from the operation of those provisions simply because the act is that of the judicial branch of the state government.

III

Against this background of judicial construction, extending over a period of some three-quarters of a century, we are called upon to consider whether enforcement by state courts of the restrictive agreements in these cases may be deemed to be the acts of those States, and, if so, whether that action has denied these petitioners the equal protection of the laws which the Amendment was intended to insure.

We have no doubt that there has been state action in these cases in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers, and contracts of sale were accordingly consummated. It is clear that, but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.

These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such individuals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing.

...We hold that, in granting judicial enforcement of the restrictive agreements in these cases, the States have denied petitioners the equal protection of the laws, and that, therefore, the action of the state courts cannot stand. We have noted that freedom from discrimination by the States in the enjoyment of property rights was among the basic objectives sought to be effectuated by the framers of the Fourteenth Amendment. That such discrimination has occurred in these cases is clear. Because of the race or color of these petitioners, they have been denied rights of ownership or occupancy enjoyed as a matter of course by other citizens of different race or color. The Fourteenth Amendment declares "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."

...[We do not] find merit in the suggestion that property owners who are parties to these agreements are denied equal protection of the laws if denied access to the courts to enforce the terms of restrictive covenants and to assert property rights which the state courts have held to be created by such agreements. The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment. *Cf. Marsh v. Alabama*, 326 U. S. 501 (1946).

The problem of defining the scope of the restrictions which the Federal Constitution imposes upon exertions of power by the States has given rise to many of the most persistent and fundamental issues which this Court has been called upon to consider. That problem was foremost in the minds of the framers of the Constitution, and, since that early day, has arisen in a multitude of forms. The task of determining whether the action of a State offends constitutional provisions is one which may not be undertaken lightly. Where, however, it is clear that the action of the State violates the terms of the fundamental charter, it is the obligation of this Court so to declare.

The historical context in which the Fourteenth Amendment became a part of the Constitution should not be forgotten. Whatever else the framers sought to achieve, it is clear that the matter of primary concern was the establishment of equality in the enjoyment of basic civil and political rights and the preservation of those rights from discriminatory action on the part of the States based on considerations of race or color. Seventy-five years ago, this Court announced that the provisions of the Amendment are to be construed with this fundamental purpose in mind. Upon full consideration, we have concluded that, in these cases, the States have acted to deny petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment. Having so decided, we find it unnecessary to consider whether petitioners have also been deprived of property without due process of law or denied privileges and immunities of citizens of the United States.

For the reasons stated, the judgment of the Supreme Court of Missouri and the judgment of the Supreme Court of Michigan must be reversed.

Reversed.

Side bar: This modest, two-story masonry residence built in St. Louis, Missouri in 1906 came to be known as the Shelley House and is a National Historic Landmark. J. D. Shelley was born in Starkville,



Mississippi in 1907. He was not yet 16 when he married his wife, Ethel in 1923. In 1930, the Shelleys and their six children migrated to St. Louis from Mississippi to escape the pervasive racial oppression of the South. For a number of years they lived with relatives and then in rental properties. In looking to buy a home, they found that many buildings in St. Louis



were covered by racially restrictive covenants by which the building owners agreed not to sell to anyone other than a Caucasian. The Shelleys directly challenged this discriminatory practice by purchasing such a building at 4600 Labadie Avenue from an owner who agreed not to enforce the racial covenant. Louis D. Kraemer, owner of another property on Labadie covered by restrictive covenants, sued in the St. Louis Circuit (State) Court to enforce the restrictive covenant and prevent the Shelleys from acquiring title to the building. See <http://ehocstl.org/jd-ethel-shelley/>

**Sipuel v. Board of Regents,
332 U.S. 631 (1948)**

Argued January 7-8, 1948

Decided January 12, 1948

PER CURIAM.



On January 14, 1946, the petitioner, a Negro, concededly qualified to receive the professional legal education offered by the State, applied for admission to the School of Law of the University of Oklahoma, the only institution for legal education supported and maintained by the taxpayers of the Oklahoma. Petitioner's application for admission was denied solely because of her color.

Petitioner then made application for a writ of mandamus in the District Court of Cleveland County, Oklahoma. The writ of mandamus was refused, and the Supreme Court of the Oklahoma affirmed the judgment of the District Court. We brought the case here for review.

The petitioner is entitled to secure legal education afforded by a state institution. To this time, it has been denied her although, during the same period, many white applicants have been afforded legal education by the State. The State must provide it for her in conformity with the equal protection clause of the Fourteenth Amendment, and provide it as soon as it does for applicants of any other group. *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337.

The judgment of the Supreme Court of Oklahoma is reversed, and the cause is remanded to that court for proceedings not inconsistent with this opinion. The mandate shall issue forthwith.

Reversed.

Side Bar: Although Ada Lois Sipuel Fisher was permitted to attend the law school, she was forced to sit in the back of the room behind a row of empty seats and a wooden railing with a sign designated "colored." All black students enrolled at the University of Oklahoma were provided separate eating facilities and restrooms, separate reading sections in the library, and roped-off stadium seats at the football games. These conditions persisted through 1950. In August 1952 Fisher graduated from the University of Oklahoma College of Law. She earned a master's degree in history from the University of Oklahoma in 1968. After briefly practicing law in Chickasha, Fisher joined the faculty of Langston University in 1957 and served as chair of the Department of Social Sciences. She retired in December 1987 as assistant vice president for academic affairs. In 1991 the University of Oklahoma awarded Fisher an honorary doctorate of humane letters.

On April 22, 1992, Gov. David Walters symbolically righted the wrongs of the past by appointing Dr. Ada Lois Sipuel Fisher to the Board of Regents of the University of Oklahoma, the same school that had once refused to admit her to its College of Law. As the governor said during the ceremony, it was a "completed cycle." The lady who was once rejected by the university was now a member of its governing board. On October 18, 1995, Dr. Ada Lois Sipuel Fisher died. In her honor the University of Oklahoma subsequently dedicated the Ada Lois Sipuel Fisher Garden on the Norman campus.

Sweatt v. Painter
339 U.S. 629 (1950)

Argued April 4, 1950
Decided June 5, 1950

CERTIORARI TO THE SUPREME COURT OF TEXAS

Syllabus

Petitioner was denied admission to the state supported University of Texas Law School, solely because he is a Negro and state law forbids the admission of Negroes to that Law School. He was offered, but he refused, enrollment in a separate law school newly established by the State for Negroes. The University of Texas Law School has 16 full-time and three part-time professors, 850 students, a library of 65,000 volumes, a law review, moot court facilities, scholarship funds, an Order of the Coif affiliation, many distinguished alumni, and much tradition and prestige. The separate law school for Negroes has five full-time professors, 23 students, a library of 16,500 volumes, a practice court, a legal aid association, and one alumnus admitted to the Texas Bar, but it excludes from its student body members of racial groups which number 85% of the population of the State and which include most of the lawyers, witnesses, jurors, judges, and other officials with whom petitioner would deal as a member of the Texas Bar.

Held: The legal education offered petitioner is not substantially equal to that which he would receive if admitted to the University of Texas Law School, and the Equal Protection Clause of the Fourteenth Amendment requires that he be admitted to the University of Texas Law School. Pp. 343 U. S. 631-636.

Reversed.

A Texas trial court found that a newly established state law school for Negroes offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas," and denied mandamus to compel his admission to the University of Texas Law School. The Court of Civil Appeals affirmed. 210 S.W.2d 442. The Texas Supreme Court denied writ of error. This Court granted certiorari. 338 U.S. 865. *Reversed*, p. 339 U. S. 636.

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

This case and *McLaurin v. Oklahoma State Regents*, *post*, p. 339 U. S. 637, present different aspects of this general question: to what extent does the Equal Protection Clause of the Fourteenth Amendment limit the power of a state to distinguish between students of different races in professional and graduate education in a state university? Broader issues have been urged for our consideration, but we adhere to the principle of deciding constitutional questions only in the context of the particular case before the Court. We have frequently reiterated that this Court will decide constitutional questions only when necessary to the disposition of the case at hand, and that such decisions will be drawn as narrowly as possible. *Rescue Army v. Municipal Court*, 331 U. S. 549 (1947), and cases cited therein. Because of this traditional reluctance to extend constitutional interpretations to situations or facts which are not before the Court, much of the excellent research and detailed argument presented in these cases is unnecessary to their disposition.

In the instant case, petitioner filed an application for admission to the University of Texas Law School for the February, 1946, term. His application was rejected solely because he is a Negro. Petitioner thereupon brought this suit for mandamus against the appropriate school officials, respondents here, to compel his admission. At that time, there was no law school in Texas which admitted Negroes.

The state trial court recognized that the action of the State in denying petitioner the opportunity to gain a legal education while granting it to others deprived him of the equal protection of the laws guaranteed by the Fourteenth Amendment. The court did not grant the relief requested, however, but continued the case for six months to allow the State to supply substantially equal facilities. At the expiration of the six months, in December, 1946, the court denied the writ on the showing that the authorized university officials had adopted an order calling for the opening of a law school for Negroes the following February. While petitioner's appeal was pending, such a school was made available, but petitioner refused to register therein. The Texas Court of Civil Appeals set aside the trial court's judgment and ordered the cause "remanded generally to the trial court for further proceedings without prejudice to the rights of any party to this suit."

On remand, a hearing was held on the issue of the equality of the educational facilities at the newly established school as compared with the University of Texas Law School. Finding that the new school offered petitioner "privileges, advantages, and opportunities for the study of law substantially equivalent to those offered by the State to white students at the University of Texas," the trial court denied mandamus. The Court of Civil Appeals affirmed. 210 S.W.2d 442 (1948). Petitioner's application for a writ of error was denied by the Texas Supreme Court. We granted certiorari, 338 U.S. 865 (1949), because of the manifest importance of the constitutional issues involved.

The University of Texas Law School, from which petitioner was excluded, was staffed by a faculty of sixteen full-time and three part-time professors, some of whom are nationally recognized authorities in their field. Its student body numbered 850. The library contained over 65,000 volumes. Among the other facilities available to the students were a law review, moot court facilities, scholarship funds, and Order of the Coif affiliation. The school's alumni occupy the most distinguished positions in the private practice of the law and in the public life of the State. It may properly be considered one of the nation's ranking law schools.

The law school for Negroes which was to have opened in February, 1947, would have had no independent faculty or library. The teaching was to be carried on by four members of the University of Texas Law School faculty, who were to maintain their offices at the University of Texas while teaching at both institutions. Few of the 10,000 volumes ordered for the library had arrived, nor was there any full-time librarian. The school lacked accreditation.

Since the trial of this case, respondents report the opening of a law school at the Texas State University for Negroes. It is apparently on the road to full accreditation. It has a faculty of five full-time professors; a student body of 23; a library of some 16,500 volumes serviced by a full-time staff; a practice court and legal aid association, and one alumnus who has become a member of the Texas Bar.

Whether the University of Texas Law School is compared with the original or the new law school for Negroes, we cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for

specialization, size of the student body, scope of the library, availability of law review and similar activities, the University of Texas Law School is superior. What is more important, the University of Texas Law School possesses to a far greater degree those qualities which are incapable of objective measurement but which make for greatness in a law school. Such qualities, to name but a few, include reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige. It is difficult to believe that one who had a free choice between these law schools would consider the question close.

Moreover, although the law is a highly learned profession, we are well aware that it is an intensely practical one. 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. The law school to which Texas is willing to admit petitioner excludes from its student body members of the racial groups which number 85% of the population of the State and include most of the lawyers, witnesses, jurors, judges and other officials with whom petitioner will inevitably be dealing when he becomes a member of the Texas Bar. With such a substantial and significant segment of society excluded, we cannot conclude that the education offered petitioner is substantially equal to that which he would receive if admitted to the University of Texas Law School.

It may be argued that excluding petitioner from that school is no different from excluding white students from the new law school. This contention overlooks realities. It is unlikely that a member of a group so decisively in the majority, attending a school with rich traditions and prestige which only a history of consistently maintained excellence could command, would claim that the opportunities afforded him for legal education were unequal to those held open to petitioner. That such a claim, if made, would be dishonored by the State is no answer. "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley v. Kraemer*, 334 U. S. 1, 334 U. S. 22 (1948).

It is fundamental that these cases concern rights which are personal and present. This Court has stated unanimously that "The State must provide [legal education] for [petitioner] in conformity with the equal protection clause of the Fourteenth Amendment and provide it as soon as it does for applicants of any other group."

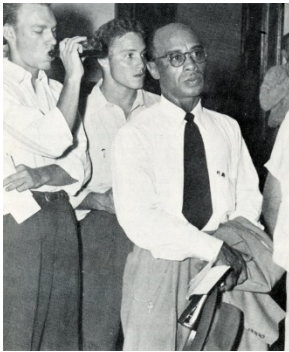
Sipuel v. Board of Regents, 332 U. S. 631, 332 U. S. 633 (1948). That case "did not present the issue whether a state might not satisfy the equal protection clause of the Fourteenth Amendment by establishing a separate law school for Negroes."

Fisher v. Hurst, 333 U. S. 147, 333 U. S. 150 (1948). In *Missouri ex rel. Gaines v. Canada*, 305 U. S. 337, 305 U. S. 351 (1938), the Court, speaking through Chief Justice Hughes, declared that "petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other negroes sought the same opportunity."

These are the only cases in this Court which present the issue of the constitutional validity of race distinctions in state supported graduate and professional education.

In accordance with these cases, petitioner may claim his full constitutional right: legal education equivalent to that offered by the State to students of other races. Such education is not available to him in a separate law school as offered by the State. We cannot, therefore, agree with respondents that the doctrine of *Plessy v. Ferguson*, 163 U. S. 537 (1896), requires affirmance of the judgment below. Nor need we reach petitioner's contention that *Plessy v. Ferguson* should be reexamined in the light of contemporary knowledge respecting the purposes of the Fourteenth Amendment and the effects of racial segregation. *See supra*, p. 339 U. S. 631.

We hold that the Equal Protection Clause of the Fourteenth Amendment requires that petitioner be admitted to the University of Texas Law School. The judgment is reversed, and the cause is remanded for proceedings not inconsistent with this opinion.



Reversed.

Footnotes omitted

Side Bar: Sweatt enrolled in the University of Texas law school but did not complete his studies there. For additional information see "Our Story-Thurgood Marshall School of Law Edition. Written by Urban Research and Resource Center, Texas Southern University, Anticipated publication date winter 2018.

Brown v. Board of Education of Topeka
347 U.S. 483 (1954)

Argued December 9, 1952

Reargued December 8, 1953

Decided May 17, 1954*

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.

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. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

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. 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. 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. 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. 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. 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. 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."

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."

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

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. The Attorney General 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.

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.



The students represented in *Brown et al. v. Board of Education of Topeka*.

(L to R: Vicki Henderson, Donald Henderson, Linda Brown, James Emanuel, Nancy Todd, and Katherine Carper)

Photo by Carl Iwasaki/Time Life Pictures/Getty Images

Side Bar: It begins sixty miles to the east of Topeka in the Kansas City suburb of Merriam, Kansas, where Esther Brown, a thirty-year-old white Jewish woman, became incensed at the local school board's reluctance to make modest repairs in a dilapidated school for area black students, even while it passed a bond issue to construct a spanking new school for whites. Eventually, Esther's empathy would cause her to push the state's NAACP chapter to launch a campaign to end segregation in Kansas schools--a campaign that would lead to victory on May 17, 1954 when a unanimous Supreme Court declared that the Topeka Board of Education's policy of segregation violated the Equal Protection Clause of the United States Constitution.



Esther Brown, civil rights activist

For additional information see: <http://www.famous-trials.com/brownvtopeka/666-home>

Garner v. Louisiana 368 U.S. 157 (1961)

Argued October 18-19, 1961

Decided

December 11, 1961*

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

These cases come to us from the Supreme Court of Louisiana, and draw in question the constitutionality of the petitioners' convictions in the 19th Judicial District Court, Parish of East Baton Rouge, Louisiana, for the crime of disturbing the peace. The petitioners were brought to trial and convicted on informations charging them with violating Title 14, Article 103(7), of the Louisiana Criminal Code, 1942, in that

"they refused to move from a cafe counter seat . . . after having been ordered to do so by the agent [of the establishment], said conduct being in such manner as to unreasonably and foreseeably disturb the public. . . ."

In accordance with state procedure, petitioners sought post-conviction review in the Supreme Court of Louisiana through writs of certiorari, mandamus and prohibition. They contended that the State had presented no evidence to support the findings of statutory violation, and that their convictions were invalid on other constitutional grounds, both state and federal. Relief was denied. Federal questions were properly raised and preserved throughout the proceedings, and timely petitions for certiorari filed in this

Court were granted. 365 U.S. 840. The United States Government appeared as *amicus curiae* urging, on various grounds, that the convictions be reversed. An *amicus* brief also urging reversal was filed by the Committee on the Bill of Rights of the Association of the Bar of the City of New York.

In our view of these cases, and for our disposition of them, the slight variance in the facts of the three cases is immaterial. Although the alleged offenses did not occur on the same day or in the same establishment, the petitioners were all arrested by the same officers, charged with commission of the same acts, represented by the same counsel, tried and convicted by the same judge, and given identical sentences. Because of this factual similarity and the identical nature of the problems involved in granting certiorari, we ordered the cases consolidated for argument, and now deem it sufficient to file one opinion. In addition, as the facts are simple, we think it sufficient to recite but one of the cases in detail, noting whatever slight variations exist in the others.

In No. 28, *Hoston et al. v. Louisiana*, Jannette Hoston, a student at Southern University, and six of her colleagues took seats at a lunch counter in Kress' Department Store in Baton Rouge, Louisiana, on March 29, 1960. In Kress', as in Sitman's Drug Store in No. 26, where Negroes are considered "very good customers," a segregation policy is maintained only with regard to the service of food. Hence, although both stores solicit business from white and Negro patrons, and the latter as well as the former may make purchases in the general merchandise sections without discrimination, the stores do not provide integrated service at their lunch counters.

The manager at Kress' store, who was also seated at the lunch counter, told the waitress to advise the students that they could be served at the counter across the aisle, which she did. The petitioners made no response, and remained quietly in their seats. After the manager had finished his lunch, he telephoned the police and told them that "[some Negroes] were seated at the counter reserved for whites." The police arrived at the store and ordered the students to leave. The arresting officer testified that the petitioners did and said nothing, except that one of them stated that she would like a glass of iced tea, but that he believed they were disturbing the peace "by sitting there." When none of the petitioners showed signs of leaving their seats, they were placed under arrest and taken to the police station. They were then charged with violating Title 14, Article 103(7), of the Louisiana Criminal Code, a section of the Louisiana disturbance of the peace statute.

Before trial, the petitioners moved for a bill of particulars as to the details of their allegedly disruptive behavior, and to quash the informations for failure to state any unlawful acts of which they could be constitutionally convicted. The motions were denied, and the petitioners applied to the Supreme Court of Louisiana for writs of certiorari, prohibition and mandamus to review the rulings. The Supreme Court denied the writs on the ground that an adequate remedy was available through resort to its supervisory jurisdiction in the event of a conviction. The petitioners were then tried and convicted, and sentenced to imprisonment for four months, three months of which would be suspended upon the payment of a fine of \$100. Subsequent to their convictions, the Supreme Court, in denying relief on appeal, issued the following oral opinion in each case.

"Writs refused."

"This court is without jurisdiction to review facts in criminal cases. *See* Art. 7, Sec. 10, La. Constitution of 1921."

"The rulings of the district judge on matters of law are not erroneous. *See Town of Ponchatoula v. Bates*, 173 La., 824, 138 So., 851."

Before this Court, petitioners and the *amici* have presented a number of questions claiming deprivation of rights guaranteed to petitioners by the First and Fourteenth Amendments to the United States Constitution. The petitioners contend:

"(a) The decision below affirms a criminal conviction based upon no evidence of guilt and, therefore, deprives them of due process of law as defined in *Thompson v. Louisville*, 362 U. S. 199."

"(b) The petitioners were convicted of a crime under the provisions of a state statute which, as applied to their acts, is so vague, indefinite and uncertain as to offend the Due Process Clause of the Fourteenth Amendment."

"(c) The decisions below conflict with the Fourteenth Amendment's guarantee of freedom of expression."

"(d) The decision below conflicts with prior decisions of this Court which condemn racially discriminatory administration of State criminal laws in contravention of the Equal Protection Clause of the Fourteenth Amendment."

With regard to argument (d), the petitioners and the New York Committee on the Bill of Rights contend that the participation of the police and the judiciary to enforce a state custom of segregation resulted in the use of "state action," and was therefore plainly violative of the Fourteenth Amendment. The petitioners also urge that, even if these cases contain a relevant component of "private action," that action is substantially infected with state, power and thereby remains state action for purposes of the Fourteenth Amendment.

In the view we take of the cases, we find it unnecessary to reach the broader constitutional questions presented, and, in accordance with our practice not to formulate a rule of constitutional law broader than is required by the precise facts presented in the record, for the reasons hereinafter stated, we hold that the convictions in these cases are so totally devoid of evidentiary support as to render them unconstitutional under the Due Process Clause of the Fourteenth Amendment. As in *Thompson v. Louisville*, 362 U. S. 199, our inquiry does not turn on a question of sufficiency of evidence to support a conviction, but on whether these convictions rest upon any evidence which would support a finding that the petitioners' acts caused a disturbance of the peace. In addition, we cannot be concerned with whether the evidence proves the commission of some other crime, for it is as much a denial of due process to send an accused to prison following conviction for a charge that was never made as it is to convict him upon a charge for which there is no evidence to support that conviction.

The respondent, in both its brief and its argument to this Court, implied that the evidence proves the elements of a criminal trespass. In oral argument, it contended that the real question here

"is whether or not a private property owner and proprietor of a private establishment has the right to serve only those whom he chooses and to refuse to serve those whom he desires not to serve for whatever reason he may determine."

That this is not a question presented by the records in these cases seems too apparent for debate. Even assuming it were the question, however, which it clearly is not, these convictions could not stand for the reason stated in *Cole v. Arkansas*, 333 U. S. 196.

Under our view of these cases, our task is to determine whether there is any evidence in the records to show that the petitioners, by their actions at the lunch counters in the business establishments involved, violated Title 14, Article 103(7), of the Louisiana Criminal Code. At the time of petitioners' acts, Article 103 provided:

"Disturbing the peace is the doing of any of the following in such a manner as would foreseeably disturb or alarm the public:"

"(1) Engaging in a fistic encounter; or"

"(2) Using of any unnecessarily loud, offensive, or insulting language; or"

"(3) Appearing in an intoxicated condition; or"

"(4) Engaging in any act in a violent and tumultuous manner by any three or more persons; or"

"(5) Holding of an unlawful assembly; or"

"(6) Interruption of any lawful assembly of people; or"

"(7) Commission of any other act in such a manner as to unreasonably disturb or alarm the public."

I

Our initial inquiry is necessarily to determine the type of conduct proscribed by this statute and the elements of guilt which the evidence must prove to support a criminal conviction thereunder. First, it is evident from a reading of the statute that the accused must conduct himself in a manner that would "foreseeably disturb or alarm the public." In addition, when a person is charged with a violation of Paragraph 7, an earlier version of which was aptly described by the Supreme Court of Louisiana as "the general portion of the statute which does not define the *conduct or acts' the members of the Legislature had in mind*" (*State v. Sanford*, 203 La. 961, 967, 14 So.2d

778, 780), it would also seem apparent from the words of the statute that the acts, whatever they might be, must be done "in such a manner as to [actually] unreasonably disturb or alarm the public." However, because we find the records barren of any evidence that would support a finding that the petitioners' conduct would even "foreseeably" have disturbed the public, we need not consider whether the statute also requires the acts to be done in a manner as actually to disturb the peace.

We, of course, are bound by a State's interpretation of its own statute, and will not substitute our judgment for that of the State's when it becomes necessary to analyze the evidence for the purpose of determining whether that evidence supports the findings of a state court. Hence, we must look to Louisiana for

guidance in the meaning of the phrase "foreseeably disturb or alarm the public" in order to determine the type of conduct proscribed by La.Rev.Stat., 1950, § 14:103(7).

The Supreme Court of Louisiana has had occasion in the past, in interpreting the predecessor of Article 103, to give content to these words, and it is evident from the court's prior treatment of them that they were not intended to embrace peaceful conduct. On the contrary, it is plain that, under the court's application of the statute, these words encompass only conduct which is violent or boisterous in itself, or which is provocative in the sense that it induces a foreseeable physical disturbance. In *State v. Sanford*, 203 La. 961, 14 So.2d 778, the evidence showed that thirty Jehovah's Witnesses approached a Louisiana town for the purpose of distributing religious tracts and persuading the public to make contributions to their cause. The Witnesses were warned by the mayor and police officers that "their presence and activities would cause trouble among the population, and asked them to stay away from the town. . . ." 203 La. at 964, 14 So.2d at 779. The Witnesses failed to yield to the warning, and proceeded on their mission. The trial court found that the acts of the Witnesses in entering the town and stopping passersby in the crowded street "might or would tend to incite riotous and disorderly conduct." 203 La. at 965, 14 So.2d at 779. The Supreme Court of Louisiana set aside convictions for breach of the peace, holding that the defendants did not commit any unlawful act or pursue any disorderly course of conduct which would tend to disturb the peace -- thus, in effect, that peaceful conduct, even though conceivably offensive to another class of the public, is not conduct which may be proscribed by Louisiana's disturbance of the peace statute without evidence that the actor conducted himself in some outwardly unruly manner.

The conclusion of the highest Louisiana court that the breach of the peace statute does not reach peaceful and orderly conduct is substantiated by the conclusion drawn from reading the statute as a whole. The catch-all provision under which the petitioners were tried and convicted follows an enumeration of six specific offenses, each of which describes overtly tumultuous or disruptive behavior. It would therefore normally be interpreted in the light of the preceding sections as an effort to cover other forms of violence or loud and boisterous conduct not already listed. We do not mean to imply that an *ejusdem generis* reading of the statute is constitutionally compelled to the exclusion of other reasonable interpretations, but we do note that here such a reading is consistent with the Louisiana Supreme Court's application in *Sanford*.

Further evidence that Article 103(7) was not designed to encompass the petitioners' conduct in these cases has been supplied by the Louisiana Legislature. Shortly after the events for which the petitioners were arrested took place, the legislature amended its disturbance of the peace statute in an obvious attempt to reach the type of activity involved in these cases. The contrast between the language of the present statute and the one under which the petitioners were convicted confirms the interpretation given the general terms of the latter by the Supreme Court in *State v. Sanford* and the natural meaning of the words used in Article 103.

We are aware that the Louisiana courts have the final authority to interpret and, where they see fit, to reinterpret that State's legislation. However, we have seen no indication that the Louisiana Supreme Court has changed its *Sanford* interpretation of La.Rev.Stat., 1950, § 14:103(7), and we will not infer that an inferior Louisiana court intended to overrule a longstanding and reasonable interpretation of a state statute by that State's highest court. Our reluctance so to infer is supported, moreover, by the fact that *State v. Sanford* was argued by the petitioners to both the trial court and the Supreme Court, and that neither court mentioned in its opinion that *Sanford* was no longer to be the law in Louisiana.

We think that the above discussion would given ample support to a conclusion that Louisiana law requires a finding of outwardly boisterous or unruly conduct in order to charge a defendant with "foreseeably" disturbing or alarming the public. However, because this case comes to us from a state court and necessitates a delicate involvement in federal-state relations, we are willing to assume with the respondent that the Louisiana courts might construe the statute more broadly to encompass the traditional common law concept of disturbing the peace. Thus construed, it might permit the police to prevent an imminent public commotion even though caused by peaceful and orderly conduct on the part of the accused. *Cf. Cantwell v. Connecticut*, 310 U. S. 296, 310 U. S. 308. We therefore treat these cases as though evidence of such imminent danger, as well as evidence of a defendant's active conduct which is outwardly provocative, could support a finding that the acts might "foreseeably disturb or alarm the public" under the Louisiana statute.

II

Having determined what evidence is necessary to support a finding of disturbing the peace under Louisiana law, the ultimate question, as in *Thompson v. Louisville*, *supra*, is whether the records in these cases contain any such evidence. With appropriate notations to the slight differences in testimony in the other two cases, we again turn to the record in No. 28. The manager of the department store in which the lunch counter was located testified that, after the students had taken their seats at the "white lunch counter" where he was also occupying a seat, he advised the waitress on duty to offer the petitioners service at the counter across the aisle, which served Negroes. The petitioners, however, after being "advised that they would be served at the other counter," remained in their seats, and the manager continued eating his lunch at the same counter. In No. 26, where there were no facilities to serve colored persons, the petitioners were merely told that they couldn't be served, but were never even asked to move. In No. 27, a waitress testified that the petitioners were merely told that they would have to go "to the other side to be served." The petitioners not only made no speeches, they did not even speak to anyone except to order food; they carried no placards, and did nothing, beyond their mere presence at the lunch counter, to attract attention to themselves or to others. In none of the cases was there any testimony that the petitioners were told that their mere presence was causing, or was likely to cause, a disturbance of the peace, nor that the petitioners were ever asked to leave the counters or the establishments by anyone connected with the stores.

The manager in No. 28 testified that, after finishing his meal, he went to the telephone and called the police department, advising them that Negroes were in his store sitting at the lunch counter reserved for whites. This is the only case in which "the owner or his agent" notified the police of the petitioners' presence at the lunch counter, and even, here the manager gave no indication to the officers that he feared any disturbance or that he had received any complaint concerning the petitioners' presence. In No. 27, a waitress testified that a bus driver sitting in the restaurant notified the police that "there were several colored people sitting at the lunch counter." In No. 26, the arresting officers were not summoned to the drugstore by anyone even remotely connected with Sitman's but, rather, by a call from an officer on his "beat" who had observed the petitioners sitting quietly at the lunch counter.

Although the manager of Kress' Department Store testified that the only conduct which he considered disruptive was the petitioners' mere presence at the counter, he did state that he called the police because he "feared that some disturbance might occur." However, his fear is completely unsubstantiated by the record. The manager continued eating his lunch in an apparently leisurely manner at the same counter at

which the petitioners were sitting before calling the police. Moreover, not only did he fail to give the petitioners any warning of his alleged "fear," but he specifically testified to the fact that the petitioners were never asked to move or to leave the store. Nor did the witness elaborate on the basis of his fear except to state that "it isn't customary for the two races to sit together and eat together." In addition, there is no evidence that this alleged fear was ever communicated to the arresting officers, either at the time the manager made the initial call to police headquarters or when the police arrived at the store. Under these circumstances, the manager's general statement gives no support for the convictions within the meaning of *Thompson v. Louisville*, *supra*.

Subsequent to the manager's notification, the police arrived at the store and, without consulting the manager or anyone else on the premises, went directly to confront the petitioners. An officer asked the petitioners to leave the counter because "they were disturbing the peace and violating the law by sitting there." One of the students stated that she wished to get a glass of iced tea, but she and her friends were told, again by the police, that they were disturbing the peace by sitting at a counter reserved for whites, and that they would have to leave. When the petitioners continued to occupy the seats, they were arrested, as the officer testified, for disturbing the peace "[b]y sitting there" "because that place was reserved for white people." The same officer testified that the petitioners had done nothing other than take seats at that particular lunch counter, which he considered to be a breach of the peace.

The respondent discusses at length the history of race relations and the high degree of racial segregation which exists throughout the South. Although there is no reference to such facts in the records, the respondent argues that the trial court took judicial notice of the general situation, as he may do under Louisiana law, and that it therefore became apparent to the court that the petitioners' presence at the lunch counters might cause a disturbance which it was the duty of the police to prevent. There is nothing in the records to indicate that the trial judge did in fact take judicial notice of anything. To extend the doctrine of judicial notice to the length pressed by the respondent would require us to allow the prosecution to do, through argument to this Court, what it is required by due process to do at the trial, and would be "to turn the doctrine into a pretext for dispensing with a trial." *Ohio Bell Telephone Co. v. Public Utilities Comm.*, 301 U. S. 292, 301 U. S. 302. Furthermore, unless an accused is informed at the trial of the facts of which the court is taking judicial notice, not only does he not know upon what evidence he is being convicted, but, in addition, he is deprived of any opportunity to challenge the deductions drawn from such notice or to dispute the notoriety or truth of the facts allegedly relied upon. Moreover, there is no way by which an appellate court may review the facts and law of a case and intelligently decide whether the findings of the lower court are supported by the evidence where that evidence is unknown. Such an assumption would be a denial of due process. *Ohio Bell*, *supra*.

Thus, having shown that these records contain no evidence to support a finding that petitioners disturbed the peace, either by outwardly boisterous conduct or by passive conduct likely to cause a public disturbance, we hold that these convictions violated petitioners' rights to due process of law guaranteed them by the Fourteenth Amendment to the United States Constitution. The undisputed evidence shows that the police who arrested the petitioners were left with nothing to support their actions except their own opinions that it was a breach of the peace for the petitioners to sit peacefully in a place where custom decreed they should not sit. Such activity, in the circumstances of these cases, is not evidence of any crime, and cannot be so considered either by the police or by the courts.

The judgments are reversed.

*Together with No. 27, *Briscoe et al. v. Louisiana*, and No. 28, *Hoston et al. v. Louisiana*, also on certiorari to the same Court.

Side Bar: Justice Marshall saw, sometimes first hand, what police do to people and his experiences most certainly colored his views on the constitutional protections afforded individuals. For more information see Tracey Maclin, Justice Thurgood Marshall: Taking the Fourth Amendment Seriously, 77 Cornell L. Rev. 723 (1992)

Associate Justice, United States Supreme Court



On September, 1, 1967, Thurgood Marshall took his constitutional oath of office and became the first African American Supreme Court justice in the United States. He had been nominated by President Lyndon B. Johnson and after a grueling senate hearing that embarrassed many Americans, the senate voted to approve the nomination by a vote of 69-11. Marshall was the first African-American to rise to the court and the first Marylander since Chief Justice Roger B. Taney, a former slave owner, had ruled in the Dred Scott case 110 years earlier that the Negro had no rights which the white man was bound to respect.

Marshall was the only justice who had defended a murder suspect and he believed that the state had no constitutional right to extinguish anyone's life. Much of this belief was rooted in his own experiences, having seen so many defendants convicted and put to death for crimes they did not commit.

At the time that Justice Marshall assumed his seat on the bench, the United States Supreme Court was considered a progressive court that had been led by Chief Justice Earl Warren and counted among his liberal peers, Justices Brennan, Douglas, Fortas and Black who had been a former member of the Ku Klux Klan. However, within two years, the court would drastically change and Marshall would no longer be among a 5-member majority, but would instead be in the Supreme Court minority.

After the court went conservative and decisions on issues like busing, abortion and affirmative action didn't go his way, he started telling clerks that if they didn't like writing dissenting opinions, they shouldn't apply for jobs with him. "If there was a leitmotif to Marshall's dissents," says A. E. Dick Howard, professor of law at the University of Virginia, "it was his concern for the unempowered, the poor, minorities, those outside the mainstream."¹⁷

TERRY v. OHIO
392 US 1 (1968)

Argued: December 12, 1967

Decided: June 10, 1968

...

Majority: Warren, joined by Black, Brennan, Stewart, Fortas, Marshall

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

This case presents serious questions concerning the role of the Fourth Amendment in the confrontation on the street between the citizen and the policeman investigating suspicious circumstances.

Petitioner Terry was convicted of carrying a concealed weapon and sentenced to the statutorily prescribed term of one to three years in the penitentiary. Following the denial of a pretrial motion to suppress, the prosecution introduced in evidence two revolvers and a number of bullets seized from Terry and a codefendant, Richard Chilton, by Cleveland Police Detective Martin McFadden. At the hearing on the motion to suppress this evidence, Officer McFadden testified that while he was patrolling in plain clothes in downtown Cleveland at approximately 2:30 in the afternoon of October 31, 1963, his attention was attracted by two men, Chilton and Terry, standing on the corner of Huron Road and Euclid Avenue. He had never seen the two men before, and he was unable to say precisely what first drew his eye to them. However, he testified that he had been a policeman for 39 years and a detective for 35 and that he had been assigned to patrol this vicinity of downtown Cleveland for shoplifters and pickpockets for 30 years. He explained that he had developed routine habits of observation over the years and that he would "stand and watch people or walk and watch people at many intervals of the day." He added: "Now, in this case when I looked over they didn't look right to me at the time."

His interest aroused, Officer McFadden took up a post of observation in the entrance to a store 300 to 400 feet away from the two men. "I get more purpose to watch them when I seen their movements," he testified. He saw one of the men leave the other one and walk southwest on Huron Road, past some stores. The man paused for a moment and looked in a store window, then walked on a short distance, turned

¹⁷ A Great Original's Lives At The Law by Newsweek Staff On 7/7/91 available at <http://www.newsweek.com/great-originals-lives-law-204982>

around and walked back toward the corner, pausing once again to look in the same store window. He rejoined his companion at the corner, and the two conferred briefly. Then the second man went through the same series of motions, strolling down Huron Road, looking in the same window, walking on a short distance, turning back, peering in the store window again, and returning to confer with the first man at the corner. The two men repeated this ritual alternately between five and six times apiece - in all, roughly a dozen trips. At one point, while the two were standing together on the corner, a third man approached them and engaged them briefly in conversation. This man then left the two others and walked west on Euclid Avenue. Chilton and Terry resumed their measured pacing, peering, and conferring. After this had gone on for 10 to 12 minutes, the two men walked off together, heading west on Euclid Avenue, following the path taken earlier by the third man.

By this time Officer McFadden had become thoroughly suspicious. He testified that after observing their elaborately casual and oft-repeated reconnaissance of the store window on Huron Road, he suspected the two men of "casing a job, a stick-up," and that he considered it his duty as a police officer to investigate further. He added that he feared "they may have a gun." Thus, Officer McFadden followed Chilton and Terry and saw them stop in front of Zucker's store to talk to the same man who had conferred with them earlier on the street corner. Deciding that the situation was ripe for direct action, Officer McFadden approached the three men, identified himself as a police officer and asked for their names. At this point his knowledge was confined to what he had observed. He was not acquainted with any of the three men by name or by sight, and he had received no information concerning them from any other source. When the men "mumbled something" in response to his inquiries, Officer McFadden grabbed petitioner Terry, spun him around so that they were facing the other two, with Terry between McFadden and the others, and patted down the outside of his clothing. In the left breast pocket of Terry's overcoat Officer McFadden felt a pistol. He reached inside the overcoat pocket, but was unable to remove the gun. At this point, keeping Terry between himself and the others, the officer ordered all three men to enter Zucker's store. As they went in, he removed Terry's overcoat completely, removed a .38-caliber revolver from the pocket and ordered all three men to face the wall with their hands raised. Officer McFadden proceeded to pat down the outer clothing of Chilton and the third man, Katz. He discovered another revolver in the outer pocket of Chilton's overcoat, but no weapons were found on Katz. The officer testified that he only patted the men down to see whether they had weapons, and that he did not put his hands beneath the outer garments of either Terry or Chilton until he felt their guns. So far as appears from the record, he never placed his hands beneath Katz' outer garments. Officer McFadden seized Chilton's gun, asked the proprietor of the store to call a police wagon, and took all three men to the station, where Chilton and Terry were formally charged with carrying concealed weapons.

On the motion to suppress the guns the prosecution took the position that they had been seized following a search incident to a lawful arrest. The trial court rejected this theory, stating that it "would be stretching the facts beyond reasonable comprehension" to find that Officer McFadden had had probable cause to arrest the men before he patted them down for weapons. However, the court denied the defendants' motion on the ground that Officer McFadden, on the basis of his experience, "had reasonable cause to believe . . . that the defendants were conducting themselves suspiciously, and some interrogation should be made

of their action." Purely for his own protection, the court held, the officer had the right to pat down the outer clothing of these men, who he had reasonable cause to believe might be armed. The court distinguished between an investigatory "stop" and an arrest, and between a "frisk" of the outer clothing for weapons and a full-blown search for evidence of crime. The frisk, it held, was essential to the proper performance of the officer's investigatory duties, for without it "the answer to the police officer may be a bullet, and a loaded pistol discovered during the frisk is admissible."

After the court denied their motion to suppress, Chilton and Terry waived jury trial and pleaded not guilty. The court adjudged them guilty, and the Court of Appeals for the Eighth Judicial District, Cuyahoga County, affirmed. *State v. Terry*, 5 Ohio App. 2d 122, 214 N. E. 2d 114 (1966). The Supreme Court of Ohio dismissed their appeal on the ground that no "substantial constitutional question" was involved. We granted certiorari, 387 U.S. 929 (1967), to determine whether the admission of the revolvers in evidence violated petitioner's rights under the Fourth Amendment, made applicable to the States by the Fourteenth. *Mapp v. Ohio*, 367 U.S. 643 (1961). We affirm the conviction.

I.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" This inestimable right of personal security belongs as much to the citizen on the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs. For, as this Court has always recognized,

"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." [citation omitted].

We have recently held that "the Fourth Amendment protects people, not places," *Katz v. United States*, 389 U.S. 347, 351 (1967), and wherever an individual may harbor a reasonable "expectation of privacy,"... he is entitled to be free from unreasonable governmental intrusion. Of course, the specific content and incidents of this right must be shaped by the context in which it is asserted. For "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." [citations omitted] The question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure.

We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity - issues which have never before been squarely presented to this Court. Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to "stop and frisk" - as it is sometimes euphemistically termed - suspicious persons.

On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. For this purpose it is urged that distinctions should be

made between a "stop" and an "arrest" (or a "seizure" of a person), and between a "frisk" and a "search." Thus, it is argued, the police should be allowed to "stop" a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion that the person may be armed, the police should have the power to "frisk" him for weapons. If the "stop" and the "frisk" give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal "arrest," and a full incident "search" of the person. This scheme is justified in part upon the notion that a "stop" and a "frisk" amount to a mere "minor inconvenience and petty indignity," which can properly be imposed upon the...citizen in the interest of effective law enforcement on the basis of a police officer's suspicion.

On the other side the argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence of the Fourth Amendment. It is contended with some force that there is not - and cannot be - a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest based upon probable cause to make such an arrest. The heart of the Fourth Amendment, the argument runs, is a severe requirement of specific justification for any intrusion upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State the commands of the Constitution. Acquiescence by the courts in the compulsion inherent ...in the field interrogation practices at issue here, it is urged, would constitute an abdication of judicial control over, and indeed an encouragement of, substantial interference with liberty and personal security by police officers whose judgment is necessarily colored by their primary involvement in "the often competitive enterprise of ferreting out crime." [citation omitted]. This, it is argued, can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities.

In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street. The State has characterized the issue here as "the right of a police officer . . . to make an on-the-street stop, interrogate and pat down for weapons (known in street vernacular as 'stop and frisk')." But this is only partly accurate. For the issue is not the abstract propriety of the police conduct, but the admissibility against petitioner of the evidence uncovered by the search and seizure. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct. See *Weeks v. United States*, 232 U.S. 383, 391 -393 (1914). Thus its major thrust is a deterrent one, see *Linkletter v. Walker*, 381 U.S. 618, 629 -635 (1965), and experience has taught that it is the only effective deterrent to police misconduct in the criminal context, and that without it the constitutional guarantee against unreasonable searches and seizures would be a mere "form of words." *Mapp v. Ohio*, 367 U.S. 643, 655 (1961). The rule also serves another vital function - "the imperative of judicial integrity." *Elkins v. United States*, 364 U.S. 206, 222 (1960). Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. ...

The exclusionary rule has its limitations ... as a tool of judicial control. It cannot properly be invoked to exclude the products of legitimate police investigative techniques on the ground that much conduct which is closely similar involves unwarranted intrusions upon constitutional protections. Moreover, in some contexts the rule is ineffective as a deterrent. Street encounters between citizens and police officers are incredibly rich in diversity. They range from wholly friendly exchanges of pleasantries or mutually useful information to hostile confrontations of armed men involving arrests, or injuries, or loss of life. Moreover, hostile confrontations are not all of a piece. Some of them begin in a friendly enough manner, only to take a different turn upon the injection of some unexpected element into the conversation. Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime. Doubtless some police "field interrogation" conduct violates the Fourth Amendment. But a stern refusal by this Court to condone such activity does not necessarily render it responsive to the exclusionary rule. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

Proper adjudication of cases in which the exclusionary rule is invoked demands a constant awareness of these limitations. The wholesale harassment by certain elements of the police community, of which minority groups, particularly Negroes, frequently complain, will not be stopped by the exclusion of any evidence from any criminal trial. Yet a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime. ...

Having thus roughly sketched the perimeters of the constitutional debate over the limits on police investigative conduct in general and the background against which this case presents itself, we turn our attention to the quite narrow question posed by the facts before us: whether it is always unreasonable for a policeman to seize a person and subject him to a limited search for weapons unless there is probable cause for an arrest. Given the narrowness of this question, we have no occasion to canvass in detail the constitutional limitations upon the scope of a policeman's power when he confronts a citizen without probable cause to arrest him.

II.

Our first task is to establish at what point in this encounter the Fourth Amendment becomes relevant. That is, we must decide whether and when Officer McFadden "seized" Terry and whether and when he conducted a "search." ... It is quite plain that the Fourth Amendment governs "seizures" of the person which do not eventuate in a trip to the station house and prosecution for crime - "arrests" in traditional terminology. It must be recognized that whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person. ... Moreover, it is simply fantastic to urge that such a procedure [392 U.S. 1, 17] performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised, is a "petty indignity." It is a serious intrusion upon the sanctity

of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.

The danger in the logic which proceeds upon distinctions between a "stop" and an "arrest," or "seizure" of the person, and between a "frisk" and a "search" is two-fold. It seeks to isolate from constitutional scrutiny the initial stages of the contact between the policeman and the citizen. And by suggesting a rigid all-or-nothing model of justification and regulation under the Amendment, it obscures the utility of limitations upon the scope, as well as the initiation, of police action as a means of constitutional regulation. This Court has held ... in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope. [citations omitted]

The distinctions of classical "stop-and-frisk" theory thus serve to divert attention from the central inquiry under the Fourth Amendment - the reasonableness in all the circumstances of the particular governmental invasion of a citizen's personal security. "Search" and "seizure" are not talismans. We therefore reject the notions that the Fourth Amendment does not come into play at all as a limitation upon police conduct if the officers stop short of something called a "technical arrest" or a "full-blown search."

In this case there can be no question, then, that Officer McFadden "seized" petitioner and subjected him to a "search" when he took hold of him and patted down the outer surfaces of his clothing. We must decide whether at that point it was reasonable for Officer McFadden to have interfered with petitioner's personal security as he did. And in determining whether the seizure and search were "unreasonable" our inquiry is a dual one - whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.

III.

If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether "probable cause" existed to justify the search and seizure which took place. However, that is not the case. We do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure, ... or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. But we deal here with an entire rubric of police conduct - necessarily swift action predicated upon the on-the-spot observations of the officer on the beat - which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures.

... In order to assess the reasonableness of Officer McFadden's conduct as a general proposition, it is necessary "first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen," for there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." And in justifying the particular intrusion the police officer must be able to point to

specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion. The scheme of the Fourth Amendment becomes meaningful only when it is assured that at some point the conduct of those charged with enforcing the laws can be subjected to the more detached, neutral scrutiny of a judge who must evaluate the reasonableness of a particular search or seizure in light of the particular circumstances. And in making that assessment it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search "warrant a man of reasonable caution in the belief" that the action taken was appropriate? [citations omitted] Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction. See, e. g., *Beck v. Ohio*, supra; *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959). And simple "'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police."

Applying these principles to this case, we consider first the nature and extent of the governmental interests involved. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. It was this legitimate investigative function Officer McFadden was discharging when he decided to approach petitioner and his companions. He had observed Terry, Chilton, and Katz go through a series of acts, each of them perhaps innocent in itself, but which taken together warranted further investigation. There is nothing unusual in two men standing together on a street corner, perhaps waiting for someone. Nor is there anything suspicious about people in such circumstances strolling up and down the street, singly or in pairs. Store windows, moreover, are made to be looked in. But the story is quite different where, as here, two men hover about a street corner for an extended period of time, at the end of which it becomes apparent that they are not waiting for anyone or anything; where these men pace alternately along an identical route, pausing to stare in the same store window roughly times; where each completion of this route is followed immediately by a conference between the two men on the corner; where they are joined in one of these conferences by a third man who leaves swiftly; and where the two men finally follow the third and rejoin him a couple of blocks away. It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.

The crux of this case, however, is not the propriety of Officer McFadden's taking steps to investigate petitioner's suspicious behavior, but rather, whether there was justification for McFadden's invasion of Terry's personal security by searching him for weapons in the course of that investigation. We are now concerned with more than the governmental interest in investigating crime; in addition, there is the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him. Certainly it would be unreasonable to require that police officers take unnecessary risks in the performance of their

duties. American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded. Virtually all of these deaths and a substantial portion of the injuries are inflicted with guns and knives.

In view of these facts, we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.

We must still consider, however, the nature and quality of the intrusion on individual rights which must be accepted if police officers are to be conceded the right to search for weapons in situations where probable cause to arrest for crime is lacking. Even a limited search of the outer clothing for weapons constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience. Petitioner contends that such an intrusion is permissible only incident to a lawful arrest, either for a crime involving the possession of weapons or for a crime the commission of which led the officer to investigate in the first place. However, this argument must be closely examined.

Petitioner does not argue that a police officer should refrain from making any investigation of suspicious circumstances until such time as he has probable cause to make an arrest; nor does he deny that police officers in properly discharging their investigative function may find themselves confronting persons who might well be armed and dangerous. Moreover, he does not say that an officer is always unjustified in searching a suspect to discover weapons. Rather, he says it is unreasonable for the policeman to take that step until such time as the situation evolves to a point where there is probable cause to make an arrest. When that point has been reached, petitioner would concede the officer's right to conduct a search of the suspect for weapons, fruits or instrumentalities of the crime, or "mere" evidence, incident to the arrest.

There are two weaknesses in this line of reasoning, however. First, it fails to take account of traditional limitations upon the scope of searches, and thus recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, *Preston v. United States*, 376 U.S. 364, 367 (1964), is also justified on other grounds, *ibid.*, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a "full" search, even though it remains a serious intrusion.

A second, and related, objection to petitioner's argument is that it assumes that the law of arrest has already worked out the balance between the particular interests involved here - the neutralization of

danger to the policeman in the investigative circumstance and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. ...

Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger. ... And in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or "hunch," but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.

IV.

We must now examine the conduct of Officer McFadden in this case to determine whether his search and seizure of petitioner were reasonable, both at their inception and as conducted. ...

The manner in which the seizure and search were conducted is, of course, as vital a part of the inquiry as whether they were warranted at all. The Fourth Amendment proceeds as much by limitations upon the scope of governmental action as by imposing preconditions upon its initiation. ... The entire deterrent purpose of the rule excluding evidence seized in violation of the Fourth Amendment rests on the assumption that "limitations upon the fruit to be gathered tend to limit the quest itself." [citations omitted] Thus, evidence may not be introduced if it was discovered by means of a seizure and search which were not reasonably related in scope to the justification for their initiation. ...

... The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.

The scope of the search in this case presents no serious problem in light of these standards. Officer McFadden patted down the outer clothing of petitioner and his two companions. He did not place his hands in their pockets or under the outer surface of their garments until he had felt weapons, and then he merely reached for and removed the guns. He never did invade Katz' person beyond the outer surfaces of his clothes, since he discovered nothing in his pat-down which might have been a weapon. Officer McFadden confined his search strictly to what was minimally necessary to learn whether the men were armed and to disarm them once he discovered the weapons. He did not conduct a general exploratory search for whatever evidence of criminal activity he might find.

V.

We conclude that the revolver seized from Terry was properly admitted in evidence against him. ...Each case of this sort will, of course, have to be decided on its own facts. We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him. Such a search is a reasonable search under the Fourth Amendment, and any weapons seized may properly be introduced in evidence against the person from whom they were taken. Affirmed.

Furman v. Georgia
408 U.S. 238 (1972)

Argued January 17, 1972

Decided June 29, 1972*

Syllabus

Imposition and carrying out of death penalty in these cases held to constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments.

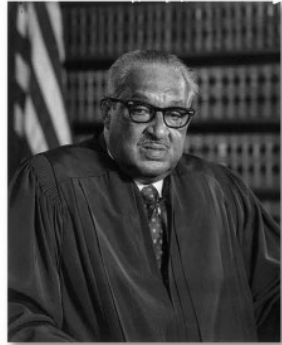
PER CURIAM.

Petitioner in No. 69-5003 was convicted of murder in Georgia, and was sentenced to death pursuant to Ga.Code Ann. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S.E.2d 628 (1969). Petitioner in No. 69-5030 was convicted of rape in Georgia, and was sentenced to death pursuant to Ga.Code Ann. § 26-1302 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 790, 171 S.D.2d 501 (1969). Petitioner in No. 69-5031 was convicted of rape in Texas, and was sentenced to death pursuant to Tex.Penal Code, Art. 1189 (1961). 447 S.W.2d 932 (Ct.Crim.App. 1969). Certiorari was granted limited to the following question:

"Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"

Justice Thurgood Marshall

*"In recognizing
the humanity of
our fellow
beings, we pay
ourselves the
highest tribute."*



The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.

So ordered.

...MR. JUSTICE MARSHALL, concurring.

These three cases present the question whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.

Furman was convicted of murder for shooting the father of five children when he discovered that Furman had broken into his home early one morning. [Furman was also convicted in cases that] involve state convictions for forcible rape. Jackson was found guilty of rape during the course of a robbery in the victim's home. The rape was accomplished as he held the pointed ends of scissors at the victim's throat. Branch also was convicted of a rape committed in the victim's home. No weapon was utilized, but physical force and threats of physical force were employed.

The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized. But we are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed on each of the petitioners and to determine whether or not it violates the Eighth Amendment. The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is "a punishment no longer consistent with our own self-respect" and, therefore, violative of the Eighth Amendment.

The elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint. Hence, we must proceed with caution to answer the question presented. By first examining the historical derivation of the Eighth Amendment and the construction given it in the past by this Court, and then exploring the history and attributes of capital punishment in this country, we can answer the question presented with objectivity and a proper measure of self-restraint.

Candor is critical to such an inquiry. All relevant material must be marshaled and sorted and forthrightly examined. We must not only be precise as to the standards of judgment that we are utilizing, but exacting in examining the relevant material in light of those standards.

Candor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution. While this fact cannot affect our ultimate decision, it necessitates that the decision be free from any possibility of error.

I

The Eighth Amendment's ban against cruel and unusual punishments derives from English law. In 1583, John Whitgift, Archbishop of Canterbury, turned the High Commission into a permanent ecclesiastical court, and the Commission began to use torture to extract confessions from persons suspected of various offenses. Sir Robert Beale protested that cruel and barbarous torture violated Magna Carta, but his protests were made in vain.

Cruel punishments were not confined to those accused of crimes, but were notoriously applied with even greater relish to those who were convicted. Blackstone described in ghastly detail the myriad of inhumane forms of punishment imposed on persons found guilty of any of a large number of offenses. Death, of course, was the usual result.

...This legislative history has led at least one legal historian to conclude "that the cruel and unusual punishments clause of the Bill of Rights of 1689 was, first, an objection to the imposition of punishments that were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties,"

Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that, in borrowing the language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments.

The precise language used in the Eighth Amendment first appeared in America on June 12, 1776, in Virginia's "Declaration of Rights," § 9 of which read: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." This language was drawn verbatim from the English Bill of Rights of 1689. Other States adopted similar clauses, and there is evidence in the debates of the various state conventions that were called upon to ratify the Constitution of great concern for the omission of any prohibition against torture or other cruel punishments.

The Virginia Convention offers some clues as to what the Founding Fathers had in mind in prohibiting cruel and unusual punishments. At one point, George Mason advocated the adoption of a Bill of Rights, and Patrick Henry concurred, stating:

"By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? . . . Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence -- petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our bill of rights. -- 'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to prescribe trials and define punishments without this control? Will they find sentiments there

similar to this bill of rights? You let them loose; you do more -- you depart from the genius of your country. . . . "

"In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors. -- That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany -- of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone."

Henry's statement indicates that he wished to insure that "relentless severity" would be prohibited by the Constitution. Other expressions with respect to the proposed Eighth Amendment by Members of the First Congress indicate that they shared Henry's view of the need for and purpose of the Cruel and Unusual Punishments Clause.

Thus, the history of the clause clearly establishes that it was intended to prohibit cruel punishments. We must now turn to the case law to discover the manner in which courts have given meaning to the term "cruel."

II

This Court did not squarely face the task of interpreting the cruel and unusual punishments language for the first time until *Wilkerson v. Utah*, 9 U. S. 130 (1879), although the language received a cursory examination in several prior cases. In *Wilkerson*, the Court unanimously upheld a sentence of public execution by shooting imposed pursuant to a conviction for premeditated murder. In his opinion for the Court, Mr. Justice Clifford wrote:

"Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, ... and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution."

Thus, the Court found that unnecessary cruelty was no more permissible than torture. To determine whether the punishment under attack was unnecessarily cruel, the Court examined the history of the Utah Territory and the then-current writings on capital punishment, and compared this Nation's practices with those of other countries. It is apparent that the Court felt it could not dispose of the question simply by referring to traditional practices; instead, it felt bound to examine developing thought.

Eleven years passed before the Court again faced a challenge to a specific punishment under the Eighth Amendment. In the case of *In re Kemmler*, 136 U. S. 436 (1890), Chief Justice Fuller wrote an opinion

for a unanimous Court upholding electrocution as a permissible mode of punishment. While the Court ostensibly held that the Eighth Amendment did not apply to the States, it is very apparent that the nature of the punishment involved was examined under the Due Process Clause of the Fourteenth Amendment. The Court held that the punishment was not objectionable. Today, *Kemmler* stands primarily for the proposition that a punishment is not necessarily unconstitutional simply because it is unusual, so long as the legislature has a humane purpose in selecting it.

Two years later, in *O'Neil v. Vermont*, 144 U. S. 323 (1892), the Court reaffirmed that the Eighth Amendment was not applicable to the States. O'Neil was found guilty on 307 counts of selling liquor in violation of Vermont law. A fine of \$6,140 (\$20 for each offense) and the costs of prosecution (\$497.96) were imposed. O'Neil was committed to prison until the fine and the costs were paid, and the court provided that, if they were not paid before a specified date, O'Neil was to be confined in the house of corrections for 19,914 days (approximately 54 years) at hard labor. Three Justices -- Field, Harlan, and Brewer -- dissented. They maintained not only that the Cruel and Unusual Punishments Clause was applicable to the States, but that, in O'Neil's case, it had been violated. . . ."

...[I]n the landmark case of *Weems v. United States*, 217 U. S. 349 (1910), Weems, an officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was convicted of falsifying a "public and official document." He was sentenced to 15 years' incarceration at hard labor with chains on his ankles, to an unusual loss of his civil rights, and to perpetual surveillance. Called upon to determine whether this was a cruel and unusual punishment, the Court found that it was. The Court emphasized that the Constitution was not an "ephemeral" enactment, or one "designed to meet passing occasions." Recognizing that "[t]ime works changes, [and] brings into existence new conditions and purposes," the Court commented that, "[i]n the application of a constitution . . . our contemplation cannot be only of what has been, but of what may be."

In striking down the penalty imposed on Weems, the Court examined the punishment in relation to the offense, compared the punishment to those inflicted for other crimes and to those imposed in other jurisdictions, and concluded that the punishment was excessive. ... *Weems* is a landmark case because it represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. The Court made it plain beyond any reasonable doubt that excessive punishments were as objectionable as those that were inherently cruel. ...

...[In] *Louisiana ex rel. Francis v. Resweber*, 329 U. S. 459 (1947), Francis had been convicted of murder and sentenced to be electrocuted. The first time the current passed through him, there was a mechanical failure, and he did not die. Thereafter, Francis sought to prevent a second electrocution on the ground that it would be a cruel and unusual punishment. Eight members of the Court assumed the applicability of the Eighth Amendment to the States. The Court was virtually unanimous in agreeing that "[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain," but split 5-4 on whether Francis would, under the circumstances, be forced to undergo any excessive pain. Five members of the Court treated the case like *In re Kemmler*, and held that the legislature adopted electrocution for a humane purpose, and that its will should not be thwarted because, in its desire to

reduce pain and suffering in most cases, it may have inadvertently increased suffering in one particular case. ...

Trop v. Dulles, 356 U. S. 86 (1958), [was] the next major cruel and unusual punishment case in this Court. *Trop*, a native-born American, was declared to have lost his citizenship by reason of a conviction by court-martial for wartime desertion. Writing for himself and Justices Black, DOUGLAS, and Whittaker, Chief Justice Warren concluded that loss of citizenship amounted to a cruel and unusual punishment that violated the Eighth Amendment.

Emphasizing the flexibility inherent in the words "cruel and unusual," the Chief Justice wrote that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." His approach to the problem was that utilized by the Court in *Weems*: he scrutinized the severity of the penalty in relation to the offense, examined the practices of other civilized nations of the world, and concluded that involuntary statelessness was an excessive and, therefore, an unconstitutional punishment. Justice Frankfurter, dissenting, urged that expatriation was not punishment, and that even if it were, it was not excessive. While he criticized the conclusion arrived at by the Chief Justice, his approach to the Eighth Amendment question was identical.

[I]n *Robinson v. California*, 370 U. S. 660 (1962), [the court found] that a sentence of 90 days' imprisonment for violation of a California statute making it a crime to "be addicted to the use of narcotics" was cruel and unusual. ...

Several principles emerge from these prior cases and serve as a beacon to an enlightened decision in the instant cases.

III

Perhaps the most important principle in analyzing "cruel and unusual" punishment questions is one that is reiterated again and again in the prior opinions of the Court: i.e., the cruel and unusual language "must draw its meaning from the evolving standard of decency that mark the progress of a maturing society." Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.

... There is no holding directly in point, and the very nature of the Eighth Amendment would dictate that, unless a very recent decision existed, *stare decisis* would bow to changing values, and the question of the constitutionality of capital punishment at a given moment in history would remain open.

Faced with an open question, we must establish our standards for decision. The decisions discussed in the previous section imply that a punishment may be deemed cruel and unusual for any one of four distinct reasons.

First, there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them -- e.g., use of the rack, the thumbscrew, or other modes of torture.

... Regardless of public sentiment with respect to imposition of one of these punishments in a particular case or at any one moment in history, the Constitution prohibits it. These are punishments that have been barred since the adoption of the Bill of Rights.

Second, there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense. ... If these punishments are intended to serve a humane purpose, they may be constitutionally permissible. In light of the meager history that does exist, one would suppose that an innovative punishment would probably be constitutional if no more cruel than that punishment which it superseded. We need not decide this question here, however, for capital punishment is certainly not a recent phenomenon.

Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. ... these punishments are unconstitutional even though popular sentiment may favor them. It should also be noted that the "cruel and unusual" language of the Eighth Amendment immediately follows language that prohibits excessive bail and excessive fines. The entire thrust of the Eighth Amendment is, in short, against "that which is excessive."

Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it.

It is immediately obvious, then, that since capital punishment is not a recent phenomenon, if it violates the Constitution, it does so because it is excessive or unnecessary, or because it is abhorrent to currently existing moral values.

We must proceed to the history of capital punishment in the United States.

IV

Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization. Its precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members. Thus, infliction of death as a penalty for objectionable conduct appears to have its beginnings in private vengeance.

As individuals gradually ceded their personal prerogatives to a sovereign power, the sovereign accepted the authority to punish wrongdoing as part of its "divine right" to rule. Individual vengeance gave way to the vengeance of the state, and capital punishment became a public function. Capital punishment worked its way into the laws of various countries, and was inflicted in a variety of macabre and horrific ways.

...By 1500, English law recognized eight major capital crimes: treason, petty treason (killing of husband by his wife), murder, larceny, robbery, burglary, rape, and arson. Tudor and Stuart kings added many more crimes to the list of those punishable by death, and, by 1688, there were nearly 50. George II (1727-1760) added nearly 36 more, and George III (1760-1820) increased the number by 60.

By shortly after 1800, capital offenses numbered more than 200....

Capital punishment was not as common a penalty in the American Colonies. "The Capitall Lawes of New England," dating from 1636, were drawn by the Massachusetts Bay Colony, and are the first written expression of capital offenses known to exist in this country. These laws make the following crimes capital offenses: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion. Each crime is accompanied by a reference to the Old Testament to indicate its source. By the 18th century, the list of crimes became much less theocratic and much more secular. In the average colony, there were 12 capital crimes. This was far fewer than existed in England, and part of the reason was that there was a scarcity of labor in the Colonies. Still, there were many executions, because "[w]ith county jails inadequate and insecure, the criminal population seemed best controlled by death, mutilation, and fines."

Even in the 17th century, there was some opposition to capital punishment in some of the colonies. In his "Great Act" of 1682, William Penn prescribed death only for premeditated murder and treason, although his reform was not long-lived.

In 1776 the Philadelphia Society for Relieving Distressed Prisoners organized, and it was followed 11 years later by the Philadelphia Society for Alleviating the Miseries of Public Prisons. These groups pressured for reform of all penal laws, including capital offenses. ...In 1793, William Bradford, the Attorney General of Pennsylvania and later Attorney General of the United States, conducted "An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania." He concluded that it was doubtful whether capital punishment was at all necessary, and that, until more information could be obtained, it should be immediately eliminated for all offenses except high treason and murder.

...During the 1830's, there was a rising tide of sentiment against capital punishment. ...Anti-capital-punishment feeling grew in the 1840's as the literature of the period pointed out the agony of the condemned man and expressed the philosophy that repentance atoned for the worst crimes, and that true repentance derived not from fear, but from harmony with nature.

But the Civil War halted much of the abolition furor. One historian has said that, "[a]fter the Civil War, men's finer sensibilities, which had once been revolted by the execution of a fellow being, seemed hardened and blunted."

...One great success of the abolitionist movement in the period from 1830-1900 was almost complete elimination of mandatory capital punishment. Before the legislatures formally gave juries discretion to refrain from imposing the death penalty, the phenomenon of "jury nullification," in which juries refused to convict in cases in which they believed that death was an inappropriate penalty, was experienced. ...

By 1917, 12 States had become abolitionist jurisdictions. But, under the nervous tension of World War I, four of these States reinstituted capital punishment and promising movements in other State came grinding to a halt. During the period following the First World War, the abolitionist movement never regained its momentum.

...The foregoing history demonstrates that capital punishment was carried from Europe to America but, once here, was tempered considerably. At times in our history, strong abolitionist movements have existed. But they have never been completely successful, as no more than one-quarter of the States of the Union have, at any one time, abolished the death penalty. They have had partial success, however, especially in reducing the number of capital crimes, replacing mandatory death sentences with jury discretion, and developing more humane methods of conducting executions.

This is where our historical foray leads. The question now to be faced is whether American society has reached a point where abolition is not dependent on a successful grass roots movement in particular jurisdictions, but is demanded by the Eighth Amendment. To answer this question, we must first examine whether or not the death penalty is today tantamount to excessive punishment.

V

In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional.

There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. These are considered seriatim below.

A. The concept of retribution is one of the most misunderstood in all of our criminal jurisprudence. The principal source of confusion derives from the fact that, in dealing with the concept, most people confuse the question "why do men in fact punish?" with the question "what justifies men in punishing?" Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law. Thus, it can correctly be said that breaking the law is the *sine qua non* of punishment, or, in other words, that we only tolerate punishment as it is imposed on one who deviates from the norm established by the criminal law.

The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.

Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

...It is plain that the view of the Weems Court was that punishment for the sake of retribution was not permissible under the Eighth Amendment. This is the only view that the Court could have taken if the "cruel and unusual" language were to be given any meaning. Retribution surely underlies the imposition

of some punishment on one who commits a criminal act. But the fact that some punishment may be imposed does not mean that any punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would, by definition, be acceptable means for designating society's moral approbation of a particular act. ...

... The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.

B. The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a deterrent to crime. While the contrary position has been argued, it is my firm opinion that the death penalty is a more severe sanction than life imprisonment. ...Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not. ...

It must be kept in mind, then, that the question to be considered is not simply whether capital punishment is deterrent, but whether it is a better deterrent than life imprisonment. There is no more complex problem than determining the deterrent efficacy of the death penalty.

"Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged." This is the nub of the problem, and it is exacerbated by the paucity of useful data. The United States is more fortunate than most countries, however, in that it has what are generally considered to be the world's most reliable statistics.

The two strongest arguments in favor of capital punishment as a deterrent are both logical hypotheses devoid of evidentiary support, but persuasive nonetheless. The first proposition was best stated by Sir James Stephen in 1864:

"No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove simply because they are, in themselves, more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. ..."

This hypothesis relates to the use of capital punishment as a deterrent for any crime. The second proposition is that, "life imprisonment is the maximum penalty for a crime such as murder, an offender who is serving a life sentence cannot then be deterred from murdering a fellow inmate or a prison officer."

This hypothesis advocates a limited deterrent effect under particular circumstances.

...Thorsten Sellin, one of the leading authorities on capital punishment, has urged that, if the death penalty deters prospective murderers, the following hypotheses should be true:

"(a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states that are as alike as possible in all other respects -- character of population, social and economic condition, etc. -- in order not

to introduce factors known to influence murder rates in a serious manner but present in only one of these states."

"(b) Murders should increase when the death penalty is abolished, and should decline when it is restored."

"(c) The deterrent effect should be greatest, and should therefore affect murder rates most powerfully, in those communities where the crime occurred and its consequences are most strongly brought home to the population."

"(d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty than in those without it." [Footnotes omitted.]

Sellin's evidence indicates that not one of these propositions is true. This evidence has its problems, however. One is that there are no accurate figures for capital murders; there are only figures on homicides, and they, of course, include noncapital killings. A second problem is that certain murders undoubtedly are misinterpreted as accidental deaths or suicides, and there is no way of estimating the number of such undetected crimes. A third problem is that not all homicides are reported. Despite these difficulties, most authorities have assumed that the proportion of capital murders in a State's or nation's homicide statistics remains reasonably constant, and that the homicide statistics are therefore useful.

Sellin's statistics demonstrate that there is no correlation between the murder rate and the presence or absence of the capital sanction. ...

Statistics also show that the deterrent effect of capital punishment is no greater in those communities where executions take place than in other communities. In fact, there is some evidence that imposition of capital punishment may actually encourage crime, rather than deter it. And, while police and law enforcement officers are the strongest advocates of capital punishment, the evidence is overwhelming that police are no safer in communities that retain the sanction than in those that have abolished it.

There is also a substantial body of data showing that the existence of the death penalty has virtually no effect on the homicide rate in prisons. Most of the persons sentenced to death are murderers, and murderers tend to be model prisoners.

In sum, the only support for the theory that capital punishment is an effective deterrent is found in the hypotheses with which we began and the occasional stories about a specific individual being deterred from doing a contemplated criminal act. These claims of specific deterrence are often spurious, however, and may be more than counterbalanced by the tendency of capital punishment to incite certain crimes.

...In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.

C. Much of what must be said about the death penalty as a device to prevent recidivism is obvious -- if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes, either in prison or upon their release. For the most part,

they are first offenders, and, when released from prison, they are known to become model citizens. ... In light of these facts, if capital punishment were justified purely on the basis of preventing recidivism, it would have to be considered to be excessive; no general need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases.

D. The three final purposes which may underlie utilization of a capital sanction -- encouraging guilty pleas and confessions, eugenics, and reducing state expenditures -- may be dealt with quickly. If the death penalty is used to encourage guilty pleas, and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional. ...

Moreover, to the extent that capital punishment is used to encourage confessions and guilty pleas, it is not being used for punishment purposes. A State that justifies capital punishment on its utility as part of the conviction process could not profess to rely on capital punishment as a deterrent. Such a State's system would be structured with twin goals only: obtaining guilty pleas and confessions and imposing imprisonment as the maximum sanction. Since life imprisonment is sufficient for bargaining purposes, the death penalty is excessive if used for the same purposes.

In light of the previous discussion on deterrence, any suggestions concerning the eugenic benefits of capital punishment are obviously meritless. ... there is not even any attempt made to discover which capital offenders are likely to be recidivists, let alone which are positively incurable. ... In addition, the "cruel and unusual" language would require that life imprisonment, treatment, and sterilization be inadequate for eugenic purposes. More importantly, this Nation has never formally professed eugenic goals, and the history of the world does not look kindly on them. If eugenics is one of our purposes, then the legislatures should say so forthrightly and design procedures to serve this goal. Until such time, I can only conclude, as has virtually everyone else who has looked at the problem, that capital punishment cannot be defended on the basis of any eugenic purposes.

As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive. Appeals are often automatic, and courts admittedly spend more time with death cases.

... When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.

E. There is but one conclusion that can be drawn from all of this -- i.e., the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment. ...

VI

In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history. ...

In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.

This is not to suggest that, with respect to this test of unconstitutionality, people are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens.

It has often been noted that American citizens know almost nothing about capital punishment. [Full] information would almost surely convince the average citizen that the death penalty was unwise, but a problem arises as to whether it would convince him that the penalty was morally reprehensible. ... The solution to the problem lies in the fact that no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories. This should not be surprising. It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people who have injected a sense of purpose into our penology. I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral, and therefore unconstitutional.

But, if this information needs supplementing, I believe that the following facts would serve to convince even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system. Each of these facts is considered briefly below.

Regarding discrimination, it has been said that

"[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group -- the man who, because he is without means, and is defended by a court-appointed attorney -- who becomes society's sacrificial lamb. . . . Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that, while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination.

... There is also overwhelming evidence that the death penalty is employed against men, and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women have received such favored treatment, since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.

It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated, and apathy soon becomes its mate, and we have today's situation.

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.

Proving one's innocence after a jury finding of guilt is almost impossible. ...No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed, but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law.

...Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone, capital punishment cannot stand.

VII

To arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey. The amount of information that we have assembled and sorted is enormous. Yet I firmly believe that we have not deviated in the slightest from the principles with which we began.

At a time in our history when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system.

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve "a major milestone in the long road up from barbarism"

and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

I concur in the judgments of the Court.



Side Bar: William Henry Furman had a sixth grade education and was “emotionally disturbed and mentally impaired when he was convicted of murdering a man during a home invasion in Savannah, Georgia. He was sentenced to death on September 26, 1968 after a one-day trial. Furman was paroled in 1984 after his sentence was overturned. He pled guilty to burglary in 2004 at the age of 64, and was sentenced to 20 years in prison. He was paroled in 2016.

MILLER v. CALIFORNIA
413 U.S. 15 (1973)

Argued: November 7, 1972

Decided: June 21, 1973

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

This is one of a group of "obscenity-pornography" cases being reviewed by the Court in a re-examination of standards enunciated in earlier cases involving what Mr. Justice Harlan called "the intractable obscenity problem."

Appellant conducted a mass mailing campaign to advertise the sale of illustrated books, euphemistically called "adult" material. After a jury trial, he was convicted of violating California Penal Code 311.2 (a), a misdemeanor, by knowingly distributing obscene matter, and the Appellate Department, Superior Court of California, County of Orange, summarily affirmed the judgment without opinion. Appellant's conviction was specifically based on his conduct in causing five unsolicited advertising brochures to be sent through the mail in an envelope addressed to a restaurant in Newport Beach, California. The envelope was opened by the manager of the restaurant and his mother. They had not requested the brochures; they complained to the police.

The brochures advertise four books entitled "Intercourse," "Man-Woman," "Sex Orgies Illustrated," and "An Illustrated History of Pornography," and a film entitled "Marital Intercourse." While the brochures contain some descriptive printed material, primarily they consist of pictures and drawings very explicitly depicting men and women in groups of two or more engaging in a variety of sexual activities, with genitals often prominently displayed.

I

This case involves the application of a State's criminal obscenity statute to a situation in which sexually explicit materials have been thrust by aggressive sales action upon unwilling recipients who had in no way indicated any desire to receive such materials. This Court has recognized that the States have a legitimate interest in prohibiting dissemination or exhibition of obscene material when the mode of dissemination carries with it a significant danger of offending the sensibilities of unwilling recipients or of exposure to juveniles. *[citations omitted]* It is in this context that we are called on to define the standards which must be used to identify obscene material that a State may regulate without infringing on the First Amendment as applicable to the States through the Fourteenth Amendment.

The dissent of MR. JUSTICE BRENNAN review the background of the obscenity problem, but since the Court now undertakes to formulate standards more concrete than those in the past, it is useful for us to focus on two of the landmark cases in the somewhat tortured history of the Court's obscenity decisions. In *Roth v. United States*, 354 U.S. 476 (1957), the Court sustained a conviction under a federal statute punishing the mailing of "obscene, lewd, lascivious or filthy . . ." materials. The key to that holding was the Court's rejection of the claim that obscene materials were protected by the First Amendment. Five Justices joined in the opinion stating:

"All ideas having even the slightest redeeming social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion - have the full protection of the [First Amendment] guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. . . ."

" . . . 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 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. . . .' [Emphasis by Court in *Roth* opinion.]

"We hold that obscenity is not within the area of constitutionally protected speech or press." 354 U.S., at 484 -485 (footnotes omitted).

Nine years later, in *Memoirs v. Massachusetts*, 383 U.S. 413 (1966), the Court veered sharply away from the *Roth* concept and, with only three Justices in the plurality opinion, articulated a new test of obscenity. The plurality held that under the *Roth* definition.

"as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *Id.*, at 418.

The sharpness of the break with Roth, represented by the third element of the Memoirs test and emphasized by MR. JUSTICE WHITE'S dissent, *id.*, at 460-462, was further underscored when the Memoirs plurality went on to state:

"The Supreme Judicial Court erred in holding that a book need not be 'unqualifiedly worthless before it can be deemed obscene.' A book cannot be proscribed unless it is found to be utterly without redeeming social value." *Id.*, at 419 (emphasis in original).

While Roth presumed "obscenity" to be "utterly without redeeming social importance," Memoirs required that to prove obscenity it must be affirmatively established that the material is "utterly without redeeming social value." Thus, even as they repeated the words of Roth, the Memoirs plurality produced a drastically altered test that called on the prosecution to prove a negative, i. e. that the material was "utterly without redeeming social value" - a burden virtually impossible to discharge under our criminal standards of proof. Such considerations caused Mr. Justice Harlan to wonder if the "utterly without redeeming social value" test had any meaning at all. ...

Apart from the initial formulation in the Roth case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material subject to regulation under the States' police power. ... This is not remarkable, for in the area of freedom of speech and press the courts must always remain sensitive to any infringement on genuinely serious literary, artistic, political, or scientific expression. This is an area in which there are few eternal verities.

The case we now review was tried on the theory that the California Penal Code 311 approximately incorporates the three-stage Memoirs test, *supra*. But now the Memoirs test has been abandoned as unworkable by its author, and no Member of the Court today supports the Memoirs formulation.

II

This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment. ... "The First and Fourteenth Amendments have never been treated as absolutes [footnote omitted]." ... We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. ... As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

The basic guidelines for the trier of fact must be: (a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. We do not adopt as a constitutional standard the "utterly without redeeming social value" test of *Memoirs v. Massachusetts*, that concept has never commanded the adherence of more than three Justices at one time. ... If a state law that regulates obscene material is thus limited, as written or construed, the First Amendment values applicable to the States through the Fourteenth Amendment

are adequately protected by the ultimate power of appellate courts to conduct an independent review of constitutional claims when necessary. [citations omitted]

We emphasize that it is not our function to propose regulatory schemes for the States. That must await their concrete legislative efforts. It is possible, however, to give a few plain examples of what a state statute could define for regulation under part (b) of the standard announced in this opinion, *supra*:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Sex and nudity may not be exploited without limit by films or pictures exhibited or sold in places of public accommodation any more than live sex and nudity can be exhibited or sold without limit in such public places. At a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value to merit First Amendment protection. ...For example, medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy. In resolving the inevitably sensitive questions of fact and law, we must continue to rely on the jury system, accompanied by the safeguards that judges, rules of evidence, presumption of innocence, and other protective features provide, as we do with rape, murder, and a host of other offenses against society and its individual members.

MR. JUSTICE BRENNAN, ... has abandoned his former position and now maintains that no formulation of this Court, the Congress, or the States can adequately distinguish obscene material unprotected by the First Amendment from protected expression, ...Paradoxically, MR. JUSTICE BRENNAN indicates that suppression of unprotected obscene material is permissible to avoid exposure to unconsenting adults, as in this case, and to juveniles, although he gives no indication of how the division between protected and nonprotected materials may be drawn with greater precision for these purposes than for regulation of commercial exposure to consenting adults only. Nor does he indicate where in the Constitution he finds the authority to distinguish between a willing "adult" one month past the state law age of majority and a willing "juvenile" one month younger.

Under the holdings announced today, no one will be subject to prosecution for the sale or exposure of obscene materials unless these materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed. We are satisfied that these specific prerequisites will provide fair notice to a dealer in such materials that his public and commercial activities may bring prosecution. If the inability to define regulated materials with ultimate, god-like precision altogether removes the power of the States or the Congress to regulate, then "hard core" pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike, as, indeed, MR. JUSTICE DOUGLAS contends. In this belief, however, MR. JUSTICE DOUGLAS now stands alone.

MR. JUSTICE BRENNAN also emphasizes "institutional stress" in justification of his change of view. Noting that "[t]he number of obscenity cases on our docket gives ample testimony to the burden that has been placed upon this Court," he quite rightly remarks that the examination of contested materials "is

hardly a source of edification to the members of this Court." He also notes, and we agree, that "uncertainty of the standards creates a continuing source of tension between state and federal courts" "The problem is . . . that one cannot say with certainty that material is obscene until at least five members of this Court, applying inevitably obscure standards, have pronounced it so."

It is certainly true that the absence, since *Roth*, of a single majority view of this Court as to proper standards for testing obscenity has placed a strain on both state and federal courts. But today, for the first time since *Roth* was decided in 1957, a majority of this Court has agreed on concrete guidelines to isolate "hard core" pornography from expression protected by the First Amendment. . . .

This may not be an easy road, free from difficulty. But no amount of "fatigue" should lead us to adopt a convenient "institutional" rationale - an absolutist, "anything goes" view of the First Amendment - because it will lighten our burdens. "Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees." . . . Nor should we remedy "tension between state and federal courts" by arbitrarily depriving the States of a power reserved to them under the Constitution, a power which they have enjoyed and exercised continuously from before the adoption of the First Amendment to this day. "Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' [citations omitted]"

III

Under a National Constitution, fundamental First Amendment limitations on the powers of the States do not vary from community to community, but this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the "prurient interest" or is "patently offensive." . . . It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. [citations omitted] People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity. As the Court made . . . , the primary concern with requiring a jury to apply the standard of "the average person, applying contemporary community standards" is to be certain that, so far as material is not aimed at a deviant group, it will be judged by its impact on an average person, rather than a particularly susceptible or sensitive person - or indeed a totally insensitive one. . . . We hold that the requirement that the jury evaluate the materials with reference to "contemporary standards of the State of California" serves this protective purpose and is constitutionally adequate.

IV

The dissenting Justices sound the alarm of repression. But, in our view, to equate the free and robust exchange of ideas and political debate with commercial exploitation of obscene material demeans the grand conception of the First Amendment and its high purposes in the historic struggle for freedom. . . .

... In sum, we (a) reaffirm the *Roth* holding that obscene material is not protected by the First Amendment; (b) hold that such material can be regulated by the States, subject to the specific safeguards enunciated above, without a showing that the material is "utterly without redeeming social value"; and (c) hold that obscenity is to be determined by applying "contemporary community standards," . . . not "national standards." The judgment of the Appellate Department of the Superior Court, Orange County, California, is vacated and the case remanded to that court for further proceedings not inconsistent with the First Amendment standards established by this opinion.

Vacated and remanded.

Mr. Justice Brennan, with whom Mr. Justice Stewart and Mr. Justice Marshall join, dissenting.

... In the case before us, appellant was convicted of distributing obscene matter in violation of California Penal Code 311.2, on the basis of evidence that he had caused to be mailed unsolicited brochures advertising various books and a movie. I need not now decide whether a statute might be drawn to impose, within the requirements of the First Amendment, criminal penalties for the precise conduct at issue here. For it is clear that under my dissent in *Paris Adult Theatre I*, the statute under which the prosecution was brought is unconstitutionally overbroad, and therefore invalid on its face. "[T]he transcendent value to all society of constitutionally protected expression is deemed to justify allowing 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" ... Since my view in *Paris Adult Theatre I* represents a substantial departure from the course of our prior decisions, and since the state courts have as yet had no opportunity to consider whether a "readily apparent construction suggests itself as a vehicle for rehabilitating the [statute] in a single prosecution," I would reverse the judgment of the Appellate Department of the Superior Court and remand the case for proceedings not inconsistent with this opinion.

SAN ANTONIO SCHOOL DISTRICT v. RODRIGUEZ, (1973)

Argued: October 12, 1972

Decided: March 21, 1973

MR. JUSTICE POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas. They brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The complaint was filed in the summer of 1968 and a three-judge court was impaneled in January 1969. In December 1971 the panel rendered its judgment in a per curiam opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented. For the reasons stated in this opinion, we reverse the decision of the District Court.

I

... The State, supplying funds from its general revenues, finances approximately 80% of the Program, and the school districts are responsible - as a unit - for providing the remaining 20%. The districts' share, known as the Local Fund Assignment, is apportioned among the school districts under a formula designed to reflect each district's relative taxpaying ability. The Assignment is first divided among Texas' 254 counties pursuant to a complicated economic index that takes into account the relative value of each

county's contribution to the State's total income from manufacturing, mining, and agricultural activities. It also considers each county's relative share of all payrolls paid within the State and, to a lesser extent, considers each county's share of all property in the State. Each county's assignment is then divided among its school districts on the basis of each district's share of assessable property within the county. The district, in turn, finances its share of the Assignment out of revenues from local property taxation.

The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children but that would not by itself exhaust any district's resources. Today every school district does impose a property tax from which it derives locally expendable funds in excess of the amount necessary to satisfy its Local Fund Assignment under the Foundation Program.

In the years since this program went into operation in 1949, expenditures for education - from state as well as local sources - have increased steadily. Between 1949 and 1967, expenditures increased approximately 500%. In the last decade alone the total public school budget rose from \$750 million to \$2.1 billion and these increases have been reflected in consistently rising per-pupil expenditures throughout the State. Teacher salaries, by far the largest item in any school's budget, have increased dramatically - the state-supported minimum salary for teachers possessing college degrees has risen from \$2,400 to \$6,000 over the last 20 years.

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools. The district is situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is \$5,960 - the lowest in the metropolitan area - and the median family income (\$4,686) is also the lowest. At an equalized tax rate of \$1.05 per \$100 of assessed property - the highest in the metropolitan area - the district contributed \$26 to the education of each child for the 1967-1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed \$222 per pupil for a state-local total of \$248. Federal funds added another \$108 for a total of \$356 per pupil.

Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly "Anglo," having only 18% Mexican-Americans and less than 1% Negroes. The assessed property value per pupil exceeds \$49,000, and the median family income is \$8,001. In 1967-1968 the local tax rate of \$.85 per \$100 of valuation yielded \$333 per pupil over and above its contribution to the Foundation Program. Coupled with the \$225 provided from that Program, the district was able to supply \$558 per student. Supplemented by a \$36 per-pupil grant from federal sources, Alamo Heights spent \$594 per pupil.

...Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications. If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification," that the State must demonstrate that its educational system has been structured with "precision," and is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic means" for effectuating its objectives, the Texas financing system and its counterpart in virtually every other State will not pass muster. The State candidly admits that "[n]o one familiar with the Texas system would contend that it has yet achieved perfection." Apart from its concession that educational financing in Texas has "defects" and "imperfections," the State defends the system's rationality with vigor and disputes the District Court's finding that it lacks a "reasonable basis."

This, then, establishes the framework for our analysis. We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. ...

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that "the grave significance of education both to the individual and to our society" cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. Mr. Justice Harlan, dissenting from the Court's application of strict scrutiny to a law impinging upon the right of interstate travel, admonished that "[v]irtually every state statute affects important rights." In his view, if the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected, we would have gone "far toward making this Court a 'super-legislature.'" Ibid. We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence. ...

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. ...

We need not dispute any of these propositions. The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice. That these may be desirable goals of a system of freedom of expression and of a representative form of government is not to be doubted. These are indeed goals to

be pursued by a people whose thoughts and beliefs are freed from governmental interference. But they are not values to be pursued by an implemented by judicial intrusion into otherwise legitimate state activities.

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. ... we stand on familiar ground when we continue to acknowledge that the Justices of this Court lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues. Yet, we are urged to direct the States either to alter drastically the present system or to throw out the property tax altogether in favor of some other form of taxation. No scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact. In such a complex arena in which no perfect alternatives exist, the Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

In addition to matters of fiscal policy, this case also involves the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels. Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." ... The very complexity of the problems of financing and managing a statewide public school system suggests that "there will be more than one constitutionally permissible method of solving them," and that, within the limits of rationality, "the legislature's efforts to tackle the problems" should be entitled to respect. ...

It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While "[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action," it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State.

The foregoing considerations buttress our conclusion that Texas' system of public school finance is an inappropriate candidate for strict judicial scrutiny. These same considerations are relevant to the determination whether that system, with its conceded imperfections, nevertheless bears some rational relationship to a legitimate state purpose. It is to this question that we next turn our attention.

...Reversed.

Mr. Justice Marshall, with whom Mr. Justice Douglas concurs, dissenting.

The Court today decides, in effect, that a State may constitutionally vary the quality of education which it offers its children in accordance with the amount of taxable wealth located in the school districts within which they reside. The majority's decision represents an abrupt departure from the mainstream of recent

state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth. More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.

In my judgment, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proved singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). I must therefore respectfully dissent.

I

The Court acknowledges that "substantial interdistrict disparities in school expenditures" exist in Texas and that these disparities are "largely attributable to differences in the amounts of money collected through local property taxation". But instead of closely examining the seriousness of these disparities and the invidiousness of the Texas financing scheme, the Court undertakes an elaborate exploration of the efforts Texas has purportedly made to close the gaps between its districts in terms of levels of district wealth and resulting educational funding. Yet, however praiseworthy Texas' equalizing efforts, the issue in this case is not whether Texas is doing its best to ameliorate the worst features of a discriminatory scheme but, rather, whether the scheme itself is in fact unconstitutionally discriminatory in the face of the Fourteenth Amendment's guarantee of equal protection of the laws. When the Texas financing scheme is taken as a whole, I do not think it can be doubted that it produces a discriminatory impact on substantial numbers of the school-age children of the State of Texas.

A

Funds to support public education in Texas are derived from three sources: local ad valorem property taxes; the Federal Government; and the state government. It is enlightening to consider these in order.

Under Texas law, the only mechanism provided the local school district for raising new, unencumbered revenues is the power to tax property located within its boundaries. At the same time, the Texas financing scheme effectively restricts the use of monies raised by local property taxation to the support of public education within the boundaries of the district in which they are raised, since any such taxes must be approved by a majority of the property-taxpaying voters of the district.

... The necessary effect of the Texas local property tax is, in short, to favor property-rich districts and to disfavor property-poor ones.

The seriously disparate consequences of the Texas local property tax, when that tax is considered alone, are amply illustrated by data presented to the District Court by appellees. These data included a detailed study of a sample of 110 Texas school districts for the 1967-1968 school year conducted by Professor Joel S. Berke of Syracuse University's Educational Finance Policy Institute. Among other things, this study revealed that the 10 richest districts examined, each of which had more than \$100,000 in taxable property per pupil, raised through local effort an average of \$610 per pupil, whereas the four poorest districts studied, each of which had less than \$10,000 in taxable property per pupil, were able to raise only an average of \$63 per pupil. And, as the Court effectively recognizes, ante, at 27, this correlation between the amount of taxable property per pupil and the amount of local revenues per pupil holds true for the 96 districts in between the richest and poorest districts.

...Without more, this state-imposed system of educational funding presents a serious picture of widely varying treatment of Texas school districts, and thereby of Texas schoolchildren, in terms of the amount of funds available for public education.

Nor are these funding variations corrected by the other aspects of the Texas financing scheme. The Federal Government provides funds sufficient to cover only some 10% of the total cost of public education in Texas. Furthermore, while these federal funds are not distributed in Texas solely on a per-pupil basis, appellants do not here contend that they are used in such a way as to ameliorate significantly the widely varying consequences for Texas school districts and schoolchildren of the local property tax element of the state financing scheme.

...Despite these facts, the majority continually emphasizes how much state aid has, in recent years, been given to property-poor Texas school districts. What the Court fails to emphasize is the cruel irony of how much more state aid is being given to property-rich Texas school districts on top of their already substantial local property tax revenues. Under any view, then, it is apparent that the state aid provided by the Foundation School Program fails to compensate for the large funding variations attributable to the local property tax element of the Texas financing scheme. And it is these stark differences in the treatment of Texas school districts and school children inherent in the Texas financing scheme, not the absolute amount of state aid provided to any particular school district, that are the crux of this case. There can, moreover, be no escaping the conclusion that the local property tax which is dependent upon taxable district property wealth is an essential feature of the Texas scheme for financing public education.

B

The appellants do not deny the disparities in educational funding caused by variations in taxable district property wealth. They do contend, however, that whatever the differences in per-pupil spending among Texas districts, there are no discriminatory consequences for the children of the disadvantaged districts. They recognize that what is at stake in this case is the quality of the public education provided Texas children in the districts in which they live. But appellants reject the suggestion that the quality of education in any particular district is determined by money - beyond some minimal level of funding which they believe to be assured every Texas district by the Minimum Foundation School Program. In their view, there is simply no denial of equal educational opportunity to any Texas schoolchildren as a result of the widely varying per-pupil spending power provided districts under the current financing scheme.

In my view, though, even an unadorned restatement of this contention is sufficient to reveal its absurdity. ... We sit, however, not to resolve disputes over educational theory but to enforce our Constitution. It is an inescapable fact that if one district has more funds available per pupil than another district, the former will have greater choice in educational planning than will the latter. In this regard, I believe the question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive. That a child forced to attend an underfunded school with poorer physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds - and thus with greater choice in educational planning - may nevertheless excel is to the credit of the child, not the State, cf. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938). Indeed, who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.

Hence, even before this Court recognized its duty to tear down the barriers of state-enforced racial segregation in public education, it acknowledged that inequality in the educational facilities provided to students may be discriminatory state action as contemplated by the Equal Protection Clause. As a basis for striking down state-enforced segregation of a law school, the Court in *Sweatt v. Painter*, 339 U.S. 629, 633 -634 (1950), stated:

"[W]e cannot find substantial equality in the educational opportunities offered white and Negro law students by the State. In terms of number of the faculty, variety of courses and opportunity for specialization, size of the student body, scope of the library, availability of law review and similar activities, the [whites-only] Law School is superior. . . . It is difficult to believe that one who had a free choice between these law schools would consider the question close."

... The consequences, in terms of objective educational input, of the variations in district funding caused by the Texas financing scheme are apparent from the data introduced before the District Court. For example, in 1968-1969, 100% of the teachers in the property-rich Alamo Heights School District had college degrees. By contrast, during the same school year only 80.02% of the teachers had college degrees in the property poor Edgewood Independent School District. Also, in 1968-1969, approximately 47% of the teachers in the Edgewood District were on emergency teaching permits, whereas only 11% of the teachers in Alamo Heights were on such permits. This is undoubtedly a reflection of the fact that the top of Edgewood's teacher salary scale was approximately 80% of Alamo Heights'. And, not surprisingly, the teacher-student ratio varies significantly between the two districts. In other words, as might be expected, a difference in the funds available to districts results in a difference in educational inputs available for a child's public education in Texas. For constitutional purposes, I believe this situation, which is directly attributable to the Texas financing scheme, raises a grave question of state-created discrimination in the provision of public education.

... Alternatively, the appellants and the majority may believe that the Equal Protection Clause cannot be offended by substantially unequal state treatment of persons who are similarly situated so long as the State provides everyone with some unspecified amount of education which evidently is "enough." The basis for such a novel view is far from clear. It is, of course, true that the Constitution does not require precise equality in the treatment of all persons. As Mr. Justice Frankfurter explained:

"The equality at which the 'equal protection' clause aims is not a disembodied equality. The Fourteenth Amendment enjoins 'the equal protection of the laws,' and laws are not abstract propositions. . . . The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." ...But this Court has never suggested that because some "adequate" level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that "all persons similarly circumstanced shall be treated alike."

...In my view, then, it is inequality - not some notion of gross inadequacy - of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle. Here, appellees have made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the schoolchildren of Texas. This discrimination is, in large measure, attributable to significant disparities in the taxable wealth of local Texas school districts. This is a sufficient showing to raise a substantial question of discriminatory state action in violation of the Equal Protection Clause.

C

Despite the evident discriminatory effect of the Texas financing scheme, both the appellants and the majority raise substantial questions concerning the precise character of the disadvantaged class in this case. The District Court concluded that the Texas financing scheme draws "distinction between groups of citizens depending upon the wealth of the district in which they live" and thus creates a disadvantaged class composed of persons living in property-poor districts. See 337 F. Supp., at 282. See also *id.*, at 281. In light of the data introduced before the District Court, the conclusion that the schoolchildren of property-poor districts constitute a sufficient class for our purposes seems indisputable to me.

Appellants contend, however, that in constitutional terms this case involves nothing more than discrimination against local school districts, not against individuals, since on its face the state scheme is concerned only with the provision of funds to local districts. The result of the Texas financing scheme, appellants suggest, is merely that some local districts have more available revenues for education; others have less. In that respect, they point out, the States have broad discretion in drawing reasonable distinctions between their political subdivisions. [citations omitted]

But this Court has consistently recognized that where there is in fact discrimination against individual interests, the constitutional guarantee of equal protection of the laws is not inapplicable simply because the discrimination is based upon some group characteristic such as geographic location. [citations omitted] Texas has chosen to provide free public education for all its citizens, and it has embodied that decision in its constitution. Yet, having established public education for its citizens, the State, as a direct consequence of the variations in local property wealth endemic to Texas' financing scheme, has provided some Texas schoolchildren with substantially less resources for their education than others. Thus, while on its face the Texas scheme may merely discriminate between local districts, the impact of that discrimination falls directly upon the children whose educational opportunity is dependent upon where they happen to live. Consequently, the District Court correctly concluded that the Texas financing scheme

discriminates, from a constitutional perspective, between schoolchildren on the basis of the amount of taxable property located within their local districts.

In my Brother STEWART'S view, however, such a description of the discrimination inherent in this case is apparently not sufficient, for it fails to define the "kind of objectively identifiable classes" that he evidently perceives to be necessary for a claim to be "cognizable under the Equal Protection Clause, ". He asserts that this is also the view of the majority, but he is unable to cite, nor have I been able to find, any portion of the Court's opinion which remotely suggests that there is no objectively identifiable or definable class in this case. In any event, if he means to suggest that an essential predicate to equal protection analysis is the precise identification of the particular individuals who compose the disadvantaged class, I fail to find the source from which he derives such a requirement. Certainly such precision is not analytically necessary. So long as the basis of the discrimination is clearly identified, it is possible to test it against the State's purpose for such discrimination - whatever the standard of equal protection analysis employed. This is clear from our decision only last Term in *Bullock v. Carter*, 405 U.S. 134 (1972), where the Court, in striking down Texas' primary filing fees as violative of equal protection, found no impediment to equal protection analysis in the fact that the members of the disadvantaged class could not be readily identified. The Court recognized that the filing-fee system tended "to deny some voters the opportunity to vote for a candidate of their choosing; at the same time it gives the affluent the power to place on the ballot their own names or the names of persons they favor." *Id.*, at 144. The Court also recognized that "[t]his disparity in voting power based on wealth cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause" *Ibid.* Nevertheless, it concluded that "we would ignore reality were we not to recognize that this system falls with unequal weight on voters . . . according to their economic status." *Ibid.* The nature of the classification in *Bullock* was clear, although the precise membership of the disadvantaged class was not. This was enough in *Bullock* for purposes of equal protection analysis. It is enough here.

It may be, though, that my Brother STEWART is not in fact demanding precise identification of the membership of the disadvantaged class for purposes of equal protection analysis, but is merely unable to discern with sufficient clarity the nature of the discrimination charged in this case. Indeed, the Court itself displays some uncertainty as to the exact nature of the discrimination and the resulting disadvantaged class alleged to exist in this case. It is, of course, essential to equal protection analysis to have a firm grasp upon the nature of the discrimination at issue. In fact, the absence of such a clear, articulable understanding of the nature of alleged discrimination in a particular instance may well suggest the absence of any real discrimination. But such is hardly the case here.

A number of theories of discrimination have, to be sure, been considered in the course of this litigation. Thus, the District Court found that in Texas the poor and minority group members tend to live in property-poor districts, suggesting discrimination on the basis of both personal wealth and race. The Court goes to great lengths to discredit the data upon which the District Court relied, and thereby its conclusion that poor people live in property-poor districts. . . .

I believe it is sufficient that the overarching form of discrimination in this case is between the schoolchildren of Texas on the basis of the taxable property wealth of the districts in which they happen to live. To understand both the precise nature of this discrimination and the parameters of the disadvantaged class it is sufficient to consider the constitutional principle which appellees contend is

controlling in the context of educational financing. In their complaint appellees asserted that the Constitution does not permit local district wealth to be determinative of educational opportunity. This is simply another way of saying, as the District Court concluded, that consistent with the guarantee of equal protection of the laws, "the quality of public education may not be a function of wealth, other than the wealth of the state as a whole." 337 F. Supp., at 284. Under such a principle, the children of a district are excessively advantaged if that district has more taxable property per pupil than the average amount of taxable property per pupil considering the State as a whole. By contrast, the children of a district are disadvantaged if that district has less taxable property per pupil than the state average. The majority attempts to disparage such a definition of the disadvantaged class as the product of an "artificially defined level" of district wealth. But such is clearly not the case, for this is the definition unmistakably dictated by the constitutional principle for which appellees have argued throughout the course of this litigation. And I do not believe that a clearer definition of either the disadvantaged class of Texas schoolchildren or the allegedly unconstitutional discrimination suffered by the members of that class under the present Texas financing scheme could be asked for, much less needed. Whether this discrimination, against the schoolchildren of property-poor districts, inherent in the Texas financing scheme, is violative of the Equal Protection Clause is the question to which we must now turn.

II

To avoid having the Texas financing scheme struck down because of the interdistrict variations in taxable property wealth, the District Court determined that it was insufficient for appellants to show merely that the State's scheme was rationally related to some legitimate state purpose; rather, the discrimination inherent in the scheme had to be shown necessary to promote a "compelling state interest" in order to withstand constitutional scrutiny. The basis for this determination was twofold: first, the financing scheme divides citizens on a wealth basis, a classification which the District Court viewed as highly suspect; and second, the discriminatory scheme directly affects what it considered to be a "fundamental interest," namely, education.

This Court has repeatedly held that state discrimination which either adversely affects a "fundamental interest," ... or is based on a distinction of a suspect character ... must be carefully scrutinized to ensure that the scheme is necessary to promote a substantial, legitimate state interest. The majority today concludes, however, that the Texas scheme is not subject to such a strict standard of review under the Equal Protection Clause. Instead, in its view, the Texas scheme must be tested by nothing more than that lenient standard of rationality which we have traditionally applied to discriminatory state action in the context of economic and commercial matters. ... By so doing, the Court avoids the telling task of searching for a substantial state interest which the Texas financing scheme, with its variations in taxable district property wealth, is necessary to further. I cannot accept such an emasculation of the Equal Protection Clause in the context of this case.

A

To begin, I must once more voice my disagreement with the Court's rigidified approach to equal protection analysis. ... The Court apparently seeks to establish today that equal protection cases fall into one of two neat categories which dictate the appropriate standard of review - strict scrutiny or mere rationality. But this Court's decisions in the field of equal protection defy such easy categorization. A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular

classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued - that is, an approach in which "concentration [is] placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."

I therefore cannot accept the majority's labored efforts to demonstrate that fundamental interests, which call for strict scrutiny of the challenged classification, encompass only established rights which we are somehow bound to recognize from the text of the Constitution itself. To be sure, some interests which the Court has deemed to be fundamental for purposes of equal protection analysis are themselves constitutionally protected rights. Thus, discrimination against the guaranteed right of freedom of speech has called for strict judicial scrutiny. . . . Further, every citizen's right to travel interstate, although nowhere expressly mentioned in the Constitution, has long been recognized as implicit in the premises underlying that document: the right "was conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created." Consequently, the Court has required that a state classification affecting the constitutionally protected right to travel must be "shown to be necessary to promote a compelling governmental interest." But it will not do to suggest that the "answer" to whether an interest is fundamental for purposes of equal protection analysis is always determined by whether that interest "is a right . . . explicitly or implicitly guaranteed by the Constitution," ante, at 33-34.

I would like to know where the Constitution guarantees the right to procreate, *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942), or the right to vote in state elections, e. g., *Reynolds v. Sims*, 377 U.S. 533 (1964), or the right to an appeal from a criminal conviction, e. g., *Griffin v. Illinois*, 351 U.S. 12 (1956). These are instances in which, due to the importance of the interests at stake, the Court has displayed a strong concern with the existence of discriminatory state treatment. But the Court has never said or indicated that these are interests which independently enjoy full-blown constitutional protection.

Thus, in *Buck v. Bell*, 274 U.S. 200 (1927), the Court refused to recognize a substantive constitutional guarantee of the right to procreate. Nevertheless, in *Skinner v. Oklahoma*, supra, at 541, the Court, without impugning the continuing validity of *Buck v. Bell*, held that "strict scrutiny" of state discrimination affecting procreation "is essential," for "[m]arriage and procreation are fundamental to the very existence and survival of the race." Recently, in *Roe v. Wade*, 410 U.S. 113, 152 -154 (1973), the importance of procreation has, indeed, been explained on the basis of its intimate relationship with the constitutional right of privacy which we have recognized. Yet the limited stature thereby accorded any "right" to procreate is evident from the fact that at the same time the Court reaffirmed its initial decision in *Buck v. Bell*.

Similarly, the right to vote in state elections has been recognized as a "fundamental political right," because the Court concluded very early that it is "preservative of all rights." For this reason, "this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Dunn v. Blumstein*, 405 U.S., at 336 (emphasis added). The final source of such protection from inequality in the provision of the state franchise is, of course, the Equal Protection Clause. Yet it is clear that whatever degree of importance has been attached to the state

electoral process when unequally distributed, the right to vote in state elections has itself never been accorded the stature of an independent constitutional guarantee.

Finally, it is likewise "true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all." Nevertheless, discrimination adversely affecting access to an appellate process which a State has chosen to provide has been considered to require close judicial scrutiny.

The majority is, of course, correct when it suggests that the process of determining which interests are fundamental is a difficult one. But I do not think the problem is insurmountable. And I certainly do not accept the view that the process need necessarily degenerate into an unprincipled, subjective "picking-and-choosing" between various interests or that it must involve this Court in creating "substantive constitutional rights in the name of guaranteeing equal protection of the laws." Although not all fundamental interests are constitutionally guaranteed, the determination of which interests are fundamental should be firmly rooted in the text of the Constitution. The task in every case should be to determine the extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution. As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. Thus, it cannot be denied that interests such as procreation, the exercise of the state franchise, and access to criminal appellate processes are not fully guaranteed to the citizen by our Constitution. But these interests have nonetheless been afforded special judicial consideration in the face of discrimination because they are, to some extent, interrelated with constitutional guarantees. Procreation is now understood to be important because of its interaction with the established constitutional right of privacy. The exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment. And access to criminal appellate processes enhances the integrity of the range of rights implicit in the Fourteenth Amendment guarantee of due process of law. Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.

The effect of the interaction of individual interests with established constitutional guarantees upon the degree of care exercised by this Court in reviewing state discrimination affecting such interests is amply illustrated by our decision last Term in *Eisenstadt v. Baird*, 405 U.S. 438 (1972). In *Baird*, the Court struck down as violative of the Equal Protection Clause a state statute which denied unmarried persons access to contraceptive devices on the same basis as married persons. The Court purported to test the statute under its traditional standard whether there is some rational basis for the discrimination effected. *Id.*, at 446-447. In the context of commercial regulation, the Court has indicated that the Equal Protection Clause "is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." [citations omitted] And this lenient standard is further weighted in the State's favor by the fact that "[a] statutory discrimination will not be set aside if any state of facts reasonably may be conceived [by the Court] to justify it." *McGowan v. Maryland*, *supra*, at 426. But in *Baird* the Court clearly did not adhere to these highly tolerant standards of traditional rational review. For although there were conceivable state interests intended to be advanced by the statute - e. g., deterrence of premarital sexual activity and regulation of the dissemination of potentially dangerous articles - the Court was not prepared to accept these interests on their face, but instead proceeded to test their substantiality by

independent analysis. ... Such close scrutiny of the State's interests was hardly characteristic of the deference shown state classifications in the context of economic interests. [citations omitted] Yet I think the Court's action was entirely appropriate, for access to and use of contraceptives bears a close relationship to the individual's constitutional right of privacy. [citations omitted]

A similar process of analysis with respect to the invidiousness of the basis on which a particular classification is drawn has also influenced the Court as to the appropriate degree of scrutiny to be accorded any particular case. The highly suspect character of classifications based on race, nationality, or alienage is well established. The reasons why such classifications call for close judicial scrutiny are manifold. Certain racial and ethnic groups have frequently been recognized as "discrete and insular minorities" who are relatively powerless to protect their interests in the political process. [citations omitted] Moreover, race, nationality, or alienage is "'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose, [citations omitted] Instead, lines drawn on such bases are frequently the reflection of historic prejudices rather than legislative rationality. It may be that all of these considerations, which make for particular judicial solicitude in the face of discrimination on the basis of race, nationality, or alienage, do not coalesce - or at least not to the same degree - in other forms of discrimination. Nevertheless, these considerations have undoubtedly influenced the care with which the Court has scrutinized other forms of discrimination.

In *James v. Strange*, 407 U.S. 128 (1972), the Court held unconstitutional a state statute which provided for recoupment from indigent convicts of legal defense fees paid by the State. The Court found that the statute impermissibly differentiated between indigent criminals in debt to the State and civil judgment debtors, since criminal debtors were denied various protective exemptions afforded civil judgment debtors. The Court suggested that in reviewing the statute under the Equal Protection Clause, it was merely applying the traditional requirement that there be "some rationality" in the line drawn between the different types of debtors. *Id.*, at 140. Yet it then proceeded to scrutinize the statute with less than traditional deference and restraint. Thus, the Court recognized "that state recoupment statutes may betoken legitimate state interests" in recovering expenses and discouraging fraud. ...

Similarly, in *Reed v. Reed*, 404 U.S. 71 (1971), the Court, in striking down a state statute which gave men preference over women when persons of equal entitlement apply for assignment as an administrator of a particular estate, resorted to a more stringent standard of equal protection review than that employed in cases involving commercial matters. The Court indicated that it was testing the claim of sex discrimination by nothing more than whether the line drawn bore "a rational relationship to a state objective," which it recognized as a legitimate effort to reduce the work of probate courts in choosing between competing applications for letters of administration. *Id.*, at 76. Accepting such a purpose, the Idaho Supreme Court had thought the classification to be sustainable on the basis that the legislature might have reasonably concluded that, as a rule, men have more experience than women in business matters relevant to the administration of an estate. This Court, however, concluded that "[t]o give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment" This Court, in other words, was unwilling to consider a theoretical and unsubstantiated basis for distinction - however reasonable it might appear - sufficient to sustain a statute discriminating on the basis of sex.

James and Reed can only be understood as instances in which the particularly invidious character of the classification caused the Court to pause and scrutinize with more than traditional care the rationality of state discrimination. Discrimination on the basis of past criminality and on the basis of sex posed for the Court the specter of forms of discrimination which it implicitly recognized to have deep social and legal roots without necessarily having any basis in actual differences. Still, the Court's sensitivity to the invidiousness of the basis for discrimination is perhaps most apparent in its decisions protecting the interests of children born out of wedlock from discriminatory state action. [citations omitted].

...In summary, it seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimination in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees. Moreover, "[t]he extremes to which the Court has gone in dreaming up rational bases for state regulation in that area may in many instances be ascribed to a healthy revulsion from the Court's earlier excesses in using the Constitution to protect interests that have more than enough power to protect themselves in the legislative halls." *Dandridge v. Williams*, 397 U.S., at 520 (dissenting opinion). But the situation differs markedly when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved. The majority suggests, however, that a variable standard of review would give this Court the appearance of a "superlegislature." *Ante*, at 31. I cannot agree. Such an approach seems to me a part of the guarantees of our Constitution and of the historic experiences with oppression of and discrimination against discrete, powerless minorities which underlie that document. In truth, the Court itself will be open to the criticism raised by the majority so long as it continues on its present course of effectively selecting in private which cases will be afforded special consideration without acknowledging the true basis of its action. Opinions such as those in *Reed* and *James* seem drawn more as efforts to shield rather than to reveal the true basis of the Court's decisions. Such obfuscated action may be appropriate to a political body such as a legislature, but it is not appropriate to this Court. Open debate of the bases for the Court's action is essential to the rationality and consistency of our decisionmaking process. Only in this way can we avoid the label of legislature and ensure the integrity of the judicial process.

Nevertheless, the majority today attempts to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests. By so doing, the majority singles this case out for analytic treatment at odds with what seems to me to be the clear trend of recent decisions in this Court, and thereby ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification, factors that call for far more than the lenient scrutiny of the Texas financing scheme which the majority pursues. Yet if the discrimination inherent in the Texas scheme is scrutinized with the care demanded by the interest and classification present in this case, the unconstitutionality of that scheme is unmistakable.

B

Since the Court now suggests that only interests guaranteed by the Constitution are fundamental for purposes of equal protection analysis, and since it rejects the contention that public education is

fundamental, it follows that the Court concludes that public education is not constitutionally guaranteed. It is true that this Court has never deemed the provision of free public education to be required by the Constitution. Indeed, it has on occasion suggested that state-supported education is a privilege bestowed by a State on its citizens. See *Missouri ex rel. Gaines v. Canada*, 305 U.S., at 349. Nevertheless, the fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.

The special concern of this Court with the educational process of our country is a matter of common knowledge. Undoubtedly, this Court's most famous statement on the subject is that contained in *Brown v. Board of Education*, 347 U.S., at 493 :

"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. . . ."

... Education directly affects the ability of a child to exercise his First Amendment rights, both as a source and as a receiver of information and ideas, whatever interests he may pursue in life. This Court's decision in *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), speaks of the right of students "to inquire, to study and to evaluate, to gain new maturity and understanding" Thus, we have not casually described the classroom as the "marketplace of ideas." *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967). The opportunity for formal education may not necessarily be the essential determinant of an individual's ability to enjoy throughout his life the rights of free speech and association guaranteed to him by the First Amendment. But such an opportunity may enhance the individual's enjoyment of those rights, not only during but also following school attendance. Thus, in the final analysis, "the pivotal position of education to success in American society and its essential role in opening up to the individual the central experiences of our culture lend it an importance that is undeniable."

Of particular importance is the relationship between education and the political process. "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." Education serves the essential function of instilling in our young an understanding of and appreciation for the principles and operation of our governmental processes. Education may instill the interest and provide the tools necessary for political discourse and debate. Indeed, it has frequently been suggested that education is the dominant factor affecting political consciousness and participation. A system of "[c]ompetition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." ... But of most immediate and direct concern must be the demonstrated effect of education on the exercise of the franchise by the electorate. The right to vote in federal elections is conferred by Art. I, 2, and the Seventeenth Amendment of the Constitution, and access to the state franchise has been afforded special protection because it is "preservative of other basic civil and political rights," Data from the Presidential Election of 1968 clearly demonstrate a direct relationship between

participation in the electoral process and level of educational attainment; and, as this Court recognized in *Gaston County v. United States*, 395 U.S. 285, 296 (1969), the quality of education offered may influence a child's decision to "enter or remain in school." It is this very sort of intimate relationship between a particular personal interest and specific constitutional guarantees that has heretofore caused the Court to attach special significance, for purposes of equal protection analysis, to individual interests such as procreation and the exercise of the state franchise.

While ultimately disputing little of this, the majority seeks refuge in the fact that the Court has "never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice." This serves only to blur what is in fact at stake. With due respect, the issue is neither provision of the most effective speech nor of the most informed vote. Appellees do not now seek the best education Texas might provide. They do seek, however, an end to state discrimination resulting from the unequal distribution of taxable district property wealth that directly impairs the ability of some districts to provide the same educational opportunity that other districts can provide with the same or even substantially less tax effort. The issue is, in other words, one of discrimination that affects the quality of the education which Texas has chosen to provide its children; and, the precise question here is what importance should attach to education for purposes of equal protection analysis of that discrimination. As this Court held in *Brown v. Board of Education*, 347 U.S., at 493, the opportunity of education, "where the state has undertaken to provide it, is a right which must be made available to all on equal terms." The factors just considered, including the relationship between education and the social and political interests enshrined within the Constitution, compel us to recognize the fundamentality of education and to scrutinize with appropriate care the bases for state discrimination affecting equality of educational opportunity in Texas' school districts - a conclusion which is only strengthened when we consider the character of the classification in this case.

C

The District Court found that in discriminating between Texas schoolchildren on the basis of the amount of taxable property wealth located in the district in which they live, the Texas financing scheme created a form of wealth discrimination. This Court has frequently recognized that discrimination on the basis of wealth may create a classification of a suspect character and thereby call for exacting judicial scrutiny. [citations omitted] The majority, however, considers any wealth classification in this case to lack certain essential characteristics which it contends are common to the instances of wealth discrimination that this Court has heretofore recognized. We are told that in every prior case involving a wealth classification, the members of the disadvantaged class have "shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit." I cannot agree.

In *Harper*, the Court struck down as violative of the Equal Protection Clause an annual Virginia poll tax of \$1.50, payment of which by persons over the age of 21 was a prerequisite to voting in Virginia elections. In part, the Court relied on the fact that the poll tax interfered with a fundamental interest - the exercise of the state franchise. In addition, though, the Court emphasized that "[l]ines drawn on the basis of wealth or property . . . are traditionally disfavored." Under the first part of the theory announced by the majority, the disadvantaged class in *Harper*, in terms of a wealth analysis, should have consisted only of those too poor to afford the \$1.50 necessary to vote. But the *Harper* Court did not see it that way. In its view, the Equal Protection Clause "bars a system which excludes [from the franchise] those unable to

pay a fee to vote or who fail to pay." Ibid. (Emphasis added.) So far as the Court was concerned, the "degree of the discrimination [was] irrelevant." Ibid. Thus, the Court struck down the poll tax in toto; it did not order merely that those too poor to pay the tax be exempted; complete impecuniosity clearly was not determinative of the limits of the disadvantaged class, nor was it essential to make an equal protection claim.

Similarly, Griffin and Douglas refute the majority's contention that we have in the past required an absolute deprivation before subjecting wealth classifications to strict scrutiny. The Court characterizes Griffin as a case concerned simply with the denial of a transcript or an adequate substitute therefore, and Douglas as involving the denial of counsel. But in both cases the question was in fact whether "a State that [grants] appellate review can do so in a way that discriminates against some convicted defendants on account of their poverty." Griffin v. Illinois, *supra*, at 18 (emphasis added). In that regard, the Court concluded that inability to purchase a transcript denies "the poor an adequate appellate review accorded to all who have money enough to pay the costs in advance," *ibid.* (emphasis added), and that "the type of an appeal a person is afforded . . . hinges upon whether or not he can pay for the assistance of counsel," Douglas v. California, *supra*, at 355-356 (emphasis added). The right of appeal itself was not absolutely denied to those too poor to pay; but because of the cost of a transcript and of counsel, the appeal was a substantially less meaningful right for the poor than for the rich. It was on these terms that the Court found a denial of equal protection, and those terms clearly encompassed degrees of discrimination on the basis of wealth which do not amount to outright denial of the affected right or interest.

This is not to say that the form of wealth classification in this case does not differ significantly from those recognized in the previous decisions of this Court. Our prior cases have dealt essentially with discrimination on the basis of personal wealth. Here, by contrast, the children of the disadvantaged Texas school districts are being discriminated against not necessarily because of their personal wealth or the wealth of their families, but because of the taxable property wealth of the residents of the district in which they happen to live. The appropriate question, then, is whether the same degree of judicial solicitude and scrutiny that has previously been afforded wealth classifications is warranted here.

As the Court points out, no previous decision has deemed the presence of just a wealth classification to be sufficient basis to call forth rigorous judicial scrutiny of allegedly discriminatory state action. That wealth classifications alone have not necessarily been considered to bear the same high degree of suspectness as have classifications based on, for instance, race or alienage may be explainable on a number of grounds. The "poor" may not be seen as politically powerless as certain discrete and insular minority groups. Personal poverty may entail much the same social stigma as historically attached to certain racial or ethnic groups. But personal poverty is not a permanent disability; its shackles may be escaped. Perhaps most importantly, though, personal wealth may not necessarily share the general irrelevance as a basis for legislative action that race or nationality is recognized to have. While the "poor" have frequently been a legally disadvantaged group, it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens. Thus, we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests. See Harper v. Virginia Bd. of Elections, *supra*.

When evaluated with these considerations in mind, it seems to me that discrimination on the basis of group wealth in this case likewise calls for careful judicial scrutiny. First, it must be recognized that while local district wealth may serve other interests, it bears no relationship whatsoever to the interest of Texas

schoolchildren in the educational opportunity afforded them by the State of Texas. Given the importance of that interest, we must be particularly sensitive to the invidious characteristics of any form of discrimination that is not clearly intended to serve it, as opposed to some other distinct state interest. Discrimination on the basis of group wealth may not, to be sure, reflect the social stigma frequently attached to personal poverty. Nevertheless, insofar as group wealth discrimination involves wealth over which the disadvantaged individual has no significant control, it represents in fact a more serious basis of discrimination than does personal wealth. For such discrimination is no reflection of the individual's characteristics or his abilities. And thus - particularly in the context of a disadvantaged class composed of children - we have previously treated discrimination on a basis which the individual cannot control as constitutionally disfavored. ...

The disability of the disadvantaged class in this case extends as well into the political processes upon which we ordinarily rely as adequate for the protection and promotion of all interests. Here legislative reallocation of the State's property wealth must be sought in the face of inevitable opposition from significantly advantaged districts that have a strong vested interest in the preservation of the status quo, a problem not completely dissimilar to that faced by underrepresented districts prior to the Court's intervention in the process of reapportionment.

Nor can we ignore the extent to which, in contrast to our prior decisions, the State is responsible for the wealth discrimination in this instance. Griffin, Douglas, Williams, Tate, and our other prior cases have dealt with discrimination on the basis of indigency which was attributable to the operation of the private sector. But we have no such simple de facto wealth discrimination here. The means for financing public education in Texas are selected and specified by the State. It is the State that has created local school districts, and tied educational funding to the local property tax and thereby to local district wealth. At the same time, governmentally imposed land use controls have undoubtedly encouraged and rigidified natural trends in the allocation of particular areas for residential or commercial use, and thus determined each district's amount of taxable property wealth. In short, this case, in contrast to the Court's previous wealth discrimination decisions, can only be seen as "unusual in the extent to which governmental action is the cause of the wealth classification."

In the final analysis, then, the invidious characteristics of the group wealth classification present in this case merely serve to emphasize the need for careful judicial scrutiny of the State's justifications for the resulting interdistrict discrimination in the educational opportunity afforded to the schoolchildren of Texas.

D

The nature of our inquiry into the justification for state discrimination is essentially the same in all equal protection cases: We must consider the substantiality of the state interests sought to be served, and we must scrutinize the reasonableness of the means by which the State has sought to advance its interest. See *Police Dept. of Chicago v. Mosley*, 408 U.S., at 95 . Differences in the application of this test are, in my view, a function of the constitutional importance of the interests at stake and the invidiousness of the particular classification. In terms of the asserted state interests, the Court has indicated that it will require, for instance, a "compelling," *Shapiro v. Thompson*, 394 U.S., at 634 , or a "substantial" or "important," *Dunn v. Blumstein*, 405 U.S., at 343 , state interest to justify discrimination affecting individual interests of constitutional significance. Whatever the differences, if any, in these descriptions of the character of the state interest necessary to sustain such discrimination, basic to each is, I believe, a concern with the

legitimacy and the reality of the asserted state interests. Thus, when interests of constitutional importance are at stake, the Court does not stand ready to credit the State's classification with any conceivable legitimate purpose, but demands a clear showing that there are legitimate state interests which the classification was in fact intended to serve. Beyond the question of the adequacy of the State's purpose for the classification, the Court traditionally has become increasingly sensitive to the means by which a State chooses to act as its action affects more directly interests of constitutional significance. [citations omitted] Thus, by now, "less restrictive alternatives" analysis is firmly established in equal protection jurisprudence. [citations omitted] It seems to me that the range of choice we are willing to accord the State in selecting the means by which it will act, and the care with which we scrutinize the effectiveness of the means which the State selects, also must reflect the constitutional importance of the interest affected and the invidiousness of the particular classification. Here, both the nature of the interest and the classification dictate close judicial scrutiny of the purposes which Texas seeks to serve with its present educational financing scheme and of the means it has selected to serve that purpose.

The only justification offered by appellants to sustain the discrimination in educational opportunity caused by the Texas financing scheme is local educational control. Presented with this justification, the District Court concluded that "[n]ot only are defendants unable to demonstrate compelling state interests for their classifications based upon wealth, they fail even to establish a reasonable basis for these classifications." 337 F. Supp., at 284. I must agree with this conclusion.

At the outset, I do not question that local control of public education, as an abstract matter, constitutes a very substantial state interest. ... even if we accept Texas' general dedication to local control in educational matters, it is difficult to find any evidence of such dedication with respect to fiscal matters. It ignores reality to suggest - as the Court does - that the local property tax element of the Texas financing scheme reflects a conscious legislative effort to provide school districts with local fiscal control. If Texas had a system truly dedicated to local fiscal control, one would expect the quality of the educational opportunity provided in each district to vary with the decision of the voters in that district as to the level of sacrifice they wish to make for public education. In fact, the Texas scheme produces precisely the opposite result. Local school districts cannot choose to have the best education in the State by imposing the highest tax rate. Instead, the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district - a factor over which local voters can exercise no control.

The study introduced in the District Court showed a direct inverse relationship between equalized taxable district property wealth and district tax effort with the result that the property-poor districts making the highest tax effort obtained the lowest per-pupil yield. The implications of this situation for local choice are illustrated by again comparing the Edgewood and Alamo Heights School Districts. In 1967-1968, Edgewood, after contributing its share to the Local Fund Assignment, raised only \$26 per pupil through its local property tax, whereas Alamo Heights was able to raise \$333 per pupil. Since the funds received through the Minimum Foundation School Program are to be used only for minimum professional salaries, transportation costs, and operating expenses, it is not hard to see the lack of local choice - with respect to higher teacher salaries to attract more and better teachers, physical facilities, library books, and facilities, special courses, or participation in special state and federal matching funds programs - under which a property-poor district such as Edgewood is forced to labor. In fact, because of the difference in taxable local property wealth, Edgewood would have to tax itself almost nine times as heavily to obtain the same yield as Alamo Heights. At present, then, local control is a myth for many of the local school districts in

Texas. As one district court has observed, "rather than reposing in each school district the economic power to fix its own level of per pupil expenditure, the State has so arranged the structure as to guarantee that some districts will spend low (with high taxes) while others will spend high (with low taxes)."

In my judgment, any substantial degree of scrutiny of the operation of the Texas financing scheme reveals that the State has selected means wholly inappropriate to secure its purported interest in assuring its school districts local fiscal control. ...If, for the sake of local education control, this Court is to sustain interdistrict discrimination in the educational opportunity afforded Texas school children, it should require that the State present something more than the mere sham now before us.

III

In conclusion, it is essential to recognize that an end to the wide variations in taxable district property wealth inherent in the Texas financing scheme would entail none of the untoward consequences suggested by the Court or by the appellants.

First, affirmance of the District Court's decisions would hardly sound the death knell for local control of education. It would mean neither centralized decisionmaking nor federal court intervention in the operation of public schools. Clearly, this suit has nothing to do with local decisionmaking with respect to educational policy or even educational spending. It involves only a narrow aspect of local control - namely, local control over the raising of educational funds. In fact, in striking down interdistrict disparities in taxable local wealth, the District Court took the course which is most likely to make true local control over educational decisionmaking a reality for all Texas school districts.

Nor does the District Court's decision even necessarily eliminate local control of educational funding. The District Court struck down nothing more than the continued interdistrict wealth discrimination inherent in the present property tax. ... Still, we are told that this case requires us "to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interest." Yet no one in the course of this entire litigation has ever questioned the constitutionality of the local property tax as a device for raising educational funds. The District Court's decision, at most, restricts the power of the State to make educational funding dependent exclusively upon local property taxation so long as there exists interdistrict disparities in taxable property wealth. But it hardly eliminates the local property tax as a source of educational funding or as a means of providing local fiscal control.

The Court seeks solace for its action today in the possibility of legislative reform. The Court's suggestions of legislative redress and experimentation will doubtless be of great comfort to the schoolchildren of Texas' disadvantaged districts, but considering the vested interests of wealthy school districts in the preservation of the status quo, they are worth little more. The possibility of legislative action is, in all events, no answer to this Court's duty under the Constitution to eliminate unjustified state discrimination. In this case we have been presented with an instance of such discrimination, in a particularly invidious form, against an individual interest of large constitutional and practical importance. To support the demonstrated discrimination in the provision of educational opportunity the State has offered a justification which, on analysis, takes on at best an ephemeral character. Thus, I believe that the wide disparities in taxable district property wealth inherent in the local property tax element of the Texas financing scheme render that scheme violative of the Equal Protection Clause.

I would therefore affirm the judgment of the District Court.



Side Bar: Demetrio Rodriguez led plaintiffs in the class-action suit that challenged Texas's method of funding public schools. Rodriguez was born into a migrant farm working family who served in the United States military. He fought the state so that his children would receive the quality public education that Texas was mandated by the state constitution to provide. He died in 2013 at the age of 87 years but his lawsuit sparked numerous challenges of the Texas public school funding methods over the years, the most recent ending in 2016.

UNITED STATES v. NIXON
418 U.S. 683 (1974)

Argued: July 8, 1974

Decided: July 24, 1974

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

This litigation presents for review the denial of a motion, filed in the District Court on behalf of the President of the United States, in the case of *United States v. Mitchell* (D.C. Crim. No. 74-110), to quash a third-party subpoena duces tecum issued by the United States District Court for the District of Columbia, pursuant to Fed. Rule Crim. Proc. 17 (c). The subpoena directed the President to produce certain tape recordings and documents relating to his conversations with aides and advisers. The court rejected the President's claims of absolute executive privilege, of lack of jurisdiction, and of failure to satisfy the requirements of Rule 17 (c). The President appealed to the Court of Appeals. We granted both the United States' petition for certiorari before judgment (No. 73-1766), and also the President's cross-petition for certiorari before judgment (No. 73-1834), because of the public importance of the issues presented and the need for their prompt resolution.

On March 1, 1974, a grand jury of the United States District Court for the District of Columbia returned an indictment charging seven named individuals with various offenses, including conspiracy to defraud the United States and to obstruct justice. Although he was not designated as such in the indictment, the grand jury named the President, among others, as an unindicted coconspirator. On April 18, 1974, upon motion of the Special Prosecutor, a subpoena duces tecum was issued pursuant to Rule 17 (c) to the President by the United States District Court and made returnable on May 2, 1974. This subpoena required the production, in advance of the September 9 trial date, of certain tapes, memoranda, papers, transcripts, or other writings relating to certain precisely identified meetings between the President and others. The Special Prosecutor was able to fix the time, place, and persons present at these discussions because the White House daily logs and appointment records had been delivered to him. On April 30, the President publicly released edited transcripts of 43 conversations; portions of 20 conversations subject to subpoena in the present case were included. On May 1, 1974, the President's counsel filed a "special appearance" and a motion to quash the subpoena under Rule 17 (c). This motion was accompanied by a

formal claim of privilege. At a subsequent hearing, further motions to expunge the grand jury's action naming the President as an unindicted coconspirator and for protective orders against the disclosure of that information were filed or raised orally by counsel for the President.

On May 20, 1974, the District Court denied the motion to quash and the motions to expunge and for protective orders. 377 F. Supp. 1326. It further ordered "the President or any subordinate officer, official, or employee with custody or control of the documents or objects subpoenaed," *id.*, at 1331, to deliver to the District Court, on or before May 31, 1974, the originals of all subpoenaed items, as well as an index and analysis of those items, together with tape copies of those portions of the subpoenaed recordings for which transcripts had been released to the public by the President on April 30. The District Court rejected jurisdictional challenges based on a contention that the dispute was nonjusticiable because it was between the Special Prosecutor and the Chief Executive and hence "intra-executive" in character; it also rejected the contention that the Judiciary was without authority to review an assertion of executive privilege by the President. The court's rejection of the first challenge was based on the authority and powers vested in the Special Prosecutor by the regulation promulgated by the Attorney General; the court concluded that a justiciable controversy was presented. The second challenge was held to be foreclosed by the decision in *Nixon v. Sirica*, 159 U.S. App. D.C. 58, 487 F.2d 700 (1973).

The District Court held that the judiciary, not the President, was the final arbiter of a claim of executive privilege. The court concluded that, under the circumstances of this case, the presumptive privilege was overcome by the Special Prosecutor's *prima facie* "demonstration of need sufficiently compelling to warrant judicial examination in chambers" 377 F. Supp., at 1330. The court held, finally, that the Special Prosecutor had satisfied the requirements of Rule 17 (c). The District Court stayed its order pending appellate review on condition that review was sought before 4 p. m., May 24. The court further provided that matters filed under seal remain under seal when transmitted as part of the record.

On May 24, 1974, the President filed a timely notice of appeal from the District Court order, and the certified record from the District Court was docketed in the United States Court of Appeals for the District of Columbia Circuit. On the same day, the President also filed a petition for writ of mandamus in the Court of Appeals seeking review of the District Court order.

Later on May 24, the Special Prosecutor also filed, in this Court, a petition for a writ of certiorari before judgment. On May 31, the petition was granted with an expedited briefing schedule. 417 U.S. 927 . On June 6, the President filed, under seal, a cross-petition for writ of certiorari before judgment. This cross-petition was granted June 15, 1974, 417 U.S. 960 , and the case was set for argument on July 8, 1974.

I

Jurisdiction

The threshold question presented is whether the May 20, 1974, order of the District Court was an appealable order and whether this case was properly "in" the Court of Appeals when the petition for certiorari was filed in this Court. 28 U.S.C. 1254. The Court of Appeals' jurisdiction under 28 U.S.C. 1291 encompasses only "final decisions of the district courts." Since the appeal was timely filed and all other procedural requirements were met, the petition is properly before this Court for consideration if the District Court order was final. 28 U.S.C. 1254 (1), 2101 (e).

The finality requirements of 28 U.S.C. 1291 embodies a strong congressional policy against piecemeal reviews, and against obstructing or impeding an ongoing judicial proceeding by interlocutory appeals. See, e. g., *Cobbledick v. United States*, 309 U.S. 323, 324 -326 (1940). This requirement ordinarily promotes judicial efficiency and hastens the ultimate termination of litigation. In applying this principle to an order denying a motion to quash and requiring the production of evidence pursuant to a subpoena duces tecum, it has been repeatedly held that the order is not final and hence not appealable. *United States v. Ryan*, 402 U.S. 530, 532 (1971); *Cobbledick v. United States*, *supra*; *Alexander v. United States*, 201 U.S. 117 (1906). This Court has

"consistently held that the necessity for expedition in the administration of the criminal law justifies putting one who seeks to resist the production of desired information to a choice between compliance with a trial court's order to produce prior to any review of that order, and resistance to that order with the concomitant possibility of an adjudication of contempt if his claims are rejected on appeal." *United States v. Ryan*, *supra*, at 533.

...Here too, the traditional contempt avenue to immediate appeal is peculiarly inappropriate due to the unique setting in which the question arises. To require a President of the United States to place himself in the posture of disobeying an order of a court merely to trigger the procedural mechanism for review of the ruling would be unseemly, and would present an unnecessary occasion for constitutional confrontation between two branches of the Government. Similarly, a federal judge should not be placed in the posture of issuing a citation to a President simply in order to invoke review. The issue whether a President can be cited for contempt could itself engender protracted litigation, and would further delay both review on the merits of his claim of privilege and the ultimate termination of the underlying criminal action for which his evidence is sought. These considerations lead us to conclude that the order of the District Court was an appealable order. The appeal from that order was therefore properly "in" the Court of Appeals, and the case is now properly before this Court on the writ of certiorari before judgment.

II

Justiciability

In the District Court, the President's counsel argued that the court lacked jurisdiction to issue the subpoena because the matter was an intra-branch dispute between a subordinate and superior officer of the Executive Branch and hence not subject to judicial resolution. That argument has been renewed in this Court with emphasis on the contention that the dispute does not present a "case" or "controversy" which can be adjudicated in the federal courts. The President's counsel argues that the federal courts should not intrude into areas committed to the other branches of Government. He views the present dispute as essentially a "jurisdictional" dispute within the Executive Branch which he analogizes to a dispute between two congressional committees. Since the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case, it is contended that a President's decision is final in determining what evidence is to be used in a given criminal case. Although his counsel concedes that the President has delegated certain specific powers to the Special Prosecutor, he has not "waived nor delegated to the Special Prosecutor the President's duty to claim privilege as to all materials . . . which fall within the President's inherent authority to refuse to disclose to any executive officer." *The Special*

Prosecutor's demand for the items therefore presents, in the view of the President's counsel, a political question under *Baker v. Carr*, 369 U.S. 186 (1962), since it involves a "textually demonstrable" grant of power under Art. II.

The mere assertion of a claim of an "intra-branch dispute," without more, has never operated to defeat federal jurisdiction; justiciability does not depend on such a surface inquiry. In *United States v. ICC*, 337 U.S. 426 (1949), the Court observed, "courts must look behind names that symbolize the parties to determine whether a justiciable case or controversy is presented." *Id.*, at 430. [citations omitted]

Our starting point is the nature of the proceeding for which the evidence is sought - here a pending criminal prosecution. It is a judicial proceeding in a federal court alleging violation of federal laws and is brought in the name of the United States as sovereign. *Berger v. United States*, 295 U.S. 78, 88 (1935). Under the authority of Art. II, 2, Congress has vested in the Attorney General the power to conduct the criminal litigation of the United States Government. It has also vested in him the power to appoint subordinate officers to assist him in the discharge of his duties. ... Acting pursuant to those statutes, the Attorney General has delegated the authority to represent the United States in these particular matters to a Special Prosecutor with unique authority and tenure. The regulation gives the Special Prosecutor explicit power to contest the invocation of executive privilege in the process of seeking evidence deemed relevant to the performance of these specially delegated duties.

...The demands of and the resistance to the subpoena present an obvious controversy in the ordinary sense, but that alone is not sufficient to meet constitutional standards. In the constitutional sense, controversy means more than disagreement and conflict; rather it means the kind of controversy courts traditionally resolve. Here at issue is the production or nonproduction of specified evidence deemed by the Special Prosecutor to be relevant and admissible in a pending criminal case. It is sought by one official of the Executive Branch within the scope of his express authority; it is resisted by the Chief Executive on the ground of his duty to preserve the confidentiality of the communications of the President. Whatever the correct answer on the merits, these issues are "of a type which are traditionally justiciable." The independent Special Prosecutor with his asserted need for the subpoenaed material in the underlying criminal prosecution is opposed by the President with his steadfast assertion of privilege against disclosure of the material. This setting assures there is "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S., at 204. Moreover, since the matter is one arising in the regular course of a federal criminal prosecution, it is within the traditional scope of Art. III power. *Id.*, at 198.

In light of the uniqueness of the setting in which the conflict arises, the fact that both parties are officers of the Executive Branch cannot be viewed as a barrier to justiciability. It would be inconsistent with the applicable law and regulation, and the unique facts of this case to conclude other than that the Special Prosecutor has standing to bring this action and that a justiciable controversy is presented for decision.

III

RULE 17 (c)

The subpoena duces tecum is challenged on the ground that the Special Prosecutor failed to satisfy the requirements of Fed. Rule Crim. Proc. 17 (c), which governs the issuance of subpoenas duces tecum in

federal criminal proceedings. If we sustained this challenge, there would be no occasion to reach the claim of privilege asserted with respect to the subpoenaed material. Thus we turn to the question whether the requirements of Rule 17 (c) have been satisfied. ...

Rule 17 (c) provides:

"A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit the books, papers, documents or objects or portions thereof to be inspected by the parties and their attorneys."

A subpoena for documents may be quashed if their production would be "unreasonable or oppressive," but not otherwise. The leading case in this Court interpreting this standard is *Bowman Dairy Co. v. United States*, 341 U.S. 214 (1951). This case recognized certain fundamental characteristics of the subpoena duces tecum in criminal cases: (1) it was not intended to provide a means of discovery for criminal cases, *id.*, at 220; (2) its chief innovation was to expedite the trial by providing a time and place before trial for the inspection of subpoenaed materials, *ibid.* ... Under this test, in order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general "fishing expedition."

Against this background, the Special Prosecutor, in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity. Our own review of the record necessarily affords a less comprehensive view of the total situation than was available to the trial judge and we are unwilling to conclude that the District Court erred in the evaluation of the Special Prosecutor's showing under Rule 17 (c). Our conclusion is based on the record before us, much of which is under seal. Of course, the contents of the subpoenaed tapes could not at that stage be described fully by the Special Prosecutor, but there was a sufficient likelihood that each of the tapes contains conversations relevant to the offenses charged in the indictment. *United States v. Gross*, 24 F. R. D. 138 (SDNY 1959). With respect to many of the tapes, the Special Prosecutor offered the sworn testimony or statements of one or more of the participants in the conversations as to what was said at the time. As for the remainder of the tapes, the identity of the participants and the time and place of the conversations, taken in their total context, permit a rational inference that at least part of the conversations relate to the offenses charged in the indictment.

We also conclude there was a sufficient preliminary showing that each of the subpoenaed tapes contains evidence admissible with respect to the offenses charged in the indictment. The most cogent objection to the admissibility of the taped conversations here at issue is that they are a collection of out-of-court statements by declarants who will not be subject to cross-examination and that the statements are

therefore inadmissible hearsay. Here, however, most of the tapes apparently contain conversations to which one or more of the defendants named in the indictment were party. The hearsay rule does not automatically bar all out-of-court statements by a defendant in a criminal case. Declarations by one defendant may also be admissible against other defendants upon a sufficient showing, by independent evidence, of a conspiracy among one or more other defendants and the declarant and if the declarations at issue were in furtherance of that conspiracy. The same is true of declarations of coconspirators who are not defendants in the case on trial. *Dutton v. Evans*, 400 U.S. 74, 81 (1970). Recorded conversations may also be admissible for the limited purpose of impeaching the credibility of any defendant who testifies or any other coconspirator who testifies. Generally, the need for evidence to impeach witnesses is insufficient to require its production in advance of trial. Here, however, there are other valid potential evidentiary uses for the same material, and the analysis and possible transcription of the tapes may take a significant period of time. Accordingly, we cannot conclude that the District Court erred in authorizing the issuance of the subpoena duces tecum.

Enforcement of a pretrial subpoena duces tecum must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17 (c).

In a case such as this, however, where a subpoena is directed to a President of the United States, appellate review, in deference to a coordinate branch of Government, should be particularly meticulous to ensure that the standards of Rule 17 (c) have been correctly applied. *United States v. Burr*, 25 F. Cas. 30, 34 (No. 14,692d) (CC Va. 1807). From our examination of the materials submitted by the Special Prosecutor to the District Court in support of his motion for the subpoena, we are persuaded that the District Court's denial of the President's motion to quash the subpoena was consistent with Rule 17 (c). We also conclude that the Special Prosecutor has made a sufficient showing to justify a subpoena for production before trial. The subpoenaed materials are not available from any other source, and their examination and processing should not await trial in the circumstances shown.

IV

The Claim of Privilege

A

Having determined that the requirements of Rule 17 (c) were satisfied, we turn to the claim that the subpoena should be quashed because it demands "confidential conversations between a President and his close advisors that it would be inconsistent with the public interest to produce." The first contention is a broad claim that the separation of powers doctrine precludes judicial review of a President's claim of privilege. The second contention is that if he does not prevail on the claim of absolute privilege, the court should hold as a matter of constitutional law that the privilege prevails over the subpoena duces tecum.

In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the interpretation of its powers by any branch is due great respect from the others. The President's counsel, as we have noted, reads the Constitution as providing an absolute privilege of confidentiality for all Presidential communications. Many decisions of this Court, however,

have unequivocally reaffirmed the holding of *Marbury v. Madison*, 1 Cranch 137 (1803), that "[i]t is emphatically the province and duty of the judicial department to say what the law is." *Id.*, at 177.

No holding of the Court has defined the scope of judicial power specifically relating to the enforcement of a subpoena for confidential Presidential communications for use in a criminal prosecution, but other exercises of power by the Executive Branch and the Legislative Branch have been found invalid as in conflict with the Constitution. [citations omitted] Since this Court has consistently exercised the power to construe and delineate claims arising under express powers, it must follow that the Court has authority to interpret claims with respect to powers alleged to derive from enumerated powers.

Our system of government "requires that federal courts on occasion interpret the Constitution in a manner at variance with the construction given the document by another branch." *Powell v. McCormack*, *supra*, at 549. And in *Baker v. Carr*, 369 U.S., at 211, the Court stated:

"Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution."

Notwithstanding the deference each branch must accord the others, the "judicial Power of the United States" vested in the federal courts by Art. III, 1, of the Constitution can no more be shared with the Executive Branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto. Any other conclusion would be contrary to the basic concept of separation of powers and the checks and balances that flow from the scheme of a tripartite government. *The Federalist*, No. 47, p. 313 (S. Mittell ed. 1938). We therefore reaffirm that it is the province and duty of this Court "to say what the law is" with respect to the claim of privilege presented in this case. *Marbury v. Madison*, *supra*, at 177.

B

In support of his claim of absolute privilege, the President's counsel urges two grounds, one of which is common to all governments and one of which is peculiar to our system of separation of powers. The first ground is the valid need for protection of communications between high Government officials and those who advise and assist them in the performance of their manifold duties; the importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process. Whatever the nature of the privilege of confidentiality of Presidential communications in the exercise of Art. II powers, the privilege can be said to derive from the supremacy of each branch within its own assigned area of constitutional duties. Certain powers and privileges flow from the nature of enumerated powers; the protection of the confidentiality of Presidential communications has similar constitutional underpinnings.

The second ground asserted by the President's counsel in support of the claim of absolute privilege rests on the doctrine of separation of powers. Here it is argued that the independence of the Executive Branch within its own sphere, [citations omitted] insulates a President from a judicial subpoena in an ongoing criminal prosecution, and thereby protects confidential Presidential communications.

However, neither the doctrine of separation of powers, nor the need for confidentiality of high-level communications, without more, can sustain an absolute, unqualified Presidential privilege of immunity from judicial process under all circumstances. The President's need for complete candor and objectivity from advisers calls for great deference from the courts. However, when the privilege depends solely on the broad, undifferentiated claim of public interest in the confidentiality of such conversations, a confrontation with other values arises. Absent a claim of need to protect military, diplomatic, or sensitive national security secrets, we find it difficult to accept the argument that even the very important interest in confidentiality of Presidential communications is significantly diminished by production of such material for in camera inspection with all the protection that a district court will be obliged to provide.

The impediment that an absolute, unqualified privilege would place in the way of the primary constitutional duty of the Judicial Branch to do justice in criminal prosecutions would plainly conflict with the function of the courts under Art. III. In designing the structure of our Government and dividing and allocating the sovereign power among three co-equal branches, the Framers of the Constitution sought to provide a comprehensive system, but the separate powers were not intended to operate with absolute independence.

"While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity."

To read the Art. II powers of the President as providing an absolute privilege as against a subpoena essential to enforcement of criminal statutes on no more than a generalized claim of the public interest in confidentiality of nonmilitary and nondiplomatic discussions would upset the constitutional balance of "a workable government" and gravely impair the role of the courts under Art. III.

C

Since we conclude that the legitimate needs of the judicial process may outweigh Presidential privilege, it is necessary to resolve those competing interests in a manner that preserves the essential functions of each branch. The right and indeed the duty to resolve that question does not free the Judiciary from according high respect to the representations made on behalf of the President.

The expectation of a President to the confidentiality of his conversations and correspondence, like the claim of confidentiality of judicial deliberations, for example, has all the values to which we accord deference for the privacy of all citizens and, added to those values, is the necessity for protection of the public interest in candid, objective, and even blunt or harsh opinions in Presidential decision-making. A President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately. These are the considerations justifying a presumptive privilege for Presidential communications. The privilege is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution. ...

But this presumptive privilege must be considered in light of our historic commitment to the rule of law. This is nowhere more profoundly manifest than in our view that "the twofold aim [of criminal justice] is that guilt shall not escape or innocence suffer." *Berger v. United States*, 295 U.S., at 88. We have elected

to employ an adversary system of criminal justice in which the parties contest all issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence. To ensure that justice is done, it is imperative to the function of courts that compulsory process be available for the production of evidence needed either by the prosecution or by the defense.

Only recently the Court restated the ancient proposition of law, albeit in the context of a grand jury inquiry rather than a trial,

"that 'the public . . . has a right to every man's evidence,' except for those persons protected by a constitutional, common-law, or statutory privilege."

The privileges referred to by the Court are designed to protect weighty and legitimate competing interests. Thus, the Fifth Amendment to the Constitution provides that no man "shall be compelled in any criminal case to be a witness against himself." And, generally, an attorney or a priest may not be required to disclose what has been revealed in professional confidence. These and other interests are recognized in law by privileges against forced disclosure, established in the Constitution, by statute, or at common law. Whatever their origins, these exceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth.

In this case the President challenges a subpoena served on him as a third party requiring the production of materials for use in a criminal prosecution; he does so on the claim that he has a privilege against disclosure of confidential communications. He does not place his claim of privilege on the ground they are military or diplomatic secrets. As to these areas of Art. II duties the courts have traditionally shown the utmost deference to Presidential responsibilities. In *C. & S. Air Lines v. Waterman S. S. Corp.*, 333 U.S. 103, 111 (1948), dealing with Presidential authority involving foreign policy considerations, the Court said:

"The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs, has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken on information properly held secret."

In *United States v. Reynolds*, 345 U.S. 1 (1953), dealing with a claimant's demand for evidence in a Tort Claims Act case against the Government, the Court said:

"It may be possible to satisfy the court, from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interest of national security, should not be divulged. When this is the case, the occasion for the privilege is appropriate, and the court should not jeopardize the security which the privilege is meant to protect by insisting upon an examination of the evidence, even by the judge alone, in chambers." *Id.*, at 10.

No case of the Court, however, has extended this high degree of deference to a President's generalized interest in confidentiality. Nowhere in the Constitution, as we have noted earlier, is there any explicit reference to a privilege of confidentiality, yet to the extent this interest relates to the effective discharge of a President's powers, it is constitutionally based.

The right to the production of all evidence at a criminal trial similarly has constitutional dimensions. The Sixth Amendment explicitly confers upon every defendant in a criminal trial the right "to be confronted with the witnesses against him" and "to have compulsory process for obtaining witnesses in his favor." Moreover, the Fifth Amendment also guarantees that no person shall be deprived of liberty without due process of law. It is the manifest duty of the courts to vindicate those guarantees, and to accomplish that it is essential that all relevant and admissible evidence be produced.

In this case we must weigh the importance of the general privilege of confidentiality of Presidential communications in performance of the President's responsibilities against the inroads of such a privilege on the fair administration of criminal justice. The interest in preserving confidentiality is weighty indeed and entitled to great respect. However, we cannot conclude that advisers will be moved to temper the candor of their remarks by the infrequent occasions of disclosure because of the possibility that such conversations will be called for in the context of a criminal prosecution.

On the other hand, the allowance of the privilege to withhold evidence that is demonstrably relevant in a criminal trial would cut deeply into the guarantee of due process of law and gravely impair the basic function of the courts. A President's acknowledged need for confidentiality in the communications of his office is general in nature, whereas the constitutional need for production of relevant evidence in a criminal proceeding is specific and central to the fair adjudication of a particular criminal case in the administration of justice. Without access to specific facts a criminal prosecution may be totally frustrated. The President's broad interest in confidentiality of communications will not be vitiated by disclosure of a limited number of conversations preliminarily shown to have some bearing on the pending criminal cases.

We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specific need for evidence in a pending criminal trial.

D

We have earlier determined that the District Court did not err in authorizing the issuance of the subpoena. If a President concludes that compliance with a subpoena would be injurious to the public interest he may properly, as was done here, invoke a claim of privilege on the return of the subpoena. Upon receiving a claim of privilege from the Chief Executive, it became the further duty of the District Court to treat the subpoenaed material as presumptively privileged and to require the Special Prosecutor to demonstrate that the Presidential material was "essential to the justice of the [pending criminal] case." *United States v. Burr*, 25 F. Cas., at 192. Here the District Court treated the material as presumptively privileged, proceeded to find that the Special Prosecutor had made a sufficient showing to rebut the presumption, and ordered an in camera examination of the subpoenaed material. On the basis of our examination of the record we are unable to conclude that the District Court erred in ordering the inspection. Accordingly,

we affirm the order of the District Court that subpoenaed materials be transmitted to that court. We now turn to the important question of the District Court's responsibilities in conducting the in camera examination of Presidential materials or communications delivered under the compulsion of the subpoena duces tecum.

E

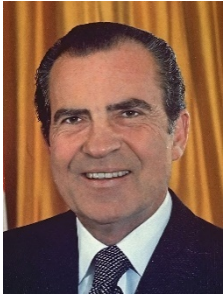
Enforcement of the subpoena duces tecum was stayed pending this Court's resolution of the issues raised by the petitions for certiorari. Those issues now having been disposed of, the matter of implementation will rest with the District Court. "[T]he guard, furnished to [the President] to protect him from being harassed by vexatious and unnecessary subpoenas, is to be looked for in the conduct of a [district] court after those subpoenas have issued; not in any circumstance which is to precede their being issued." ... Statements that meet the test of admissibility and relevance must be isolated; all other material must be excised. At this stage the District Court is not limited to representations of the Special Prosecutor as to the evidence sought by the subpoena; the material will be available to the District Court. It is elementary that in camera inspection of evidence is always a procedure calling for scrupulous protection against any release or publication of material not found by the court, at that stage, probably admissible in evidence and relevant to the issues of the trial for which it is sought. That being true of an ordinary situation, it is obvious that the District Court has a very heavy responsibility to see to it that Presidential conversations, which are either not relevant or not admissible, are accorded that high degree of respect due the President of the United States. Mr. Chief Justice Marshall, sitting as a trial judge in the Burr case, *supra*, was extraordinarily careful to point out that

"[i]n no case of this kind would a court be required to proceed against the president as against an ordinary individual."

Marshall's statement cannot be read to mean in any sense that a President is above the law, but relates to the singularly unique role under Art. II of a President's communications and activities, related to the performance of duties under that Article. Moreover, a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any "ordinary individual." It is therefore necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justice. The need for confidentiality even as to idle conversations with associates in which casual reference might be made concerning political leaders within the country or foreign statesmen is too obvious to call for further treatment. We have no doubt that the District Judge will at all times accord to Presidential records that high degree of deference suggested in *United States v. Burr*, *supra*, and will discharge his responsibility to see to it that until released to the Special Prosecutor no in camera material is revealed to anyone. This burden applies with even greater force to excised material; once the decision is made to excise, the material is restored to its privileged status and should be returned under seal to its lawful custodian.

Since this matter came before the Court during the pendency of a criminal prosecution, and on representations that time is of the essence, the mandate shall issue forthwith.

Affirmed.



Side Bar:

Richard Milhous Nixon, who is quoted for saying “When the President does it, that means that it is not illegal”, resigned in disgrace in 1974. The scandal, known as Watergate, involved numerous clandestine and often illegal activities undertaken by members of the Nixon administration. Dirty tricks included bugging the offices of political opponents, and the harassment of activist groups and political figures. The activities were brought to light after five men were caught breaking into Democratic party headquarters at the Watergate complex in Washington, D.C. on June 17, 1972. The Washington Post reporters Carl Bernstein and Bob Woodward relied on an informant known as “Deep Throat”—later revealed to be Mark Felt, associate director at the FBI—to link the men to the Nixon administration. Nixon downplayed the scandal as mere politics, calling news articles biased and misleading. A series of revelations made it clear that the Committee to Re-elect President Nixon, and later the White House, was involved in attempts to sabotage the Democrats. Senior aides such as White House Counsel John Dean faced prosecution; in total 48 officials were convicted of wrongdoing.



Mark Felt, Sr. was the second highest ranked FBI special agent from 1972 until he retired in 1973.

After leaving office, Nixon was pardoned by his successor, President Gerald Ford. During his retirement, he wrote nine books and tried to rebrand his image as an elder statesman. He died at age 81 from complications following a stroke. The similarities to occurrences in the present day Donald Trump administration are impossible to avoid.

UNIVERSITY OF CALIFORNIA REGENTS v. BAKKE

Argued: October 12, 1977

Decided: June 28, 1978

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.
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.

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.

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.

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.

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.

... 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 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. 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 STEWART, MR. JUSTICE REHNQUIST, and MR. JUSTICE STEVENS concur in this judgment.

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.

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.

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 *Dred Scott v. Sandford*, 19 How. 393 (1857), holding that the Missouri Compromise - which prohibited slavery in the portion of the Louisiana Purchase Territory north of Missouri - was unconstitutional because it deprived slave owners of their property without due process. The Court declared that under the Constitution a slave was property, and "[t]he right to traffic in it, like an ordinary article of merchandise and property, was guarantied to the citizens of the United States" *Id.*, at 451. The Court further concluded that Negroes were not intended to be included as citizens under the Constitution but were "regarded as beings of an inferior order . . . altogether unfit to associate with the white race, either in social or political relations; and so far inferior, that they had no rights which the white man was bound to respect" *Id.*, at 407.

B

The status of the Negro as property was officially erased by his emancipation at the end of the Civil War. But the long-awaited emancipation, while freeing the Negro from slavery, did not bring him citizenship or equality in any meaningful way. Slavery was replaced by a system of "laws which imposed upon the colored race onerous disabilities and burdens, and curtailed their rights in the pursuit of life, liberty, and property to such an extent that their freedom was of little value." *Slaughter-House Cases*, 16 Wall. 36, 70 (1873). Despite the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments, the Negro was systematically denied the rights those Amendments were supposed to secure. The combined actions and inactions of the State and Federal Governments maintained Negroes in a position of legal inferiority for another century after the Civil War.

The Southern States took the first steps to re-enslave the Negroes. Immediately following the end of the Civil War, many of the provisional legislatures passed Black Codes, similar to the Slave Codes, which, among other things, limited the rights of Negroes to own or rent property and permitted imprisonment for breach of employment contracts. Over the next several decades, the South managed to disenfranchise the Negroes in spite of the Fifteenth Amendment by various techniques, including poll taxes, deliberately complicated balloting processes, property and literacy qualifications, and finally the white primary.

Congress responded to the legal disabilities being imposed 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."

The Court began by interpreting the Civil War Amendments in a manner that sharply curtailed their substantive protections. [citations omitted] 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, theaters and other places of public amusement." *Id.*, at 10. According to the Court, the Fourteenth Amendment gave Congress the power to proscribe only discriminatory action by the State. The Court ruled that the Negroes who were excluded from public places suffered only an invasion of their social rights at the hands of private individuals, and Congress had no power to remedy that. *Id.*, at 24-25. "When a man has emerged from slavery, and by the aid of beneficent legislation has shaken off the inseparable concomitants of that state," the Court concluded, "there must be some stage in the progress of his elevation when he takes the rank of a mere citizen, and ceases to be the special favorite of the laws" *Id.*, at 25. As Mr. Justice Harlan noted in dissent, however, the Civil War Amendments and Civil Rights Acts did not make the Negroes the "special favorite" of the laws but instead "sought to accomplish in reference to that race . . . - what had already been done in every State of the Union for the white race - to secure and protect rights belonging to them as freemen and citizens; nothing more." *Id.*, at 61.

The Court's ultimate blow to the Civil War Amendments and to the equality of Negroes came in *Plessy v. Ferguson*, 163 U.S. 537 (1896). In upholding a Louisiana law that required railway companies to provide "equal but separate" accommodations for whites and Negroes, the Court held that the Fourteenth Amendment was not intended "to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." *Id.*, at 544. Ignoring totally the realities of the positions of the two races, the Court remarked:

"We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it." *Id.*, at 551.

Mr. Justice Harlan's dissenting opinion recognized the bankruptcy of the Court's reasoning. He noted that the "real meaning" of the legislation was "that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens." *Id.*, at 560. He expressed his fear that if like laws were enacted in other States, "the effect would be in the highest degree mischievous." *Id.*, at 563. Although slavery would have disappeared, the States would retain the power "to interfere with the full enjoyment of the blessings of freedom; to regulate civil rights, common to all citizens, upon the basis of race; and to place in a condition of legal inferiority a large body of American citizens" *Ibid.*

The fears of Mr. Justice Harlan were soon to be realized. In the wake of Plessy, many States expanded their Jim Crow laws, which had up until that time been limited primarily to passenger trains and schools. The segregation of the races was extended to residential areas, parks, hospitals, theaters, waiting rooms, and bathrooms. There were even statutes and ordinances which authorized separate phone booths for 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."

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."

Nor were the laws restricting the rights of Negroes limited 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."

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). [citations omitted] 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.

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. The Negro child's mother is over three times more likely to die of complications in childbirth, and the infant mortality rate for Negroes is nearly twice that for whites. The median income of the Negro family is only 60% that of the median of a white family, and the percentage of Negroes who live in families with incomes below the poverty line is nearly four times greater than that of whites.

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, and the unemployment rate for Negro teenagers is nearly three times that of white teenagers. 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. Although Negroes represent 11.5% of the population, 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.

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 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. [citations omitted] 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." *Id.*, at App. 75 (remarks of Rep. Phelps).

Despite the objection to the special treatment the bill would provide for Negroes, it was passed by Congress. *Id.*, at 421, 688. President Johnson vetoed this bill and also a subsequent bill that contained some modifications; one of his principal 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," 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. 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. Country School Board*, 391 U.S. 430 (1968), that all reasonable methods be available to formulate an effective remedy." *Board of Education v. Swann*, 402 U.S. 43, 46 (1971).

As we have observed, "[a]ny other approach would freeze the status quo that is the very target of all desegregation processes."

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 317, quoting *Califano v. Goldfarb*, 430 U.S. 199, 209 n. 8 (1977) (plurality opinion).

We thus recognized the permissibility of remedying past societal discrimination through the use of otherwise disfavored classifications.

Nothing in those cases suggests that a university cannot similarly act to remedy past discrimination. It is true that 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." 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," 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 color-blind" appeared only in the opinion of the lone dissenter. 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.

Side Bar:



Allan Bakke was born in 1940. He received his bachelor's degree in Engineering from the University of Minnesota. He then served 4 years with the U.S. Marines in Vietnam. After returning from home, he obtained a masters degree from Stanford. He got a job with NASA near San Francisco. At NASA he was involved with testing the effects of weightlessness and radiation on animals. This work increased his interest in medicine. In 1972, he applied for admission into medical school at the University of California, Davis. His MCAT score was above the 90th percentile in 3 out of 4 categories. UC Davis admitted 100 students in medical school every year. They "reserved" 16 seats for "economically or educationally disadvantaged" candidates. He had a lesser score than those in the general admission pool. He reapplied in 1973 and was rejected.

Bakke had been rejected from 13 medical schools due to his age (34). According to the state Medical Examiners Board, the Minneapolis native earned his medical degree June 18, 1982, from the University of California Medical School at Davis. He served a four-year residency at the Mayo Clinic and was licensed to practice medicine in Minnesota in 1983. Bakke was married and had 3 children. He is now practicing as an anesthesiologist in Rochester, Minnesota.

Side Bar II: In another controversial Supreme Court ruling, *Grutter v. Bollinger*, the majority ruled in favor of an affirmative action admissions policy at the University of Michigan Law School. The majority included Justices O'Connor, Stevens, Souter, Ginsburg and Breyer. The four dissenters were Chief Justice Rehnquist, and Justices Scalia, Kennedy and Thomas.

Justice O'Connor wrote that the United States Constitution "does not prohibit the law school's narrowly tailored use of race in admissions decisions to further a compelling interest in obtaining the educational benefits that flow from a diverse student body." The Court held that the law school's interest in obtaining a "critical mass" of minority students was indeed a "tailored use. The Court takes the Law School at its word that it would like nothing better than to find a race-neutral admissions formula and will terminate its use of racial preferences as soon as practicable. The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."

While the opinion did not give a deadline for affirmative action of 25 years (which ends 2028) it clearly recognized the use of affirmative action as a remedy without describing what the wrong was that was being remedied. For many the 25 years is viewed as a hard and fast year that all affirmative action would be eliminated. See 539 U.S. 306 (2003).

Batson v. Kentucky
476 U.S. 79 (1985)

Syllabus

During the criminal trial in a Kentucky state court of petitioner, a black man, the judge conducted voir dire examination of the jury venire and excused certain jurors for cause. The prosecutor then used his peremptory challenges to strike all four black persons on the venire, and a jury composed only of white persons was selected. Defense counsel moved to discharge the jury on the ground that the prosecutor's removal of the black veniremen violated petitioner's rights under the Sixth and Fourteenth Amendments to a jury drawn from a cross-section of the community, and under the Fourteenth Amendment to equal protection of the laws. Without expressly ruling on petitioner's request for a hearing, the trial judge denied the motion, and the jury ultimately convicted petitioner. Affirming the conviction, the Kentucky Supreme Court observed that recently, in another case, it had relied on *Swain v. Alabama*, 380 U.S. 202, and had held that a defendant alleging lack of a fair cross-section must demonstrate systematic exclusion of a group of jurors from the venire.

Held:

1. The principle announced in *Strauder v. West Virginia*, 100 U.S. 303, that a State denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded, is reaffirmed.

(a) A defendant has no right to a petit jury composed in whole or in part of persons of his own race. *Strauder v. West Virginia*, 100 U.S. 303, 305. However, the Equal Protection Clause guarantees the defendant that the State will not exclude members of his race from the jury venire on account of race, or

on the false assumption that members of his race as a group are not qualified to serve as jurors. By denying a person participation in jury service on account of his race, the State also unconstitutionally discriminates against the excluded juror. Moreover, selection procedures that purposefully exclude black persons from juries undermine public confidence in the fairness of our system of justice.

(b) The same equal protection principles as are applied to determine whether there is discrimination in selecting the venire also govern the State's use of peremptory challenges to strike individual jurors from the petit jury. Although a prosecutor ordinarily is entitled to exercise peremptory challenges for any reason, as long as that reason is related to his view concerning the outcome of the case to be tried, the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant.

2. The portion of *Swain v. Alabama*, *supra*, concerning the evidentiary burden placed on a defendant who claims that he has been denied equal protection through the State's discriminatory use of peremptory challenges is rejected. In *Swain*, it was held that a black defendant could make out a *prima facie* case of purposeful discrimination on proof that the peremptory challenge system as a whole was being perverted. Evidence offered by the defendant in *Swain* did not meet that standard, because it did not demonstrate the circumstances under which prosecutors in the jurisdiction were responsible for striking black jurors beyond the facts of the defendant's case. This evidentiary formulation is inconsistent with equal protection standards subsequently developed in decisions relating to selection of the jury venire. A defendant may make a *prima facie* showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection in his case.

3. A defendant may establish a *prima facie* case of purposeful discrimination solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. The defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. The defendant may also rely on the fact that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate. Finally, the defendant must show that such facts and any other relevant circumstances raise an inference that the prosecutor used peremptory challenges to exclude the veniremen from the petit jury on account of their race. Once the defendant makes a *prima facie* showing, the burden shifts to the State to come forward with a neutral explanation for challenging black jurors. The prosecutor may not rebut a *prima facie* showing by stating that he challenged the jurors on the assumption that they would be partial to the defendant because of their shared race or by affirming his good faith in individual selections.

4. While the peremptory challenge occupies an important position in trial procedures, the above-stated principles will not undermine the contribution that the challenge generally makes to the administration of justice. Nor will application of such principles create serious administrative difficulties.

5. Because the trial court here flatly rejected petitioner's objection to the prosecutor's removal of all black persons on the venire without requiring the prosecutor to explain his action, the case is remanded for further proceedings.

Reversed and remanded. [all citations to transcript omitted]

JUSTICE MARSHALL, concurring.

I join JUSTICE POWELL's eloquent opinion for the Court, which takes a historic step toward eliminating the shameful practice of racial discrimination in the selection of juries. The Court's opinion cogently explains the pernicious nature of the racially discriminatory use of peremptory challenges, and the repugnancy of such discrimination to the Equal Protection Clause. The Court's opinion also ably demonstrates the inadequacy of any burden of proof for racially discriminatory use of peremptories that requires that "justice . . . sit supinely by" and be flouted in case after case before a remedy is available. I nonetheless write separately to express my views. The decision today will not end the racial discrimination that peremptories inject into the jury selection process. That goal can be accomplished only by eliminating peremptory challenges entirely.

I

A little over a century ago, this Court invalidated a state statute providing that black citizens could not serve as jurors. *Strauder West Virginia*, 100 U.S. 303 (1880). State officials then turned to somewhat more subtle ways of keeping blacks off jury venires. [citations omitted] Although the means used to exclude blacks have changed, the same pernicious consequence has continued.

Misuse of the peremptory challenge to exclude black jurors has become both common and flagrant. Black defendants rarely have been able to compile statistics showing the extent of that practice, but the few cases setting out such figures are instructive. [citations omitted] Prosecutors have explained to courts that they routinely strike black jurors, see *State v. Washington*, 375 So.2d 1162, 1163-1164 (La.1979). An instruction book used by the prosecutor's office in Dallas County, Texas, explicitly advised prosecutors that they conduct jury selection so as to eliminate "any member of a minority group." In 100 felony trials in Dallas County in 1983-1984, prosecutors peremptorily struck 405 out of 467 eligible black jurors; the chance of a qualified black sitting on a jury was 1 in 10, compared to 1 in 2 for a white.

The Court's discussion of the utter unconstitutionality of that practice needs no amplification. This Court explained more than a century ago that "in the selection of jurors to pass upon [a defendant's] life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them, because of their color."

Neal v. Delaware, 103 U.S. 370, 394 (1881), quoting *Virginia v. Rives*, 100 U.S. 313, 323 (1880). JUSTICE REHNQUIST, dissenting, concedes that exclusion of blacks from a jury, solely because they are black, is at best based upon "crudely stereotypical and . . . in many cases hopelessly mistaken" notions. Yet the Equal Protection Clause prohibits a State from taking any action based on crude, inaccurate racial stereotypes -- even an action that does not serve the State's interests. Exclusion of blacks from a jury, solely because of race, can no more be justified by a belief that blacks are less likely than whites to consider fairly or sympathetically the State's case against a black defendant than it can be justified by the notion that blacks lack the "intelligence, experience, or moral integrity," *Neal*, *supra*, at 397, to be entrusted with that role.

II

I wholeheartedly concur in the Court's conclusion that use of the peremptory challenge to remove blacks from juries on the basis of their race violates the Equal Protection Clause. I would go further, however, in fashioning a remedy adequate to eliminate that discrimination. Merely allowing defendants the

opportunity to challenge the racially discriminatory use of peremptory challenges in individual cases will not end the illegitimate use of the peremptory challenge.

Evidentiary analysis similar to that set out by the Court ante at 97-98 has been adopted as a matter of state law in States including Massachusetts and California. Cases from those jurisdictions illustrate the limitations of the approach. First, defendants cannot attack the discriminatory use of peremptory challenges at all unless the challenges are so flagrant as to establish a *prima facie* case. This means, in those States, that where only one or two black jurors survive the challenges for cause, the prosecutor need have no compunction about striking them from the jury because of their race. See *Commonwealth v. Robinson*, 382 Mass. 189, 195, 415 N.E.2d 805, 809-810 (1981) (no *prima facie* case of discrimination where defendant is black, prospective jurors include three blacks and one Puerto Rican, and prosecutor excludes one for cause and strikes the remainder peremptorily, producing all-white jury); *People v. Rousseau*, 129 Cal.App.3d 526, 536-537, 179 Cal.Rptr. 892, 897-898 (1982) (no *prima facie* case where prosecutor peremptorily strikes only two blacks on jury panel). Prosecutors are left free to discriminate against blacks in jury selection provided that they hold that discrimination to an "acceptable" level.

Second, when a defendant can establish a *prima facie* case, trial courts face the difficult burden of assessing prosecutors' motives. See *King v. County of Nassau*, 581 F.Supp. 493, 501-502 (EDNY 1984). Any prosecutor can easily assert facially neutral reasons for striking a juror, and trial courts are ill-equipped to second-guess those reasons. How is the court to treat a prosecutor's statement that he struck a juror because the juror had a son about the same age as defendant, see *People v. Hall*, 35 Cal.3d 161, 672 P.2d 854 (1983), or seemed "uncommunicative," *King*, supra, at 498, or "never cracked a smile" and, therefore "did not possess the sensitivities necessary to realistically look at the issues and decide the facts in this case," *Hall*, supra, at 165, 672 P.2d at 856? If such easily generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on nonracial grounds, then the protection erected by the Court today may be illusory.

Nor is outright prevarication by prosecutors the only danger here. "[I]t is even possible that an attorney may lie to himself in an effort to convince himself that his motives are legal." *King*, supra, at 502. A prosecutor's own conscious or unconscious racism may lead him easily to the conclusion that a prospective black juror is "sullen," or "distant," a characterization that would not have come to his mind if a white juror had acted identically. A judge's own conscious or unconscious racism may lead him to accept such an explanation as well supported. As JUSTICE REHNQUIST concedes, prosecutors' peremptories are based on their "seat-of-the-pants instincts" as to how particular jurors will vote. Post at 138; see also THE CHIEF JUSTICE's dissenting opinion, post at 123. Yet "seat-of-the-pants instincts" may often be just another term for racial prejudice. Even if all parties approach the Court's mandate with the best of conscious intentions, that mandate requires them to confront and overcome their own racism on all levels -- a challenge I doubt all of them can meet. It is worth remembering that 114 years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole.

III

The inherent potential of peremptory challenges to distort the jury process by permitting the exclusion of jurors on racial grounds should ideally lead the Court to ban them entirely from the criminal justice system. See Van Dyke, at 167-169; Imlay, *Federal Jury Reformation: Saving a Democratic Institution*, 6 Loyola (LA) L.Rev. 247, 269-270 (1973). Justice Goldberg, dissenting in *Swain*, emphasized that [w]ere

it necessary to make an absolute choice between the right of a defendant to have a jury chosen in conformity with the requirements of the Fourteenth Amendment and the right to challenge peremptorily, the Constitution compels a choice of the former.

I believe that this case presents just such a choice, and I would resolve that choice by eliminating peremptory challenges entirely in criminal cases.

Some authors have suggested that the courts should ban prosecutors' peremptories entirely, but should zealously guard the defendant's peremptory as "essential to the fairness of trial by jury," *Lewis v. United States*, 146 U.S. 370, 376 (1892), and "one of the most important of the rights secured to the accused," *Pointer v. United States*, 151 U.S. 396, 408 (1894). See Van Dyke, at 167; Brown, McGuire, & Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials: Traditional Use or Abuse*, 14 *New England L.Rev.* 192 (1978). I would not find that an acceptable solution. Our criminal justice system requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state, the scales are to be evenly held.

We can maintain that balance, not by permitting both prosecutor and defendant to engage in racial discrimination in jury selection, but by banning the use of peremptory challenges by prosecutors and by allowing the States to eliminate the defendant's peremptories as well.

Much ink has been spilled regarding the historic importance of defendants' peremptory challenges. The approving comments of the *Lewis* and *Pointer* Courts are noted above; the *Swain* Court emphasized the "very old credentials" of the peremptory challenge, 380 U.S. at 212, and cited the "long and widely held belief that peremptory challenge is a necessary part of trial by jury." *Id.* at 219. But this Court has also repeatedly stated that the right of peremptory challenge is not of constitutional magnitude, and may be withheld altogether without impairing the constitutional guarantee of impartial jury and fair trial. [citations omitted] The potential for racial prejudice, further, inheres in the defendant's challenge as well. If the prosecutor's peremptory challenge could be eliminated only at the cost of eliminating the defendant's challenge as well, I do not think that would be too great a price to pay.

I applaud the Court's holding that the racially discriminatory use of peremptory challenges violates the Equal Protection Clause, and I join the Court's opinion. However, only by banning peremptories entirely can such discrimination be ended.

Side Bar: On July 10, 2018, Judge Brett Kavanaugh was officially nominated to fill the seat of retired Justice Anthony Kennedy when his nomination was sent to the United States Senate. In 1989, Kavanaugh wrote a note titled *Defense Presence and Participation: A Procedural Minimum for Batson v. Kentucky* Hearings and published in 99 *Yale L.J.* 187 (1989).

BOWERS v. HARDWICK
478 U.S. 186 (1986)

Argued: March 31, 1986

Decided: June 30, 1986

After being charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of his home, respondent Hardwick (respondent) brought suit in Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. The court granted the defendants' motion to dismiss for failure to state a claim. The Court of Appeals reversed and remanded, holding that the Georgia statute violated respondent's fundamental rights.

Held:

The Georgia statute is constitutional.

(a) The Constitution does not confer a fundamental right upon homosexuals to engage in sodomy. None of the fundamental rights announced in this Court's prior cases involving family relationships, marriage, or procreation bear any resemblance to the right asserted in this case. And any claim that those cases stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscription is unsupportable.

(b) Against a background in which many States have criminalized sodomy and still do, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

(c) There should be great resistance to expand the reach of the Due Process Clauses to cover new fundamental rights. Otherwise, the Judiciary necessarily would take upon itself further authority to govern the country without constitutional authority. The claimed right in this case falls far short of overcoming this resistance.

(d) The fact that homosexual conduct occurs in the privacy of the home does not affect the result. *Stanley v. Georgia*, 394 U.S. 557, distinguished.

(e) Sodomy laws should not be invalidated on the asserted basis that majority belief that sodomy is immoral is an inadequate rationale to support the laws.

760 F.2d 1202, reversed.

...JUSTICE WHITE delivered the opinion of the Court.

In August 1982, respondent Hardwick (hereafter respondent) was charged with violating the Georgia statute criminalizing sodomy by committing that act with another adult male in the bedroom of respondent's home. After a preliminary hearing, the District Attorney decided not to present the matter to the grand jury unless further evidence developed.

Respondent then brought suit in the Federal District Court, challenging the constitutionality of the statute insofar as it criminalized consensual sodomy. He asserted that he was a practicing homosexual, that the Georgia sodomy statute, as administered by the defendants, placed him in imminent danger of arrest, and that the statute for several reasons violates the Federal Constitution. The District Court granted the defendants' motion to dismiss for failure to state a claim, relying on *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (ED Va. 1975), which this Court summarily affirmed, 425 U.S. 901 (1976).

A divided panel of the Court of Appeals for the Eleventh Circuit reversed. 760 F.2d 1202 (1985). The court first held that, because Doe was distinguishable and in any event had been undermined by later decisions, our summary affirmance in that case did not require affirmance of the District Court. Relying on our decisions in *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Stanley v. Georgia*, 394 U.S. 557 (1969); and *Roe v. Wade*, 410 U.S. 113 (1973), the court went on to hold that the Georgia statute violated respondent's fundamental rights because his homosexual activity is a private and intimate association that is beyond the reach of state regulation by reason of the Ninth Amendment and the Due Process Clause of the Fourteenth Amendment. The case was remanded for trial, at which, to prevail, the State would have to prove that the statute is supported by a compelling interest and is the most narrowly drawn means of achieving that end.

Because other Courts of Appeals have arrived at judgments contrary to that of the Eleventh Circuit in this case, we granted the Attorney General's petition for certiorari questioning the holding that the sodomy statute violates the fundamental rights of homosexuals. We agree with petitioner that the Court of Appeals erred, and hence reverse its judgment.

This case does not require a judgment on whether laws against sodomy between consenting adults in general, or between homosexuals in particular, are wise or desirable. It raises no question about the right or propriety of state legislative decisions to repeal their laws that criminalize homosexual sodomy, or of state-court decisions invalidating those laws on state constitutional grounds. The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy and hence invalidates the laws of the many States that still make such conduct illegal and have done so for a very long time. The case also calls for some judgment about the limits of the Court's role in carrying out its constitutional mandate.

We first register our disagreement with the Court of Appeals and with respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy and for all intents and purposes have decided this case. The reach of this line of cases was sketched in [citations omitted] The latter three cases were interpreted as construing the Due Process Clause of the Fourteenth Amendment to confer a fundamental individual right to decide whether or not to beget or bear a child. *Carey v. Population Services International*, *supra*, at 688-689.

Accepting the decisions in these cases and the above description of them, we think it evident that none of the rights announced in those cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent. Moreover, any claim that these cases nevertheless stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally

insulated from state proscription is unsupportable. Indeed, the Court's opinion in *Carey* twice asserted that the privacy right, which the *Griswold* line of cases found to be one of the protections provided by the Due Process Clause, did not reach so far. 431 U.S., at 688, n. 5, 694, n. 17.

Precedent aside, however, respondent would have us announce, as the Court of Appeals did, a fundamental right to engage in homosexual sodomy. This we are quite unwilling to do. It is true that despite the language of the Due Process Clauses of the Fifth and Fourteenth Amendments, which appears to focus only on the processes by which life, liberty, or property is taken, the cases are legion in which those Clauses have been interpreted to have substantive content, subsuming rights that to a great extent are immune from federal or state regulation or proscription. Among such cases are those recognizing rights that have little or no textual support in the constitutional language. *Meyer*, *Prince*, and *Pierce* fall in this category, as do the privacy cases from *Griswold* to *Carey*.

Striving to assure itself and the public that announcing rights not readily identifiable in the Constitution's text involves much more than the imposition of the Justices' own choice of values on the States and the Federal Government, the Court has sought to identify the nature of the rights qualifying for heightened judicial protection. In *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937), it was said that this category includes those fundamental liberties that are "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if [they] were sacrificed." A different description of fundamental liberties appeared in *Moore v. East Cleveland*, 431 U.S. 494, 503 (1977) (opinion of POWELL, J.), where they are characterized as those liberties that are "deeply rooted in this Nation's history and tradition." *Id.*, at 503 (POWELL, J.). See also *Griswold v. Connecticut*, 381 U.S., at 506.

It is obvious to us that neither of these formulations would extend a fundamental right to homosexuals to engage in acts of consensual sodomy. Proscriptions against that conduct have ancient roots. See generally *Survey on the Constitutional Right to Privacy in the Context of Homosexual Activity*, 40 U. Miami L. Rev. 521, 525 (1986). Sodomy was a criminal offense at common law and was forbidden by the laws of the original 13 States when they ratified the Bill of Rights. In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 24 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between consenting adults. See *Survey*, U. Miami L. Rev., *supra*, at 524, n. 9. Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Respondent, however, asserts that the result should be different where the homosexual conduct occurs in the privacy of the home. He relies on *Stanley v. Georgia*, 394 U.S. 557 (1969), where the Court held that the First Amendment prevents conviction for possessing and reading obscene material in the privacy of one's home: "If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his house, what books he may read or what films he may watch." *Id.*, at 565.

Stanley did protect conduct that would not have been protected outside the home, and it partially prevented the enforcement of state obscenity laws; but the decision was firmly grounded in the First Amendment. The right pressed upon us here has no similar support in the text of the Constitution, and it does not qualify for recognition under the prevailing principles for construing the Fourteenth Amendment. Its limits are also difficult to discern. Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. *Stanley* itself recognized that its holding offered no protection for the possession in the home of drugs, firearms, or stolen goods. *Id.*, at 568, n. 11. And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct [478 U.S. 186, 196] while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Even if the conduct at issue here is not a fundamental right, respondent asserts that there must be a rational basis for the law and that there is none in this case other than the presumed belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable. This is said to be an inadequate rationale to support the law. The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed. Even respondent makes no such claim, but insists that majority sentiments about the morality of homosexuality should be declared inadequate. We do not agree, and are unpersuaded that the sodomy laws of some 25 States should be invalidated on this basis.

Accordingly, the judgment of the Court of Appeals is

Reversed.

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

This case is no more about "a fundamental right to engage in homosexual sodomy," as the Court purports to declare, than *Stanley v. Georgia*, 394 U.S. 557 (1969), was about a fundamental right to watch obscene movies, or *Katz v. United States*, 389 U.S. 347 (1967), was about a fundamental right to place interstate bets from a telephone booth. Rather, this case is about "the most comprehensive of rights and the right most valued by civilized men," namely, "the right to be let alone." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

The statute at issue, Ga. Code Ann. 16-6-2 (1984), denies individuals the right to decide for themselves whether to engage in particular forms of private, consensual sexual activity. The Court concludes that 16-6-2 is valid essentially because "the laws of . . . many States . . . still make such conduct illegal and have done so for a very long time." But the fact that the moral judgments expressed by statutes like 16-6-2

may be "natural and familiar . . . ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States." *Roe v. Wade*, 410 U.S. 113, 117 (1973), quoting *Lochner v. New York*, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting). Like Justice Holmes, I believe that "[i]t is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 469 (1897). I believe we must analyze respondent Hardwick's claim in the light of the values that underlie the constitutional right to privacy. If that right means anything, it means that, before Georgia can prosecute its citizens for making choices about the most intimate aspects of their lives, it must do more than assert that the choice they have made is an "abominable crime not fit to be named among Christians." ...

I

In its haste to reverse the Court of Appeals and hold that the Constitution does not "confe[r] a fundamental right upon homosexuals to engage in sodomy," the Court relegates the actual statute being challenged to a footnote and ignores the procedural posture of the case before it. A fair reading of the statute and of the complaint clearly reveals that the majority has distorted the question this case presents.

First, the Court's almost obsessive focus on homosexual activity is particularly hard to justify in light of the broad language Georgia has used. Unlike the Court, the Georgia Legislature has not proceeded on the assumption that homosexuals are so different from other citizens that their lives may be controlled in a way that would not be tolerated if it limited the choices of those other citizens. Cf. *ante*, at 188, n. 2. Rather, Georgia has provided that "[a] person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." Ga. Code Ann. 16-6-2(a) (1984). The sex or status of the persons who engage in the act is irrelevant as a matter of state law. In fact, to the extent I can discern a legislative purpose for Georgia's 1968 enactment of 16-6-2, that purpose seems to have been to broaden the coverage of the law to reach heterosexual as well as homosexual activity. I therefore see no basis for the Court's decision to treat this case as an "as applied" challenge to 16-6-2, or for Georgia's attempt, both in its brief and at oral argument, to defend 16-6-2 solely on the grounds that it prohibits homosexual activity. Michael Hardwick's standing may rest in significant part on Georgia's apparent willingness to enforce against homosexuals a law it seems not to have any desire to enforce against heterosexuals. ... But his claim that 16-6-2 involves an unconstitutional intrusion into his privacy and his right of intimate association does not depend in any way on his sexual orientation.

Second, I disagree with the Court's refusal to consider whether 16-6-2 runs afoul of the Eighth or Ninth Amendments or the Equal Protection Clause of the Fourteenth Amendment. *Ante*, at 196, n. 8. Respondent's complaint expressly invoked the Ninth Amendment, see App. 6, and he relied heavily before this Court on *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), which identifies that Amendment as one of the specific constitutional provisions giving "life and substance" to our understanding of privacy. ... even if respondent did not advance claims based on the Eighth or Ninth Amendments, or on the Equal Protection Clause, his complaint should not be dismissed if any of those provisions could entitle him to relief. I need not reach either the Eighth Amendment or the Equal Protection Clause issues because I believe that Hardwick has stated a cognizable claim that 16-6-2 interferes with constitutionally protected interests in privacy and freedom of intimate association. But neither the Eighth Amendment nor the Equal

Protection Clause is so clearly irrelevant that a claim resting on either provision should be peremptorily dismissed. The Court's cramped reading of the issue before it makes for a short opinion, but it does little to make for a persuasive one.

II

"Our cases long have recognized that the Constitution embodies a promise that a certain private sphere of individual liberty will be kept largely beyond the reach of government." *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986). In construing the right to privacy, the Court has proceeded along two somewhat distinct, albeit complementary, lines. First, it has recognized a privacy interest with reference to certain decisions that are properly for the individual to make. e. g., *Roe v. Wade*, 410 U.S. 113 (1973); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). Second, it has recognized a privacy interest with reference to certain places without regard for the particular activities in which the individuals who occupy them are engaged. E. g., *United States v. Karo*, 468 U.S. 705 (1984); *Payton v. New York*, 445 U.S. 573 (1980); *Rios v. United States*, 364 U.S. 253 (1960). The case before us implicates both the decisional and the spatial aspects of the right to privacy.

A

The Court concludes today that none of our prior cases dealing with various decisions that individuals are entitled to make free of governmental interference "bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case." While it is true that these cases may be characterized by their connection to protection of the family, see *Roberts v. United States Jaycees*, 468 U.S. 609, 619 (1984), the Court's conclusion that they extend no further than this boundary ignores the warning in *Moore v. East Cleveland*, 431 U.S. 494, 501 (1977) (plurality opinion), against "clos[ing] our eyes to the basic reasons why certain rights associated with the family have been accorded shelter under the Fourteenth Amendment's Due Process Clause." We protect those rights not because they contribute, in some direct and material way, to the general public welfare, but because they form so central a part of an individual's life. "[T]he concept of privacy embodies the 'moral fact that a person belongs to himself and not others nor to society as a whole.'" [citations omitted] And so we protect the decision whether to marry precisely because marriage "is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects." *Griswold v. Connecticut*, 381 U.S., at 486. We protect the decision whether to have a child because parenthood alters so dramatically an individual's self-definition, not because of demographic considerations or the Bible's command to be fruitful and multiply. ... And we protect the family because it contributes so powerfully to the happiness of individuals, not because of a preference for stereotypical households. .. The Court recognized in *Roberts*, 468 U.S., at 619, that the "ability independently to define one's identity that is central to any concept of liberty" cannot truly be exercised in a vacuum; we all depend on the "emotional enrichment from close ties with others."

Only the most willful blindness could obscure the fact that sexual intimacy is "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality," *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63 (1973); see also *Carey v. Population Services International*, 431 U.S. 678, 685 (1977). The fact that individuals define themselves in a

significant way through their intimate sexual relationships with others suggests, in a Nation as diverse as ours, that there may be many "right" ways of conducting those relationships, and that much of the richness of a relationship will come from the freedom an individual has to choose the form and nature of these intensely personal bonds. ...

In a variety of circumstances we have recognized that a necessary corollary of giving individuals freedom to choose how to conduct their lives is acceptance of the fact that different individuals will make different choices. For example, in holding that the clearly important state interest in public education should give way to a competing claim by the Amish to the effect that extended formal schooling threatened their way of life, the Court declared: "There can be no assumption that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different." *Wisconsin v. Yoder*, 406 U.S. 205, 223-224 (1972). The Court claims that its decision today merely refuses to recognize a fundamental right to engage in homosexual sodomy; what the Court really has refused to recognize is the fundamental interest all individuals have in controlling the nature of their intimate associations with others.

B

The behavior for which *Hardwick* faces prosecution occurred in his own home, a place to which the Fourth Amendment attaches special significance. The Court's treatment of this aspect of the case is symptomatic of its overall refusal to consider the broad principles that have informed our treatment of privacy in specific cases. Just as the right to privacy is more than the mere aggregation of a number of entitlements to engage in specific behavior, so too, protecting the physical integrity of the home is more than merely a means of protecting specific activities that often take place there. Even when our understanding of the contours of the right to privacy depends on "reference to a 'place,'" *Katz v. United States*, 389 U.S., at 361 (Harlan, J., concurring), "the essence of a Fourth Amendment violation is 'not the breaking of [a person's] doors, and the rummaging of his drawers,' but rather is 'the invasion of his indefensible right of personal security, personal liberty and private property.'" [citations omitted]

The Court's interpretation of the pivotal case of *Stanley v. Georgia*, 394 U.S. 557 (1969), is entirely unconvincing. *Stanley* held that Georgia's undoubted power to punish the public distribution of constitutionally unprotected, obscene material did not permit the State to punish the private possession of such material. According to the majority here, *Stanley* relied entirely on the First Amendment, and thus, it is claimed, sheds no light on cases not involving printed materials. *Ante*, at 195. But that is not what *Stanley* said. Rather, the *Stanley* Court anchored its holding in the Fourth Amendment's special protection for the individual in his home:

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations."

.....

“These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases - the right to satisfy his intellectual and emotional needs in the privacy of his own home.” 394 U.S., at 564 -565, quoting *Olmstead v. United States*, 277 U.S., at 478 (Brandeis, J., dissenting).

The central place that Stanley gives Justice Brandeis' dissent in *Olmstead*, a case raising no First Amendment claim, shows that Stanley rested as much on the Court's understanding of the Fourth Amendment as it did on the First. Indeed, in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), the Court suggested that reliance on the Fourth Amendment not only supported the Court's outcome in Stanley but actually was necessary to it: "If obscene material unprotected by the First Amendment in itself carried with it a 'penumbra' of constitutionally protected privacy, this Court would not have found it necessary to decide Stanley on the narrow basis of the 'privacy of the home,' which was hardly more than a reaffirmation that 'a man's home is his castle.'" 413 U.S., at 66 . "The right of the people to be secure in their . . . houses," expressly guaranteed by the Fourth Amendment, is perhaps the most "textual" of the various constitutional provisions that inform our understanding of the right to privacy, and thus I cannot agree with the Court's statement that "[t]he right pressed upon us here has no . . . support in the text of the Constitution," ante, at 195. Indeed, the right of an individual to conduct intimate relationships in the intimacy of his or her own home seems to me to be the heart of the Constitution's protection of privacy.

III

The Court's failure to comprehend the magnitude of the liberty interests at stake in this case leads it to slight the question whether petitioner, on behalf of the State, has justified Georgia's infringement on these interests. I believe that neither of the two general justifications for 16-6-2 that petitioner has advanced warrants dismissing respondent's challenge for failure to state a claim.

First, petitioner asserts that the acts made criminal by the statute may have serious adverse consequences for "the general public health and welfare," such as spreading communicable diseases or fostering other criminal activity. Inasmuch as this case was dismissed by the District Court on the pleading, it is not surprising that the record before us is barren of any evidence to support petitioner's claim. In light of the state of the record, I see no justification for the Court's attempt to equate the private, consensual sexual activity at issue here with the "possession in the home of drugs, firearms, or stolen goods," to which Stanley refused to extend its protection. None of the behavior so mentioned in Stanley can properly be viewed as "[v]ictimless,": drugs and weapons are inherently dangerous, see, e. g., *McLaughlin v. United States*, 476 U.S. 16 (1986), and for property to be "stolen," someone must have been wrongfully deprived of it. Nothing in the record before the Court provides any justification for finding the activity forbidden by 16-6-2 to be physically dangerous, either to the persons engaged in it or to others.

The core of petitioner's defense of 16-6-2, however, is that respondent and others who engage in the conduct prohibited by 16-6-2 interfere with Georgia's exercise of the "right of the Nation and of the States to maintain a decent society," *Paris Adult Theater I v. Slaton*, 413 U.S., at 59 -60, quoting *Jacobellis v. Ohio*, 378 U.S. 184, 199 (1964) (Warren, C. J., dissenting). Essentially, petitioner argues, and the Court agrees, that the fact that the acts described in 16-6-2 "for hundreds of years, if not thousands,

have been uniformly condemned as immoral" is a sufficient reason to permit a State to ban them today. Brief for Petitioner 19; see ante, at 190, 192-194, 196.

I cannot agree that either the length of time a majority has held its convictions or the passions with which it defends them can withdraw legislation from this Court's security. [citations omitted] "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . . [F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order." See also Karst, 89 Yale L. J., at 627. It is precisely because the issue raised by this case touches the heart of what makes individuals what they are that we should be especially sensitive to the rights of those whose choices upset the majority.

The assertion that "traditional Judeo-Christian values proscribe" the conduct involved, Brief for Petitioner 20, cannot provide an adequate justification for 16-6-2. That certain, but by no means all, religious groups condemn the behavior at issue gives the State no license to impose their judgments on the entire citizenry. The legitimacy of secular legislation depends instead on whether the State can advance some justification for its law beyond its conformity to religious doctrine. See, e. g., *McGowan v. Maryland*, 366 U.S. 420, 429 -453 (1961); *Stone v. Graham*, 449 U.S. 39 (1980). Thus, far from buttressing his case, petitioner's invocation of Leviticus, Romans, St. Thomas Aquinas, and sodomy's heretical status during the Middle Ages undermines his suggestion that 16-6-2 represents a legitimate use of secular coercive power. A State can no more punish private behavior because of religious intolerance than it can punish such behavior because of racial animus. "The Constitution cannot control such prejudices, but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). No matter how uncomfortable a certain group may make the majority of this Court, we have held that "[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty." *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975). [citations omitted]

Nor can 16-6-2 be justified as a "morally neutral" exercise of Georgia's power to "protect the public environment," *Paris Adult Theatre I*, 413 U.S., at 68 -69. Certainly, some private behavior can affect the fabric of society as a whole. Reasonable people may differ about whether particular sexual acts are moral or immoral, but "we have ample evidence for believing that people will not abandon morality, will not think any better of murder, cruelty and dishonesty, merely because some private sexual practice which they abominate is not punished by the law." H. L. A. Hart, *Immorality and Treason*, reprinted in *The Law as Literature* 220, 225 (L. Blom-Cooper ed. 1961). Petitioner and the Court fail to see the difference between laws that protect public sensibilities and those that enforce private morality. Statutes banning public sexual activity are entirely consistent with protecting the individual's liberty interest in decisions concerning sexual relations: the same recognition that those decisions are intensely private which justifies protecting them from governmental interference can justify protecting individuals from unwilling exposure to the sexual activities of others. But the mere fact that intimate behavior may be punished when it takes place in public cannot dictate how States can regulate intimate behavior that occurs in intimate places. See *Paris Adult Theatre I*, 413 U.S., at 66 , n. 13 ("marital intercourse on a street corner or a theater stage" can be forbidden despite the constitutional protection identified in *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

This case involves no real interference with the rights of others, for the mere knowledge that other individuals do not adhere to one's value system cannot be a legally cognizable interest, cf. *Diamond v. Charles*, 476 U.S. 54, 65 -66 (1986), let alone an interest that can justify invading the houses, hearts, and minds of citizens who choose to live their lives differently.

IV

It took but three years for the Court to see the error in its analysis in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940), and to recognize that the threat to national cohesion posed by a refusal to salute the flag was vastly outweighed by the threat to those same values posed by compelling such a salute. See *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). I can only hope that here, too, the Court soon will reconsider its analysis and conclude that depriving individuals of the right to choose for themselves how to conduct their intimate relationships poses a far greater threat to the values most deeply rooted in our Nation's history than tolerance of nonconformity could ever do. Because I think the Court today betrays those values, I dissent.



Michael Hardwick

Side Bar: *Bowers* was overturned by the United States Supreme Court in *Lawrence v. Texas*, 539 U.S. 558 (2003) where the Court struck down the sodomy law in Texas in a 6-3 decision and, by extension, invalidated sodomy laws in 13 other states, making same-sex legal in the U.S. and its territories. Michael Hardwick didn't live to see the U.S. Supreme Court overturn sodomy laws. He died in Gainesville, Florida, on June 13, 1991, from complications from AIDS.

TEXAS v. JOHNSON 491 US 397 (1989)

Argued: March 21, 1989

Decided: June 21, 1989

During the 1984 Republican National Convention in Dallas, Texas, 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. 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.

(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 [491 U.S. 397, 398] 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.

(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.

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, REHNQUIST, C. J., filed a dissenting opinion, in which WHITE and O'CONNOR, JJ., STEVENS, J., filed a dissenting opinion.

JUSTICE BRENNAN delivered the opinion of the Court.

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 protestors 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). 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.

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. 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, 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, 377 (1968); *Spence*, supra, at 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 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. See *Spence*, supra, at 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 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 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 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." 418 U.S., at 410 -411. Hence, we have recognized the expressive nature of students' wearing of black armbands to protest American military involvement in Vietnam, *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 505 (1969); of a sit-in by blacks in a "whites only" area to protest segregation, *Brown v. Louisiana*, 383 U.S. 131, 141 -142 (1966); of the wearing of American military uniforms in a dramatic presentation criticizing American involvement in Vietnam, *Schacht v. United States*, 398 U.S. 58 (1970); and of picketing about a wide variety of causes, see, e. g., *Food Employees v. Logan Valley Plaza, Inc.*, 391 U.S. 308, 313 -314 (1968); *United States v. Grace*, 461 U.S. 171, 176 (1983).

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 409-410; refusing to salute the flag, *Barnette*, 319 U.S., at 632 ; and displaying a red flag, *Stromberg v. California*, 283 U.S. 359 , 368-369 (1931), we have held, all may find shelter under the First Amendment. See also *Smith v. Goguen*, 415 U.S. 566, 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 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 short cut 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 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 concededly triggered by the Cambodian incursion and the Kent State tragedy." 418 U.S., at 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 409.

The State of Texas conceded for purposes of its oral argument in this case that Johnson's conduct was expressive conduct, 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 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 376-377; *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Dallas v. Stanglin*, 490 U.S. 19, 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." *Community for Creative Non-Violence v. Watt*, 227 U.S. App. D.C. 19, 55-56, 703 F.2d 586, 622-623 (1983) (Scalia, J., dissenting) (emphasis in original), rev'd sub nom. *Clark v. Community for Creative Non-Violence*, supra. It is, in short, not simply the verbal or nonverbal nature of the expression, but the governmental interest at stake, that helps to determine whether a restriction on that expression is valid.

Thus, although we have recognized that where "'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 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 377; see also *Spence*, supra, at 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 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 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. 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. 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." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). See also *Cox v. Louisiana*, 379 U.S. 536, 551 (1965); *Tinker v. Des Moines Independent Community School Dist.* 393 U.S., at 508 -509; *Coates v. Cincinnati*, 402 U.S. 611, 615 (1971); *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 -56 (1988). It would be odd indeed to conclude both that "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection," *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978) (opinion of STEVENS, J.), and that the government may ban the expression of certain disagreeable ideas on the unsupported presumption that their very disagreeableness will provoke violence.

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, 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, 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 an invitation to exchange fisticuffs. See *id.*, at 572-573; *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940); *FCC v. Pacifica Foundation*, *supra*, at 745 (opinion of STEVENS, J.).

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 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 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 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 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 318; *Frisby v. Schultz*, 487 U.S. 474, 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. 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. Our decision in *Boos v. Barry*, supra, [491 U.S. 397, 412] 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 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 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 321 (plurality opinion); see also *id.*, at 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*, *supra*, at 321.

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 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.

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable. [citations omitted]

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 593, quoting *Barnette*, 319 U.S., at 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 634.

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 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 415. See also *Goguen*, *supra*, at 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. 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 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. 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 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 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 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 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." *Barnette*, 319 U.S., at 640.

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, 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.

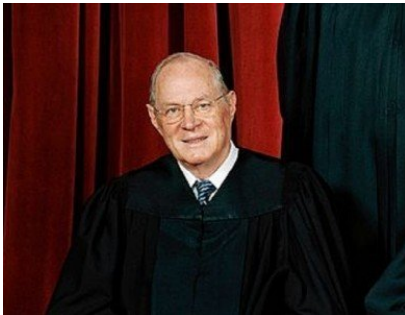
The way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong. "To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no 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." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). 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.



Anthony Kennedy

Side Bar: “Among the most controversial of all Supreme Court decisions happened in 1989, when a divided Court allowed flag burning as protected free speech. So how did the Court choose to make an unpopular decision about an American institution?”

The battle in the courts over people burning the American flag, or doing other offensive acts to the flag, dates back to 1907. In the prior decade, states started passing laws that banned flag desecration, which not only included laws protecting the flag from physical abuse, but also from

commercial abuse.

The Court said in the 1907 case of *Halter v. Nebraska* that two businessmen couldn’t sell beer that had flag labels on the bottles, upholding a state law.

Then a 1931 case set the first precedent for the use of a flag in an act of symbolic speech under the First Amendment, when the Court struck down a California law that banned the flying of a red flag to protest against the government.

In 1968, Congress approved the Federal Flag Desecration Law after a Vietnam War protest. The law made it illegal to "knowingly" cast "contempt" upon "any flag of the United States by publicly mutilating, defacing, defiling, burning or trampling upon it."

The Court moved toward its historic 1989 decision about flag burning in 1974, when it said in *Spence v. Washington* that a person couldn’t be convicted for using tape to put a peace sign on an American flag. The decision made it clear that a majority of the Court saw the act as protected expression under the First Amendment.

During the decade, states narrowed the focus on their flag desecration laws, but they still prohibited flag burning and other acts of mutilation.

The issue was then settled, at least in the Supreme Court, in the controversial *Texas v. Johnson* decision.



In protest of President Ronald Reagan's administrative policies, Gregory Lee Johnson burned a flag outside the City Hall building in Dallas, Texas, in 1984. Many onlookers said the scene was deeply offensive, a sentiment that represented the popular majority's view on the matter.

Texas arrested Johnson and convicted him of breaking a Texas state law that prohibited desecration of the flag of the United States. Johnson was sentenced to one year in prison and ordered to pay a \$2,000 fine.

Johnson appealed his conviction, claiming First Amendment protection, and the Texas Court of Criminal Appeals stated that Johnson's speech was symbolic and ruled in his favor.

The Supreme Court took the case, and in a very unusual majority, the Court voted 5-4 in favor of Johnson. Johnson's actions, the majority argued, were symbolic speech political in nature and could be expressed even at the affront of those who disagreed with him.

Justice Anthony Kennedy, writing a regular concurrence, spelled out his reasoning succinctly.

"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," Kennedy said. "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.

"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," he said.

Chief Justice William Rehnquist, in his dissent said that, "the flag is not simply another 'idea' or 'point of view' competing for recognition in the marketplace of ideas."

"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," he said.

In reaction to the *Johnson* decision, which only applied to the state of Texas, Congress passed an anti-flag burning law called the Flag Protection Act of 1989.

But in 1990, the Court struck down that law as unconstitutional.

“If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable,” said Justice William Brennan.

The case remains controversial to the present day, and Congress has, as recently as 2006, attempted to amend the Constitution to prohibit flag desecration, with the effort failing by one vote in the Senate. “quoted from Scott Bomboy, Inside the Supreme Court’s flag burning decision, Constitution Daily, June 14, 2015 available at <https://constitutioncenter.org/blog/inside-the-supreme-courts-flag-burning-decision/>.

Skinner v. Railway Labor Executives' Association
489 U.S. 602 (1989)

Syllabus

Upon the basis of evidence indicating that alcohol and drug abuse by railroad employees had caused or contributed to a number of significant train accidents, the Federal Railroad Administration (FRA) promulgated regulations under petitioner Secretary of Transportation's statutory authority to adopt safety standards for the industry. Among other things, Subpart C of the regulations requires railroads to see that blood and urine tests of covered employees are conducted following certain major train accidents or incidents, while Subpart D authorizes, but does not require, railroads to administer breath or urine tests, or both, to covered employees who violate certain safety rules. Respondents, the Railway Labor Executives' Association and various of its member labor organizations, brought suit in the Federal District Court to enjoin the regulations. The court granted summary judgment for petitioners, concluding that the regulations did not violate the Fourth Amendment. The Court of Appeals reversed, ruling, *inter alia*, that a requirement of particularized suspicion is essential to a finding that toxicological testing of railroad employees is reasonable under the Fourth Amendment. The court stated that such a requirement would ensure that the tests, which reveal the presence of drug metabolites that may remain in the body for weeks following ingestion, are confined to the detection of current impairment.

Held:

1. The Fourth Amendment is applicable to the drug and alcohol testing mandated or authorized by the FRA regulations. Pp. 613-618.

(a) The tests in question cannot be viewed as private action outside the reach of the Fourth Amendment. A railroad that complies with Subpart C does so by compulsion of sovereign authority, and therefore must be viewed as an instrument or agent of the Government. Similarly, even though Subpart D does not compel railroads to test, it cannot be concluded, in the context of this facial challenge, that such testing will be primarily the result of private initiative, since specific features of the regulations combine to establish that the Government has actively encouraged, endorsed, and participated in the testing. Specifically, since the regulations preempt state laws covering the same subject matter, and are intended to supersede collective bargaining and arbitration award provisions, the Government has removed all legal barriers to the testing authorized by Subpart D. Moreover, by conferring upon the FRA the right to

receive biological samples and test results procured by railroads, Subpart D makes plain a strong preference for testing and a governmental desire to share the fruits of such intrusions. In addition, the regulations mandate that railroads not bargain away their Subpart D testing authority, and provide that an employee who refuses to submit to such tests must be withdrawn from covered service. Pp. 614-616.

(b) The collection and subsequent analysis of the biological samples required or authorized by the regulations constitute searches of the person subject to the Fourth Amendment. This Court has long recognized that a compelled intrusion into the body for blood to be tested for alcohol content, and the ensuing chemical analysis, constitute searches. Similarly, subjecting a person to the breath test authorized by Subpart D must be deemed a search, since it requires the production of "deep lung" breath, and thereby implicates concerns about bodily integrity. Moreover, although the collection and testing of urine under the regulations do not entail any intrusion into the body, they nevertheless constitute searches, since they intrude upon expectations of privacy as to medical information and the act of urination that society has long recognized as reasonable. Even if the employer's antecedent interference with the employee's freedom of movement cannot be characterized as an independent Fourth Amendment seizure, any limitation on that freedom that is necessary to obtain the samples contemplated by the regulations must be considered in assessing the intrusiveness of the searches affected by the testing program. Pp. 616-618.

2. The drug and alcohol tests mandated or authorized by the FRA regulations are reasonable under the Fourth Amendment, even though there is no requirement of a warrant or a reasonable suspicion that any particular employee may be impaired, since, on the present record, the compelling governmental interests served by the regulations outweigh employees' privacy concerns. Pp. 618-633.

(a) The Government's interest in regulating the conduct of railroad employees engaged in safety-sensitive tasks in order to ensure the safety of the traveling public and of the employees themselves plainly justifies prohibiting such employees from using alcohol or drugs while on duty or on call for duty and the exercise of supervision to assure that the restrictions are in fact observed. That interest presents "special needs" beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements. Pp. 618-621.

(b) Imposing a warrant requirement in the present context is not essential to render the intrusions at issue reasonable. Such a requirement would do little to further the purposes of a warrant, since both the circumstances justifying toxicological testing and the permissible limits of such intrusions are narrowly and specifically defined by the regulations, and doubtless are well known to covered employees, and since there are virtually no facts for a neutral magistrate to evaluate, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program. Moreover, imposing a warrant requirement would significantly hinder, and in many cases frustrate, the objectives of the testing program, since the delay necessary to procure a warrant could result in the destruction of valuable evidence, in that alcohol and drugs are eliminated from the bloodstream at a constant rate, and since the railroad supervisors who set the testing process in motion have little familiarity with the intricacies of Fourth Amendment jurisprudence. Pp. 621-624.

(c) Imposing an individualized suspicion requirement in the present context is not essential to render the intrusions at issue reasonable. The testing procedures contemplated by the regulations pose only limited threats to covered employees' justifiable privacy expectations, particularly since they participate in an industry subject to pervasive safety regulation by the Federal and State Governments. Moreover, because

employees ordinarily consent to significant employer-imposed restrictions on their freedom of movement, any additional interference with that freedom that occurs in the time it takes to procure a sample from a railroad employee is minimal. Furthermore, *Schmerber v. California*, 384 U.S. 757, established that governmentally imposed blood tests do not constitute an unduly extensive imposition on an individual's privacy and bodily integrity, and the breath tests authorized by Subpart D are even less intrusive than blood tests. And, although urine tests require employees to perform an excretory function traditionally shielded by great privacy, the regulations reduce the intrusiveness of the collection process by requiring that samples be furnished in a medical environment, without direct observation. In contrast, the governmental interest in testing without a showing of individualized suspicion is compelling. A substance-impaired railroad employee in a safety-sensitive job can cause great human loss before any signs of the impairment become noticeable, and the regulations supply an effective means of deterring such employees from using drugs or alcohol by putting them on notice that they are likely to be discovered if an accident occurs. An individualized suspicion requirement would also impede railroads' ability to obtain valuable information about the causes of accidents or incidents and how to protect the public, since obtaining evidence giving rise to the suspicion that a particular employee is impaired is impracticable in the chaotic aftermath of an accident, when it is difficult to determine which employees contributed to the occurrence and objective indicia of impairment are absent. The Court of Appeals' conclusion that the regulations are unreasonable because the tests in question cannot measure current impairment is flawed. Even if urine test results disclosed nothing more specific than the recent use of controlled substances, this information would provide the basis for a further investigation, and might allow the FRA to reach an informed judgment as to how the particular accident occurred. More importantly, the court overlooked the FRA's policy of placing principal reliance on blood tests, which unquestionably can identify recent drug use, and failed to recognize that the regulations are designed not only to discern impairment, but to deter it. Pp. 624-632.

839 F.2d 575, reversed.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting.

The issue in this case is not whether declaring a war on illegal drugs is good public policy. The importance of ridding our society of such drugs is, by now, apparent to all. Rather, the issue here is whether the Government's deployment in that war of a particularly draconian weapon -- the compulsory collection and chemical testing of railroad workers' blood and urine -- comports with the Fourth Amendment. Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great. History teaches that grave threats to liberty often come in times of urgency, when constitutional rights seem too extravagant to endure. The World War II relocation camp cases, *Hirabayashi v. United States*, 320 U.S. 81 (1943); *Korematsu v. United States*, 323 U.S. 214 (1944), and the Red scare and McCarthy-era internal subversion cases, *Schenck v. United States*, 249 U.S. 47 (1919); *Dennis v. United States*, 341 U.S. 494 (1951), are only the most extreme reminders that, when we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.

In permitting the Government to force entire railroad crews to submit to invasive blood and urine tests, even when it lacks any evidence of drug or alcohol use or other wrongdoing, the majority today joins those shortsighted courts which have allowed basic constitutional rights to fall prey to momentary emergencies. The majority holds that the need of the Federal Railroad Administration (FRA) to deter and diagnose train accidents outweighs any "minimal" intrusions on personal dignity and privacy posed by

mass toxicological testing of persons who have given no indication whatsoever of impairment. ... In reaching this result, the majority ignores the text and doctrinal history of the Fourth Amendment, which require that highly intrusive searches of this type be based on probable cause, not on the evanescent cost-benefit calculations of agencies or judges. But the majority errs even under its own utilitarian standards, trivializing the raw intrusiveness of, and overlooking serious conceptual and operational flaws in, the FRA's testing program. These flaws cast grave doubts on whether that program, though born of good intentions, will do more than ineffectually symbolize the Government's opposition to drug use.

The majority purports to limit its decision to post-accident testing of workers in "safety-sensitive" jobs, *ante* at 620, much as it limits its holding in the companion case to the testing of transferees to jobs involving drug interdiction or the use of firearms. *National Treasury Employees Union v. Von Raab*, *post* at 664. But the damage done to the Fourth Amendment is not so easily cabined. The majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens. I therefore dissent.

I

The Court today takes its longest step yet toward reading the probable cause requirement out of the Fourth Amendment. For the fourth time in as many years, a majority holds that a "'special need[d], beyond the normal need for law enforcement,'" makes the "'requirement'" of probable cause "'impracticable.'" *Ante* at 619 (citations omitted). With the recognition of "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety" as such a need, *ante* at 620, the Court has now permitted "special needs" to displace constitutional text in each of the four categories of searches enumerated in the Fourth Amendment: searches of "persons," *ante* at 613-614; "houses," *Griffin v. Wisconsin*, 483 U.S. 868 (1987); "papers," *O'Connor v. Ortega*, 480 U.S. 709 (1987); and "effects," *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

The process by which a constitutional "requirement" can be dispensed with as "impracticable" is an elusive one to me. The Fourth Amendment provides that

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

The majority's recitation of the Amendment, remarkably, leaves off after the word "violated," *ante* at 613, but the remainder of the Amendment -- the Warrant Clause -- is not so easily excised. As this Court has long recognized, the Framers intended the provisions of that Clause -- a warrant and probable cause -- to "provide the yardstick against which official searches and seizures are to be measured." *T.L.O.*, *supra*, at 359-360 (opinion of BRENNAN, J.). Without the content which those provisions give to the Fourth Amendment's overarching command that searches and seizures be "reasonable," the Amendment lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term. *See Dunaway v. New York*, 442 U.S. 200, 213 (1979) ("[T]he protections intended by the Framers could all too easily disappear in the consideration and balancing of the multifarious circumstances presented by different cases"). Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when "special needs" make them seem not.

Until recently, an unbroken line of cases had recognized probable cause as an indispensable prerequisite for a full-scale search, regardless of whether such a search was conducted pursuant to a warrant or under one of the recognized exceptions to the warrant requirement. *T.L.O.*, *supra*, at 358 and 359, n. 3 (opinion of BRENNAN, J.); *see also Chambers v. Maroney*, 399 U.S. 42, 51 (1970). Only where the Government action in question had a "substantially less intrusive" impact on privacy, *Dunaway*, *supra*, at 210, and thus clearly fell short of a full-scale search, did we relax the probable cause standard. *Id.* at 214 ("For all but those narrowly defined intrusions, the requisite 'balancing' . . . is embodied in the principle that seizures are 'reasonable' only if supported by probable cause"); *see also T.L.O.*, *supra*, at 360 (opinion of BRENNAN, J.). Even in this class of cases, we almost always required the Government to show some individualized suspicion to justify the search. The few searches which we upheld in the absence of individualized justification were routinized, fleeting, and nonintrusive encounters conducted pursuant to regulatory programs which entailed no contact with the person.

In the four years since this Court, in *T.L.O.*, first began recognizing "special needs" exceptions to the Fourth Amendment, the clarity of Fourth Amendment doctrine has been badly distorted, as the Court has eclipsed the probable cause requirement in a patchwork quilt of settings: public school principals' searches of students' belongings, *T.L.O.*; public employers' searches of employees' desks, *O'Connor*; and probation officers' searches of probationers' homes, *Griffin*. Tellingly, each time the Court has found that "special needs" counseled ignoring the literal requirements of the Fourth Amendment for such full-scale searches in favor of a formless and unguided "reasonableness" balancing inquiry, it has concluded that the search in question satisfied that test. I have joined dissenting opinions in each of these cases, protesting the "jettison[ing of] . . . the only standard that finds support in the text of the Fourth Amendment" and predicting that the majority's "Rohrschach-like 'balancing test'" portended "a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens." *T.L.O.*, *supra*, at 357-358 (opinion of BRENNAN, J.).

The majority's decision today bears out that prophecy. After determining that the Fourth Amendment applies to the FRA's testing regime, the majority embarks on an extended inquiry into whether that regime is "reasonable," an inquiry in which it balances "all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Ante* at 619, quoting *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). The result is "special needs" balancing analysis' deepest incursion yet into the core protections of the Fourth Amendment. Until today, it was conceivable that, when a Government search was aimed at a person and not simply the person's possessions, balancing analysis had no place. No longer: with nary a word of explanation or acknowledgment of the novelty of its approach, the majority extends the "special needs" framework to a regulation involving compulsory blood withdrawal and urinary excretion, and chemical testing of the bodily fluids collected through these procedures. And until today, it was conceivable that a prerequisite for surviving "special needs" analysis was the existence of individualized suspicion. No longer: in contrast to the searches in *T.L.O.*, *O'Connor*, and *Griffin*, which were supported by individualized evidence suggesting the culpability of the persons whose property was searched, the regulatory regime upheld today requires the post-accident collection and testing of the blood and urine of *all* covered employees -- even if every member of this group gives every indication of sobriety and attentiveness.

In widening the "special needs" exception to probable cause to authorize searches of the human body unsupported by any evidence of wrongdoing, the majority today completes the process begun in *T.L.O.* of eliminating altogether the probable cause requirement for civil searches -- those undertaken for reasons "beyond the normal need for law enforcement." *Ante* at 619 (citations omitted). In its place, the majority

substitutes a manipulable balancing inquiry under which, upon the mere assertion of a "special need," even the deepest dignitary and privacy interests become vulnerable to governmental incursion. *See ante* at 619 (distinguishing criminal from civil searches). By its terms, however, the Fourth Amendment -- unlike the Fifth and Sixth -- does not confine its protections to either criminal or civil actions. Instead, it protects generally "[t]he right of the people to be secure."

The fact is that the malleable "special needs" balancing approach can be justified only on the basis of the policy results it allows the majority to reach. The majority's concern with the railroad safety problems caused by drug and alcohol abuse is laudable; its cavalier disregard for the text of the Constitution is not. There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). Because abandoning the explicit protections of the Fourth Amendment seriously imperils "the right to be let alone -- the most comprehensive of rights and the right most valued by civilized men," *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), I reject the majority's "special needs" rationale as unprincipled and dangerous.

II

The proper way to evaluate the FRA's testing regime is to use the same analytic framework which we have traditionally used to appraise Fourth Amendment claims involving full-scale searches, at least until the recent "special needs" cases. Under that framework, we inquire, serially, whether a search has taken place, *see, e.g., Katz v. United States*, 389 U.S. 347, 350-353 (1967); whether the search was based on a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement, *see, e.g., Welsh v. Wisconsin*, 466 U.S. 740, 748-750 (1984); whether the search was based on probable cause or validly based on lesser suspicion because it was minimally intrusive, *see, e.g., Dunaway*, 442 U.S. at 208-210; and, finally, whether the search was conducted in a reasonable manner, *see, e.g., Winston v. Lee*, 470 U.S. 753, 763-766 (1985). *See also T.L.O.*, 469 U.S. at 354-355 (opinion of BRENNAN, J.) (summarizing analytic framework).

The majority's threshold determination that "covered" railroad employees have been searched under the FRA's testing program is certainly correct. *Ante* at 616-618. Who among us is not prepared to consider reasonable a person's expectation of privacy with respect to the extraction of his blood, the collection of his urine, or the chemical testing of these fluids? *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).¹⁶¹ The majority's ensuing conclusion that the warrant requirement may be dispensed with, however, conveniently overlooks the fact that there are three distinct searches at issue. Although the importance of collecting blood and urine samples before drug or alcohol metabolites disappear justifies waiving the warrant requirement for those two searches under the narrow "exigent circumstances" exception, *see Schmerber v. California*, 384 U.S. 757, 770 (1966) ("[T]he delay necessary to obtain a warrant . . . threaten[s] 'the destruction of evidence'"), no such exigency prevents railroad officials from securing a warrant before chemically testing the samples they obtain. Blood and urine do not spoil if properly collected and preserved, and there is no reason to doubt the ability of railroad officials to grasp the relatively simple procedure of obtaining a warrant authorizing, where appropriate, chemical analysis of the extracted fluids. It is therefore wholly unjustified to dispense with the warrant requirement for this final search. *See Chimel v. California*, 395 U.S. 752, 761-764 (1969) (exigency exception permits warrantless searches only to the extent that exigency exists).

It is the probable cause requirement, however, that the FRA's testing regime most egregiously violates, a fact which explains the majority's ready acceptance and expansion of the countertextual "special needs"

exception. By any measure, the FRA's highly intrusive collection and testing procedures qualify as full-scale personal searches. Under our precedents, a showing of probable cause is therefore clearly required. But even if these searches were viewed as entailing only minimal intrusions on the order, say, of a police stop-and-frisk, the FRA's program would still fail to pass constitutional muster, for we have, without exception, demanded that even minimally intrusive searches of the person be founded on individualized suspicion. *See supra* at 638, and n. 1. The federal parties concede it does not satisfy this standard. Brief for Federal Parties 18. Only if one construes the FRA's collection and testing procedures as akin to the routinized and fleeting regulatory interactions which we have permitted in the absence of individualized suspicion, *see* n. 2, *supra*, might these procedures survive constitutional scrutiny. Presumably for this reason, the majority likens this case to *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), which upheld brief automobile stops at the border to ascertain the validity of motorists' residence in the United States. *Ante* at 624. Case law and common sense reveal both the bankruptcy of this absurd analogy and the constitutional imperative of adhering to the textual standard of probable cause to evaluate the FRA's multifarious full-scale searches.

Compelling a person to submit to the piercing of his skin by a hypodermic needle so that his blood may be extracted significantly intrudes on the "personal privacy and dignity against unwarranted intrusion by the State" against which the Fourth Amendment protects. *Schmerber, supra*, at 767. As we emphasized in *Terry*:

Even a limited search of the outer clothing . . . constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience.

392 U.S. 24-25. We have similarly described the taking of a suspect's fingernail scrapings as a "severe, though brief, intrusion upon cherished personal security." *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (quoting *Terry, supra*, at 24-25, and upholding this procedure upon a showing of probable cause). The government-compelled withdrawal of blood, involving as it does the added aspect of physical invasion, is surely no less an intrusion. The surrender of blood on demand is, furthermore, hardly a quotidian occurrence. *Cf. Martinez-Fuerte, supra*, at 557 (routine stops involve "quite limited" intrusion).

In recognition of the intrusiveness of this procedure, we specifically required in *Schmerber* that police have evidence of a drunk-driving suspect's impairment before forcing him to endure a blood test:

The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear. . . .

384 U.S. at 769-770. *Schmerber* strongly suggested that the "clear indication" needed to justify a compulsory blood test amounted to a showing of probable cause, which "plainly" existed in that case. *Id.* at 768. Although subsequent cases interpreting *Schmerber* have differed over whether a showing of individualized suspicion would have sufficed, compare *Winston*, 470 U.S. at 760 (*Schmerber* "noted the importance of probable cause"), with *Montoya de Hernandez*, 473 U.S. at 540 (*Schmerber* "indicate[d] the necessity for particularized suspicion"), by any reading, *Schmerber* clearly forbade compulsory blood tests on any lesser showing than individualized suspicion. Exactly why a blood test which, if conducted on one person, requires a showing of at least individualized suspicion may, if conducted on many persons, be based on no showing whatsoever, the majority does not -- and cannot -- explain.

Compelling a person to produce a urine sample on demand also intrudes deeply on privacy and bodily integrity. Urination is among the most private of activities. It is generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of personal seclusion. *Cf. Martinez-Fuerte, supra*, at 560 (border-stop questioning involves no more than "some annoyance," and is neither "frightening" nor "offensive"). The FRA, however, gives scant regard to personal privacy, for its Field Manual instructs supervisors monitoring urination that railroad workers must provide urine samples "*under direct observation* by the physician/technician." Federal Railroad Administration, United States Dept. of Transportation, Field Manual: Control of Alcohol and Drug Use in Railroad Operations D-5 (1986) (emphasis added). That the privacy interests offended by compulsory and supervised urine collection are profound is the overwhelming judgment of the lower courts and commentators. As Professor -- later Solicitor General -- Charles Fried has written:

[I]n our culture, the excretory functions are shielded by more or less absolute privacy, so much so that situations in which this privacy is violated are experienced as extremely distressing, as detracting from one's dignity and self esteem.

Privacy, 77 Yale L.J. 475, 487 (1968).

The majority's characterization of the privacy interests implicated by urine collection as "minimal," *ante* at 624, is nothing short of startling. This characterization is, furthermore, belied by the majority's own prior explanation of why compulsory urination constitutes a search for the purposes of the Fourth Amendment:

"There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms, if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom."

Ante at 617, quoting *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (CA5 1987). The fact that the majority can invoke this powerful passage in the context of deciding that a search has occurred, and then ignore it in deciding that the privacy interests this search implicates are "minimal," underscores the shameless manipulability of its balancing approach.

Finally, the chemical analysis the FRA performs upon the blood and urine samples implicates strong privacy interests apart from those intruded upon by the collection of bodily fluids. Technological advances have made it possible to uncover, through analysis of chemical compounds in these fluids, not only drug or alcohol use, but also medical disorders such as epilepsy, diabetes, and clinical depression. *Cf. Martinez-Fuerte*, 428 U.S. at 558, quoting *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975) (checkpoint inquiry involves only "'a brief question or two'" about motorist's residence). As the Court of Appeals for the District of Columbia has observed:

[S]uch tests may provide Government officials with a periscope through which they can peer into an individual's behavior in her private life, even in her own home.

Jones v. McKenzie, 266 U.S.App.D.C. 85, 89, 833 F.2d 335, 339 (1987); *see also Capua v. Plainfield*, 643 F.Supp. 1507, 1511 (NJ 1986) (urine testing is "form of surveillance" which "reports on a person's off-duty activities just as surely as someone had been present and watching"). The FRA's requirement that workers disclose the medications they have taken during the 30 days prior to chemical testing further impinges upon the confidentiality customarily attending personal health secrets.

By any reading of our precedents, the intrusiveness of these three searches demands that they -- like other full-scale searches -- be justified by probable cause. It is no answer to suggest, as does the majority, that railroad workers have relinquished the protection afforded them by this Fourth Amendment requirement, either by "participat[ing] in an industry that is regulated pervasively to ensure safety" or by undergoing periodic fitness tests pursuant to state law or to collective bargaining agreements. *Ante* at 627.

Our decisions in the regulatory search area refute the suggestion that the heavy regulation of the railroad industry eclipses workers' rights under the Fourth Amendment to insist upon a showing of probable cause when their bodily fluids are being extracted. This line of cases has exclusively involved searches of employer *property*, with respect to which

[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a *proprietor* over the *stock* of such an enterprise.

Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978) (emphasis added; citation omitted), quoted in *New York v. Burger*, 482 U.S. 691, 700 (1987). Never have we intimated that regulatory searches reduce employees' rights of privacy in their persons. See *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 537 (1967) ("[T]he inspections are [not] personal in nature"); cf. *Donovan v. Dewey*, 452 U.S. 594, 598-599 (1981); *Marshall, supra*, at 313. As the Court pointed out in *O'Connor*, individuals do not lose Fourth Amendment rights at the workplace gate, 480 U.S. at 716-718; see also *Oliver v. United States*, 466 U.S. 170, 178, n. 8 (1984), any more than they relinquish these rights at the schoolhouse door, *T.L.O.*, 469 U.S. at 333, or the hotel room threshold. *Hoffa v. United States*, 385 U.S. 293, 301 (1966). These rights mean little indeed if, having passed through these portals, an individual may remain subject to a suspicionless search of his person justified solely on the grounds that the Government already is permitted to conduct a search of the inanimate contents of the surrounding area. In holding that searches of persons may fall within the category of regulatory searches permitted in the absence of probable cause or even individualized suspicion, the majority sets a dangerous and ill-conceived precedent.

The majority's suggestion that railroad workers' privacy is only minimally invaded by the collection and testing of their bodily fluids because they undergo periodic fitness tests, *ante* at 624-625, is equally baseless. As an initial matter, even if participation in these fitness tests did render "minimal" an employee's "interest in bodily security," *ante* at 628, such minimally intrusive searches of the person require, under our precedents, a justificatory showing of individualized suspicion. See *supra*, at 637. More fundamentally, railroad employees are not routinely required to submit to blood or urine tests to gain or to maintain employment, and railroad employers do not ordinarily have access to employees' blood or urine, and certainly not for the purpose of ascertaining drug or alcohol usage. That railroad employees sometimes undergo tests of eyesight, hearing, skill, intelligence, and agility, *ante* at 627, n. 8, hardly prepares them for Government demands to submit to the extraction of blood, to excrete under supervision, or to have these bodily fluids tested for the physiological and psychological secrets they may contain. Surely employees who release basic information about their financial and personal history so that employers may ascertain their "ethical fitness" do not, by so doing, relinquish their expectations of privacy with respect to their personal letters and diaries, revealing though these papers may be of their character.

I recognize that invalidating the full-scale searches involved in the FRA's testing regime for failure to comport with the Fourth Amendment's command of probable cause may hinder the Government's attempts to make rail transit as safe as humanly possible. But constitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well-intentioned,

must always be pursued within constitutional boundaries. Were the police freed from the constraints of the Fourth Amendment for just one day to seek out evidence of criminal wrongdoing, the resulting convictions and incarcerations would probably prevent thousands of fatalities. Our refusal to tolerate this spectre reflects our shared belief that even beneficent governmental power -- whether exercised to save money, save lives, or make the trains run on time -- must always yield to "a resolute loyalty to constitutional safeguards." *Almeida-Sanchez v. United States*, 413 U.S. 266, 273 (1973). The Constitution demands no less loyalty here.

III

Even accepting the majority's view that the FRA's collection and testing program is appropriately analyzed under a multifactor balancing test, and not under the literal terms of the Fourth Amendment, I would still find the program invalid. The benefits of suspicionless blood and urine testing are far outstripped by the costs imposed on personal liberty by such sweeping searches. Only by erroneously deriding as "minimal" the privacy and dignity interests at stake, and by uncritically inflating the likely efficacy of the FRA's testing program, does the majority strike a different balance.

For the reasons stated above, I find nothing minimal about the intrusion on individual liberty that occurs whenever the Government forcibly draws and analyzes a person's blood and urine. Several aspects of the FRA's testing program exacerbate the intrusiveness of these procedures. Most strikingly, the agency's regulations not only do not forbid, but, in fact, appear to invite criminal prosecutors to obtain the blood and urine samples drawn by the FRA and use them as the basis of criminal investigations and trials. *See* 49 CFR § 219.211(d) (1987) ("Each sample . . . may be made available to . . . a party in litigation upon service of appropriate compulsory process on the custodian of the sample . . ."). This is an unprecedented invitation, leaving open the possibility of criminal prosecutions based on suspicionless searches of the human body. *Cf. National Treasury Employees Union, post* at 666 (Customs Service drug-testing program prohibits use of test results in criminal prosecutions); *Camara*, 387 U.S. at 537.

To be sure, the majority acknowledges, in passing, the possibility of criminal prosecutions, *ante* at 621, n. 5, but it refuses to factor this possibility into its Fourth Amendment balancing process, stating that "the record does not disclose that [49 CFR § 219.211(d) (1987)] was intended to be, or actually has been, so used." *Ibid.* This demurrer is highly disingenuous. The federal parties concede that they find "no prohibition on the release of FRA testing results to prosecutors." Brief for Federal Parties 10, n. 15. The absence of prosecutions to date -- which is likely due to the fact that the FRA's regulations have been held invalid for much of their brief history -- hardly proves that prosecutors will not avail themselves of the FRA's invitation in the future. If the majority really views the impact of FRA testing on privacy interests as minimal even if these tests generate criminal prosecutions, it should say so. If the prospect of prosecutions would lead the majority to reassess the validity of the testing program with prosecutions as part of the balance, it should say so, too, or condition its approval of that program on the nonrelease of test results to prosecutors. In ducking this important issue, the majority gravely disserves both the values served by the Fourth Amendment and the rights of those persons whom the FRA searches. Furthermore, the majority's refusal to restrict the release of test results casts considerable doubt on the conceptual basis of its decision -- that the "special need" of railway safety is one "beyond the normal need for law enforcement." *Ante* at 619 (citations omitted).

The majority also overlooks needlessly intrusive aspects of the testing process itself. Although the FRA requires the collection and testing of both blood and urine, the agency concedes that mandatory urine tests -- unlike blood tests -- do not measure current impairment, and therefore cannot differentiate on-

duty impairment from prior drug or alcohol use which has ceased to affect the user's behavior. *See* 49 CFR § 219.309(2) (1987) (urine test may reveal use of drugs or alcohol as much as 60 days prior to sampling). Given that the FRA's stated goal is to ascertain current impairment, and not to identify persons who have used substances in their spare time sufficiently in advance of their railroad duties to pose no risk of on-duty impairment, § 219.101(a), mandatory urine testing seems wholly excessive. At the very least, the FRA could limit its use of urinalysis to confirming findings of current impairment suggested by a person's blood tests. The additional invasion caused by automatically testing urine as well as blood hardly ensures that privacy interests "will be invaded no more than is necessary." *T.L.O.*, 469 U.S. at 343.

The majority's trivialization of the intrusions on worker privacy posed by the FRA's testing program is matched at the other extreme by its blind acceptance of the Government's assertion that testing will "dete[r] employees engaged in safety-sensitive tasks from using controlled substances or alcohol," and "help railroads obtain invaluable information about the causes of major accidents." *Ante* at 629, 630. With respect, first, to deterrence, it is simply implausible that testing employees *after* major accidents occur, 49 CFR § 219.201(a)(1) (1987), will appreciably discourage them from using drugs or alcohol. As JUSTICE STEVENS observes in his concurring opinion:

Most people -- and I would think most railroad employees as well -- do not go to work with the expectation that they may be involved in a major accident, particularly one causing such catastrophic results as loss of life or the release of hazardous material requiring an evacuation. Moreover, even if they are conscious of the possibilities that such an accident might occur and that alcohol or drug use might be a contributing factor, if the risk of serious personal injury does not deter their use of these substances, it seems highly unlikely that the additional threat of loss of employment would have any effect on their behavior.

Ante at 634. Under the majority's deterrence rationale, people who skip school or work to spend a sunny day at the zoo will not taunt the lions because their truancy or absenteeism might be discovered in the event they are mauled. It is, of course, the fear of the accident, not the fear of a post-accident revelation, that deters. The majority's credulous acceptance of the FRA's deterrence rationale is made all the more suspect by the agency's failure to introduce, in an otherwise ample administrative record, *any* studies explaining or supporting its theory of accident deterrence.

The poverty of the majority's deterrence rationale leaves the Government's interest in diagnosing the causes of major accidents as the sole remaining justification for the FRA's testing program. I do not denigrate this interest, but it seems a slender thread from which to hang such an intrusive program, particularly given that the knowledge that one or more workers were impaired at the time of an accident falls far short of proving that substance abuse caused or exacerbated that accident. *See* 839 F.2d 575, 587 (CA9 1988). Some corroborative evidence is needed: witness or coworker accounts of a worker's misfeasance, or at least indications that the cause of the accident was within a worker's area of responsibility. Such particularized facts are, of course, the very essence of the individualized suspicion requirement which the respondent railroad workers urge, and which the Court of Appeals found to "pos[e] no insuperable burden on the government." *Id.* at 588. Furthermore, reliance on the importance of diagnosing the causes of an accident as a critical basis for upholding the FRA's testing plan is especially hard to square with our frequent admonition that the interest in ascertaining the causes of a criminal episode does not justify departure from the Fourth Amendment's requirements. "[T]his Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime. . . ." *Katz*, 389 U.S. at 356. Nor should it here.

IV

In his first dissenting opinion as a Member of this Court, Oliver Wendell Holmes observed:

Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

Northern Securities Co. v. United States, 193 U.S. 197, 400-401 (1904).

A majority of this Court, swept away by society's obsession with stopping the scourge of illegal drugs, today succumbs to the popular pressures described by Justice Holmes. In upholding the FRA's plan for blood and urine testing, the majority bends time-honored and textually based principles of the Fourth Amendment -- principles the Framers of the Bill of Rights designed to ensure that the Government has a strong and individualized justification when it seeks to invade an individual's privacy. I believe the Framers would be appalled by the vision of mass governmental intrusions upon the integrity of the human body that the majority allows to become reality. The immediate victims of the majority's constitutional timorousness will be those railroad workers whose bodily fluids the Government may now forcibly collect and analyze. But ultimately, today's decision will reduce the privacy all citizens may enjoy, for, as Justice Holmes understood, principles of law, once bent, do not snap back easily. I dissent.

Side Bar: **Thurgood Marshall's Prescient Warning: Don't Gut the 4th Amendment**

available at <https://www.theatlantic.com/politics/archive/2013/07/thurgood-marshalls-prescient-warning-dont-gut-the-4th-amendment/277657/> by Conor Friedersdorf Jul 10, 2013

"His dissent in a 1989 case stated that "today's decision will reduce the privacy all citizens may enjoy." And so it has.

In a story on the secret body of law being created by the FISA court, *The New York Times* reports that "in one of the court's most important decisions, the judges have expanded the use in terrorism cases of a legal principle known as the 'special needs' doctrine and carved out an exception to the Fourth Amendment's requirement of a warrant for searches and seizures, the officials said." A judicially created exception to the Fourth Amendment?! How did that happen, you might wonder.

The newspaper explains:

The special needs doctrine was originally established in 1989 by the Supreme Court in a ruling allowing the drug testing of railway workers, finding that a minimal intrusion on privacy was justified by the government's need to combat an overriding public danger. Applying that concept more broadly, the FISA judges have ruled that the N.S.A.'s collection and examination of Americans' communications data to track possible terrorists does not run afoul of the Fourth Amendment...

The article goes on to quote a legal expert who explains why the FISA court's expansion of the 1989 precedent is highly dubious (and not just because it was issued in secret, though that is also problematic). And the FISA court's interpretation *is* wrongheaded.

It is thus the perfect time to return to Justice Thurgood Marshall's dissent in *Skinner v. Railway Labor Executives' Association*.”

Author's comments: You'd think that avowedly originalist conservatives would embrace this dissent and contest the wisdom of a secret court that has gone even farther than the wrongheaded precedent set by a 1989 majority opinion. Instead, conservatives by and large argue that the FISA court's decisions properly render legal the sweeping, warrantless surveillance being conducted on American citizens, without any hint of individualized suspicion. In doing so, conservatives are signing onto the notion that there are special, judicially created exceptions to the Bill of Rights. So are many Obama Administration supporters.

COOPER v. AARON

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United States Supreme Court

COOPER v. AARON(1958)

No. 116

Argued: September 11, 1958 Decided: September 12, 1958

Opinion announced September 29, 1958.

Fn [358 U.S. 1, 1] NOTE: The per curiam opinion announced on September 12, 1958, and printed in a footnote, post, p. 5, applies not only to this case but also to No. 1, Misc., August Special Term, 1958, Aaron et al. v. Cooper et al., on application for vacation of order of the United States Court of Appeals for the Eighth Circuit staying issuance of its mandate, for stay of order of the United States District Court for the Eastern District of Arkansas, and for such other orders as petitioners may be entitled to, argued August 28, 1958.

Under a plan of gradual desegregation of the races in the public schools of Little Rock, Arkansas, adopted by petitioners and approved by the courts below, respondents, Negro children, were ordered admitted to a previously all-white high school at the beginning of the 1957-1958 school year. Due to actions by the Legislature and Governor of the State opposing desegregation, and to threats of mob violence resulting therefrom, respondents were unable to attend the school until troops were sent and maintained there by the Federal Government for their protection; but they [358 U.S. 1, 2] attended the school for the remainder of that school year. Finding that these events had resulted in tensions, bedlam, chaos and turmoil in the school, which disrupted the educational process, the District Court, in June 1958, granted petitioners' request that operation of their plan of desegregation be suspended for two and one-half years, and that respondents be sent back to segregated schools. The Court of Appeals reversed. Held: The judgment of the Court of Appeals is affirmed, and the orders of the District Court enforcing petitioners' plan of desegregation are reinstated, effective immediately. Pp. 4-20.

1. This Court cannot countenance a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution in *Brown v. Board of Education*, 347 U.S. 483 . P. 4.

2. This Court rejects the contention that it should uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify its holding in the *Brown* case have been further challenged and tested in the courts. P. 4.

3. In many locations, obedience to the duty of desegregation will require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. P. 7.

4. If, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), a District Court concludes that justification exists for not requiring the present nonsegregated admission of all qualified Negro children to public schools, it should scrutinize the program of the school authorities to make sure that they have developed arrangements pointed toward the earliest practicable completion of desegregation, and have taken appropriate steps to put their program into effective operation. P. 7.

5. The petitioners stand in this litigation as the agents of the State, and they cannot assert their good faith as an excuse for delay in implementing the respondents' constitutional rights, when vindication of those rights has been rendered difficult or impossible by the actions of other state officials. Pp. 15-16. THURGOOD MARSHALL
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6. The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed [358 U.S. 1, 3] upon the actions of the Governor and Legislature, and law and order are not here to be preserved by depriving the Negro children of their constitutional rights. P. 16.

7. The constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the Brown case can neither be nullified openly and directly by state legislators or state executives or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." Pp. 16-17.

8. The interpretation of the Fourteenth Amendment enunciated by this Court in the Brown case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." P. 18.

9. No state legislator or executive or judicial officer can war against the Constitution without violating his solemn oath to support it. P. 18.

10. State support of segregated schools through any arrangement, management, funds or property cannot be squared with the command of the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the laws. P. 19.

257 F.2d 33, affirmed.

Richard C. Butler argued the cause for petitioners. With him on the brief were A. F. House and, by special leave of Court, John H. Haley, pro hac vice.

Thurgood Marshall argued the cause for respondents. With him on the brief were Wiley A. Branton, William Coleman, Jr., Jack Greenberg and Louis H. Pollak.

Solicitor General Rankin, at the invitation of the Court, post, p. 27, argued the cause for the United States, as amicus curiae, urging that the relief sought by respondents should be granted. With him on the brief were Oscar H. Davis, Philip Elman and Ralph S. Spritzer. [358 U.S. 1, 4]

Opinion of the Court by THE CHIEF JUSTICE, MR. JUSTICE BLACK, MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, MR. JUSTICE BURTON, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, and MR. JUSTICE WHITTAKER.

As this case reaches us it raises questions of the highest importance to the maintenance of our federal system of government. It necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution. Specifically it involves actions by the Governor and Legislature of Arkansas upon the premise that they are not bound by our holding in *Brown v. Board of Education*, 347 U.S. 483. That holding was that the Fourteenth Amendment forbids States to use their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds or property. We are urged to uphold a suspension of the Little Rock School Board's plan to do away with segregated public schools in Little Rock until state laws and efforts to upset and nullify our holding in *Brown v. Board of Education* have been further challenged and tested in the courts. We reject these contentions.

The case was argued before us on September 11, 1958. On the following day we unanimously affirmed the judgment of the Court of Appeals for the Eighth Circuit, 257 F.2d 33, which had reversed a judgment of the District Court for the Eastern District of Arkansas, 163 F. Supp. 13. The District Court had granted the application of the petitioners, the Little Rock School Board and School Superintendent, to suspend for two and one-half years the operation of the School Board's court-approved desegregation program. In order that the School Board [358 U.S. 1, 5] might know, without doubt, its duty in this regard before the opening of school, which had been set for

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the following Monday, September 15, 1958, we immediately issued the judgment, reserving the expression of our supporting views to a later date. * This opinion of all of the members of the Court embodies those views. The following are the facts and circumstances so far as necessary to show how the legal questions are presented. On May 17, 1954, this Court decided that enforced racial segregation in the public schools of a State is a denial of the equal protection of the laws enjoined by the Fourteenth Amendment. *Brown v. Board of Education*, [358 U.S. 1, 6] 347 U.S. 483 . The Court postponed, pending further argument, formulation of a decree to effectuate this decision. That decree was rendered May 31, 1955. *Brown v. Board of Education*, 349 U.S. 294 . In the formulation of that decree the Court recognized that good faith compliance with the principles declared in *Brown* might in some situations "call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision." *Id.*, at 300. The Court went on to state:

"Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

"While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S., at 300 -301. [358 U.S. 1, 7]

Under such circumstances, the District Courts were directed to require "a prompt and reasonable start toward full compliance," and to take such action as was necessary to bring about the end of racial segregation in the public schools "with all deliberate speed." *Ibid.* Of course, in many locations, obedience to the duty of desegregation would require the immediate general admission of Negro children, otherwise qualified as students for their appropriate classes, at particular schools. On the other hand, a District Court, after analysis of the relevant factors (which, of course, excludes hostility to racial desegregation), might conclude that justification existed for not requiring the present nonsegregated admission of all qualified Negro children. In such circumstances, however, the courts should scrutinize the program of the school authorities to make sure that they had developed arrangements pointed toward the earliest practicable completion of desegregation, and had taken appropriate steps to put their program into effective operation. It was made plain that delay in any guise in order to deny the constitutional rights of Negro children could not be countenanced, and that only a prompt start, diligently and earnestly pursued, to eliminate racial segregation from the public schools could constitute good faith compliance. State authorities were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system.

On May 20, 1954, three days after the first *Brown* opinion, the Little Rock District School Board adopted, and on May 23, 1954, made public, a statement of policy entitled "Supreme Court Decision - Segregation in Public Schools." In this statement the Board recognized that

"It is our responsibility to comply with Federal Constitutional Requirements and we intend to do so when the Supreme Court of the United States outlines the method to be followed." [358 U.S. 1, 8]

Thereafter the Board undertook studies of the administrative problems confronting the transition to a desegregated public school system at Little Rock. It instructed the Superintendent of Schools to prepare a plan

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for desegregation, and approved such a plan on May 24, 1955, seven days before the second Brown opinion. The plan provided for desegregation at the senior high school level (grades 10 through 12) as the first stage. Desegregation at the junior high and elementary levels was to follow. It was contemplated that desegregation at the high school level would commence in the fall of 1957, and the expectation was that complete desegregation of the school system would be accomplished by 1963. Following the adoption of this plan, the Superintendent of Schools discussed it with a large number of citizen groups in the city. As a result of these discussions, the Board reached the conclusion that "a large majority of the residents" of Little Rock were of "the belief . . . that the Plan, although objectionable in principle," from the point of view of those supporting segregated schools, "was still the best for the interests of all pupils in the District."

Upon challenge by a group of Negro plaintiffs desiring more rapid completion of the desegregation process, the District Court upheld the School Board's plan, *Aaron v. Cooper*, 143 F. Supp. 855. The Court of Appeals affirmed. 243 F.2d 361. Review of that judgment was not sought here.

While the School Board was thus going forward with its preparation for desegregating the Little Rock school system, other state authorities, in contrast, were actively pursuing a program designed to perpetuate in Arkansas the system of racial segregation which this Court had held violated the Fourteenth Amendment. First came, in November 1956, an amendment to the State Constitution flatly commanding the Arkansas General Assembly to oppose "in every Constitutional manner the Un-constitutional [358 U.S. 1, 9] desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court," Ark. Const., Amend. 44, and, through the initiative, a pupil assignment law, Ark. Stat. 80-1519 to 80-1524. Pursuant to this state constitutional command, a law relieving school children from compulsory attendance at racially mixed schools, Ark. Stat. 80-1525, and a law establishing a State Sovereignty Commission, Ark. Stat. 6-801 to 6-824, were enacted by the General Assembly in February 1957.

The School Board and the Superintendent of Schools nevertheless continued with preparations to carry out the first stage of the desegregation program. Nine Negro children were scheduled for admission in September 1957 to Central High School, which has more than two thousand students. Various administrative measures, designed to assure the smooth transition of this first stage of desegregation, were undertaken.

On September 2, 1957, the day before these Negro students were to enter Central High, the school authorities were met with drastic opposing action on the part of the Governor of Arkansas who dispatched units of the Arkansas National Guard to the Central High School grounds and placed the school "off limits" to colored students. As found by the District Court in subsequent proceedings, the Governor's action had not been requested by the school authorities, and was entirely unheralded. The findings were these:

"Up to this time [September 2], no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred. Nevertheless, out of an abundance of caution, the school authorities had frequently conferred with the Mayor and Chief of Police of Little Rock about taking appropriate [358 U.S. 1, 10] steps by the Little Rock police to prevent any possible disturbances or acts of violence in connection with the attendance of the 9 colored students at Central High School. The Mayor considered that the Little Rock police force could adequately cope with any incidents which might arise at the opening of school. The Mayor, the Chief of Police, and the school authorities made no request to the Governor or any representative of his for State assistance in maintaining peace and order at Central High School. Neither the Governor nor any other official of the State government consulted with the Little Rock authorities about whether the Little Rock police were prepared to cope with any incidents which might arise at the school, about any need for State assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School." *Aaron v. Cooper*, 156 F. Supp. 220, 225.

The Board's petition for postponement in this proceeding states: "The effect of that action [of the Governor] was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this [District] Court, and from that date hostility to the Plan was

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increased and criticism of the officials of the [School] District has become more bitter and unrestrained." The Governor's action caused the School Board to request the Negro students on September 2 not to attend the high school "until the legal dilemma was solved." The next day, September 3, 1957, the Board petitioned the District Court for instructions, and the court, after a hearing, found that the Board's [358 U.S. 1, 11] request of the Negro students to stay away from the high school had been made because of the stationing of the military guards by the state authorities. The court determined that this was not a reason for departing from the approved plan, and ordered the School Board and Superintendent to proceed with it.

On the morning of the next day, September 4, 1957, the Negro children attempted to enter the high school but, as the District Court later found, units of the Arkansas National Guard "acting pursuant to the Governor's order, stood shoulder to shoulder at the school grounds and thereby forcibly prevented the 9 Negro students . . . from entering," as they continued to do every school day during the following three weeks. 156 F. Supp., at 225.

That same day, September 4, 1957, the United States Attorney for the Eastern District of Arkansas was requested by the District Court to begin an immediate investigation in order to fix responsibility for the interference with the orderly implementation of the District Court's direction to carry out the desegregation program. Three days later, September 7, the District Court denied a petition of the School Board and the Superintendent of Schools for an order temporarily suspending continuance of the program.

Upon completion of the United States Attorney's investigation, he and the Attorney General of the United States, at the District Court's request, entered the proceedings and filed a petition on behalf of the United States, as *amicus curiae*, to enjoin the Governor of Arkansas and officers of the Arkansas National Guard from further attempts to prevent obedience to the court's order. After hearings on the petition, the District Court found that the School Board's plan had been obstructed by the Governor through the use of National Guard troops, and granted a preliminary injunction on September [358 U.S. 1, 12] 20, 1957, enjoining the Governor and the officers of the Guard from preventing the attendance of Negro children at Central High School, and from otherwise obstructing or interfering with the orders of the court in connection with the plan. 156 F. Supp. 220, affirmed, *Faubus v. United States*, 254 F.2d 797. The National Guard was then withdrawn from the school.

The next school day was Monday, September 23, 1957. The Negro children entered the high school that morning under the protection of the Little Rock Police Department and members of the Arkansas State Police. But the officers caused the children to be removed from the school during the morning because they had difficulty controlling a large and demonstrating crowd which had gathered at the high school. 163 F. Supp., at 16. On September 25, however, the President of the United States dispatched federal troops to Central High School and admission of the Negro students to the school was thereby effected. Regular army troops continued at the high school until November 27, 1957. They were then replaced by federalized National Guardsmen who remained throughout the balance of the school year. Eight of the Negro students remained in attendance at the school throughout the school year.

We come now to the aspect of the proceedings presently before us. On February 20, 1958, the School Board and the Superintendent of Schools filed a petition in the District Court seeking a postponement of their program for desegregation. Their position in essence was that because of extreme public hostility, which they stated had been engendered largely by the official attitudes and actions of the Governor and the Legislature, the maintenance of a sound educational program at Central High School, with the Negro students in attendance, would be impossible. The Board therefore proposed that the Negro students already admitted to the school be withdrawn [358 U.S. 1, 13] and sent to segregated schools, and that all further steps to carry out the Board's desegregation program be postponed for a period later suggested by the Board to be two and one-half years.

After a hearing the District Court granted the relief requested by the Board. Among other things the court found that the past year at Central High School had been attended by conditions of "chaos, bedlam and turmoil"; that there were "repeated incidents of more or less serious violence directed against the Negro students and their property"; that there was "tension and unrest among the school administrators, the class-room teachers, the pupils, and the latter's parents, which inevitably had an adverse effect upon the educational program"; that a school official was threatened with violence; that a "serious financial burden" had been cast on the School District; that the education of the students had suffered "and under existing conditions will continue to suffer";

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that the Board would continue to need "military assistance or its equivalent"; that the local police department would not be able "to detail enough men to afford the necessary protection"; and that the situation was "intolerable." 163 F. Supp., at 20-26.

The District Court's judgment was dated June 20, 1958. The Negro respondents appealed to the Court of Appeals for the Eighth Circuit and also sought there a stay of the District Court's judgment. At the same time they filed a petition for certiorari in this Court asking us to review the District Court's judgment without awaiting the disposition of their appeal to the Court of Appeals, or of their petition to that court for a stay. That we declined to do. 357 U.S. 566. The Court of Appeals did not act on the petition for a stay, but, on August 18, 1958, after convening in special session on August 4 and hearing the appeal, reversed the District Court, 257 F.2d 33. On August 21, 1958, the Court of Appeals stayed its mandate [358 U.S. 1, 14] to permit the School Board to petition this Court for certiorari. Pending the filing of the School Board's petition for certiorari, the Negro respondents, on August 23, 1958, applied to MR. JUSTICE WHITTAKER, as Circuit Justice for the Eighth Circuit, to stay the order of the Court of Appeals withholding its own mandate and also to stay the District Court's judgment. In view of the nature of the motions, he referred them to the entire Court. Recognizing the vital importance of a decision of the issues in time to permit arrangements to be made for the 1958-1959 school year, see *Aaron v. Cooper*, 357 U.S. 566, 567, we convened in Special Term on August 28, 1958, and heard oral argument on the respondents' motions, and also argument of the Solicitor General who, by invitation, appeared for the United States as *amicus curiae*, and asserted that the Court of Appeals' judgment was clearly correct on the merits, and urged that we vacate its stay forthwith. Finding that respondents' application necessarily involved consideration of the merits of the litigation, we entered an order which deferred decision upon the motions pending the disposition of the School Board's petition for certiorari, and fixed September 8, 1958, as the day on or before which such petition might be filed, and September 11, 1958, for oral argument upon the petition. The petition for certiorari, duly filed, was granted in open Court on September 11, 1958, post, p. 29, and further arguments were had, the Solicitor General again urging the correctness of the judgment of the Court of Appeals. On September 12, 1958, as already mentioned, we unanimously affirmed the judgment of the Court of Appeals in the *per curiam* opinion set forth in the margin at the outset of this opinion, ante, p. 5.

In affirming the judgment of the Court of Appeals which reversed the District Court we have accepted without reservation the position of the School Board, the [358 U.S. 1, 15] Superintendent of Schools, and their counsel that they displayed entire good faith in the conduct of these proceedings and in dealing with the unfortunate and distressing sequence of events which has been outlined. We likewise have accepted the findings of the District Court as to the conditions at Central High School during the 1957-1958 school year, and also the findings that the educational progress of all the students, white and colored, of that school has suffered and will continue to suffer if the conditions which prevailed last year are permitted to continue.

The significance of these findings, however, is to be considered in light of the fact, indisputably revealed by the record before us, that the conditions they depict are directly traceable to the actions of legislators and executive officials of the State of Arkansas, taken in their official capacities, which reflect their own determination to resist this Court's decision in the *Brown* case and which have brought about violent resistance to that decision in Arkansas. In its petition for certiorari filed in this Court, the School Board itself describes the situation in this language: "The legislative, executive, and judicial departments of the state government opposed the desegregation of Little Rock schools by enacting laws, calling out troops, making statements villifying federal law and federal courts, and failing to utilize state law enforcement agencies and judicial processes to maintain public peace."

One may well sympathize with the position of the Board in the face of the frustrating conditions which have confronted it, but, regardless of the Board's good faith, the actions of the other state agencies responsible for those conditions compel us to reject the Board's legal position. Had Central High School been under the direct management of the State itself, it could hardly be suggested [358 U.S. 1, 16] that those immediately in charge of the school should be heard to assert their own good faith as a legal excuse for delay in implementing the constitutional rights of these respondents, when vindication of those rights was rendered difficult or impossible by the actions of other state officials. The situation here is in no different posture because the members of the School Board and the Superintendent of Schools are local officials; from the point of view of the Fourteenth Amendment, they stand in this litigation as the agents of the State. THURGOOD MARSHALL JURISPRUDENCE SYLLABUS, READING ASSIGNMENTS AND COURSE MATERIALS FALL Page 204

The constitutional rights of respondents are not to be sacrificed or yielded to the violence and disorder which have followed upon the actions of the Governor and Legislature. As this Court said some 41 years ago in a unanimous opinion in a case involving another aspect of racial segregation: "It is urged that this proposed segregation will promote the public peace by preventing race conflicts. Desirable as this is, and important as is the preservation of the public peace, this aim cannot be accomplished by laws or ordinances which deny rights created or protected by the Federal Constitution." *Buchanan v. Warley*, 245 U.S. 60, 81. Thus law and order are not here to be preserved by depriving the Negro children of their constitutional rights. The record before us clearly establishes that the growth of the Board's difficulties to a magnitude beyond its unaided power to control is the product of state action. Those difficulties, as counsel for the Board forthrightly conceded on the oral argument in this Court, can also be brought under control by state action.

The controlling legal principles are plain. The command of the Fourteenth Amendment is that no "State" shall deny to any person within its jurisdiction the equal protection of the laws. "A State acts by its legislative, its executive, or its judicial authorities. It can act in no [358 U.S. 1, 17] other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning." *Ex parte Virginia*, 100 U.S. 339, 347. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see *Virginia v. Rives*, 100 U.S. 313; *Pennsylvania v. Board of Directors of City Trusts of Philadelphia*, 353 U.S. 230; *Shelley v. Kraemer*, 334 U.S. 1; or whatever the guise in which it is taken, see *Derrington v. Plummer*, 240 F.2d 922; *Department of Conservation and Development v. Tate*, 231 F.2d 615. In short, the constitutional rights of children not to be discriminated against in school admission on grounds of race or color declared by this Court in the *Brown* case can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously." *Smith v. Texas*, 311 U.S. 128, 132.

What has been said, in the light of the facts developed, is enough to dispose of the case. However, we should answer the premise of the actions of the Governor and Legislature that they are not bound by our holding in the *Brown* case. It is necessary only to recall some basic constitutional propositions which are settled doctrine.[358 U.S. 1, 18]

Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison*, 1 Cranch 137, 177, that "It is emphatically the province and duty of the judicial department to say what the law is." This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." Chief Justice Taney, speaking for a unanimous Court in 1859, said that this requirement reflected the framers' "anxiety to preserve it [the Constitution] in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a State" *Ableman v. Booth*, 21 How. 506, 524.

No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery" *United States v. Peters*, 5 Cranch 115, 136. A Governor who asserts a [358 U.S. 1, 19] power to nullify a federal court order is similarly restrained. If he had such power, said Chief Justice Hughes, in 1932, also for a unanimous Court, "it is manifest that the fiat of a state Governor, and not the Constitution of the United States, would be the supreme law of the

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land; that the restrictions of the Federal Constitution upon the exercise of state power would be but impotent phrases" *Sterling v. Constantin*, 287 U.S. 378, 397 -398.

It is, of course, quite true that the responsibility for public education is primarily the concern of the States, but it is equally true that such responsibilities, like all other state activity, must be exercised consistently with federal constitutional requirements as they apply to state action. The Constitution created a government dedicated to equal justice under law. The Fourteenth Amendment embodied and emphasized that ideal. State support of segregated schools through any arrangement, management, funds, or property cannot be squared with the Amendment's command that no State shall deny to any person within its jurisdiction the equal protection of the laws. The right of a student not to be segregated on racial grounds in schools so maintained is indeed so fundamental and pervasive that it is embraced in the concept of due process of law. *Bolling v. Sharpe*, 347 U.S. 497 . The basic decision in *Brown* was unanimously reached by this Court only after the case had been briefed and twice argued and the issues had been given the most serious consideration. Since the first *Brown* opinion three new Justices have come to the Court. They are at one with the Justices still on the Court who participated in that basic decision as to its correctness, and that decision is now unanimously reaffirmed. The principles announced in that decision and the obedience of the States to them, according to the command of the Constitution, [358 U.S. 1, 20] are indispensable for the protection of the freedoms guaranteed by our fundamental charter for all of us. Our constitutional ideal of equal justice under law is thus made a living truth. [Footnote *] The following was the Court's per curiam opinion:

"PER CURIAM.

"The Court, having fully deliberated upon the oral arguments had on August 28, 1958, as supplemented by the arguments presented on September 11, 1958, and all the briefs on file, is unanimously of the opinion that the judgment of the Court of Appeals for the Eighth Circuit of August 18, 1958, 257 F.2d 33, must be affirmed. In view of the imminent commencement of the new school year at the Central High School of Little Rock, Arkansas, we deem it important to make prompt announcement of our judgment affirming the Court of Appeals. The expression of the views supporting our judgment will be prepared and announced in due course.

"It is accordingly ordered that the judgment of the Court of Appeals for the Eighth Circuit, dated August 18, 1958, 257 F.2d 33, reversing the judgment of the District Court for the Eastern District of Arkansas, dated June 20, 1958, 163 F. Supp. 13, be affirmed, and that the judgments of the District Court for the Eastern District of Arkansas, dated August 28, 1956, see 143 F. Supp. 855, and September 3, 1957, enforcing the School Board's plan for desegregation in compliance with the decision of this Court in *Brown v. Board of Education*, 347 U.S. 483, 349 U.S. 294, be reinstated. It follows that the order of the Court of Appeals dated August 21, 1958, staying its own mandate is of no further effect.

"The judgment of this Court shall be effective immediately, and shall be communicated forthwith to the District Court for the Eastern District of Arkansas."

Concurring opinion of MR. JUSTICE FRANKFURTER. *

While unreservedly participating with my brethren in our joint opinion, I deem it appropriate also to deal individually with the great issue here at stake.

By working together, by sharing in a common effort, men of different minds and tempers, even if they do not reach agreement, acquire understanding and thereby tolerance of their differences. This process was under way in Little Rock. The detailed plan formulated by the Little Rock School Board, in the light of local circumstances, had been approved by the United States District Court in Arkansas as satisfying the requirements of this Court's decree in *Brown v. Board of Education*, 349 U.S. 294 . The Little Rock School Board had embarked on an educational effort "to obtain public acceptance" of its plan. Thus the process of the community's accommodation to new demands of law upon it, the development of habits of acceptance of the right of colored children to the equal protection of the laws guaranteed by the Constitution, had peacefully and promisingly begun. The

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condition in Little Rock before this process was forcibly impeded by those in control of the government of Arkansas was thus described by the District Court, and these findings of fact have not been controverted: "14. Up to this time, no crowds had gathered about Central High School and no acts of violence or threats of violence in connection with the carrying out of the plan had occurred. Nevertheless, out of an abundance of caution, the school authorities had [358 U.S. 1, 21] frequently conferred with the Mayor and Chief of Police of Little Rock about taking appropriate steps by the Little Rock police to prevent any possible disturbances or acts of violence in connection with the attendance of the 9 colored students at Central High School. The Mayor considered that the Little Rock police force could adequately cope with any incidents which might arise at the opening of school. The Mayor, the Chief of Police, and the school authorities made no request to the Governor or any representative of his for State assistance in maintaining peace and order at Central High School. Neither the Governor nor any other official of the State government consulted with the Little Rock authorities about whether the Little Rock police were prepared to cope with any incidents which might arise at the school, about any need for State assistance in maintaining peace and order, or about stationing the Arkansas National Guard at Central High School." 156 F. Supp. 220, 225.

All this was disrupted by the introduction of the state militia and by other obstructive measures taken by the State. The illegality of these interferences with the constitutional right of Negro children qualified to enter the Central High School is unaffected by whatever action or non-action the Federal Government had seen fit to take. Nor is it neutralized by the undoubted good faith of the Little Rock School Board in endeavoring to discharge its constitutional duty.

The use of force to further obedience to law is in any event a last resort and one not congenial to the spirit of our Nation. But the tragic aspect of this disruptive tactic was that the power of the State was used not to sustain law but as an instrument for thwarting law. The State of Arkansas is thus responsible for disabling one [358 U.S. 1, 22] of its subordinate agencies, the Little Rock School Board, from peacefully carrying out the Board's and the State's constitutional duty. Accordingly, while Arkansas is not a formal party in these proceedings and a decree cannot go against the State, it is legally and morally before the Court.

We are now asked to hold that the illegal, forcible interference by the State of Arkansas with the continuance of what the Constitution commands, and the consequences in disorder that it entrained, should be recognized as justification for undoing what the School Board had formulated, what the District Court in 1955 had directed to be carried out, and what was in process of obedience. No explanation that may be offered in support of such a request can obscure the inescapable meaning that law should bow to force. To yield to such a claim would be to enthrone official lawlessness, and lawlessness if not checked is the precursor of anarchy. On the few tragic occasions in the history of the Nation, North and South, when law was forcibly resisted or systematically evaded, it has signalled the breakdown of constitutional processes of government on which ultimately rest the liberties of all. Violent resistance to law cannot be made a legal reason for its suspension without loosening the fabric of our society. What could this mean but to acknowledge that disorder under the aegis of a State has moral superiority over the law of the Constitution? For those in authority thus to defy the law of the land is profoundly subversive not only of our constitutional system but of the presuppositions of a democratic society. The State "must . . . yield to an authority that is paramount to the State." This language of command to a State is Mr. Justice Holmes', speaking for the Court that comprised Mr. Justice Van Devanter, Mr. Justice McReynolds, Mr. Justice Brandeis, Mr. Justice Sutherland, [358 U.S. 1, 23] Mr. Justice Butler, and Mr. Justice Stone. *Wisconsin v. Illinois*, 281 U.S. 179, 197.

When defiance of law judicially pronounced was last sought to be justified before this Court, views were expressed which are now especially relevant:

"The historic phrase 'a government of laws and not of men' epitomizes the distinguishing character of our political society. When John Adams put that phrase into the Massachusetts Declaration of Rights he was not indulging in a rhetorical flourish. He was expressing the aim of those who, with him, framed the Declaration of Independence and founded the Republic. 'A government of laws and not of men' was the rejection in positive

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terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law, as finally pronounced by this Court. Even this Court has the last say only for a time. Being composed of fallible men, it may err. But revision of its errors must be by orderly process of law. The Court may be asked to reconsider its decisions, and this has been done successfully again and again throughout our history. Or, what this Court has deemed its duty to decide may be changed by legislation, as it often has been, and, on occasion, by constitutional amendment.

"But from their own experience and their deep reading in history, the Founders knew that Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised. 'Civilization involves subjection of force to reason, and the agency of this subjection is law.' (Pound, *The Future of Law* (1937) 47 *Yale L. J.* 1, 13.) The conception of a government by laws dominated the thoughts of those who founded this [358 U.S. 1, 24] Nation and designed its Constitution, although they knew as well as the belittlers of the conception that laws have to be made, interpreted and enforced by men. To that end, they set apart a body of men, who were to be the depositories of law, who by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be 'as free, impartial, and independent as the lot of humanity will admit.' So strongly were the framers of the Constitution bent on securing a reign of law that they endowed the judicial office with extraordinary safeguards and prestige. No one, no matter how exalted his public office or how righteous his private motive, can be judge in his own case. That is what courts are for." *United States v. United Mine Workers*, 330 U.S. 258, 307-309 (concurring opinion).

The duty to abstain from resistance to "the supreme Law of the Land," U.S. Const., Art. VI § 2, as declared by the organ of our Government for ascertaining it, does not require immediate approval of it nor does it deny the right of dissent. Criticism need not be stilled. Active obstruction or defiance is barred. Our kind of society cannot endure if the controlling authority of the Law as derived from the Constitution is not to be the tribunal specially charged with the duty of ascertaining and declaring what is "the supreme Law of the Land." (See President Andrew Jackson's Message to Congress of January 16, 1833, II Richardson, *Messages and Papers of the Presidents* (1896 ed.), 610, 623.) Particularly is this so where the declaration of what "the supreme Law" commands on an underlying moral issue is not the dubious pronouncement of a gravely divided Court but is the unanimous conclusion of a long-matured deliberative process. The Constitution is not the formulation of the [358 U.S. 1, 25] merely personal views of the members of this Court, nor can its authority be reduced to the claim that state officials are its controlling interpreters. Local customs, however hardened by time, are not decreed in heaven. Habits and feelings they engender may be counteracted and moderated. Experience attests that such local habits and feelings will yield, gradually though this be, to law and education. And educational influences are exerted not only by explicit teaching. They vigorously flow from the fruitful exercise of the responsibility of those charged with political official power and from the almost unconsciously transforming actualities of living under law.

The process of ending unconstitutional exclusion of pupils from the common school system - "common" meaning shared alike - solely because of color is no doubt not an easy, overnight task in a few States where a drastic alteration in the ways of communities is involved. Deep emotions have, no doubt, been stirred. They will not be calmed by letting violence loose - violence and defiance employed and encouraged by those upon whom the duty of law observance should have the strongest claim - nor by submitting to it under whatever guise employed. Only the constructive use of time will achieve what an advanced civilization demands and the Constitution confirms. For carrying out the decision that color alone cannot bar a child from a public school, this Court has recognized the diversity of circumstances in local school situations. But is it a reasonable hope that the necessary endeavors for such adjustment will be furthered, that racial frictions will be ameliorated, by a reversal of the process and interrupting effective measures toward the necessary goal? The progress that has been made in respecting the constitutional rights of the Negro children, according to the graduated plan sanctioned by the two [358 U.S. 1, 26] lower courts, would have to be retraced, perhaps with even greater difficulty because of deference to forcible resistance. It would have to be retraced against the seemingly vindicated feeling of those who actively sought to

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block that progress. Is there not the strongest reason for concluding that to accede to the Board's request, on the basis of the circumstances that gave rise to it, for a suspension of the Board's non-segregation plan, would be but the beginning of a series of delays calculated to nullify this Court's adamant decisions in the Brown case that the Constitution precludes compulsory segregation based on color in state-supported schools?

That the responsibility of those who exercise power in a democratic government is not to reflect inflamed public feeling but to help form its understanding, is especially true when they are confronted with a problem like a racially discriminating public school system. This is the lesson to be drawn from the heartening experience in ending enforced racial segregation in the public schools in cities with Negro populations of large proportions. Compliance with decisions of this Court, as the constitutional organ of the supreme Law of the Land, has often, throughout our history, depended on active support by state and local authorities. It presupposes such support. To withhold it, and indeed to use political power to try to paralyze the supreme Law, precludes the maintenance of our federal system as we have known and cherished it for one hundred and seventy years.

Lincoln's appeal to "the better angels of our nature" failed to avert a fratricidal war. But the compassionate wisdom of Lincoln's First and Second Inaugurals bequeathed to the Union, cemented with blood, a moral heritage which, when drawn upon in times of stress and strife, is sure to find specific ways and means to surmount difficulties that may appear to be insurmountable.

[Footnote *] [NOTE: This opinion was filed October 6, 1958.] [358 U.S. 1, 27]

AUGUST 28, 1958.

Miscellaneous Order.

No. 1, Misc. AARON ET AL. v. COOPER ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS, INDEPENDENT SCHOOL DISTRICT, ET AL. On application for vacation of the order of the United States Court of Appeals for the Eighth Circuit staying issuance of its mandate and for a stay of the order of the United States District Court for the Eastern District of Arkansas and for such other orders as petitioners may be entitled to. Argued August 28, 1958.

Having considered the oral arguments, the Court is in agreement with the view expressed by counsel for the respective parties and by the Solicitor General that petitioners' present application respecting the stay of the mandate of the Court of Appeals and of the order of the District Court of June 21, 1958, necessarily involves consideration of the merits of the Court of Appeals decision reversing the order of Judge Lemley. The Court is advised that the opening date of the High School will be September 15. In light of this, and representations made by counsel for the School Board as to the Board's plan for filing its petition for certiorari, the Court makes the following order:

1. The School Board's petition for certiorari may be filed not later than September 8, 1958.
2. The briefs of both parties on the merits may be filed not later than September 10, 1958.
3. The Solicitor General is invited to file a brief by September 10, 1958, and to present oral argument if he is so advised. [358 U.S. 1, 28]
4. The Rules of the Court requiring printing of the petition, briefs, and record are dispensed with.
5. Oral argument upon the petition for certiorari is set for September 11, 1958, at twelve o'clock noon.
6. Action on the petitioners' application addressed to the stay of the mandate of the Court of Appeals and to the stay of the order of the District Court of June 21, 1958, is deferred pending the disposition of the petition for certiorari duly filed in accordance with the foregoing schedule.

Thurgood Marshall argued the cause for petitioners. With him on the brief were Wiley A. Branton, Jack Greenberg and William Coleman, Jr. Richard C. Butler argued the cause for respondents. With him on the brief

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was A. F. House. Solicitor General Rankin, at the invitation of the Court, argued the cause for the United States, as amicus curiae, urging that the relief sought by petitioners should be granted. With him on the brief were Oscar H. Davis, Philip Elman and Ralph S. Spritzer.

SEPTEMBER 4, 1958.

Dismissal Under Rule 60.

No. 116, October Term, 1958. AMERICAN BROADCASTING-PARAMOUNT THEATRES, INC., v. UNITED STATES. Appeal from the United States District Court for the Southern District of New York. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. Albert C. Bickford for appellant. Oscar H. Davis, then Acting Solicitor General, for the United States. Reported below: 165 F. Supp. 643.

SEPTEMBER 11, 1958.

Miscellaneous Order.

No. 1, Misc. AARON ET AL. v. COOPER ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS, [358 U.S. 1, 29] INDEPENDENT SCHOOL DISTRICT, ET AL. On application for vacation of the order of the United States Court of Appeals for the Eighth Circuit staying issuance of its mandate and for a stay of the order of the United States District Court for the Eastern District of Arkansas and for such other orders as petitioners may be entitled to. Motion for leave to file brief of J. W. Fulbright, as amicus curiae, denied. Motion for leave to file brief of John Bradley Minnick, as amicus curiae, denied. Motion for leave to file brief of William Burrow, as amicus curiae, denied.

Certiorari Granted.

No. 1. COOPER ET AL., MEMBERS OF THE BOARD OF DIRECTORS OF THE LITTLE ROCK, ARKANSAS, INDEPENDENT SCHOOL DISTRICT, ET AL. v. AARON ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Motion for leave to file brief of Arlington County Chapter, Defenders of State Sovereignty of Individual Liberties, as amicus curiae, denied. Motion for leave to file brief of James M. Burke, as amicus curiae, denied. Motion for leave to file suit for declaratory judgment in re Little Rock and for other relief denied. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted. Richard C. Butler, A. F. House and, by special leave of the Court, John H. Haley, pro hac vice, for petitioners. Thurgood Marshall, Wiley A. Branton, William Coleman, Jr., Jack Greenberg and Louis H. Pollak for respondents. Solicitor General Rankin, appearing at the invitation of the Court, adhered to his brief filed in No. 1, Misc., August Special Term, 1958, urging that the relief sought by respondents should be granted. With him on this brief were Oscar H. Davis, Philip Elman and Ralph S. Spritzer. Reported below: 257 F.2d 33. [358 U.S. 1, 30] SEPTEMBER 12, 1958.

Dismissal Under Rule 60.

No. 38, Misc., October Term, 1958. BLOCH v. COMMISSIONER OF INTERNAL REVENUE. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Dismissed per stipulation pursuant to Rule 60 of the Rules of this Court. Petitioner pro se. Solicitor General Rankin for respondent. Reported below: 254 F.2d 277.

SEPTEMBER 17, 1958. THURGOOD MARSHALL JURISPRUDENCE SYLLABUS, READING ASSIGNMENTS AND COURSE MATERIALS FALL Page 210

Mendez v. Westminster School Dist., 64 F. Supp. 544 (S.D. Cal. 1946)

**U.S. District Court for the Southern District of California - 64 F. Supp. 544 (S.D. Cal. 1946)
February 18, 1946**

64 F. Supp. 544 (1946)

MENDEZ et al. v. WESTMINISTER SCHOOL DIST. OF ORANGE COUNTY et al.

Civil Action No. 4292.

District Court, S. D. California, Central Division.

February 18, 1946.

***545** David C. Marcus, of Los Angeles, Cal., for petitioner.

Joel E. Ogle, Co. Counsel, and George F. Holden, Deputy Co. Counsel, both of Santa Ana, Cal., for respondents.

A. L. Wirin and J. B. Tietz, both of Los Angeles, Cal., for American Civil Liberties Union, amicus curiae.

Chas. F. Christopher, Ben Margolis, and Loren Miller, all of Los Angeles, Cal., for National Lawyers Guild, amicus curiae.

McCORMICK, District Judge.

Gonzalo Mendez, William Guzman, Frank Palomino, Thomas Estrada and Lorenzo Ramirez, as citizens of the United States, and on behalf of their minor children, and as they allege in the petition, on behalf of "some 5000" persons similarly affected, all of Mexican or Latin descent, have filed a class suit pursuant to Rule 23 of Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, against the Westminster, Garden Grove and El Modeno School Districts, and the Santa Ana City Schools, all of Orange County, California, and the respective trustees and superintendents of said school districts.

The complaint, grounded upon the Fourteenth Amendment to the Constitution of the United States^[1] and Subdivision 14 of Section 24 of the Judicial Code, Title 28, Section 41, subdivision 14, U.S.C.A.,^[2] alleges a concerted policy and design of class discrimination against "persons of Mexican or Latin descent or extraction" of elementary school age by the defendant school agencies in the conduct and operation of public schools of said districts, THURGOOD MARSHALL

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resulting in the denial of the equal protection of the laws to such class of persons among which are the petitioning school children.

Specifically, plaintiffs allege:

"That for several years last past respondents have and do now in furtherance and in execution of their common plan, design and purpose within their respective Systems and Districts, have by their regulation, custom and usage and in execution thereof adopted and declared: That all children or persons of Mexican or Latin descent or extraction, though Citizens of the United States of America, shall be, have been and are now excluded from attending, using, enjoying and receiving the benefits of the education, health and recreation facilities of certain schools within their respective Districts and Systems but that said children are now and have been segregated and required to and must attend and use certain schools in said Districts and Systems reserved for and attended solely and exclusively by children and persons of Mexican and Latin descent, while such other schools are maintained, attended and used exclusively by and for persons and children purportedly known as White or Anglo-Saxon children.

"That in execution of said rules and regulations, each, every and all the foregoing children are compelled and required to and must attend and use the schools in said respective Districts reserved for and attended solely and exclusively by children of Mexican and Latin descent and are forbidden, barred and excluded from attending any other school in said District or System solely for the reason that said children or child are of Mexican or Latin descent."

The petitioners demand that the alleged rules, regulations, customs and usages be adjudged void and unconstitutional and that an injunction issue restraining further *546 application by defendant school authorities of such rules, regulations, customs, and usages.

It is conceded by all parties that there is no question of race discrimination in this action. It is, however, admitted that segregation per se is practiced in the above-mentioned school districts as the Spanish-speaking children enter school life and as they advance through the grades in the respective school districts. It is also admitted by the defendants that the petitioning children are qualified to attend the public schools in the respective districts of their residences.

In the Westminster, Garden Grove and El Modeno school districts the respective boards of trustees had taken official action, declaring that there be no segregation of pupils on a racial basis but that non-English-speaking children (which group, excepting as to a small number of pupils, was made up entirely of children of Mexican ancestry or descent), be required to attend schools designated by the boards separate and apart from English-speaking pupils; that such group should attend such schools until they had acquired some proficiency in the English language.

The petitioners contend that such official action evinces a covert attempt by the school authorities in such school districts to produce an arbitrary discrimination against school children of Mexican extraction or descent and that such illegal result has been established in such school districts respectively. The school authorities of the City of Santa Ana have not memorialized any such official action, but petitioners assert that the same custom and usage

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exists in the schools of the City of Santa Ana under the authority of appropriate school agencies of such city.

The concrete acts complained of are those of the various school district officials in directing which schools the petitioning children and others of the same class or group must attend. The segregation exists in the elementary schools to and including the sixth grade in two of the defendant districts, and in the two other defendant districts through the eighth grade. The record before us shows without conflict that the technical facilities and physical conveniences offered in the schools housing entirely the segregated pupils, the efficiency of the teachers therein and the curricula are identical and in some respects superior to those in the other schools in the respective districts.

The ultimate question for decision may be thus stated: Does such official action of defendant district school agencies and the usages and practices pursued by the respective school authorities as shown by the evidence operate to deny or deprive the so-called non-English-speaking school children of Mexican ancestry or descent within such school districts of the equal protection of the laws?

The defendants at the outset challenge the jurisdiction of this court under the record as it exists at this time. We have already denied the defendants' motion to dismiss the action upon the "face" of the complaint. No reason has been shown which warrants reconsideration of such decision. While education is a State matter, it is not so absolutely or exclusively. *Cumming v. Board of Education of Richmond County*, 175 U.S. 528, 20 S. Ct. 197, 201, 44 L. Ed. 262. In the *Cumming* decision the Supreme Court said: "That education of the people in schools maintained by state taxation is a matter belonging to the respective states, and *any interference on the part of Federal authority with the management of such schools cannot be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.*" (Emphasis supplied.) See, also, *Gong Lum v. Rice*, 275 U.S. 78, 48 S. Ct. 91, 72 L. Ed. 172; *Wong Him v. Callahan*, C.C., 119 F. 381; *Ward v. Flood*, 48 Cal. 36, 17 Am.Rep. 405; *Piper et al. v. Big Pine School District*, 193 Cal. 664, 226 P. 926.

Obviously, then, a violation by a State of a personal right or privilege protected by the Fourteenth Amendment in the exercise of the State's duty to provide for the education of its citizens and inhabitants would justify the Federal Court to intervene. *State of Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 59 S. Ct. 232, 83 L. Ed. 208. The complaint before us in this action, having alleged an invasion by the common school authorities of the defendant districts of the equal opportunity of pupils to acquire knowledge, confers jurisdiction on this court if the actions complained of are deemed those of the State. *Hamilton v. Regents of University of California*, 293 U.S. 245, 55 S. Ct. 197, 79 L. Ed. 343; cf. *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 1042, 29 A.L.R. 1446.

***547** Are the actions of public school authorities of a rural or city school in the State of California, as alleged and established in this case, to be considered actions of the State within the meaning of the Fourteenth Amendment so as to confer jurisdiction on this court to hear

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and decide this case under the authority of Section 24, Subdivision 14 of the Judicial Code, *supra*? We think they are.

In the public school system of the State of California the various local school districts enjoy a considerable degree of autonomy. Fundamentally, however, the people of the State have made the public school system a matter of State supervision. Such system is not committed to the exclusive control of local governments. Article IX, Constitution of California, *Butterworth v. Boyd*, 12 Cal. 2d 140, 82 P.2d 434, 126 A.L.R. 838. It is a matter of general concern, and not a municipal affair. *Esberg v. Badaracco*, 202 Cal. 110, 259 P. 730; *Becker v. Council of City of Albany*, 47 Cal. App. 2d 702, 118 P.2d 924.

The Education Code of California provides for the requirements of teachers' qualifications, the admission and exclusion of pupils, the courses of study and the enforcement of them, the duties of superintendents of schools and of the school trustees of elementary schools in the State of California. The appropriate agencies of the State of California allocate to counties all the State school money exclusively for the payment of teachers' salaries in the public schools and such funds are apportioned to the respective school districts within the counties. While, as previously observed, local school boards and trustees are vested by State legislation with considerable latitude in the administration of their districts, nevertheless, despite the decentralization of the educational system in California, the rules of the local school district are required to follow the general pattern laid down by the legislature, and their practices must be consistent with law and with the rules prescribed by the State Board of Education. See Section 2204, Education Code of California.

When the basis and composition of the public school system is considered, there can be no doubt of the oneness of the system in the State of California, or of the restricted powers of the elementary school authorities in the political subdivisions of the State. See *Kennedy v. Miller*, 97 Cal. 429, 32 P. 558; *Bruch v. Colombet*, 104 Cal. 347, 38 P. 45; *Ward v. San Diego School District*, 203 Cal. 712, 265 P. 821.

In *Hamilton v. Regents of University of California*, *supra*, and *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S. Ct. 1178, 1185, 87 L. Ed. 1628, 147 A.L.R. 674, the acts of university regents and of a board of education were held acts of the State. In the recent *Barnette* decision the court stated: "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." Although these cases dealt with State rather than local Boards, both are agencies and parts of the State educational system, as is indicated by the Supreme Court in the *Barnette* case, wherein it stated: "Such Boards are numerous and their territorial jurisdiction often small. But small and local authority may feel less sense of responsibility to the Constitution, and agencies of publicity may be less vigilant in calling it to account." Upon an appraisal of the factual situation before this court as illumined by the laws of the State of California relating to the public school system, it is clear that the respondents should be classified as representatives of the State to such an extent and in such a sense that the great restraints of the Constitution set limits to their action.

Screws v. United States, 325 U.S. 91, 65 S. Ct. 1051; *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987, 151 A.L.R. 1110; THURGOOD MARSHALL JURISPRUDENCE SYLLABUS, READING ASSIGNMENTS AND COURSE MATERIALS FALL Page 214

Hague v. Committee for Industrial Organization, 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423; Home Tel. & Tel. Co. v. Los Angeles, 227 U.S. 278, 33 S. Ct. 312, 57 L. Ed. 510.

We therefore turn to consider whether under the record before us the school boards and administrative authorities in the respective defendant districts have by their segregation policies and practices transgressed applicable law and Constitutional safeguards and limitations and thus have invaded the personal right which every public school pupil has to the equal protection provision of the Fourteenth Amendment to obtain the means of education.

We think the pattern of public education promulgated in the Constitution of California and effectuated by provisions of the Education Code of the State prohibits segregation of the pupils of Mexican ancestry *548 in the elementary schools from the rest of the school children.

Section 1 of Article IX of the Constitution of California directs the legislature to "encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement" of the people. Pursuant to this basic directive by the people of the State many laws stem authorizing special instruction in the public schools for handicapped children. See Division 8 of the Education Code. Such legislation, however, is general in its aspects. It includes all those who fall within the described classification requiring the special consideration provided by the statutes regardless of their ancestry or extraction. The common segregation attitudes and practices of the school authorities in the defendant school districts in Orange County pertain solely to children of Mexican ancestry and parentage. They are singled out as a class for segregation. Not only is such method of public school administration contrary to the general requirements of the school laws of the State, but we think it indicates an official school policy that is antagonistic in principle to Sections 16004 and 16005 of the Education Code of the State.^[3]

Obviously, the children referred to in these laws are those of Mexican ancestry. And it is noteworthy that the educational advantages of their commingling with other pupils is regarded as being so important to the school system of the State that it is provided for even regardless of the citizenship of the parents. We perceive in the laws relating to the public educational system in the State of California a clear purpose to avoid and forbid distinctions among pupils based upon race or ancestry^[4] except in specific situations^[5] not pertinent to this action. Distinctions of that kind have recently been declared by the highest judicial authority of the United States "by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." They are said to be "utterly inconsistent with American traditions and ideals." Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375, 1385, 87 L. Ed. 1774.

Our conclusions in this action, however, *549 do not rest solely upon what we conceive to be the utter irreconcilability of the segregation practices in the defendant school districts with the public educational system authorized and sanctioned by the laws of the State of California. We think such practices clearly and unmistakably disregard rights secured by the supreme law of the land.

Cumming v. Board of Education of Richmond County, supra. THURGOOD MARSHALL JURISPRUDENCE SYLLABUS, READING ASSIGNMENTS AND COURSE MATERIALS FALL Page 215

"The equal protection of the laws" pertaining to the public school system in California is not provided by furnishing in separate schools the same technical facilities, text books and courses of instruction to children of Mexican ancestry that are available to the other public school children regardless of their ancestry. A paramount requisite in the American system of public education is social equality. It must be open to all children by unified school association regardless of lineage. We think that under the record before us the only tenable ground upon which segregation practices in the defendant school districts can be defended lies in the English language deficiencies of some of the children of Mexican ancestry as they enter elementary public school life as beginners. But even such situations do not justify the general and continuous segregation in separate schools of the children of Mexican ancestry from the rest of the elementary school population as has been shown to be the practice in the defendant school districts in all of them to the sixth grade, and in two of them through the eighth grade.

The evidence clearly shows that Spanish-speaking children are retarded in learning English by lack of exposure to its use because of segregation, and that commingling of the entire student body instills and develops a common cultural attitude among the school children which is imperative for the perpetuation of American institutions and ideals.^[6] It is also established by the record that the methods of segregation prevalent in the defendant school districts foster antagonisms in the children and suggest inferiority among them where none exists. One of the flagrant examples of the discriminatory results of segregation in two of the schools involved in this case is shown by the record. In the district under consideration there are two schools, the Lincoln and the Roosevelt, located approximately 120 yards apart on the same school grounds, hours of opening and closing, as well as recess periods, are not uniform. No credible language test is given to the children of Mexican ancestry upon entering the first grade in Lincoln School. This school has an enrollment of 249 so-called Spanish-speaking pupils, and no so-called English-speaking pupils; while the Roosevelt, (the other) school, has 83 so-called English-speaking pupils and 25 so-called Spanish-speaking pupils. Standardized tests as to mental ability are given to the respective classes in the two schools and the same curricula are pursued in both schools and, of course, in the English language as required by State law. Section 8251, Education Code. In the last school year the students in the seventh grade of the Lincoln were superior scholarly to the same grade in the Roosevelt School and to any group in the seventh grade in either of the schools in the past. It further appears that not only did the class as a group have such mental superiority but that certain pupils in the group were also outstanding in the class itself. Notwithstanding this showing, the pupils of such excellence were kept in the Lincoln School. It is true that there is no evidence in the record before us that shows that any of the members of this exemplary class requested transfer to the other so-called intermingled school, but the record does show without contradiction that another class had protested against the segregation policies and practices in the schools of this El Modeno district without avail.

While the pattern or ideal of segregating the school children of Mexican ancestry from the rest of the school attendance permeates and is practiced in all of the four defendant districts, there are procedural deviations among the school administrative agencies in effectuating the general plan.

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In Garden Grove Elementary School District the segregation extends only through the fifth grade. Beyond, all pupils in such district, regardless of their ancestry or linguistic proficiency, are housed, instructed and associate in the same school facility.

This arrangement conclusively refutes the reasonableness or advisability of any segregation of children of Mexican ancestry *550 beyond the fifth grade in any of the defendant school districts in view of the standardized and uniform curricular requirements in the elementary schools of Orange County.

But the admitted practice and long established custom in this school district whereby all elementary public school children of Mexican descent are required to attend one specified school (the Hoover) until they attain the sixth grade, while all other pupils of the same grade are permitted to and do attend two other elementary schools of this district, notwithstanding that some of such pupils live within the Hoover School division of the district, clearly establishes an unfair and arbitrary class distinction in the system of public education operative in the Garden Grove Elementary School District.

The long-standing discriminatory custom prevalent in this district is aggravated by the fact shown by the record that although there are approximately 25 children of Mexican descent living in the vicinity of the Lincoln School, none of them attend that school, but all are peremptorily assigned by the school authorities to the Hoover School, although the evidence shows that there are no school zones territorially established in the district.

The record before us shows a paradoxical situation concerning the segregation attitude of the school authorities in the Westminster School District. There are two elementary schools in this undivided area. Instruction is given pupils in each school from kindergarten to the eighth grade, inclusive. Westminster School has 642 pupils, of which 628 are so-called English-speaking children, and 14 so-called Spanish-speaking pupils. The Hoover School is attended solely by 152 children of Mexican descent. Segregation of these from the rest of the school population precipitated such vigorous protests by residents of the district that the school board in January, 1944, recognizing the discriminatory results of segregation, resolved to unite the two schools and thus abolish the objectionable practices which had been operative in the schools of the district for a considerable period. A bond issue was submitted to the electors to raise funds to defray the cost of contemplated expenditures in the school consolidation. The bonds were not voted and the record before us in this action reflects no execution or carrying out of the official action of the board of trustees taken on or about the 16th of January, 1944. It thus appears that there has been no abolishment of the traditional segregation practices in this district pertaining to pupils of Mexican ancestry through the gamut of elementary school life. We have adverted to the unfair consequences of such practices in the similarly situated El Modeno School District.

Before considering the specific factual situation in the Santa Ana City Schools it should be noted that the omnibus segregation of children of Mexican ancestry from the rest of the student body in the elementary grades in the schools involved in this case because of language handicaps is not warranted by the record before us. The tests applied to the beginners are shown to have been generally hasty, superficial and not reliable. In some

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instances separate classification was determined largely by the Latinized or Mexican name of the child. Such methods of evaluating language knowledge are illusory and are not conducive to the inculcation and enjoyment of civil rights which are of primary importance in the public school system of education in the United States.

It has been held that public school authorities may differentiate in the exercise of their reasonable discretion as to the pedagogical methods of instruction to be pursued with different pupils.^[7] And foreign language handicaps may be to such a degree in the pupils in elementary schools as to require special treatment in separate classrooms. Such separate allocations, however, can be lawfully made only after credible examination by the appropriate school authority of each child whose capacity to learn is under consideration and the determination of such segregation must be based wholly upon indiscriminate foreign language impediments in the individual child, regardless of his ethnic traits or ancestry.

The defendant Santa Ana School District maintains fourteen elementary schools which furnish instruction from kindergarten to the sixth grade, inclusive.

About the year 1920 the Board of Education, for the purpose of allocating pupils to the several schools of the district in proportion to the facilities available at such *551 schools, divided the district into fourteen zones and assigned to the school established in each zone all pupils residing within such zone.

There is no evidence that any discriminatory or other objectionable motive or purpose actuated the School Board in locating or defining such zones.

Subsequently the influx of people of Mexican ancestry in large numbers and their voluntary settlement in certain of the fourteen zones resulted in three of the zones becoming occupied almost entirely by such group of people.

Two zones, that in which the Fremont School is located, and another contiguous area in which the Franklin School is situated, present the only flagrant discriminatory situation shown by the evidence in this case in the Santa Ana City Schools. The Fremont School has 325 so-called Spanish-speaking pupils and no so-called English-speaking pupils. The Franklin School has 237 pupils of which 161 are so-called English-speaking children, and 76 so-called Spanish-speaking children.

The evidence shows that approximately 26 pupils of Mexican descent who reside within the Fremont zone are permitted by the School Board to attend the Franklin School because their families had always gone there. It also appears that there are approximately 35 other pupils not of Mexican descent who live within the Fremont zone who are not required to attend the Fremont School but who are also permitted by the Board of Education to attend the Franklin School.

Sometime in the fall of the year 1944 there arose dissatisfaction by the parents of some of the so-called Spanish-speaking pupils in the Fremont School zone who were not granted the privilege that approximately 26 children also of Mexican descent, enjoyed in attending the

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Franklin School. Protest was made en masse by such dissatisfied group of parents, which resulted in the Board of Education directing its secretary to send a letter to the parents of all of the so-called Spanish-speaking pupils living in the Fremont zone and attending the Franklin School that beginning September, 1945, the permit to attend Franklin School would be withdrawn and the children would be required to attend the school of the zone in which they were living, viz., the Fremont School.

There could have been no arbitrary discrimination claimed by plaintiffs by the action of the school authorities if the same official course had been applied to the 35 other so-called English-speaking pupils exactly situated as were the approximate 26 children of Mexican lineage, but the record is clear that the requirement of the Board of Education was intended for and directed exclusively to the specified pupils of Mexican ancestry and if carried out becomes operative solely against such group of children.

It should be stated in fairness to the Superintendent of the Santa Ana City Schools that he testified he would recommend to the Board of Education that the children of those who protested the action requiring transfer from the Franklin School be allowed to remain there because of long attendance and family tradition. However, there was no official recantation shown of the action of the Board of Education reflected by the letters of the Secretary and sent only to the parents of the children of Mexican ancestry.

The natural operation and effect of the Board's official action manifests a clear purpose to arbitrarily discriminate against the pupils of Mexican ancestry and to deny to them the equal protection of the laws.

The court may not exercise legislative or administrative functions in this case to save such discriminatory act from inoperativeness. Cf. *Yu Cong Eng v. Trinidad*, 271 U.S. 500, 46 S. Ct. 619, 70 L. Ed. 1059.

There are other discriminatory customs, shown by the evidence, existing in the defendant school districts as to pupils of Mexican descent and extraction, but we deem it unnecessary to discuss them in this memorandum.

We conclude by holding that the allegations of the complaint (petition) have been established sufficiently to justify injunctive relief against all defendants, restraining further discriminatory practices against the pupils of Mexican descent in the public schools of defendant school districts. See *Morris v. Williams*, 8 Cir., 149 F.2d 703.

Findings of fact, conclusions of law, and decree of injunction are accordingly ordered pursuant to Rule 52, F.R.C.P.

Attorney for plaintiffs will within ten days from date hereof prepare and present same under local Rule 7 of this court.

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NOTES

[1] "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[2] "The district courts shall have original jurisdiction as follows: * * *"

Sec. 41, subd. (14) "Suits to redress deprivation of civil rights. Fourteenth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under color of any law, statute, ordinance, regulation, custom, or usage, of any State, of any right, privilege, or immunity, secured by the Constitution of the United States, or of any right secured by any law of the United States providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States."

[3] "Sec. 16004. Any person, otherwise eligible for admission to any class or school of a school district of this State, whose parents are or are not citizens of the United States and whose actual and legal residence is in a foreign country adjacent to this State may be admitted to the class or school of the district by the governing board of the district."

"Sec. 16005. The governing board of the district may, as a condition precedent to the admission of any person, under Section 16004, require the parent or guardian of such person to pay to the district an amount not more than sufficient to reimburse the district for the total cost, exclusive of capital outlays, of educating the person and providing him with transportation to and from school. The cost of transportation shall not exceed ten dollars (\$10) per month. Tuition payments shall be made in advance for each month or semester during the period of attendance. If the amount paid is more or less than the total cost of education and transportation, adjustment shall be made for the following semester or school year. The attendance of the pupils shall not be included in computing the average daily attendance of the class or school for the purpose of obtaining apportionment of State funds."

[4] Sec. 8501, Education Code. "Children between six and 21 years of age. The day elementary school of each school district shall be open for the admission of all children between six and 21 years of age residing within the boundaries of the district."

Sec. 8002. "Maintenance of elementary day schools and day high schools with equal rights and privileges. The governing board of any school district shall maintain all of the elementary day schools established by it, and all of the day high schools established by it with equal rights and privileges as far as possible."

[5] Sec. 8003. "Schools for Indian children, and children of Chinese, Japanese, or Mongolian parentage: Establishment. The governing board of any school district may establish separate schools for Indian children, excepting children of Indians who are wards of the United States

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Government and children of all other Indians who are descendants of the original American Indians of the United States, and for children of Chinese, Japanese, or Mongolian parentage." Sec. 8004. "Same: Admission of children into other schools. When separate schools are established for Indian children or children of Chinese, Japanese, or Mongolian parentage, the Indian children or children of Chinese, Japanese, or Mongolian parentage shall not be admitted into any other school."

[6] The study of American institutions and ideals in all schools located within the State of California is required by Section 10051, Education Code.

[7] See *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256.

Terry v. Adams

Negative Treatment

United States District Court, S.D. Texas, Galveston Division May 1, 1950 Full title

90 F. Supp. 595 (S.D. Tex. 1950) Copy Citation

Cases citing this case

☐ Terry v. Adams

...The District Court issued a declaratory judgment holding invalid racial discriminations in a pre-primary...

☐ Adams v. Terry

...Because this is so, because the facts are undisputed, and because the question at issue is one not of fact...

4

KENNERLY, Chief Judge.

This is a suit by John Terry, et al., citizens and residents of Fort Bend County, in this District and Division (for brevity called Plaintiffs), against A.J. Adams, et al., also residents and citizens of Fort Bend County (for brevity called Defendants). Defendants are sued individually and as representatives of the governing body of the Jaybird Democratic Association of Fort Bend County (for brevity called Association), commonly known, and described by Plaintiffs, as the Jaybird Party. THURGOOD MARSHALL JURISPRUDENCE SYLLABUS, READING ASSIGNMENTS AND COURSE MATERIALS FALL Page 221

Such Association is a political organization or party. About April, May, or June of each election year, it holds a primary election or elections (called for brevity Jaybird Primary) to determine to what persons such Association will give its endorsement for County and Precinct Officers in Fort Bend County to be voted on in the Democratic Primaries to be held the following July and August. No Negro is allowed to vote in such Jaybird Primary. Plaintiffs, "who are Negroes and qualified voters in such County, bring this suit for themselves and others similarly situated, seeking a Decree declaring that they are legally entitled to vote in such Jaybird Primary, for damages in the sum of Five Thousand Dollars for being deprived of such right, and enjoining Defendants from refusing to allow them to vote. Particularly they pray that Defendants be enjoined from refusing to allow them to vote in the Jaybird Primaries of May 6, 1950, and June 3, 1950. Defendants have filed a Motion to Dismiss and have Answered, and this is a hearing on such Motion and a trial on the merits.

(a) Counsel for the parties have signed a Stipulation, which was offered by Defendants, which so well states the history and purpose of such Association that I quote it as follows: —

"The matters herein contained are not stipulated by Plaintiffs in the above cause within the sense that Plaintiffs agree thereto but it is agreed that the matters set forth in the following paragraphs may be read by Defendants on any trial or hearing of this cause, as Defendants statements with reference to said matters, the same as though each of said matters hereinafter set forth were introduced into evidence by testimony of witnesses testifying personally; and the Plaintiffs make no objection to the reading of the following paragraphs:

"In seeking to understand the Jaybird Democratic Association of Fort Bend County, Texas, it is necessary to keep in mind conditions throughout the South during the so-called Reconstruction Period, and particularly in those localities like Fort Bend County where the Negroes greatly outnumbered the whites. In the registration of voters from May to September 1867 there were admitted to registry 153 white voters and 1334 colored voters in the county. The State was placed under military rule; county officials were appointed and removed at will under military authority. When military control was discontinued, county and precinct offices were held over by the group theretofore in control, most of the white members of which had come into the county after the War. The colored people, only recently freed, were controlled by the white newcomers.

"The result was a county government of dishonesty, corruption, graft and also of arrogance toward the native white citizens. The county officials were not interested in orderly honest government, the enforcement of law, the prevention of crime or its adequate punishment. The native white people tried by personal persuasion and by appeal, both to the white members of the ruling organization and also to the Negroes, to bring about some betterment of official conditions and conduct, but to no avail.

"Most, if not all, of the white people excluded from participation in voting or political affairs were Democrats. As time passed on and a greater percentage of the Democrats began to be permitted to vote, different groups among them sought to organize and support candidates for office, but **without success.**

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"Finally the condition became so intolerable that the Democrats, joined perhaps by a few good Republican citizens, decided to organize an association of white citizens to be known as the 'Jaybird Democratic Association of Fort Bend County', stating their object thus: 'The object of this association shall be to secure to the people of Fort Bend County economic and honest county government and the election of honest and faithful county officials.' 'Every bona fide white citizen of Fort Bend County shall be eligible to membership in this association.' This was in 1889.

"Throughout the years the membership of the association has, by some method, ascertained whom the majority of its members desired to support for various county and precinct offices. For a period, it determined the preference of its members at mass meetings of the membership, before which mass meetings were placed the names of those who desired to seek office or whose friends desired to present and support them. Later the method was changed to a ballot voting system paralleling in general form and method the system set up by state law for political party government.

"Those candidates selected as preferred by the membership of the Association by whatever method was followed were advised of their selection. The news of the result of voting in the Association was spread by word of mouth, newspapers and any other available news channels.

"With the announcement of the selection of the candidates preferred by the membership of the Association, the organization's connection with the matter terminated."

(b) Another Stipulation of Facts was signed and filed by Counsel for the parties. It is quite lengthy and it seems unnecessary to copy it herein. It is referred to and made a part hereof. Briefly stated, the facts as set forth in the Stipulation and shown by the evidence are as follows: —

(c) The four persons named as Defendants herein are officers of such Association. Such Association is governed by an Executive Committee of twenty-two persons, one from each voting precinct in the County. Such officers are members of such Committee.

Paragraph IV of the Stipulation is as follows: — "The Jaybird Democratic Association of Fort Bend County, Texas, has an Executive Committee. To provide representation thereon to all portions of Fort Bend County, the Committee is composed of 22 persons, each selected by the members of the Association resident in the 22 respective voting precincts of the Association. "Defendant A.J. Adams is President, George Lane is Vice-President and Mrs. Mattye Schulze is Secretary of the Association and said defendants, together with defendant R.M. Darst, are each members of the Executive Committee."

(d) The Jaybird Primary and/or Primaries are held on a date or dates fixed by such Committee of such Association each election year, to elect or select the persons who are to and will receive the endorsement of the Association for County and Precinct Officers in Fort Bend County, to be voted on at the Democratic Primary or Primaries to be held in such County in

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July and August following. Such Jaybird Primary and/or Primaries are held and conducted and persons announce themselves as candidates and become candidates therein in substantially the same way as such Democratic Primaries are held and conducted under the Laws of Texas. Except that more than two consecutive terms for County and Precinct officers are prohibited by such Association and there is no pledge on the ballot at the Jaybird Primary. And further the Executive Committee of such Association does not certify the successful candidates. Such successful candidates must file their own applications for a place on the ballot used in such Democratic Primaries. There are perhaps other minor exceptions.

(e) There is no other organization in Fort Bend County similar to such Association, and generally the persons endorsed in the Jaybird Primary are the only persons whose names appear on the ballot at the Democratic Primaries. And such persons are almost invariably elected or nominated at such Democratic Primaries and their names appear as Democratic Nominees on the official ballot at the General Election in November. The Democratic Nominees are almost invariably elected at such General Election. In other words, an endorsement at the Jaybird Primary generally means an election at the General Election in November. A majority of the white voters in Fort Bend County vote in the Jaybird Primaries, and generally abide by and support in the Democratic Primaries the persons endorsed by the Jaybird Primaries, although such Association has no way of requiring them to do so.

(f) It is perfectly plain that the main and primary object of such Association has been from the beginning of its organization and still is to aid and enable the white voters of Fort Bend County to select and elect the County and Precinct officers of Fort Bend County and to deny the Negro voters any voice or part therein.

1: — Defendants' Motion to Dismiss is not meritorious. It is clearly shown that the Jaybird Democratic Association is generally known as the Jaybird Party, by which name it is here sued. It is shown that the four Defendants herein are officers of such Association, and it is clear that the service of process on them brings them and such Association into Court under Rules 4(d)(1) and 4(d)(3) of the Federal Rules of Civil Procedure, 28 U.S.C.A. It is also clear that this Court has jurisdiction of this case under Sections 31, 43 and 47, Title 8 U.S.C.A., and Sections 1331 and 1343, Title 28 U.S.C.A., Judiciary and Judicial Procedure, effective September 1, 1948.

2: — Plaintiffs sue for themselves and for others similarly situated, claiming this to be a class suit. Plaintiffs also allege that Defendants are sued individually and as representatives of a class, "such class being the governing body and officials of the Jaybird Party." They say that such class is so numerous as to make it impracticable to bring all of them before the Court, etc. Clearly Plaintiffs may see for themselves and for those similarly situated, and as stated Plaintiffs' pleadings and the process issued and served herein and Defendants' Answer bring Defendants and such Association into Court. But the evidence shows that the Governing Body of such Association is an Executive Committee of twenty-two members, Defendants herein being four of such twenty-two members. I do not think that the members of such Executive Committee other than the four Defendants here sued are in Court. Only such Four Defendants and such Association are here.

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3: — During the last quarter of a century, the question of the right of Negroes under the Constitution of the United States to vote in political party elections or primaries such as the one in question here, has many times been before the Courts of Texas, both State and Federal. Also before the various Federal Courts of Appeals and the Supreme Court of the United States. Counsel for the parties cite many, but not all, the cases, some of which are in point and some are not.

Baskin v. Brown, 4 Cir., 174 F.2d 391; Chapman v. King, 5 Cir., 154 F.2d 460; Cooper v. Cartwright, 200 Okla. 456, 195 P.2d 290; Davis v. Schnell, D.C., 81 F. Supp. 872; Grovey v. Townsend, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292; Hall v. Nagel, 5 Cir., 154 F.2d 931; Harrell v. Sullivan, 220 Ind. 108, 40 N.E.2d 115, 41 N.E.2d 354, 140 A.L.R. 455. Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281; Mitchell v. Wright, 5 Cir., 154 F.2d 924; Newberry v. United States, 256 U.S. 232, 263, 41 S.Ct. 469, 476, 65 L.Ed. 913; Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458; Nixon v. Herndon, 273 U.S. 536, 47 S.Ct. 446, 71 L.Ed. 759; Rice v. Elmore, 4 Cir., 165 F.2d 387; Seay v. Latham, 143 Tex. 1, 182 S.W.2d 251, 155 A.L.R. 180; Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110; United States v. Classic, 313 U.S. 299, 61 S.Ct. 1031, 85 L.Ed. 1368; Waples v. Marrast, 108 Tex. 5, 184 S.W. 180, L.R.A. 1917A, 253; Drake v. Executive Committee, D.C., 2 F. Supp. 486; White v. Executive Committee, 5 Cir., 60 F.2d 973; State ex rel. Cline v. Norris, Tex.Civ.App., 33 S.W.2d 850; Perry v. Cyhers (Eastern District of Texas), Not Reported.

4: — Defendants contend that such Association is a self-governing voluntary association or club, and not a political party nor a creature or agency of the State of Texas. They also contend that there is no law of Texas regulating it, and that it has the legal and inherent right to prescribe who shall be its members and who shall vote in its primaries, and to exclude negroes from its membership and from voting in its primaries. Defendants cite and stand upon Drake v. Executive Committee, D.C., 2 F. Supp. 486, decided by this Court in 1933. In that case, it was held that there was no law of Texas which regulated or controlled the Democratic Party of the City of Houston nor its Executive Committee in the matter of holding Primary Elections in Houston for nominating City Officers. And that such party in Houston and its Committee had the inherent right to say who should vote in such City Primaries.

But Counsel overlook some recent cases in which the Law is held to be to the contrary. In the State of South Carolina, after the decision of the Supreme Court in Smith v. Allwright, supra, the Legislature of that State repealed all primary election laws regulating political parties, yet in Rice v. Elmore, 4 Cir., 165 F.2d 387, it was held that negroes were legally entitled to vote in the Democratic primaries of South Carolina held and controlled by the Democratic Party. The Supreme Court refused Certiorari, 333 U.S. 875, 68 S.Ct. 905, 92 L.Ed. 1151. See also Baskin v. Brown, 4 Cir., 174 F.2d 391.

5: — But I do not agree with Defendants' contention that such Association is not a political party, nor that it is not regulated by the Laws of Texas, nor that it is not an agency of the State. Such Association is a political party and comes clearly within the terms of Article 3163, Vernon's Texas Civil Statutes which regulates it and makes it an agency of the State. All that

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is said by this Court in *White v. Executive Committee*, 5 Cir., 60 F.2d 973, which Defendants also cite, is applicable here. Such Association cannot avoid the effect of Article 3163 by holding its primaries on a date different from the date fixed by such Article, nor by different methods.

Such Article is as follows: — "Any political party without a State organization desiring to nominate candidates for county and precinct offices only may nominate such candidates therefor under the provisions of this title by primary elections or by a county convention held on the legal primary election day, which convention shall be composed of delegates from various election precincts in said county, elected therein at primary conventions held in such precincts between the hours of eight a.m. and ten p.m. of the preceding Saturday. All nominations made by any such parties shall be certified to the county clerk by the chairman of the county committee of such party, and, after taking the same course as nominations of other parties so certified, shall be printed on the official ballot in a separate column, headed by the name of the party; provided, a written application for such printing shall have been made to the county judge, signed and sworn to by three per cent of the entire vote cast in such county at the last general election."

While in the case of *Grovey v. Townsend*, 295 U.S. 45, 55 S.Ct. 622, 79 L.Ed. 1292, 97 A.L.R. 680, the Supreme Court of the United States held exactly the opposite to what is held by this Court in *White v. Executive Committee*, the Supreme Court more recently in *Smith v. Allwright*, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110, overruled *Grovey v. Townsend*, and in effect sustained the view set forth by this Court in *White v. Executive Committee*.

6: — My conclusion is: —

(a) That Plaintiffs are entitled to Judgment, declaring that Plaintiffs and those similarly situated and for whom Plaintiffs sue, are legally entitled to vote in the Jaybird Primary and/or Primaries held by such Association and specifically those to be held May 6, 1950, and June 3, 1950.

(b) Plaintiffs have waived their claim for damages.

(c) Injunction should not issue enjoining the four Defendants sued herein, to-wit, A.J. Adams, George Lane, Mrs. Mattye Schulze, and R.M. Darst, and the Jaybird Democratic Association of Fort Bend County, from refusing to allow Plaintiffs to vote in such Jaybird Primaries. The evidence as stated shows that the affairs of such Association are in the hands of an Executive Committee of twenty-two persons, and not in the hands of the four Defendants who are parties to this suit. They do not have the power to either allow or not allow Plaintiffs to vote. That power is in such Executive Committee.

Let appropriate Decree be drawn and presented in accordance herewith.

For Justice Marshall

Elena Kagan

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For Justice Marshall

Elena Kagan*

A few days after Thurgood Marshall's death, I stood for a time at his flag-draped casket, then lying in state at the Supreme Court, and watched the people of Washington celebrate his life and mourn his passing. There would be, the next day, a memorial service for the Justice in the National Cathedral, a grand affair complete with a Bible reading by the Vice President and eulogies by the Chief Justice and other notables. That service would have its moments, but it would not honor Justice Marshall as the ordinary people of Washington did. On the day the Justice's casket lay in state, some 20,000 of them came to the Court and stood in bitter cold for upwards of an hour in a line that snaked down the Supreme Court steps, down the block, around the corner, and down the block again. The Justice's former clerks took turns standing at the casket, acting as a kind of honor guard, as these thousands of people filed by. Passing before me were people of all races, of all classes, of all ages. Many came with children and spoke, as they circuled the casket, of the significance of Justice Marshall's life. Some offered tangible tributes-flowers or letters addressed to Justice Marshall or his family. One left at the side of the casket a yellowed slip opinion of *Brown v. Board of Education*.¹ There never before has been such an outpouring of love and respect for a Supreme Court Justice, and there never will be again. As I stood and watched, I felt (as I will always feel) proud and honored and grateful beyond all measure to have had the chance to work for this hero of American law and this extraordinary man.

I first spoke with Justice Marshall in the summer of 1986, a few months after I had applied to him for a clerkship position. (It seems odd to call him Justice Marshall in these pages. My co-clerks and I called him "Judge" or "Boss" to his face, "TM" behind his back; he called me, to my face and I imagine also behind my back, "Shorty.") He called me one day and, with little in the way of preliminaries, asked me whether I still wanted

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1. 347 U.S. 483 (1954).

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a job in his chambers. I responded that I would love a job. "What's that?" he said, "you already have a job?" I tried, in every way I could, to correct his apparent misperception. I yelled, I shouted, I screamed that I did not have a job, that I wanted a job, that I would be honored to work for him. To all of which he responded: "Well, I don't know, if you already have a job " Finally, he took pity on me, assured me that he had been in jest, and confirmed that I would have a job in his chambers. He asked me, as I recall, only one further question: whether I thought I would enjoy working on dissents.

So went my introduction to Justice Marshall's (sometimes wicked) sense of humor. He took constant delight in baffling and confusing his clerks, often by saying the utterly ridiculous with an air of such sobriety that he half-convincing us of his sincerity. (There was the time, for example, when he announced sadly that he would have to recuse himself from *Gwaltney of Smithfield v. Chesapeake Bay Foundation*.² When we pressed him for a reason, he hemmed and hawed for many minutes, only finally to say: "Because I l-o-o-o-o-v-e their ham." When we laughed, he assumed an attitude of great indignation and began instructing us on proper recusal policy. It was early in the Term; perhaps we may be forgiven for thinking for a moment that, after all, this was not a joke.) He had an endless supply of jokes, not all of them, I must admit, appropriate to print in the pages of a law review. And he was the greatest comic storyteller I have ever heard, or ever expect to hear. This talent, I think, may be impossible to communicate to those never exposed to it. It was a matter of timing (the drawn-out lead-up, the pregnant pause), of vocal intonations and inflections, and most of all of facial expressions (the raised brow, the sparkling eyes, the sidelong glance). Suffice it to say that at least once in the course of every meeting we had with him (and those were frequent), my co-clerks and I would find ourselves holding our sides and gasping for breath, as we struggled to regain our composure.

Thinking back, I'm not sure why we laughed so hard-or rather, I'm not sure why Justice Marshall told his stories so as to make us laugh because most of the stories really weren't funny. To be sure, some were pure camp. (When Justice Marshall was investigating racial discrimination in the military in Korea, a soldier demanded that he provide a password; the hulking (and, of course, black) Marshall looked down at the soldier and asked, "Do you really think I'm North Korean?" And when assisting in the drafting of the Kenyan Constitution, the Justice was introduced to Prince Philip. "Do you care to hear my opinion of lawyers?" Prince Philip asked in posh British tones, mimicked to great comic effect by Justice Marshall. "Only," Justice Marshall replied-before the two discov-

2. 484 U.S. 49 (1987).

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ered mutual ground in a taste for bourbon-"if you care to hear my opinion of princes.") But most of the stories, if told by someone else, would have expressed only sorrow and grimness. They were stories of growing up black in segregated Baltimore, subject to daily humiliation and abuse. They were stories of representing African-American defendants in criminal cases-often capital cases-in which a fair trial was not to be hoped for, let alone expected. (Ie knew he had an innocent client, Justice Marshall said, when the jury returned a sentence of life imprisonment, rather than execution.) They were stories of the physical danger (the lynch mobs, the bomb-throwers, the police themselves) that the Justice frequently encountered as he traversed the South battling state-imposed segregation. They were stories of prejudice, violence, hatred, fear; only as told by Justice Marshall could they ever have become stories of humor and transcending humanity.

The stories were something more than diversions (though, of course, they were that too). They were a way of showing us that, bright young legal whipper-snappers though we were, we did not know everything; indeed, we knew, when it came to matters of real importance, nothing. They were a way of showing us foreign experiences and worlds, and in doing so, of reorienting our perspectives on even what had seemed most familiar. And they served another function as well: they reminded us, as Justice Marshall thought all lawyers (and certainly all judges) should be reminded, that behind law there are stories-stories of people's lives as shaped by law, stories of people's lives as might be changed by law. Justice Marshall had little use for law as abstraction, divorced from social reality (he muttered under his breath for days about Judge Bork's remark that he wished to serve on the Court because the experience would be "an intellectual feast"); his stories kept us focused on law as a source of human well-being.

That this focus made the Justice no less a "lawyer's lawyer" should be obvious; indeed, I think, quite the opposite. I knew, of course, before I became his clerk that Justice Marshall had been the most important-and probably the greatest-lawyer of the twentieth century. I knew that he had shaped the strategy that led to *Brown v. Board of Education* and other landmark civil rights cases; that he had achieved great renown (indeed, legendary status) as a trial lawyer; that he had won twenty-nine of the thirty-two cases he argued before the Supreme Court. But in my year of clerking, I think I saw what had made him great. Even at the age of eighty, his mind was active and acute, and he was an almost instant study. Above all, though, he had the great lawyer's talent (a talent many judges do not possess) for pinpointing a case's critical fact or core issue. That trait, I think, resulted from his understanding of the pragmatic-of the way in which law worked in practice as well as on the books, of the way in

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which law acted on people's lives. If a clerk wished for a year of spinning ever more refined (and ever less plausible) law-school hypotheticals, she might wish for a clerkship other than Justice Marshall's. If she thought it more important for a Justice to understand what was truly going on in a case and to respond to those realities, she belonged in Justice Marshall's chambers.

None of this meant that notions of equity governed Justice Marshall's vote in every case; indeed, he could become quite the formalist at times. During the Term I clerked, the Court heard argument in *Torres v. Oakland Scavenger Co.*³ There, a number of Hispanic employees had brought suit alleging employment discrimination. The district court dismissed the suit, and the employees' lawyer filed a notice of appeal. The lawyer's secretary, however, inadvertently omitted the name of one plaintiff from the notice. The question for the Court was whether the appellate court had jurisdiction over the party whose name had been omitted; on this question rode the continued existence of the employee's discrimination claim. My co-clerks and I pleaded with Justice Marshall to vote (as Justice Brennan eventually did) that the appellate court could exercise jurisdiction. Justice Marshall refused. As always when he disagreed with us, he pointed to the framed judicial commission hanging on his office wall and asked whose name was on it. (Whenever we told Justice Marshall that he "had to" do something-join an opinion, say-the Justice would look at us coldly and announce: "There are only two things I *have to* do-stay black and die." A smarter group of clerks might have learned to avoid this unfortunate grammatical construction.) The Justice referred in our conversation to his own years of trying civil rights claims. All you could hope for, he remarked, was that a court didn't rule against you for illegitimate reasons; you couldn't hope, and you had no right to expect, that a court would bend the rules in your favor. Indeed, the Justice continued, it was the very existence of rules-along with the judiciary's felt obligation to adhere to them-that best protected unpopular parties. Contrary to some conservative critiques, Justice Marshall believed devoutly-believed in a nearmystical sense-in the rule of law. He had no trouble writing the *Torres* opinion.

Always, though, Justice Marshall believed that one kind of law-the Constitution-was special, and that the courts must interpret it in a special manner. Here, more than anywhere else, Justice Marshall allowed his personal experiences, and the knowledge of suffering and deprivation gained from those experiences, to guide him. Justice Marshall used to tell of a black railroad porter who noted that he had been in every state and every city in the country, but that he had never been anyplace where he had to

3. 487 U.S. 312 (1988).

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put his hand in front of his face to know that he was black. Justice Marshall's deepest commitment was to ensuring that the Constitution

fulfilled its promise of eradicating such entrenched inequalities-not only for African-Americans, but for all Americans alike.

The case I think Justice Marshall cared about most during the Term I clerked for him was *Kadrmas v. Dickinson Public Schools*.⁴ The question in *Kadrmas* was whether a school district had violated the Equal Protection Clause by imposing a fee for school bus service and then refusing to waive the fee for an indigent child who lived sixteen miles from the nearest school. I remember, in our initial discussion of the case, opining to Justice Marshall that it would be difficult to find in favor of the child, Sarita Kadrmas, under equal protection law. After all, I said, indigency was not a suspect class; education was not a fundamental right; thus, a rational basis test should apply, and the school district had a rational basis for the contested action. Justice Marshall (I must digress here) didn't always call me "Shorty"; when I said or did something particularly foolish, he called me (as, I hasten to add, he called all his clerks in such situations) "Knucklehead." The day I first spoke to him about *Kadrmas* was definitely a "Knucklehead" day. (As I recall, my handling of *Kadrmas* earned me that appellation several more times, as Justice Marshall returned to me successive drafts of the dissenting opinion for failing to express-or for failing to express in a properly pungent tone-his understanding of the case.) To Justice Marshall, the notion that government would act so as to deprive poor children of an education-of "an opportunity to improve their status and better their lives"⁵-was anathema. And the notion that the Court would allow such action was even more so; to do this would be to abdicate the judiciary's most important responsibility and its most precious function.

For in Justice Marshall's view, constitutional interpretation demanded, above all else, one thing from the courts: it demanded that the courts show a special solicitude for the despised and disadvantaged. It was the role of the courts, in interpreting the Constitution, to protect the people who went unprotected by every other organ of government-to safeguard the interests of people who had no other champion. The Court existed primarily to fulfill this mission. (Indeed, I think if Justice Marshall had had his way, cases like *Kadrmas* would have been the only cases the Supreme Court heard. He once came back from conference and told us sadly that the other Justices had rejected his proposal for a new Supreme Court rule. "What was the rule, Judge?" we asked. "When one corporate fat cat sues another corporate fat cat," he replied, "this Court shall have no juris-

4. 487 U.S. 450 (1988).

5. *Id.* at 468-69 (Marshall, J., dissenting).

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diction.") The nine Justices sat, to put the matter baldly, to ensure that Sarita Kadrmas could go to school each morning. At any rate, this was why they sat in Justice Marshall's vision of the Court and Constitution. And however much some recent Justices have sniped at that vision, it

remains a thing of glory.

During the year that marked the bicentennial of the Constitution, Justice Marshall gave a characteristically candid speech. He declared that the Constitution, as originally drafted and conceived, was "defective"; only over the course of 200 years had the nation "attain[ed] the system of Constitutional Government, and its respect for... individual freedoms and Human Rights, we hold as fundamental today."⁶ The Constitution today, the Justice continued, contains a great deal to be proud of. "[B]ut the credit does not belong to the Framers. It belongs to those who refused to acquiesce in outdated notions of 'liberty,' 'justice,' and 'equality,' and who strived to better them."⁷ The credit, in other words, belongs to people like Justice Marshall. As the many thousands who waited on the Supreme Court steps well knew, our modern Constitution is his.

6. Thurgood Marshall, *The Constitution's Bicentennial: Commemorating the Wrong Document?*, 40 VAND. L. REV. 1337, 1338 (1987).

7. *Id.* at 1341.

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