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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF FRESNO

EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et al.,

Plaintiffs,

v.

STATE OF CALIFORNIA, et al.,

Defendants.

CASE NO. 01CECG03182

NOTICE OF LODGING AUTHORITY AND REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

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EDWARD W. HUNT, in his official capacity as District Attorney of Fresno County, and in his personal capacity as a citizen and taxpayer, et al., Plaintiffs, v. STATE OF CALIFORNIA, et al., Defendants.	CASE NO. 01CECG03182 **NOTICE OF LODGING AUTHORITY AND REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION**

TO ALL PARTIES TO THIS ACTION AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT Plaintiffs' EDWARD W. HUNT et al., hereby lodges with the court and requests judicial notice of the following federal authority and unpublished authority[1] cited in Plaintiffs' Reply to Defendants' Opposition to Motion for Summary Judgment, or in the Alternative, Summary Adjudication:

1. *Coleman v. Com*, Not Reported in S. E. 2d, 2003 WL 22703262 (Va.App.).
2. *U. S. v. Smith,* (2003) 70 Fed. Appx 804.
3. *U.S. v. Olmstead* (1987) 832 F.2d 642.
4. *Babbitt v. United Farm Workers National Union* (1979) 442 U.S. 289, 302.
5. *Village of Hoffman Estates v. The Flipside, Hoffman Estates* (1982) 455 U.S. 489, 494-95.
6. *Kolender v. Lawson* (1983) 461 U.S. 352, 353-54.
7. *Lanzetta v. New Jersey* (1939) 306 U.S. 451.
8. *City of Chicago v. Morales* (1999) 527 U.S. 41.
9. *United States v. Reese* (1876), 92 U.S. 214, 221.
10. *Forbes v. Napolitano* (9th Cir. 2000) 236 F.3d 1009.

Date: January 22, 2007

TRUTANICH • MICHEL, LLP:

Jason A. Davis
Attorney for Plaintiffs

[1] *See* Cal. Rules of Court 8.11115(b).

EXHIBIT 1

Not Reported in S.E.2d, 2003 WL 22703262 (Va.App.)
(Cite as: Not Reported in S.E.2d)

H

Briefs and Other Related Documents

Coleman v. Com.Va.App.,2003.--- S.E.2d ----Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK COURT RULES BEFORE CITING.

Court of Appeals of Virginia,Salem.

Jeffrey Neal COLEMAN,

v.

COMMONWEALTH of Virginia.

Record No. 2676-02-3.

Nov. 18, 2003.

From the Circuit Court of Rockingham County, Porter R. Graves, Jr ., Judge.

David B. Hargett (Hargett & Watson, PLC, on brief), for appellant.

Kathleen B. Martin, Assistant Attorney General (Jerry W. Kilgore, Attorney General, on brief), for appellee.

Present: HUMPHREYS, FELTON and KELSEY, JJ.

MEMORANDUM OPINION [FN*]

FN* Pursuant to Code § 17.1-413, this opinion is not designated for publication. KELSEY, Judge.

***1** The appellant, Jeffrey Neal Coleman, claims the trial court erred by not suppressing evidence seized during a search of a camper in which he claimed to have a reasonable expectation of privacy. The trial court also erred, Coleman argues, by refusing jury instructions that would have permitted the jury to conclude that he acted in self-defense when he opened fire into a crowd during a drive-by shooting. Finding Coleman's arguments meritless, we affirm.

I.

On appeal, we review the evidence "in the light most favorable" to the Commonwealth. *Commonwealth v. Hudson,* 265 Va. 505, 514, 578 S.E.2d 781, 786 (2003). That principle requires us to "discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth and all fair inferences that may be drawn therefrom." *Kelly v. Commonwealth,* 41 Va.App. 250, 254, 584 S .E.2d 444, 446 (2003) (*en banc*) (quoting *Watkins v. Commonwealth,* 26 Va.App. 335, 348, 494 S.E.2d 859, 866 (1998)) (internal quotation marks omitted).

Around 8:30 in the evening on May 11, 1998, Coleman met two men, Shawn Lewis and Donald D. Thomas, on Kelly Street in Harrisonburg to sell them marijuana. Coleman, who was accompanied by his wife and a friend, Wesley Tusing, handed the men small bags containing the marijuana. Without paying Coleman, both men "just took off running with it." Coleman and the others sat in the car for a few minutes, then drove to a house owned by a friend, Keith Trumbo. Inside Trumbo's house, Coleman retrieved a "single shot .22" that he placed in his car. After "a couple of hours," the three went to another location where Coleman retrieved a buried .30 caliber, semi-automatic assault rifle with a "flash suppressor" for nighttime use.[FN1] So armed, Coleman told the others that they "were going to talk to this dude that gave us a good deal earlier."

FN1. A flash suppressor is a "piece that goes on the end of the gun to make less flash when the fire shoots out the barrel."

At approximately 11:00 that evening, Coleman, his wife, and Tusing returned to Harrisonburg. Coleman, high on marijuana and driving a different car than earlier, placed the assault rifle on "the

driver's seat right beside him." Coleman and Tusing then picked up William Heflin, dropped off Coleman's wife, and went back to Kelly Street. Once there, Coleman parked the car and spotted a crowd of "probably 20 people" standing next to the street. A few minutes later, Coleman drove toward the crowd with his lights off and placed the assault rifle "up on the window and just started blasting," firing "12 to 15 rounds" in all. Coleman then "sped up" and quickly left Harrisonburg.

After briefly returning to Trumbo's house where Coleman's wife rejoined them, Coleman, his wife, and Tusing left and "went to some trailer up in the mountain." They arrived at approximately 3:00 a.m. the next morning. The three waited at the camper and "stashed" both the .22 and the .30 caliber rifle. Four hours later they left the camper and returned to Trumbo's house, where the police met them and placed Coleman under arrest.

***2** At the police station, Coleman confessed to the shooting. Claiming that he "didn't plan it," Coleman stated that he only "intended on getting my money back." He admitted firing "probably 10 times" at the men who had earlier stolen his marijuana. The shooting "all happened so fast," Coleman claimed. He stated that he saw "one of 'em that was running with the pot and that's when I started pulling the trigger."

Officer Al McDorman visited the camper at about 5:00 p.m. on May 12. Though a locked chain crossed the logging road that approached the camper, the camper did not have a mailbox, any "no trespassing signs," locks on the doors, or any signs indicating that the camper was on private property. McDorman announced his presence and, after hearing no reply, entered the camper without a warrant. Inside, McDorman found a bed with a bedspread, a kitchen table, and a Bible. Near the kitchen, McDorman found a pair of pants and a camouflage hat, while a camouflage jacket lay on the bed. Under the mattress, McDorman located a .22 rifle and, in drawers under the bed, a .30 caliber rifle. Ammunition for the .30 caliber rifle was located in a "small green bag" near the entrance to the camper.

Before trial, Coleman moved to suppress the evidence seized in the camper, claiming that McDorman's warrantless search of the premises violated his Fourth Amendment rights. At the suppression hearing, Betty Ritchie testified that she and her husband owned the land and gave her son permission to keep his "little camper" on the property. Mrs. Ritchie did not know Coleman and did not give him permission to be on the property or to use her son's camper. She understood that her son used the camper for hunting, camping, and cutting wood. The camper was unlocked and "a lot" of people seemed to be in and out of it. Mrs. Ritchie maintained a locked cable across the road leading to the camper.

Her son, Anthony Ritchie, testified that he had occasionally allowed Coleman and "a bunch of people" to use the camper for "camping and to grill out." Anthony, however, "hadn't talked to [Coleman] for a while before this happened" and he "did not know he was staying up there at the time." Anthony said he never gave Coleman permission to "store guns" or "rifles" in the camper. Anthony also understood he did not "have the right to control who goes on that property." "It's not in my name," he explained. His parents, he said, nevertheless did not "care who I take up there."

The trial court denied the motion to suppress. Focusing both on Coleman's use of the camper at the time he stashed his assault rifle there and the timing of Officer McDorman's search ten hours later, the court found as a fact that "the defendant's own evidence shows that at the time they weren't living [there], they had not been given permission to store things there, that they were really just stopping by." For these reasons, the court held, Coleman did not have a "reasonable expectation of privacy in the premises" and thus could not assert a Fourth Amendment challenge to Officer McDorman's search of the camper.

***3** Following the presentation of the evidence at trial, Coleman requested that the court instruct the jury that he acted in self-defense by shooting at the crowd on Kelly Street. Finding insufficient evidence to support Coleman's request, the trial court denied the proposed jury instruction. The jury found

Coleman guilty of two counts of malicious wounding (Code § 18.2-51.2) and two counts of use of a firearm while committing a felony (Code § 18.2-53 .1). The trial court then sentenced Coleman to 68 years in prison, with no time suspended. Coleman now appeals.

II.

Though the ultimate question whether an officer's conduct violated the Fourth Amendment triggers *de novo* scrutiny on appeal, the trial court's findings of historical fact bind us due to the weight we give to the inferences drawn from those facts by resident judges and local law enforcement officers. *Jackson v. Commonwealth,* 41 Va.App. 211, 222, 583 S.E.2d 780, 786 (2003) (*en banc*). Thus, we must give deference to the factual findings of the trial court and independently determine whether those findings satisfy the requirements of the Fourth Amendment. *Slayton v. Commonwealth,* 41 Va.App. 101, 105, 582 S.E.2d 448, 450 (2003) (citation omitted).

In addition, the appellant must shoulder the burden of showing that the trial court's decision " constituted reversible error." *McGee v. Commonwealth,* 25 Va.App. 193, 197, 487 S.E.2d 259, 261 (1997) (*en banc*) (citations omitted). " Absent clear evidence to the contrary in the record, the judgment of a trial court comes to us on appeal with a presumption that the law was correctly applied to the facts." *Craddock v. Commonwealth,* 40 Va.App. 539, 547, 580 S.E.2d 454, 458 (2003); *Barkley v. Commonwealth,* 39 Va.App. 682, 690, 576 S.E.2d 234, 238 (2003).

A.

To have standing to invoke the protections of the Fourth Amendment, a defendant must have a " legitimate expectation of privacy in the place searched." *Megel v. Commonwealth,* 262 Va. 531, 534, 551 S.E.2d 638, 640 (2001) (citing *Minnesota v. Carter,* 525 U.S. 83, 88 (1998), and *Rakas v. Illinois,* 439 U.S. 128, 143 (1978)); *McCracken v. Commonwealth,* 39 Va.App. 254, 260, 572 S.E.2d 493, 496 (2002) (*en banc*) (recognizing that one without a justifiable privacy expectation has "no standing to contest the entry of the house"). The legitimacy of this expectation depends not only on the person's subjective beliefs-society, too, must be " willing to recognize that expectation as reasonable." *Kyllo v. United States,* 533 U.S. 27, 33 (2001) (quoting *California v. Ciraolo,* 476 U.S. 207, 211 (1986)).

While it is often said that the Fourth Amendment " protects people, not places," *Katz v. United States,* 389 U.S. 347, 351 (1967), it is equally true that "the extent to which the Fourth Amendment protects people may depend upon where those people are," *Carter,* 525 U.S. at 88; *see also Sheler v. Commonwealth,* 38 Va.App. 465, 476, 566 S.E.2d 203, 208 (2002) ("[W]e must give effect to 'our societal understanding that certain areas deserve the most scrupulous protection from government invasion.' " (quoting *Oliver v. United States,* 466 U.S. 170, 178 (1984))). The protection of one's home, for example, is at the "very core" of the Fourth Amendment. *Kyllo,* 533 U.S. at 31. Closely related is the privacy interest of an "overnight guest. " *Minnesota v. Olson,* 495 U.S. 91, 96-97 (1990). But one "merely present with the consent of the householder" during a brief visit falls outside the privacy interests protected by the Fourth Amendment. *Carter,* 525 U.S. at 90.

***4** That said, the Fourth Amendment draws few bright lines on this subject. Instead, it focuses on a combination of variables, including whether the individual "has a possessory interest" in the place searched, "whether he has the right to exclude others from that place, whether he has exhibited a subjective expectation that it would remain free from governmental invasion, whether he took normal precautions to maintain his privacy and whether he was legitimately on the premises." *McCary v. Commonwealth,* 36 Va.App. 27, 36, 548 S.E.2d 239, 243 (2001) (quoting *McCoy v. Commonwealth,* 2 Va.App. 309, 312, 343 S.E.2d 383, 385 (1986)) (internal quotation marks omitted).

The facts of this case support the trial court's conclusion that Coleman was, at best, a casual visitor to the camper for four hours during the early

morning of May 12, 1998. Neither the landowner nor the camper owner knew Coleman was there. They had not given him permission to store weapons in the camper. Coleman left the camper ten hours before Officer McDorman conducted his search at 5:00 p.m. that evening. No evidence suggests that, upon leaving the camper, Coleman intended to return (except, perhaps, at some undetermined date to retrieve his "stashed" assault rifle) or, for that matter, that he had any right at any time to exclude others from the camper. Though relevant, the trial court correctly reasoned, Coleman's use of the camper on prior occasions " doesn't really end the inquiry" because the focus must be on the defendant's use of the camper at the time of Officer McDorman's search. Accepting the trial court's findings of historical fact, we agree that at the time of the challenged search Coleman did not have a reasonable expectation of privacy in the camper sufficient to assert a Fourth Amendment claim.

B.

Coleman also argues that the trial court erred by not instructing the jury on his claim of self-defense. Because the requisite level of evidence does not support Coleman's proposed instructions, we affirm the trial court's decision to refuse them.

A trial court should instruct the jury, when requested to do so, "on all principles of law applicable to the pleadings and the evidence." *Mouberry v. Commonwealth,* 39 Va.App. 576, 582, 575 S.E.2d 567, 569 (2003) (quoting *Dowdy v. Commonwealth,* 220 Va. 114, 116, 255 S.E.2d 506, 508 (1979), and *Taylor v. Commonwealth,* 186 Va. 587, 592, 43 S.E.2d 906, 909 (1947)). Refusal to give an instruction supported by "more than a scintilla of evidence" constitutes reversible error. *Rhodes v. Commonwealth,* 41 Va.App. 195, 200, 583 S.E.2d 773, 775 (2003) (citing *Commonwealth v. Donkor,* 256 Va. 443, 445, 507 S.E.2d 75, 76 (1998)).

An "independent prerequisite" for a jury instruction, the scintilla test focuses on whether a factfinder could "rationally" accept the position advocated by the instruction's proponent. *Carter v. United States,* 530 U.S. 255, 261 n. 3 (2000) (quoting *Schmuck v. United States,* 489 U.S. 705, 716 n. 8 (1989)) (internal quotation marks omitted). On appeal, therefore, we review the record in the light most favorable to the proponent of the instruction. *Waters v. Commonwealth,* 39 Va.App. 72, 78, 569 S.E .2d 763, 766 (2002).

***5** By raising a claim of self-defense, the defendant "implicitly admits" that his use of violence "was intentional and assumes the burden of introducing evidence of justification or excuse that raises a reasonable doubt in the minds of the jurors." *Commonwealth v. Sands,* 262 Va. 724, 729, 553 S.E.2d 733, 736 (2001) (quoting *McGhee v. Commonwealth,* 219 Va. 560, 562, 248 S.E.2d 808, 810 (1978)). To succeed in this affirmative defense, the defendant must reasonably believe that defending himself was necessary to avoid "an imminent threatened harm" that could not be avoided through any other adequate means. *Humphrey v. Commonwealth,* 37 Va.App. 36, 49, 553 S.E.2d 546, 552 (2001) (quoting *Buckley v. City of Falls Church,* 7 Va.App. 32, 33, 371 S.E.2d 827, 827-28 (1988)).

To establish justifiable self-defense, the defendant must be "free from fault in bringing on the fray." *Gilbert v. Commonwealth,* 28 Va.App. 466, 472, 506 S.E.2d 543, 546 (1998). Indeed, "the accused must be without fault 'in the minutest degree .' " Roger D. Groot, *Criminal Offenses and Defenses in Virginia* 193 (5th ed.2004) (citation omitted); *see also Adams v. Commonwealth,* 163 Va. 1053, 1058, 178 S.E. 29, 31 (1935); *Hughes v. Commonwealth,* 39 Va.App. 448, 464-65, 573 S.E.2d 324, 332 (2002).

If at fault, the defendant may still assert excusable self-defense if the evidence shows he abandoned the fight, retreated "*as far as he safely can,*" but nonetheless found no other way to "preserve his life or save himself from great bodily harm." *Dodson v. Commonwealth,* 159 Va. 976, 979-80, 167 S.E. 260, 261 (1933) (emphasis in original) (paraphrasing *Vaiden v. Commonwealth,* 53 Va. (12 Gratt.) 717, 729 (1855)); *see also Connell v. Commonwealth,* 34 Va.App. 429, 437, 542 S.E.2d

49, 53 (2001) ("Once the accused abandons the attack and retreats as far as he or she safely can, he or she may kill his or her adversary if there is 'a reasonably apparent necessity to preserve his [or her] own life or save himself [or herself] from great bodily harm.' " (quoting *Bailey v. Commonwealth,* 200 Va. 92, 96, 104 S.E.2d 28, 31 (1958))).

In this case, the defendant explained to police investigators his actions and underlying motivations this way:
Q: Were you looking when you shot or were you looking straight ahead, driving, just....
A: Yeah. Exactly ... well no, I don't know, it all happened so fast. *I seen one of 'em that was running with the pot and that's when I started pulling the trigger* and I guess I did start watching the road and it was over.

Q: *Why* did you shoot?
A: I seen one that stole my pot.
Q: You saw the guy that stole you, that ripped you off, and did you just go off? Do you, do you have a problem with that sometimes?
A: Yeah.
Q: Do you have a bad temper?
A: Oh yeah! It's like you push a button in me and all of a sudden you got uncontrollable rage when normally I'm a calm, thinking individual ....

***6** Q: That's the only thing that clicked that little button in you was guy.
A: Yeah.
Q: that ripped you off.
A: Yeah! Yeah! Yeah!

At trial, Coleman mentioned for the first time that he believed Shawn Lewis possessed a handgun and was preparing to use it against Coleman. Coleman admitted, however, he never actually saw the handgun before opening fire on Lewis and the crowd of bystanders. Coleman also provided no explanation for why he did not simply drive away if he feared Lewis might be armed.

Taken in the light most favorable to Coleman, the evidence could not lead a rational factfinder to conclude that Coleman was faultless or that he retreated from the alleged danger for purposes of establishing either justifiable or excusable self-defense. To settle a score from a failed drug transaction, Coleman obtained a loaded assault rifle fitted with a flash suppressor for nighttime shooting and hunted down his victim with the obvious intent to do harm. This whole time, Coleman admitted, his attitude was "if I had to shoot them, I was mad and I didn't really care, I would have." When he found his victim, Coleman "started blasting" his assault rifle out of an open car window into a crowd of twenty people. Though he claims his victim may have had a handgun, Coleman made no effort whatsoever to retreat from the alleged danger. Instead, he opened fire into a crowded sidewalk. "A man cannot go a-gunning for an adversary and kill him on the first appearance of resistance, and rely upon the necessity of the killing as an excuse therefor." *Jordan v. Commonwealth,* 219 Va. 852, 855-56, 252 S.E.2d 323, 325 (1979) (quoting *Sims v. Commonwealth,* 134 Va. 736, 760, 115 S.E. 382, 390 (1922)) (internal quotation marks omitted).

III.

Accepting the facts in the light most favorable to the Commonwealth, Coleman failed to demonstrate a legitimate privacy interest in the camper. The trial court, therefore, did not err in denying his motion to suppress. Viewing the evidence in the light most favorable to Coleman, he also failed to present a scintilla of evidence supporting the proffered self-defense instructions. As a result, the trial court correctly refused to instruct the jury on this affirmative defense.

Affirmed.

Va.App.,2003.
Coleman v. Com.
Not Reported in S.E.2d, 2003 WL 22703262 (Va.App.)

Briefs and Other Related Documents (Back to top)

Not Reported in S.E.2d, 2003 WL 22703262 (Va.App.)
(Cite as: Not Reported in S.E.2d)

• 2676023 (Docket) (Oct. 15, 2002)

END OF DOCUMENT

EXHIBIT 2

Westlaw.

70 Fed.Appx. 804, 2003 WL 21675340 (C.A.6 (Mich.))
(Cite as: 70 Fed.Appx. 804)

H

Briefs and Other Related Documents

U.S. v. SmithC.A.6 (Mich.),2003.This case was not selected for publication in the Federal Reporter.NOT RECOMMENDED FOR FULL--TEXT PUBLICATIONSixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.Please use FIND to look at the applicable circuit court rule before citing this opinion. Sixth Circuit Rule 28(g). (FIND CTA6 Rule 28.)

United States Court of Appeals,Sixth Circuit.

UNITED STATES of America, Plaintiff-Appellee,
v.
Brian SMITH, Defendant-Appellant.

No. 02-1017.

July 15, 2003.

Defendant was convicted by jury in the United States District Court for the Eastern District of Michigan of being felon in possession of firearm. Defendant appealed. The Court of Appeals, Cole, Circuit Judge, held that: (1) officer's testimony as to his belief that firearm belonged to defendant was admissible, and (2) admission of expert's testimony regarding nature and characteristics of firearm was not plain error warranting reversal.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿450

110 Criminal Law
110XVII Evidence
110XVII(R) Opinion Evidence
110k449 Witnesses in General
110k450 k. Matters Directly in Issue. Most Cited Cases

Officer's testimony that he believed location of firearm found in vehicle which defendant had been driving indicated that firearm belonged to defendant was admissible in trial for being felon in possession of firearm, pursuant to rule allowing admission of opinion testimony embracing ultimate issue to be decided by factfinder, inasmuch as term "belong" did not have meaning identical to legal term " possession" as used in felon-in-possession statute, and even if officer had used term "possession," in context of defendant's trial, there was no distinction between legal term of art and common vernacular usage that would render officer's testimony inadmissible under rule. 18 U.S.C.A. § 922(g); Fed.Rules Evid.Rule 704, 28 U.S.C.A.

[2] Criminal Law 110 ⚿1037.1(2)

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1037 Arguments and Conduct of Counsel
110k1037.1 In General
110k1037.1(2) k. Particular Statements, Arguments, and Comments. Most Cited Cases

Claim of prosecutorial misconduct that was based on unobjected-to expert testimony elicited at trial was subject to review for plain error.

[3] Criminal Law 110 ⚿1036.6

110 Criminal Law
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.6 k. Opinion Evidence. Most Cited Cases

Admission of expert's testimony regarding nature and characteristics of firearm underlying charge of being felon in possession of firearm was not plain error warranting reversal, given that defense

counsel opened the door regarding gun's nature and characteristics by questioning officers about their identification of gun, thereby enabling government to question its firearms expert regarding reasons why firearm might have been mistakenly identified by officers, and although defendant claimed unfair prejudice due to expert's statement that firearm was popular type of gun recovered in a lot of crimes, such information spoke to expert's familiarity with firearm, and trial court halted testimony, despite absence of objection, when it strayed toward irrelevant or prejudicial matters like available accessories and frequency of gun's use in criminal activity. 18 U.S.C.A. § 922(g).

***805** On Appeal from the United States District Court for the Eastern District of Michigan.

BEFORE: NELSON, BOGGS, and COLE, Circuit Judges.

OPINION

COLE, Circuit Judge.

****1** On August 29, 2001, Defendant-Appellant Brian Smith was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). Smith was sentenced to a term of twenty-seven months in the custody of the Bureau of Prisons, to be followed by a two-year term of supervised release. On appeal, Smith raises two points of error concerning evidentiary matters that arose at his trial. First, Smith argues that the repeated solicitation by the prosecutor of the opinion of a government witness regarding whether Smith possessed the firearm spoke to the ultimate issue in the case and therefore invaded the province of the jury. Second, Smith asserts that it was reversible error for the prosecutor to question a government witness about the characteristics of the firearm at issue in this case, thereby causing prejudice to Smith.

For the reasons that follow, we **AFFIRM** the judgment of the district court.

I.

On April 9.2001, at approximately 2:30 a.m., two Michigan State police troopers, David Geyer and Jay Kurowski, initiated a traffic stop of a GMC Yukon vehicle that was traveling well above the posted speed limit. Smith, the driver of the vehicle, was unable to provide his license at the request of Geyer, and Geyer then placed Smith under arrest for operating a vehicle without a license. There was an individual in the passenger's seat and two individuals in the rear seat of the car. After the three passengers were asked to exit the vehicle, Kurowski conducted a search of the Yukon and found a firearm on the driver's side between the seat and the console. The troopers ran a LIEN check on the vehicle, and learned that it was registered to Brian and Margaret Smith. On June 6, 2001, a grand jury in the Eastern District of Michigan returned a one-count indictment charging Smith with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g).

A jury trial commenced on August 28, 2001. Geyer was the Government's first witness, and he was followed by Kurowski. During the testimony of Kurowski, the following exchange took place:

Uetz (prosecutor): So, the handle and the stock of that gun were visible to you on the passenger's side of the car?

A: Yes.

Q: And you've described the size of the car?

A: Yes.

Q: And you saw the driver's side of the car?

A: Yes.

Q: If that much was visible to you from the driver's side, is it a fair assumption-- I'm sorry. If that much was visible to you from the passenger's seat, is it a fair assumption that the driver would have seen it?

Finn (defense attorney): I'm making an objection again to that testimony.

The Court: I think that goes to weight, not to admissibility. And the jury will hear the answer and determine what weight, if any, should be given.

Uetz: Thank you, Your Honor.

Q: Trooper [ ], from where a driver would have been seated in the car, would they have seen the gun?

A: Yes.

Q: Why do you say that?

***806** A: I believe that it would have been impossible for the driver of the vehicle not to see it. Since the fact that so much was protruding from in-between the console and the seat, there's no way, in my opinion, that the driver couldn't have seen it.
****2** Q: And was it close to the back of the driver's seat like towards the back of it, or was it up-
A: Towards the front.
Q: Okay. And does that have any significance to you?
A: Yes, it did.
Q: Could you tell the jury, please?
A: It would appear that the weapon belonged to the operator of the vehicle.
Finn: Excuse me. Continued objection to the opinion.
The Court: That objection is sustained. It's a different objection. And that's the question the jury will have to decide, as to who possessed the gun.
Uetz: Yes, Your Honor.
Q: Trooper Kurowski, in your experience as a Michigan State Police trooper, and all these traffic stops that you've been involved in, have you come across cars where individuals in the cars have had weapons in the car with them?
A: Yes.
Q: All right. Are there places where a weapon can be stored in a car that makes it more accessible?
A: Yes.
Q: And you saw this gun, you've already testified, between the driver's seat and the console, closer to the driver's side of the seat?
A: Yes.
Q: Based on your experience with the Michigan State Police and based upon your knowledge with accessibility and where guns are accessible, was this gun very accessible?
A: Yes, it was.
Q: When you observed the gun there, did that have any significance to you, the location right there?
A: Yes, it did.
Q: Can you tell the jury, please, what the significance is?
A: It appeared that the location of the weapon would have been accessible for the driver to either, one, make an attempt to assault my partner, myself, could have been-- it appeared that it would have belonged to the driver.
Finn: Objection again to opinion testimony.
The Court: Sustained. And please don't ask the same question a third time.
Uetz: Yes, Your Honor.

Kurowski's testimony continued from there without incident, and the Government called its final witness, Steven Toth, a Supervisor and Special Agent with the Bureau of Alcohol, Tobacco & Firearms. The Government used Toth an expert in the area of interstate nexus of firearms and types of firearms, as a witness for two reasons. First, Toth could establish that the firearm in question had the interstate nexus required for the application of § 922(g). Second, Toth could clarify some of the apparent confusion that had arisen regarding the type of firearm found in Smith's vehicle. The original indictment incorrectly described the firearm as a semiautomatic pistol. Before the start of trial, the Government moved for an amendment in the indictment to reflect that the weapon was actually a rifle. The district court allowed the amendment.
On cross-examination, defense counsel questioned both Geyer and Kurowski about their identification, or misidentification, of the firearm. Because the interstate nexus of the firearm was not contested by the defense, the Government asked only a few brief questions regarding this issue "for the record."
After establishing the requisite nexus, ***807** Toth was questioned about the nature of the firearm.
****3** Q:.... Does a typical rifle look like that?
A: No, it does not.
Q: Does that resemble a machine gun?
A: It resembles its sister gun, which is a machine pistol.
Q: Okay. This type of rifle has a sister gun?
A: Yes. This is a CM-11. The M-11 is a pistol, is classified as a pistol. And the M-12 also is a pistol. The only reason this is a carbine is because the model is CM, which the C stands for carbine....
Q: What is the difference between a pistol and a rifle?
A: With a pistol here in the state of Michigan, you have to get a pistol purchase permit. With a rifle, you do not. And a rifle has to be 26 inches or longer, where a pistol could be as small as-the barrel could be as small as two inches.
Q: What I mean, really, the picture that we are looking at, how long is the barrel on that gun?

A: This one the length protrudes about two inches. Inside here, I think it goes back about five inches. And basically the difference between a pistol and a rifle is the pistol you can conceal. A rifle, you really can't stick it in your pocket or hide it on your body.
Q: How long is the barrel on most rifles?
A: 26 inches-well, 16 inches or greater.
Q: Okay. And what is it about this gun-if you can take me through this slowly, because I don't understand gun parts as well as you do. What is it about this gun that makes it a rifle instead of, let's say, a machine gun or a machine pistol?
A: This gun was classified by ATF a carbine rifle because of its designation CM-11. That is the model. An FMJ CM-11 had a longer barrel and it has a stock. So, if you unfolded the stock all the way out and measured it from the end of the stock all the way to the end of a barrel, you fit the definition of a rifle. It was more than 16 inches, you know, going up to 26 inches. This gun is very popular because the stock comes off and the barrel is replaced with a short barrel and you have a pistol without going through the process of getting a pistol purchase permit-or, you have what looks like a pistol. This is not a pistol. This is a short barrel rifle.
Q: Okay. Let's get back to the barrel. You mentioned that that barrel at about two inches outside the gun is not the barrel that that gun would have been produced with?
A: That's correct.
Q: Could you tell the jury what that gun would have had on the front of it when it was manufactured?
A: It would have a barrel that is not threaded. This is threaded to put a flash suppressor on it, and it would also have a barrel that would stick out about another eight inches or so. This is just an aftermarket barrel that this same company makes that you can buy, but it is illegal to put onto this gun.
Q: All right. Now, you have mentioned that this gun has threaders and you could attach a flash suppressor?
A: Yes.
Q: Would you tell the jury what a flash suppressor is?
A: It just hides the muzzle flash when you pull the trigger.
Q: So when you shoot a gun at night, would a flash suppressor make it look any different?
***808 **4** A: Yes. Instead of seeing a big flame shooting out, it is going to diffuse it so that you are not going to see exactly where it shot from.
The Court: May I interrupt, please. This is fascinating. At least I'm fascinated. I take that reaction that the jurors may or may not be fascinated. But the relevance, please?
Uetz: Your Honor, the Defense attorney has made quite a point with both of our two troopers that they believed that this was a machine gun. I expect that-
The Court: You have covered those points. Whether or not you can put a flasher on it or not a flasher and-and I don't want to make light of it, but when you say that, I think of maybe a trench coat that goes over the barrel. I'm not interested, and I don't think it's relevant to what the charge is here.
Uetz: Yes, Your Honor. It is in order to ask-
The Court: I understand. But you've already asked those questions concerning why it's a rifle and why it is a sister gun and all of that. You are going now into accessories, that are not relevant to this case.
Uetz: Yes, Your Honor.
The Court: That is my ruling.
Uetz: Thank you, Your Honor.
Q: Agent Toth, this sort of firearm, have you come across it in your work as an ATF agent before?
A: Yes. This is a very popular gun here.
Q: When you say popular, could you tell the jury what you mean by that?
A: We recover a lot of these things in crimes, or the police and us recover a lot of these guns. This is one of the high-I guess if you were to look at all the guns that are traced in the state, this gun is traced a lot.
The Court: May we have a sidebar, please?
(Bench conference held out of the hearing of the jury, between the Court and counsel, on the record as follows:)
Finn: We had an objection before you said may we approach.
The Court: Well, I'm wondering if you had slipping [sic] something, maybe turkey with a sleeping agent in it. But this is again interesting, but it's not relevant to the charge. If it's a popular gun used in a crime, you can describe any gun in that manner. It's not relevant, and it's only prejudicial, and it's going to stop.
Uetz: Okay.

Finn: Thank you.
(End of Bench conference.)

On appeal, Smith asserts two assignments of error. First, he contends that it was prosecutorial misconduct for the Government to have questioned Kurowski regarding his opinion as to whether Smith "possessed" the gun because this was the ultimate issue for the jury to consider at trial. Second, he argues that it was prosecutorial misconduct for the Government to elicit testimony from Toth regarding the characteristics of the firearm recovered from Smith's vehicle.

II.

A.

[1] Smith argues that the prosecutor committed misconduct by eliciting Kurowski's opinion as to whether Smith possessed the firearm that was recovered from the vehicle. This court has adopted a two-step approach for determining when prosecutorial misconduct warrants a new trial. *See United States v. Carroll,* 26 F.3d 1380, 1387-90 (6th Cir.1994). First, we must determine whether the prosecutor's conduct was improper. *Id.* at 1387. If deemed improper, it must then be determined***809** whether the error was harmless *Id.* at 1389.

****5** Federal Rule of Evidence 704 provides that " testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact." Fed.R.Evid. 704(a). We have recognized that Rule 704 does not lower the bar so as to admit all opinions, but rather, its effect is to remove the proscription against opinions on "ultimate issues," thereby shifting the focus to whether the testimony is "otherwise admissible." *Torres v. County of Oakland,* 758 F.2d 147, 150 (6th Cir.1985).

However, we have also recognized a problem that arises when testimony containing a legal conclusion is allowed, as it may convey a witness's unexpressed, and perhaps erroneous, legal standards to the jury. *Id.* "The best resolution of this type of problem is to determine whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular. If they do, exclusion is appropriate." *Id.* at 151; *see also United States v. Sheffey,* 57 F.3d 1419, 1426 (6th Cir.1995) (same).

The testimony of Kurowski, therefore, stating that he believed that the location of the firearm indicated that it belonged to Smith, did not violate Rule 704. Though Kurowski twice stated that he believed that the gun belonged to Smith, the term "belong" does not have a meaning identical to the legal term " possession" contained in the statute. Moreover, even if Kurowski had used the term "possession," in the present context, there is no distinction between the legal term of art and the common vernacular usage that would render the testimony inadmissible under Rule 704. Thus, because the Government was not soliciting evidence that was in violation of Rule 704, the conduct of the prosecutor in this regard cannot be said to be improper. Accordingly, the first prong of the *Carroll* test for prosecutorial misconduct is not satisfied.

B.

[2][3] Because the defense did not object to Toth's testimony at trial, we review the corresponding purported misconduct at trial for plain error. *United States v. Emuegbunam,* 268 F.3d 377, 406 (6th Cir.2001). Smith contends on appeal that the alleged misconduct of the prosecutor in repeatedly questioning Toth about the nature of the firearm was plain error. Under the plain-error test, before an appellate court can correct an error not raised at trial, there must be: (1) error; (2) that is plain; and (3) that affects substantial rights. *United States v. Cotton,* 535 U.S. 625, 631, 122 S.Ct. 1781, 152 L.Ed.2d 860 (2002). If all of these conditions are satisfied, then the appellate court may exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Id.*

In the present case, defense counsel opened the

door to testimony regarding the nature and characteristics of the firearm by asking questions to Geyer and Kurowski regarding their identification of the gun. By raising the issue of the identification of the gun, intentionally or unintentionally, to the jury, defense counsel enabled the Government to question its firearms expert regarding the reasons why the gun may have been mistakenly identified. Smith contends that he was unfairly prejudiced by Toth's statement that the particular gun was popular and recovered in a lot of crimes. However, the Government points out that this information speaks to Toth's familiarity with the particular weapon. The degree to which Toth described the firearm was appropriate considering ***810** the questions presented by the defense concerning the identification of the gun. As soon as Toth's testimony strayed towards irrelevant or prejudicial matters, such as available gun accessories and the frequency with which this type of gun was used for criminal activity, the district court, despite receiving no objections from defense counsel, immediately halted the testimony. Thus, plain error cannot be shown. Alternatively, even if there was plain error, the error clearly cannot be said to rise to the level of seriously affecting the fairness, integrity, or public reputation of the trial.

III.

****6** For the foregoing reasons, we **AFFIRM** the judgment of the district court.

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70 Fed.Appx. 804, 2003 WL 21675340 (C.A.6 (Mich.))

Briefs and Other Related Documents (Back to top)

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END OF DOCUMENT

EXHIBIT 3

832 F.2d 642, 24 Fed. R. Evid. Serv. 116
(Cite as: 832 F.2d 642)

U.S. v. OlmsteadC.A.1 (Mass.),1987.
United States Court of Appeals,First Circuit.
UNITED STATES of America, Appellee,
v.
George OLMSTEAD, Defendant, Appellant.
No. 86-1773.

Argued Sept. 18, 1987.
Decided Oct. 29, 1987.

Defendant was convicted in the United States District Court for the District of Massachusetts, William G. Young, J., of conspiring to submit false claims to United States and for submitting fraudulent claims, and he appealed. The Court of Appeals, Bownes, Circuit Judge, held that: (1) trial court was not required to define term reasonable doubt in its instructions, which adequately emphasized standard in terms of burden of proof; (2) defendant was not entitled to accomplice testimony instruction; and (3) trial court's questions to informant did not constitute improper judicial intrusion into trial process.

Affirmed.

West Headnotes

[1] Criminal Law 110 ⚿789(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k789 Reasonable Doubt
110k789(1) k. Necessity of Defining Reasonable Doubt. Most Cited Cases

In defendant's prosecution for conspiracy to defraud United States, trial court was not required to give instruction defining "reasonable doubt"; it was sufficient that trial court sufficiently emphasized that Government had burden of proving defendant guilty beyond a reasonable doubt.

[2] Criminal Law 110 ⚿789(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k789 Reasonable Doubt
110k789(1) k. Necessity of Defining Reasonable Doubt. Most Cited Cases

Criminal Law 110 ⚿789(2)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k789 Reasonable Doubt
110k789(2) k. Sufficiency of Definitions of Reasonable Doubt in General. Most Cited Cases

No definition of reasonable doubt need be included in jury instructions, and any attempt at definition should not stray far from consistently approved charges on reasonable doubt; decision of whether to give further explanation of term is within discretion of trial judge.

[3] Criminal Law 110 ⚿780(1)

110 Criminal Law
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k780 Testimony of Accomplices and Codefendants
110k780(1) k. Necessity of Instructions. Most Cited Cases

Defendant was not entitled to accomplice testimony instruction, as informant's decision to cooperate with Government brought promptly to an end question of his involvement in conspiracy; informant approached Government on his own initiative to provide information.

[4] Criminal Law 110 ⚿1173.2(6)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1173 Failure or Refusal to Give Instructions
110k1173.2 Instructions on Particular Points
110k1173.2(6) k. Testimony of Accomplices and Codefendants. Most Cited Cases
Even if jury could have determined that informant aided and abetted conspiracy to defraud United States, refusal to give accomplice instruction did not constitute reversible error; not only did informant present consistent and credible testimony, but his account of activities was substantiated by tape recordings.

[5] Witnesses 410 ⚿246(2)

410 Witnesses
410III Examination
410III(A) Taking Testimony in General
410k246 Examination by Court or Jury
410k246(2) k. Calling and Examination by Court. Most Cited Cases
Trial court's questioning of informant did not constitute improper judicial intrusion into trial process; comments or questions interjected by court served to remedy leading questions, clarify lines of inquiry or develop witness' answer, and such questioning was well within trial court's discretion.

[6] Criminal Law 110 ⚿1166(10.10)

110 Criminal Law
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166 Preliminary Proceedings
110k1166(10.10) k. Discovery and Disclosure; Transcripts of Prior Proceedings. Most Cited Cases
In an instance in which Government delays disclosure of requested discovery to defendant, rather than totally suppresses it, reversal will be granted only when defendants are denied an opportunity to use evidence effectively.

***642** James B. Krasnoo, by Appointment of the Court, with whom Norris, Kozodoy, Krasnoo & Fong, Boston, Mass., was on brief, for defendant, appellant.
Richard G. Stearns, Asst. U.S. Atty., with whom Frank L. McNamara, Jr., Acting U.S. Atty., Boston, Mass., was on brief, for appellee.

Before BOWNES and BREYER, Circuit Judges, and LAGUEUX,[FN*] District Judge.

FN* Of the District of Rhode Island, sitting by designation.

***643** BOWNES, Circuit Judge.
Defendant-appellant George Olmstead was convicted by a jury along with codefendants Herbert Raymond and Waltham Screw Company for conspiring to submit false claims to the United States Government and for submitting, or aiding or abetting the submission of, fraudulent claims in violation of 18 U.S.C. §§ 2, 286, 287. Olmstead assigns four errors on appeal: that the trial court's decision to exclude any definition of reasonable doubt from the instructions to the jury deprived him of due process of law; that the absence of an instruction cautioning the jury to view accomplice testimony with great scrutiny was error and impermissibly undermined a defense theory; that the questioning of a government witness by the trial judge exceeded acceptable bounds and constituted an abuse of discretion; and that the delayed disclosure of exculpatory evidence by the government deprived him of a fair trial. We find each of these contentions without merit and affirm the judgment below.

I. BACKGROUND

This case concerns an alleged conspiracy to defraud the United States by falsely submitting claims for payment for products which failed to meet minimum government standards. The conspiracy involved the Waltham Screw Company of Keene, New Hampshire, George Olmstead, the plant manager, and Herbert Raymond, the production manager. In 1981, Waltham Screw Company entered into a government contract with the

Department of Defense to manufacture flash suppressors for the M-16 rifle. A flash suppressor, as its name indicates, reduces the visible flash produced when the rifle is fired. The contract called for Waltham Screw Company to provide approximately 30,800 suppressors in twenty-seven separate shipment lots.

Before the government accepts any shipment, a quality assurance representative (QAR) must inspect a representative sample of the product and sign an inspection form (DD form 250) which thenceforth serves as an invoice. Defendants allegedly conspired to defraud the government by rigging samples of flash suppressors to pass inspection. Such conduct dates to January 2, 1985, when Michael Carbone, the QAR, arrived to examine a shipment of suppressors manufactured by Waltham Screw Company. The same lot had been inspected previously and rejected by Carbone because he had detected numerous defective units.

Prior to Carbone's arrival for the reinspection, Olmstead ordered Robert Lenox, the internal quality control representative for the firm, to remove the defective suppressors from the lot and to set them aside. Lenox was told to tell Carbone that he had detected and removed fifteen defective suppressors and made up the difference with satisfactory ones. Olmstead, Lenox, and Raymond were present during Carbone's inspection. Lenox assured Carbone that the lot contained the requisite 670 items while, in fact, it was short more than 100 suppressors. After Carbone approved the shipment, Raymond put the defective suppressors back into the lot to remedy the deficiency.

Lenox decided to tell Carbone what had transpired. Prior to Carbone's arrival, he had attempted to mark the defective suppressors with ink. Carbone testified that Lenox approached him in the men's room at the Company on January 2, 1985, and that the two men then met at Carbone's office on the third of January to discuss the situation. Lenox acceded to Carbone's request, and subsequently that of Special Agent Kolben of the Defense Criminal Investigation Service, to aid in an investigation of the Waltham Screw Company's conduct.

The next two shipments due under the contract were scheduled for inspection on March 1, 1985. The conspirators prepared for this event both by preselecting satisfactory suppressors to be presented to the QAR and by increasing the number of defective ones in the actual shipments. Olmstead directed Lenox to sift through the flash suppressors and to set aside 200 acceptable units which were to be given to Carbone for inspection as a random sample that accurately reflected the quality of the ***644** entire lot. Defendant then ordered Lenox to increase the number of defective items in the shipments by taking discarded suppressors from the junk bin and putting them among those to be shipped. Olmstead also instructed Lenox and Raymond to stack the entire lot of suppressors behind machinery so as to conceal it from view by Carbone and thus avoid the risk of inspection of the doctored lot.

Before starting work on March 1, Lenox met with Carbone and Kolben. The latter fitted Lenox with a recording device. Lenox explained the rigged sample to Carbone who agreed not to insist upon selecting his own sample for inspection. Lenox then proceeded to work where the final preparations for the inspection took place.

During the inspection, Olmstead assured Carbone that the sample prepared for his convenience fairly represented the larger lot. Carbone then approved both shipments, and signed the DD form 250 which Waltham Screw Company submitted for payment. Before shipping out the approved suppressors, Olmstead ordered Lenox to remove the rigged sample and put it in his office for subsequent use.

The two final inspections were preceded by similar conduct on the part of defendants. Because the company had manufactured too few flash suppressors to meet the quantity requirements of the contract, Olmstead ordered Lenox to set aside numerous suppressors from the junk bin and informed him that, after Carbone approved the next to last shipment, these defective suppressors would be shipped in place of the approved ones. Olmstead would thus be able to reserve the satisfactory suppressors for the final inspection and obtain Carbone's (re)approval of the last shipment.

On November 22, 1985, the Grand Jury returned an indictment against Waltham Screw Company, Olmstead, and Raymond. Count I charged defendants with conspiracy to defraud the United States. 18 U.S.C. § 286. Counts II-IV charged defendants with the substantive offense of submitting, or aiding and abetting the submission of, false and fraudulent claims. 18 U.S.C. §§ 2, 287 . After a ten-day trial, the jury returned a verdict against Olmstead on all four counts. Olmstead's appeal is the only one before us.

II. THE REASONABLE DOUBT INSTRUCTION

[1] The district court instructed the jury three times, twice at the start of the case and once in the final charge, essentially as follows:
Mr. Olmstead, Mr. Raymond, Waltham Screw are presumed to be innocent of all charges. And what that means in the law is that they cannot be found guilty of anything unless and until the government proves that one or more of them is guilty and proves it beyond a reasonable doubt. It means that this burden of proving, this burden of coming up with evidence and persuading you beyond a reasonable doubt rests entirely on the government. It never shifts. Mr. Olmstead, Mr. Raymond, Waltham Screw, they don't have to explain anything. They don't have to call any witnesses. They don't have to testify themselves. Their lawyers don't have to ask a single question. They don't have to make any statements to you. Under the law they need do nothing. And you then judge whether what the United States has presented before you convinces you beyond a reasonable doubt.

Defendant argues that the absence of a definition or explanation of "reasonable doubt" deprived him of constitutional rights and warrants reversal because the instruction did not adequately apprise the jury of the appropriate standard for conviction. We disagree.

Defendant bases his argument on the importance of the reasonable doubt standard in the criminal law system. The Supreme Court has held that the Due Process Clause requires proof beyond a reasonable doubt. *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970).
The reasonable-doubt standard plays a vital role in the American scheme of criminal procedure. It is a prime instrument for reducing the risk of convictions ***645** resting on factual error. The standard provides concrete substance for the presumption of innocence-that bedrock "axiomatic and elementary" principle whose "enforcement lies at the foundation of the administration of our criminal law."

Id. at 363, 90 S.Ct. at 1072 (quoting *Coffin v. United States,* 156 U.S. 432, 453, 15 S.Ct. 394, 403, 39 L.Ed. 481 (1895)). This court has acknowledged the centrality of the reasonable doubt charge: "Discussion of the concept is perhaps the most important aspect of the closing instruction to the jury in a criminal trial." *Dunn v. Perrin,* 570 F.2d 21, 25 (1st Cir.), *cert. denied,* 437 U.S. 910, 98 S.Ct. 3102, 57 L.Ed.2d 1141 (1978).

Despite the importance of the reasonable doubt standard in safeguarding the rights of criminal defendants, the term has eluded clear definition.
Judges and jurors repeatedly witness the truth of the Supreme Court's statement that "[a]ttempts to explain the term 'reasonable doubt' do not usually result in making it any clearer to the minds of the jury." *Miles v. United States,* 103 U.S. (13 Otto 304) 304, 312, 26 L.Ed. 481 (1880). *Accord United States v. Gibson,* 726 F.2d 869, 874 (1st Cir.) ("It can be said beyond any doubt that the words 'reasonable doubt' do not lend themselves to accurate definition."), *cert. denied,* 466 U.S. 960, 104 S.Ct. 2174, 80 L.Ed.2d 557 (1984).

Most efforts at clarification result in further obfuscation of the concept. Many definitions reduce the burden of proof on the government by expanding the degree of doubt permissible, *United States v. MacDonald,* 455 F.2d 1259, 1263 (1st Cir.) , *cert. denied,* 406 U.S. 962, 92 S.Ct. 2073, 32 L.Ed.2d 350 (1972), and consequently such definitions result in increased appellate litigation. *Id.; United States v. Gibson,* 726 F.2d at 874 (" [A]ny attempt to define 'reasonable doubt' will probably trigger a constitutional challenge.") (citing *United States v. Drake,* 673 F.2d 15, 20-21 (1st

Cir.1982)).

Recently several circuits have recognized the futility of defining the words "reasonable doubt" and have discouraged further attempts at definition. The Fourth Circuit in *Murphy v. Holland,* 776 F.2d 470 (4th Cir.1985), *vacated on other grounds,* 475 U.S. 1138, 106 S.Ct. 1787, 90 L.Ed.2d 334 (1986), summarized the reasons behind its disapproval of efforts to define reasonable doubt at trial.
The term reasonable doubt itself has a self-evident meaning comprehensible to the lay juror. That subjective meaning is hardly susceptible to significant improvement by judicial efforts to define reasonable doubt with unattainable precision. Instead of improvement, the most likely outcome of attempts to define reasonable doubt is unnecessary confusion and a constitutionally impermissible lessening of the required standard of proof.... To protect the accused's due process rights and avoid supplying the grounds for unnecessary constitutional challenges ... the wisest course for trial courts to take is to avoid defining reasonable doubt in their instructions unless specifically requested to do so by the jury.

Id. at 475 (citing *United States v. Gibson,* 726 F.2d at 874); *accord United States v. Moss,* 756 F.2d 329, 333 (4th Cir.1985). Other circuits have endorsed the same approach. *See, e.g., United States v. Lawson,* 507 F.2d 433, 441-43 (7th Cir.1974) (announcing rule that definition of reasonable doubt should be at option of trial judge), *cert. denied,* 420 U.S. 1004, 95 S.Ct. 1446, 43 L.Ed.2d 762 (1975); *United States v. Martin-Trigona,* 684 F.2d 485, 493-94 (7th Cir.1982); *United States v. Regilio,* 669 F.2d 1169, 1177-78 (7th Cir.1981), *cert. denied,* 457 U.S. 1133, 102 S.Ct. 2959, 73 L.Ed.2d 1350 (1982); *United States v. Allen,* 596 F.2d 227, 229-30 (7th Cir.1979); *United States v. Witt,* 648 F.2d 608, 610-11 (9th Cir.1981) ("Although a proper definition is always appropriate, the decision whether to define reasonable doubt should be left to the court's discretion.") (footnote omitted); *Whiteside v. Parke,* 705 F.2d 869 (6th Cir.) (failure to give definition of reasonable doubt not error when viewed under totality of the circumstances test), *cert.* ****646** denied,* 464 U.S. 843, 104 S.Ct. 141, 78 L.Ed.2d 133 (1983).

We have held that an instruction to the jury will survive a constitutional challenge if it " 'adequately apprise[s] the jury of the reasonable doubt standard. ' " *United States v. Johnston,* 784 F.2d 416, 426 (1st Cir.1986) (quoting *United States v. Drake,* 673 F.2d at 21). In light of the common meaning which the words "reasonable doubt" import, we hold that an instruction which uses the words reasonable doubt without further definition adequately apprises the jury of the proper burden of proof. This does not mean, of course, that the phrase can be buried as an aside in the opinion.

The final instruction in the case at bar informed the jury in clear and understandable words of the meaning of the presumption of innocence and reasonable doubt. This is not a case where the trial judge made only passing reference to the reasonable doubt standard, thus impermissibly lessening the government's burden of proof. The instruction, which we applaud as a model of clarity, stated:
Remember that great principle, and it is a great principle of our Constitution in the criminal law, that Mr. Olmstead and Mr. Raymond and Waltham Screw started this case presumed to be innocent. And no one of them can be found guilty unless and until you determine that they are guilty beyond a reasonable doubt based upon the evidence. And that means that the burden of proving them guilty, or any one of them guilty, beyond a reasonable doubt, rests on the United States, and it never shifts. They don't have anything to explain. They don't have to testify. They don't have to have called any witnesses or made any arguments or asked any questions. And you may not, you would violate your oath if you held against anyone something that they didn't do. Because the law doesn't require them to do anything. That's unfair. The law says to the United States: You've made this charge, prove it beyond a reasonable doubt.

[2] In stating that a charge like this one is strong and clear-a belief we have formed after reviewing on appeal numerous formulations of the reasonable doubt charge-we do not intend to impose a straightjacket upon district court judges. This court

has recognized the central role of the trial court in instructing the jury, *cf. Cupp v. Naughten,* 414 U.S. 141, 149, 94 S.Ct. 396, 401, 38 L.Ed.2d 268 (1973) , and has left to the trial judge "the choice among acceptable linguistic alternatives." *Tsoumas v. State of New Hampshire,* 611 F.2d 412, 414 (1st Cir.1980); *accord Bumpus v. Gunter,* 635 F.2d 907, 910 (1st Cir.1980) ("Unless this Court is to end up imposing pattern jury instructions, we must tolerate a reasonable range of expression, some or even much of which may not suit our fancy."), *cert. denied,* 450 U.S. 1003, 101 S.Ct. 1714, 68 L.Ed.2d 207 (1981). While we hold that no definition of reasonable doubt need be included in jury instructions, and while we repeat our past admonitions that attempts at definition should not stray far from "the consistently approved stock of charges on reasonable doubt," *United States v. MacDonald,* 455 F.2d at 1263, we leave to the discretion of the trial judge whether there should be further explanation of the term.

III. THE QUESTION OF ACCOMPLICE TESTIMONY

[3] Defendant next claims error in the refusal of the trial judge to instruct the jury to scrutinize accomplice testimony with great care. Defendant argues that Lenox willfully participated in the underlying venture, and that, since the jury could have determined the government informant to be an accomplice, the standard instruction on accomplice testimony was mandatory. The absence of such an instruction, defendant further contends, deprived him of an important defense theory.

Defendant claims that prior to the meeting between Lenox and Carbone on January 3, 1985, Lenox willfully participated in the attempt to defraud the government. While defendant concedes that the informant's decision to cooperate with the government abruptly ended any question ***647** of his involvement in the conspiracy, defendant maintains that the decision merely terminated rather than negated Lenox's status as an accomplice.

The government correctly notes, however, that an accomplice must share in the criminal intent of the principals. *United States v. Tarr,* 589 F.2d 55, 59 (1st Cir.1978). Construing the evidence in the light most favorable to the government, *id.* at 57, we find that Lenox lacked such intent. Not only did Lenox approach Carbone on the day of the January 2 inspection to arrange a meeting, but he also attempted to mark the defective flash suppressors with ink prior to Carbone's arrival. Such conduct does not evince an intent to further the criminal venture. "There is no evidence which would support a sufficient inference that [defendant] consciously associated [himself] with the ... venture or participated in it as something which [he] sought to bring about or that [he] sought by [his] action to make the venture successful." *United States v. Francomano,* 554 F.2d 483, 487 (1st Cir.1977).

[4] Furthermore, even if the jury could have determined that Lenox aided and abetted the conspiracy, the absence of an accomplice instruction does not constitute reversible error. This court has held that while a cautionary instruction is advisable, its absence does not require reversal automatically. In *United States v. Wright,* 573 F.2d 681 (1st Cir.), *cert. denied,* 436 U.S. 949, 98 S.Ct. 2857, 56 L.Ed.2d 792 (1978), we considered defendant's argument that the absence of an instruction cautioning the jury to scrutinize carefully the testimony of the principal witness mandated reversal. The defendant had been convicted of transporting or causing to be transported a woman in interstate commerce for the purpose of prostitution, largely on the basis of the testimony of the woman allegedly transported. We held that the absence of an accomplice instruction was harmless.

> First, we doubt that the witness was an accomplice... . But, in any case, we have held that the uncorrobated evidence of an accomplice will convict the defendant. *United States v. Miceli,* 446 F.2d 256, 258 (1st Cir.1971). Though it is prudent for the court to give a cautionary instruction ... failure to do so is not automatic error especially where the testimony is not incredible or otherwise insubstantial on its face. *United States v. House,* 471 F.2d 886, 888 (1st Cir.1973). The principal witness's testimony in this case was "generally consistent and credible." *Id.* Moreover, aspects of the testimony were corroborated by documentary

evidence and the tapes.

Id. at 685.

The case at bar is covered by the above holding. Not only did Lenox present consistent and credible testimony, but his account of the activities was substantiated by the tapes. These tapes, in tandem with the testimony of other witnesses, revealed both defendant's orchestration of the conspiracy and his disregard for the consequences of his actions.[FN1] *See United States v. Skandier,* 758 F.2d 43, 46 (1st Cir.1985) ("The [accomplice] instruction should have been given, tied to the jury's resolution of that question.... However, we will not reverse for this failure in light of the abundant tangible evidence confirming the witness's account of defendant's guilt. ") (citations omitted). Clearly, the decision of the district court to omit an instruction regarding accomplice testimony was not reversible error, if it was error at all.

FN1. Carbone testified that during an encounter with Olmstead, the latter commented: "Why are you so concerned about the flash suppressors? It's only a piece of steel. It goes on the end of a barrel. If the soldier gets shot, someone else picks up his gun and goes on and does his duty."

Defendant further contends that the failure to caution the jury about accomplice testimony impermissibly undercut an important defense theory. In his closing argument, defendant painted a picture of Lenox as a dupicitous self-serving climber who both initiated and uncovered the fraud to better his chances for government employment. While it is true that a trial court must instruct the jury on a defense theory which is sufficiently supported by both the evidence and the law, ***648** *United States v. Sommerstedt,* 752 F.2d 1494, 1496 (9th Cir.), *cert. denied,* 474 U.S. 851, 106 S.Ct. 149, 88 L.Ed.2d 123 (1985), the judge is not bound to give the exact instructions proposed. *United States v. Morris,* 700 F.2d 427, 433 (1st Cir.) ("The refusal to give a particular instruction is unobjectionable if the charge given adequately covers the theory of defense.... The court need not give instructions in the form and language requested by the defendant.") (citations omitted), *cert. denied,* 461 U.S. 947, 103 S.Ct. 2128, 77 L.Ed.2d 1306 (1983); *United States v. Dyer,* 821 F.2d 35, 38-39 (1st Cir.1987) (same). In the instant case, the court's general instructions on witness credibility alerted the jury to the potential for conflicting motivations behind specific testimony.[FN2] The court cautioned the jury to consider not only witness credibility but also the existence of corroboration. The instructions given adequately covered defendant's theory of defense and offered no grounds for reversal. *Cf. United States v. Pitocchelli,* 830 F.2d 401, 404 (1st Cir.1987) (no error to omit instruction on accomplice testimony where court gave jury instruction on how to evaluate a witness's credibility).

FN2. The jury instructions specifically stated:
You may consider the ability of the witness to remember, to comprehend and understand those things about which the witness has testified. You may consider the interest, if any, that the witness may have in the outcome of the case; whether the witness has displayed any friendship or hostility to anyone involved in the case; whether the witness has any motive for falsifying; whether the witness's testimony is backed up, the lawyers say corroborated, but we mean backed up by other testimony or evidence in the case, or whether other evidence in the case detracts from the testimony, takes away from it; whether the witness's testimony has the ring of truth to you people as common sense men and women. Is it plausible? Does it make sense? In short, as reasonable jurors, you may sum up a witness's testimony to determine whether you believe it, disbelieve it, or believe parts of it.

IV. QUESTIONING BY THE COURT

[5] Defendant further claims reversible error on the grounds of improper judicial intrusion into the trial

process. He argues that the court wrongly directed questions to Lenox throughout the government's direct examination of the witness and thereby abandoned its neutrality and assumed the role of a prosecutor. Defendant urges that the court's unique treatment of Lenox as a witness highlighted the latter's testimony and conveyed to the jury an appearance of partiality. We have examined each instance of alleged misconduct claimed by defendant and find the charge meritless. The comments and questions interjected by the court served to remedy leading questions, clarify lines of inquiry or develop the witness's answer. Such conduct is well within the court's discretion. We have held consistently that "[t]he court has considerable discretion to interrupt and ask impartial questions 'in order to clarify misunderstandings or otherwise insure that the trial proceeds efficiently and fairly.' " *United States v. Wright,* 573 F.2d at 684 (citing *United States v. McGovern,* 499 F.2d 1140, 1144 (1st Cir.1974)); *accord United States v. Doran,* 483 F.2d 369, 374-75 (1st Cir.1973), *cert. denied,* 416 U.S. 906, 94 S.Ct. 1612, 40 L.Ed.2d 111 (1974). Moreover, in this instance, the court gave clear instructions to the jury disavowing any judicial bias.[FN3] *See United States v. Doran,* 483 F.2d at 375. The court here properly exercised its discretion to ensure an efficient and fair trial.

> FN3. The court instructed the jury:
> [I]f you think that I think anything at all about this case, anything at all, I most earnestly tell you to disregard it. And I tell you candidly, I really have no thoughts at all about how this case will come out. None. I do not discuss it with any of the people with whom I'm privileged to work. We're not back there wondering what you are going to do or laying odds on it. That's not appropriate. We don't do it at all, out of the fear that somehow then having expressed an opinion I might I have some view. I have no view.... But if you think somehow that I've got some view, I tell you to disregard it and I don't know what more I can do than earnestly tell you I have no view at all. I wait for your verdict like everyone else in the courtroom, believing that it will be just.

V. DELAYED DISCLOSURE OF EVIDENCE

Finally, defendant argues that the delayed disclosure by the government of exculpatory***649** evidence denied him a fair trial. The evidence at issue is a memorandum written by Special Agent Kolben in which he states that Carbone had notified defendants that all shipments were subject to reinspection at the packaging location. The memorandum was not disclosed to defense counsel until well into the trial. Olmstead claims that pretrial disclosure, in accord with the magistrate's discovery order, would have resulted in a different strategy.

[6] We first note that we deal here with delayed disclosure rather than with total suppression. In such cases, reversal will be granted only where defendants were denied an opportunity to use the evidence effectively. *United States v. Johnston,* 784 F.2d at 425; *United States v. Drougas,* 748 F.2d 8, 23 (1st Cir.1984); *United States v. Peters,* 732 F.2d 1004, 1009 (1st Cir.1984). In *United States v. Hemmer,* 729 F.2d 10 (1st Cir.), *cert. denied,* 467 U.S. 1218, 104 S.Ct. 2666, 81 L.Ed.2d 371 (1984), we applied a two-prong inquiry to determine when prejudice resulted: whether the actual disclosure altered the subsequent defense strategy, and whether, given timely disclosure, a different defense strategy would have resulted. *Id.* at 13. Applying this test to the facts here results in a negative answer to both queries. Defense counsel enjoyed a full day after disclosure to reconsider their strategy in light of the new evidence, *cf. United States v. Peters,* 732 F.2d at 1009 (considering preparation time as factor in equation of prejudice), but made limited use of this evidence in either the cross-examination of Carbone or in final argument. Furthermore, it remains unclear how early disclosure of the memorandum would have altered the defense strategy. The tapes not only disclose Olmstead directing others to rig samples and conceal defective pieces, but also reveal that he discounted any possibility of detection at the packaging plant.[FN4] In light of this evidence, we find that the delayed disclosure did

not deny defendants an opportunity to use Kolben's memorandum effectively.

> FN4. In response to a concern that the junk pieces might be detected at the packaging stage, Olmstead stated: "The girl, the girl that's packagin 'em, she's just, she's settin' there goin' like this puttin' 'em in a package and it's, in these ____ packages. I don't think something like that, I ____. (Pause) It'll get through."

For the reasons discussed, *the judgment of the district court is affirmed.*

C.A.1 (Mass.),1987.
U.S. v. Olmstead
832 F.2d 642, 24 Fed. R. Evid. Serv. 116

END OF DOCUMENT

EXHIBIT 4

442 U.S. 289, 99 S.Ct. 2301, 101 L.R.R.M. (BNA) 2428, 60 L.Ed.2d 895, 86 Lab.Cas. P 55,200
(Cite as: 442 U.S. 289, 99 S.Ct. 2301)

Supreme Court of the United States
Bruce BABBITT, Governor of the State of Arizona, et al., Appellants,
v.
UNITED FARM WORKERS NATIONAL UNION, etc., et al.
No. 78-225.

Argued Feb. 21, 1979.
Decided June 5, 1979.

Plaintiff, a farmworkers' union, a union agent, farmworkers, and a union supporter, brought action challenging constitutionality of Arizona Agricultural Employment Relations Act. The three-judge District Court for the District of Arizona, 449 F.Supp. 449, declared entire statute unconstitutional and enjoined its enforcement, and appeal was taken. The Supreme Court, Mr. Justice White, held that: (1) challenges to provisions regulating election procedures, consumer publicity, and criminal sanctions presented "case or controversy," but challenges to access and arbitration provisions were not justiciable; (2) district court should have abstained from adjudicating challenges to consumer publicity and criminal penalty provisions until material unresolved questions of state law were determined by Arizona courts, and (3) district court erred in invalidating election procedures provision.

Reversed and remanded.

Mr. Justice Brennan filed an opinion concurring in part and dissenting in part, in which Mr. Justice Marshall joined.

West Headnotes

[1] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
(Formerly 170Bk12)
Difference between an "abstract question" and a " case or controversy" is one of degree and is not discernible by any precise test; basic inquiry is whether conflicting contentions of the parties present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract. U.S.C.A.Const. art. 3, § 1 et seq.

[2] Federal Courts 170B ⚿12.1

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk12.1 k. In General. Most Cited Cases
(Formerly 170Bk12)
A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement, but one need not await consummation of threatened injury to obtain preventive relief, for if injury is certainly impending, that is enough. U.S.C.A.Const. art. 3, § 1 et seq.

[3] Constitutional Law 92 ⚿42.1(3)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k41 Persons Entitled to Raise Constitutional Questions
92k42.1 Particular Statutes or Actions Attacked
92k42.1(3) k. Crime and Punishment.

Most Cited Cases
When contesting constitutionality of criminal statute, it is not necessary that plaintiff first expose himself to actual arrest or prosecution to be entitled to challenge statute that he claims deters exercise of his constitutional rights. U.S.C.A.Const. art. 3, § 1 et seq.

[4] Constitutional Law 92 ⚿42.1(3)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k41 Persons Entitled to Raise Constitutional Questions
92k42.1 Particular Statutes or Actions Attacked
92k42.1(3) k. Crime and Punishment. Most Cited Cases
Where a plaintiff has alleged an intention to engage in course of conduct, arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he should not be required to await and undergo criminal prosecution as sole means of seeking relief; however, persons having no fears of state prosecution except those that are imaginary or speculative are not to be accepted as appropriate plaintiffs. U.S.C.A.Const. art. 3, § 1 et seq.

[5] Federal Courts 170B ⚿13.15

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13.15 k. Criminal Prosecutions and Sentences. Most Cited Cases
(Formerly 170Bk13)
Where plaintiffs do not claim that they have ever been threatened with prosecution, that prosecution is likely, or even that prosecution is remotely possible, they do not allege dispute susceptible to resolution by a federal court. U.S.C.A.Const. art. 3, § 1 et seq.

[6] Constitutional Law 92 ⚿42.3(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k41 Persons Entitled to Raise Constitutional Questions
92k42.3 Particular Classes of Persons
92k42.3(1) k. In General. Most Cited Cases
For purposes of action challenging provisions of Arizona Agricultural Employment Relations Act, union of farmworkers had sufficient personal stake in determination of constitutional validity of provisions regulating election procedures, consumer publicity, and criminal sanctions to present a real and substantial controversy admitting of specific relief through decree of conclusive character, and therefore union had standing to challenge such provisions. A.R.S. §§ 23-1381 to 23-1395.

[7] Federal Courts 170B ⚿13.5

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13.5 k. Labor Relations; Social Security. Most Cited Cases
(Formerly 170Bk13)
Farmworkers' and union's challenge to provision of Arizona Agricultural Employment Relations Act regulating election procedures presented a "case or controversy," even though plaintiffs had admittedly not invoked Act's election procedures in the past nor had they expressed any intention of doing so in the future, where plaintiffs complained that procedures entailed inescapable delays and so precluded conducting elections promptly enough to permit participation by many farmworkers engaged in production of crops having short seasons and that union had declined to pursue those procedures due to procedures' asserted futility. A.R.S. § 23-1389; U.S.C.A.Const. art. 3, § 1 et seq.

[8] Federal Courts 170B ⚿13.5

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General

170Bk12 Case or Controversy Requirement
170Bk13.5 k. Labor Relations; Social Security. Most Cited Cases
(Formerly 170Bk13)
Plaintiffs' attack on Arizona Agricultural Employment Relation Act's limitation on consumer publicity presented justiciable case or controversy, where violations of Act could be criminally punishable, where plaintiffs maintained that consumer publicity provision unconstitutionally penalized inaccuracies inadvertently uttered in the course of consumer appeals, where plaintiff's union had actively engaged in consumer publicity campaign in the past in Arizona, and where plaintiffs alleged an intention to continue to engage in boycott activities in Arizona. U.S.C.A.Const. art. 3, § 1 et seq.; Amend. 1; A.R.S. §§ 23-1385[B] [8] , 23-1390[C, E, J, K].

[9] Federal Courts 170B 13.5

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13.5 k. Labor Relations; Social Security. Most Cited Cases
(Formerly 170Bk13)
Plaintiffs' attack on criminal penalty provision of Arizona Agricultural Employment Relations Act presented justiciable case or controversy, where plaintiffs contended that penalty provision was unconstitutionally vague and that they could not be sure whether criminal sanctions would be visited upon them for engaging in organizing, boycotting, picketing, striking, and collective-bargaining activities regulated by various provisions of the Act. A.R.S. §§ 23-1381 to 23-1395, 23-1392; U.S.C.A.Const. art. 3, § 1 et seq.

[10] Federal Courts 170B 13.5

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13.5 k. Labor Relations; Social Security. Most Cited Cases
(Formerly 170Bk13)
Plaintiffs' challenge to access provision of Arizona Agricultural Employment Relations Act did not present justiciable case or controversy, where, while plaintiff union might seek access to employers' property in order to organize or simply to communicate with farmworkers, it was conjectural to anticipate that access would be denied, where it was impossible to know whether access would be denied to places fitting plaintiffs' constitutional claim, and where opinion would be patently advisory until plaintiffs could assert interest in seeking access to particular facilities as well as palpable basis for believing that access would be refused. A.R.S. § 23-1385[C]; U.S.C.A.Const. art. 3, § 1 et seq.; Amends. 1, 14.

[11] Federal Courts 170B 13.5

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk12 Case or Controversy Requirement
170Bk13.5 k. Labor Relations; Social Security. Most Cited Cases
(Formerly 170Bk13)
Plaintiffs' challenge to compulsory arbitration provision of Arizona Agricultural Employment Relations Act did not present justiciable case or controversy, where, even assuming the occurrence of an arguably unlawful strike, employers could seek to pursue range of responses other than seeking injunction and agreeing to arbitrate, and where plaintiffs never contested constitutionality of arbitration clause. A.R.S. §§ 23-1393, 23-1393 [B] ; U.S.C.A.Const. art. 3, § 1 et seq.; Amends. 5, 7, 14.

[12] Federal Courts 170B 43

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk43 k. Questions of State or Foreign Law Involved. Most Cited Cases

Abstention doctrine contemplates that deference to state court adjudication be made only where issue of state law is uncertain, but when state statute at issue is fairly subject to interpretation which will render unnecessary or substantially modify federal constitutional question, abstention may be required in order to avoid unnecessary friction in federal-state relations, tentative decisions on questions of state law, and premature constitutional adjudication.

[13] Federal Courts 170B ⚿55

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk47 Particular Cases and Subjects, Abstention
170Bk55 k. License and Regulation of Occupations. Most Cited Cases
District court properly refused to abstain from considering constitutional challenge to statutory election procedures of Arizona Agricultural Employment Relations Act, where state court construction of provision governing election procedures would not have obviated need for decision of constitutional issue or have materially altered question to be decided. A.R.S. § 23-1389; U.S.C.A.Const. art. 3, § 1 et seq.

[14] Federal Courts 170B ⚿55

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk47 Particular Cases and Subjects, Abstention
170Bk55 k. License and Regulation of Occupations. Most Cited Cases
District court erred in refusing to abstain from adjudicating plaintiffs' claim challenging constitutionality of criminal penalty provision of Arizona Agricultural Employment Relations Act, where plaintiffs themselves argued that until provision was enforced it would be impossible to know what would be considered violation of the Act and where statute was reasonably susceptible of construction that might undercut or modify plaintiffs' vagueness attack. U.S.C.A.Const. art. 3, § 1 et seq.; Amend. 1; A.R.S. § 23-1392.

[15] Federal Courts 170B ⚿55

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(B) Right to Decline Jurisdiction; Abstention Doctrine
170Bk47 Particular Cases and Subjects, Abstention
170Bk55 k. License and Regulation of Occupations. Most Cited Cases
District court erred in refusing to abstain from adjudicating plaintiffs' claim challenging consumer publicity provision of Arizona Agricultural Employment Relations Act, where provision was subject to various interpretations and thus interpretation by state courts was required. U.S.C.A.Const. art. 3, § 1 et seq.; Amend. 1; A.R.S. § 23-1385[B] [8].

[16] Constitutional Law 92 ⚿90.1(7.1)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(7) Labor Matters
92k90.1(7.1) k. In General; Picketing. Most Cited Cases
(Formerly 92k90.1(7))

Federal Courts 170B ⚿6

170B Federal Courts
170BI Jurisdiction and Powers in General
170BI(A) In General
170Bk3 Jurisdiction in General; Nature and Source
170Bk6 k. State or Federal Matters. Most Cited Cases

Labor and Employment 231H ⚿1195(7)

231H Labor and Employment
231HXII Labor Relations

231HXII(D) Bargaining Representatives
231Hk1186 Election of Representative
231Hk1195 Administrative Review of Election
231Hk1195(7) k. Weight and Sufficiency. Most Cited Cases
(Formerly 232Ak210.1, 232Ak210 Labor Relations)
Plaintiffs' general complaints that statutory election procedures of Arizona Agricultural Employment Relations Act were ineffective were matters for Arizona Legislature and not federal courts, as Arizona was not constitutionally obliged to provide procedure pursuant to which agricultural employees, through chosen representative, might compel their employers to negotiate and fact that Arizona had undertaken to do so in an assertedly niggardly fashion presented as a general matter no First Amendment problems. A.R.S. §§ 23-1381 to 23-1395, 23-1389; U.S.C.A.Const. Amend. 1.

[17] Constitutional Law 92 ⚖90.1(7.1)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(7) Labor Matters
92k90.1(7.1) k. In General; Picketing. Most Cited Cases
(Formerly 92k90.1(7))

Labor and Employment 231H ⚖1112

231H Labor and Employment
231HXII Labor Relations
231HXII(C) Collective Bargaining
231Hk1111 Duty to Bargain Collectively
231Hk1112 k. In General. Most Cited Cases
(Formerly 232Ak177 Labor Relations)
Constitution does not afford employees the right to compel employers to engage in a dialogue or even to listen. U.S.C.A.Const. Amend. 1.
***2304 Syllabus** [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***289** Appellees (a farmworkers' union, a union agent, farmworkers, and a union supporter) brought suit in Federal District Court in Arizona seeking a declaration of the constitutionality of various provisions of Arizona's farm labor statute, as well as of the entire statute, and an injunction against its enforcement. A three-judge court ruled unconstitutional on various grounds the provisions (1) specifying procedures for the election of employee bargaining representatives; (2) limiting union publicity directed at consumers of agricultural products; (3) imposing a criminal penalty for violations of the statute; (4) excusing an agricultural employer from furnishing a union any materials, information, time, or facilities to enable it to communicate with the employer's employees (access provision); and (5) governing arbitration of labor disputes, construed by the court as mandating compulsory arbitration. Deeming these provisions inseparable from the remainder of the statute, the court went on to declare the whole statute unconstitutional and enjoined its enforcement.

Held:

1. The challenges to the provisions regulating election procedures, consumer publicity, and criminal sanctions present a case or controversy, but the challenges to the access and arbitration provisions are not justiciable. Pp. 2308-2312.

(a) The fact that appellees have not invoked the election procedures provision in the past or expressed any intention to do so in the future, does not defeat the justiciability of their challenge in view of the nature of their claim that delays attending the statutory election scheme and the technical limitations on who may vote in unit elections severely curtail their freedom of association. To await appellees' participation in an election would not assist the resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all, and as this question is dispositive of

appellees' challenge there is no warrant for postponing consideration of the election procedures claim. Pp. 2309-2310.

***290** b) With respect to appellees' claim that the consumer publicity provision (which on its face proscribes, as an unfair labor practice, dishonest, untruthful, and deceptive publicity) unconstitutionally penalizes inaccuracies inadvertently uttered, appellees have reason to fear prosecution for violation of the provision, where the State has not disavowed any intention of invoking the criminal penalty provision (which applies in terms to "[a]ny person . . . who violates any provision" of the statute) against unions that commit unfair labor practices. Accordingly, the positions of the parties are sufficiently adverse with respect to the consumer publicity provision to present a case or controversy. For the same reasons, a case or controversy is also presented by appellees' claim that such provision unduly restricts protected speech by limiting publicity to that directed at agricultural products of an employer with whom a union has a primary dispute. Pp. 2310-2311.

(c) Where it is clear that appellees desire to engage in prohibited consumer publicity campaigns, their claim that the criminal penalty provision is unconstitutionally vague was properly entertained by the District Court and may be raised in this appeal. If the provision were truly vague, appellees should not be expected to pursue their collective activities at their peril. P. 2311.

(d) Appellees' challenge to the access provision is not justiciable, where not only is it conjectural to anticipate that access ****2305** will be denied but, more importantly, appellees' claim that such provision violates the First and Fourteenth Amendments because it deprives the state agency responsible for enforcing the statute of any discretion to compel agricultural employers to furnish the enumerated items, depends upon the attributes of the situs involved. An opinion on the constitutionality of the provision at this time would be patently advisory, and adjudication of the challenge must wait until appellees can assert an interest in seeking access to particular facilities as well as a palpable basis for believing that access will be refused. Pp. 2311-2312.

(e) Similarly, any ruling on the allegedly compulsory arbitration provision would be wholly advisory, where the record discloses that there is no real and concrete dispute as to the application of the provision, appellees themselves acknowledging that employers may elect responses to an arguably unlawful strike other than seeking an injunction and agreeing to arbitrate, and appellees never having contested the constitutionality of the provision. P. 2312.

2. The District Court properly considered the constitutionality of the election procedures provision even though a prior construction of the provision by the Arizona state courts was lacking, but the court should ***291** have abstained from adjudicating the challenges to the consumer publicity and criminal penalty provisions until material unresolved questions of state law were determined by the Arizona courts. Pp. 2312-2316.

(a) A state-court construction of the election procedures provision would not obviate the need for decision of the constitutional issue or materially alter the question to be decided, as the resolution of the question whether such procedures are affected with a First Amendment interest at all is dispositive of appellees' challenge. P. 2313.

(b) The criminal penalty provision might be construed broadly as applying to all provisions of the statute affirmatively proscribing or commanding courses of conduct, or narrowly as applying only to certain provisions susceptible of being "violated," but in either case the provision is reasonably susceptible of constructions that might undercut or modify appellees' vagueness attack or otherwise significantly alter the constitutional questions requiring resolution. Pp. 2313-2314.

(c) In view of the fact that the consumer publicity provision is patently ambiguous and subject to varying interpretations which would substantially affect the constitutional question presented, the District Court erred in entertaining all aspects of appellees' challenge to such provision without the

benefit of a construction thereof by the Arizona courts. Pp. 2314-2316.

3. The District Court erred in invalidating the election procedures provision. Arizona was not constitutionally obliged to provide procedures pursuant to which agricultural employees, through a chosen representative might compel their employers to negotiate, and that it has undertaken to do so in an assertedly niggardly fashion, presents as a general matter no First Amendment problems. Moreover, the statute does not preclude voluntary recognition of a union by an agricultural employer. Pp. 2316-2317.

449 F.Supp. 449, reversed and remanded.

Rex E. Lee, Washington, D. C., for appellants.
***292** Jerome Cohen, Salinas, Cal., for appellees.
Mr. Justice WHITE delivered the opinion of the Court.
In this case we review the decision of a three-judge District Court setting aside as unconstitutional Arizona's farm labor statute. The District Court perceived particular constitutional problems with five provisions of the Act; deeming these provisions inseparable from the remainder of the Act, the court declared the entire Act unconstitutional and enjoined its enforcement. We conclude that the challenges to two of the provisions specifically invalidated did not ****2306** present a case or controversy within the jurisdiction of a federal court and hence should not have been adjudicated. Although the attacks on two other provisions were justiciable, we conclude that the District Court should have abstained from deciding the federal issues posed until material, unresolved questions of state law were determined by the Arizona courts. Finally, we believe that the District Court properly reached the merits of the fifth provision but erred in invalidating it. Accordingly, we reverse the judgment of the District Court.

I

In 1972, the Arizona Legislature enacted a comprehensive scheme for the regulation of agricultural employment relations. Arizona Agricultural Employment Relations Act, Ariz.Rev.Stat.Ann. §§ 23-1381 to 23-1395 (Supp.1978). The ***293** statute designates procedures governing the election of employee bargaining representatives, establishes various rights of agricultural employers and employees, proscribes a range of employer and union practices, and establishes a civil and criminal enforcement scheme to ensure compliance with the substantive provisions of the Act.

Appellees-the United Farm Workers National Union (UFW), an agent of the UFW, named farmworkers, and a supporter of the UFW-commenced suit in federal court to secure a declaration of the unconstitutionality of various sections of the Act, as well as of the entire Act, and an injunction against its enforcement. [FN1] A three-judge District Court was convened to entertain the action. On the basis of past instances of enforcement of the Act and in light of the provision for imposition of criminal penalties for " violat[ion of] any provision" of the Act, Ariz.Rev.Stat.Ann. § 23-1392 (Supp.1978), the court determined that appellees' challenges were presently justiciable.[FN2] Reaching the merits of some of the ***294** claims, the court ruled unconstitutional five distinct provisions of the Act. [FN3] Specifically, the court disapproved the section specifying election procedures, § 23-1389, [FN4] ****2307** on the ground that, by failing to account for seasonal employment peaks, it precluded the consummation of elections before most workers dispersed and hence frustrated the associational rights of agricultural employees. The court was also of the view that the Act restricted unduly the class of employees technically eligible to vote for bargaining representatives and hence burdened the workers' freedom of association in this second respect. [FN5]

FN1. The complaint asserted that the Act as a whole was invalid because it was pre-empted by the federal labor statutes, imposed an impermissible burden on commerce, denied appellees equal

protection, and amounted to a bill of attainder. In addition, various constitutional challenges were made to one or more parts of 15 provisions of the Act.

FN2. The District Court did not analyze section by section why a case or controversy existed with respect to each of the challenged sections. Rather, from instances of private and official enforcement detailed in a stipulation filed by the parties, the court concluded that the case was not "hypothetical, abstract, or generalized." 449 F.Supp. 449, 452 (Ariz.1978). It did, however, focus specifically on § 23-1392. That provision makes it a crime to violate any other provision of the Act; and although the District Court deemed this section severable from the rest of the Act, it relied heavily on its conclusion that it had jurisdiction to adjudicate the validity of this section to justify its considering the constitutionality of other sections of the Act. See 449 F.Supp., at 454. In proceeding to do so, it ruled that evidence would be considered only in connection with § 23-1389 dealing with the election of bargaining representatives and with respect to § 23-1385(C) limiting union access to employer properties, although evidence was introduced at trial relative to other provisions.

FN3. The court did not explain the basis for selecting from all of the challenges presented the five provisions on which it passed judgment.

FN4. Section 23-1389 declares that representatives selected by a secret ballot for the purpose of collective bargaining by the majority of agricultural employees in an appropriate bargaining unit shall be the exclusive representatives of all agricultural employees in such unit for the purpose of collective bargaining. And it requires the Agricultural Employment Relations Board to ascertain the unit appropriate for purposes of collective bargaining. The section further provides that the Board shall investigate any petition alleging facts specified in § 23-1389 indicating that a question of representation exists and schedule an appropriate hearing when the Board has reasonable cause to believe that a question of representation does exist. If the hearing establishes that such a question exists, the Board is directed to order an election by secret ballot and to certify the results thereof. Section 23-1389 details the manner in which an election is to be conducted. The section further provides for procedures by which an employer might challenge a petition for an election. Additionally, § 23-1389 stipulates that no election shall be directed or conducted in any unit within which a valid election has been held in the preceding 12 months.
Section 23-1389 also sets down certain eligibility requirements regarding participation in elections conducted thereunder. And it imposes obligations on employers to furnish information to the Board, to be made available to interested unions and employees, concerning bargaining-unit employees qualified to vote. Finally, the section specifies procedures whereby agricultural employees may seek to rescind the representation authority of a union currently representing those employees.

FN5. The election provision contemplates voting by "agricultural employees," § 23-1389(A), which is defined in § 23-1382(1) so as to exclude workers having only a brief history of employment with an agricultural employer.

***295** The court, moreover, ruled violative of the First and Fourteenth Amendments the provision limiting union publicity directed at consumers of agricultural products, § 23-1385(B)(8),[FN6] because as it construed the section, it proscribed innocent as well as deliberately false representations. The same section was declared infirm for the additional reason that it prohibited any consumer publicity, whether true or false, implicating a product trade name that "may include" agricultural products of an employer other than the employer with whom the

protesting labor organization is engaged in a primary dispute.

FN6. Section 23-1385(B)(8) makes it an unfair labor practice for a labor organization or its agents:
"To induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name."

The court also struck down the statute's criminal penalty provision, § 23-1392,[FN7] on vagueness grounds, and held unconstitutional the provision excusing the employer from furnishing to a labor organization any materials, information, time, or facilities to enable the union to communicate with the ***296** employer's employees. § 23-1385(C).[FN8] The court thought that the latter provision permitted employers to prevent access by unions to migratory farmworkers residing on their property, in violation of the guarantees of free speech and association.

FN7. Section 23-1392 provides:
"Any person who knowingly resists, prevents, impedes or interferes with any member of the board or any of its agents or agencies in the performance of duties pursuant to this article, or who violates any provision of this article is guilty of a class 1 misdemeanor. The provisions of this section shall not apply to any activities carried on outside the state of Arizona."

FN8. Section 23-1385(C) provides in part:
"No employer shall be required to furnish or make available to a labor organization, and no labor organization shall be required to furnish or make available to an employer, materials, information, time, or facilities to enable such employer or labor organization, as the case may be, to communicate with employees of the employer, members of the labor organization, its supporters, or adherents."

Finally, the court disapproved a provision construed as mandating compulsory arbitration, § 23-1393(B),[FN9] on the ground that it ****2308** denied employees due process and the right to a jury trial, which the District Court found guaranteed by the Seventh Amendment. The remainder of the Act fell "by ***297** reason of its inseparability and inoperability apart from the provisions found to be invalid." 449 F.Supp. 449, 467 (Ariz.1978).

FN9. Section 23-1393(B) provides:
"In the case of a strike or boycott, or threat of a strike or boycott, against an agricultural employer, the court may grant, and upon proper application shall grant as provided in this section, a ten-day restraining order enjoining such a strike or boycott, provided that if an agricultural employer invokes the court's jurisdiction to issue the ten-day restraining order to enjoin a strike as provided by this subsection, said employer must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues. In the event the parties cannot agree on an arbitrator within two days after the court awards a restraining order, the court shall appoint one to decide the unresolved issues. Any agricultural employer shall be entitled to injunctive relief accorded by Rule 65 of the Arizona Rules of Civil Procedure upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities. For the purpose of this subsection, an agricultural commodity or commodities for human consumption

with a market value of five thousand dollars or more shall constitute commercial quantities."

Appellants sought review by this Court of the judgment below. Because of substantial doubts regarding the justiciability of appellees' claims, we postponed consideration of our jurisdiction to review the merits. 439 U.S. 891, 99 S.Ct. 247, 58 L.Ed.2d 236 (1978). We now hold that, of the five provisions specifically invalidated by the District Court,[FN10] only the sections pertaining to election of bargaining representatives, consumer publicity, and imposition of criminal penalties are susceptible of judicial resolution at this time. We further conclude that the District Court should have abstained from adjudicating appellees' challenge to the consumer publicity and criminal penalty provisions, although we think the constitutionality of the election procedures was properly considered even lacking a prior construction by the Arizona courts. We are unable to sustain the District Court's declaration, however, that the election procedures are facially unconstitutional.

> FN10. Appellees challenged numerous provisions before the District Court not expressly considered by that court. After disapproving the five provisions that we address on this appeal, the court concluded that "there is obviously no need to rule on plaintiffs' other contentions including the claimed equal protection violation." 449 F.Supp., at 466. The court then enjoined enforcement of the Act in its entirety, finding the provisions not explicitly invalidated to be inseparable from those actually adjudicated. *Id.*, at 467. We find insufficient reason to consider in this Court in the first instance appellees' challenges to the provisions on which the District Court did not specifically pass judgment.

II

[1] We address first the threshold question whether appellees have alleged a case or controversy within the meaning of Art. III of the Constitution or only abstract questions not currently justiciable by a federal court. The difference between an abstract question and a "case or controversy" is one of degree, of course, and is not discernible by any precise test. ***298** See *Maryland Casualty Co. v. Pacific Coal & Oil Co.*, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). The basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract." *Railway Mail Assn. v. Corsi*, 326 U.S. 88, 93, 65 S.Ct. 1483, 1487, 89 L.Ed. 2072 (1945); see *Evers v. Dwyer*, 358 U.S. 202, 203, 79 S.Ct. 178, 179, 3 L.Ed.2d 222 (1958); *Maryland Casualty Co. v. Pacific Coal & Oil Co., supra.*

[2] A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. *O'Shea v. Littleton*, 414 U.S. 488, 494, 94 S.Ct. 669, 675, 38 L.Ed.2d 674 (1974). But "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593, 43 S.Ct. 658, 663, 67 L.Ed. 1117 (1923); see ****2309***Regional Rail Reorganization Act Cases*, 419 U.S. 102, 143, 95 S.Ct. 335, 358, 42 L.Ed.2d 320 (1974); *Pierce v. Society of Sisters*, 268 U.S. 510, 526, 45 S.Ct. 571, 574, 69 L.Ed. 1070 (1925).

[3][4][5] When contesting the constitutionality of a criminal statute, "it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 1216, 39 L.Ed.2d 505 (1974); see *Epperson v. Arkansas*, 393 U.S. 97, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968); *Evers v. Dwyer, supra*, at 204, 79 S.Ct., at 179. When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he " should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Doe v. Bolton*, 410 U.S. 179, 188, 93 S.Ct.

739, 745, 35 L.Ed.2d 201 (1973). But "persons having no fears of state prosecution except those that are imaginary or speculative, are not to be accepted as appropriate plaintiffs." *Younger v. Harris*, 401 U.S. 37, 42, 91 S.Ct. 746, 749, 27 L.Ed.2d 669 (1971); *Golden v. Zwickler*, 394 U.S. 103, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). When plaintiffs "do not claim that they have ever ***299** been threatened with prosecution, that a prosecution is likely, or even that a prosecution is remotely possible," they do not allege a dispute susceptible to resolution by a federal court. *Younger v. Harris, supra*, at 42, 91 S.Ct., at 749.

[6][7] Examining the claims adjudicated by the three-judge court against the foregoing principles, it is our view that the challenges to the provisions regulating election procedures, consumer publicity, and criminal sanctions-but only those challenges-present a case or controversy.[FN11] As already noted, appellees' principal complaint about the statutory election procedures is that they entail inescapable delays and so preclude conducting an election promptly enough to permit participation by many farmworkers engaged in the production of crops having short seasons. Appellees also assail the assertedly austere limitations on who is eligible to participate in elections under the Act. Appellees admittedly have not invoked the Act's election procedures in the past nor have they expressed any intention of doing so in the future. But, as we see it, appellees' reluctance in this respect does not defeat the justiciability of their challenge in view of the nature of their claim.

> FN11. Although appellants have contested the justiciability of appellees' several challenges to the Act's provisions, they have not contended that the standing of any particular appellee is more dubious than the standing of any other. We conclude that at least the UFW has a " sufficient 'personal stake' in a determination of the constitutional validity of [the three aforementioned provisions] to present 'a real and substantial controversy admitting of specific relief through a decree of a conclusive character.' " *Buckley v. Valeo*, 424 U.S. 1, 12, 96 S.Ct. 612, 631, 46 L.Ed.2d 659 (1976) (footnote omitted), quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241, 57 S.Ct. 461, 464, 81 L.Ed. 617 (1937). See *NAACP v. Alabama*, 357 U.S. 449, 458, 78 S.Ct. 1163, 1169, 2 L.Ed.2d 1488 (1958). Accordingly, we do not assess the standing of the remaining appellees. See *Buckley v. Valeo, supra*, at 12, 96 S.Ct., at 631.

Appellees insist that agricultural workers are constitutionally entitled to select representatives to bargain with their employers over employment conditions. As appellees read the statute, only representatives duly elected under its provisions may compel an employer to bargain with them. But ***300** appellees maintain, and have adduced evidence tending to prove, that the statutory election procedures frustrate rather than facilitate democratic selection of bargaining representatives. And the UFW has declined to pursue those procedures, not for lack of interest in representing Arizona farmworkers in negotiations with employers, but due to the procedures' asserted futility. Indeed, the UFW has in the past sought to represent Arizona farmworkers and has asserted in its complaint a desire to organize such workers and to represent them in collective bargaining. Moreover, ****2310** the UFW has participated in nearly 400 elections in California under procedures thought to be amenable to prompt and fair elections. The lack of a comparable opportunity in Arizona is said to impose a continuing burden on appellees' associational rights.

Even though a challenged statute is sure to work the injury alleged, however, adjudication might be postponed until "a better factual record might be available." *Regional Rail Reorganization Act Cases, supra*, 419 U.S., at 143, 95 S.Ct., at 358. Thus, appellants urge that we should decline to entertain appellees' challenge until they undertake to invoke the Act's election procedures. In that way, the Court might acquire information regarding how the challenged procedures actually operate, in lieu of the predictive evidence that appellees introduced at trial.[FN12] We ***301** are persuaded, however, that awaiting appellees' participation in an election

would not assist our resolution of the threshold question whether the election procedures are subject to scrutiny under the First Amendment at all. As we regard that question dispositive to appellees' challenge-as elaborated below-we think there is no warrant for postponing adjudication of the election claim.

> FN12. Though waiting until appellees invoke unsuccessfully the statutory election procedures would remove any doubt about the existence of concrete injury resulting from application of the election provision, little could be done to remedy the injury incurred in the particular election. Challengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment. See, *e. g., Dunn v. Blumstein* , 405 U.S. 330, 333 n. 2, 92 S.Ct. 995, 998, 31 L.Ed.2d 274 (1972); *Moore v. Ogilvie*, 394 U.S. 814, 816, 89 S.Ct. 1493, 1494, 23 L.Ed.2d 1 (1969); *Williams v. Rhodes*, 393 U.S. 23, 34-35, 89 S.Ct. 5, 12, 21 L.Ed.2d 24 (1968). Justiciability in such cases depends not so much on the fact of past injury but on the prospect of its occurrence in an impending or future election. See, *e. g., Storer v. Brown*, 415 U.S. 724, 737 n. 8, 94 S.Ct. 1274, 1282, 39 L.Ed.2d 714 (1974); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n. 5, 93 S.Ct. 1245, 1249, 36 L.Ed.2d 1 (1973); *Dunn v. Blumstein, supra*, at 333 n. 2, 92 S.Ct., at 998. There is value in adjudicating election challenges notwithstanding the lapse of a particular election because "[t]he construction of the statute, an understanding of its operation, and possible constitutional limits on its application, will have the effect of simplifying future challenges, thus increasing the likelihood that timely filed cases can be adjudicated *before* an election is held." *Storer v. Brown, supra*, at 737 n. 8, 94 S.Ct., at 1283 (emphasis added).

[8] Appellees' twofold attack on the Act's limitation on consumer publicity is also justiciable now. Section 23-1385(B)(8) makes it an unfair labor practice "[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity." And violations of that section may be criminally punishable. § 23-1392. Appellees maintain that the consumer publicity provision unconstitutionally penalizes inaccuracies inadvertently uttered in the course of consumer appeals.

The record shows that the UFW has actively engaged in consumer publicity campaigns in the past in Arizona, and appellees have alleged in their complaint an intention to continue to engage in boycott activities in that State. Although appellees do not plan to propagate untruths, they contend-as we have observed-that "erroneous statement is inevitable in free debate." *New York Times Co. v. Sullivan*, 376 U.S. 254, 271, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964). They submit that to avoid criminal prosecution they must curtail their consumer appeals, and thus forgo full exercise of what they insist are their First Amendment rights. It is urged, accordingly, that their challenge to the limitation on consumer publicity plainly poses an actual case or controversy.

***302** Appellants maintain that the criminal penalty provision has not yet been applied and may never be applied to commissions of unfair labor practices, including forbidden consumer publicity. But, as we have noted, when fear of criminal prosecution under an ****2311** allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not "first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute." *Steffel v. Thompson*, 415 U.S., at 459, 94 S.Ct., at 1216. The consumer publicity provision on its face proscribes dishonest, untruthful, and deceptive publicity, and the criminal penalty provision applies in terms to "[a]ny person . . . who violates any provision" of the Act. Moreover, the State has not disavowed any intention of invoking the criminal penalty provision against unions that commit unfair labor practices. Appellees are thus not without

some reason in fearing prosecution for violation of the ban on specified forms of consumer publicity. [FN13] In our view, the positions of the parties are sufficiently adverse with respect to the consumer publicity provision proscribing misrepresentations to present a case or controversy within the jurisdiction of the District Court.

> FN13. Even independently of criminal sanctions, § 23-1385(B)(8) affirmatively prohibits the variety of consumer publicity specified therein. We think that the prospect of issuance of an administrative cease-and-desist order, § 23-1390(C), or a court-ordered injunction, §§ 23-1390(E), (J), (K), against such prohibited conduct provides substantial additional support for the conclusion that appellees' challenge to the publicity provision is justiciable.

Section 23-1385(B)(8) also is said to limit consumer appeals to those directed at products with whom the labor organization involved has a primary dispute; as appellees construe it, it *proscribes* " publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name." Appellees challenge that limitation as unduly restricting protected speech. Appellees***303** have in the past engaged in appeals now arguably prohibited by the statute and allege an intention to continue to do the same. For the reasons that appellees' challenge to the first aspect of the consumer publicity provision is justiciable, we think their claim directed against the second aspect may now be entertained as well.

[9] We further conclude that the attack on the criminal penalty provision, itself, is also subject to adjudication at this time. Section 23-1392 authorizes imposition of criminal sanctions against " [a]ny person . . . who violates any provision" of the Act. Appellees contend that the penalty provision is unconstitutionally vague in that it does not give notice of what conduct is made criminal. Appellees aver that they have previously engaged, and will in the future engage, in organizing, boycotting, picketing, striking, and collective-bargaining activities regulated by various provisions of the Act.[FN14] They assert that they cannot be sure whether criminal sanctions may be visited upon them for pursuing any such conduct, much of which is allegedly constitutionally protected. As we have noted, it is clear that appellees desire to engage at least in consumer publicity campaigns prohibited by the Act; accordingly, we think their challenge to the precision of the criminal penalty provision, itself, was properly entertained by the District Court and may be raised here on appeal. If the provision were truly vague, appellees should not be expected to pursue their collective activities at their peril.

> FN14. *E. g.*, § 23-1385(C) (access to employer's property); § 23-1385(B)(7) (boycotts); § 23-1385(B)(12) (picketing and boycotts); § 23-1385(B)(13) (striking by minorities); §§ 23-1384, 23-1385(D) (collective bargaining).

[10] Appellees' challenge to the access provision, however, is not justiciable. The provision, § 23-1385(C), stipulates that "[n]o employer shall be required to furnish or make available to a labor organization . . . information, time, or facilities to enable such . . . labor organization . . . to communicate with ***304** employees of the employer, members of the labor organization, its supporters, or adherents." Appellees insist, and the District Court held, that this provision deprives the Arizona Employment Relations Board-charged ****2312** with responsibility for enforcing the Act-of any discretion to compel agricultural employers to furnish materials, information, time, or facilities to labor organizations desirous of communicating with workers located on the employers' property and that the section for this reason violates the First and Fourteenth Amendments to the Constitution.

It may be accepted that the UFW will inevitably seek access to employers' property in order to organize or simply to communicate with farmworkers. But it is conjectural to anticipate that access will be denied. More importantly, appellees' claim depends inextricably upon the attributes of

the situs involved. They liken farm labor camps to the company town involved in *Marsh v. Alabama*, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946), in which the First Amendment was held to operate. Yet it is impossible to know whether access will be denied to places fitting appellees' constitutional claim. We can only hypothesize that such an event will come to pass, and it is only on this basis that the constitutional claim could be adjudicated at this time. An opinion now would be patently advisory; the adjudication of appellees' challenge to the access provision must therefore await at least such time as appellees can assert an interest in seeking access to particular facilities as well as a palpable basis for believing that access will be refused.

[11] Finally, the constitutionality of the allegedly compulsory arbitration provision was also improperly considered by the District Court. That provision specifies that an employer may seek and obtain an injunction "upon the filing of a verified petition showing that his agricultural employees are unlawfully on strike or are unlawfully conducting a boycott, or are unlawfully threatening to strike or boycott, and that the ***305** resulting cessation of work or conduct of a boycott will result in the prevention of production or the loss, spoilage, deterioration, or reduction in grade, quality or marketability of an agricultural commodity or commodities for human consumption in commercial quantities." § 23-1393(B). If an employer invokes a court's jurisdiction to issue a temporary restraining order to enjoin a *strike*, the employer "must as a condition thereto agree to submit the dispute to binding arbitration as the means of settling the unresolved issues." And if the parties cannot agree on an arbitrator, the court must appoint one.

On the record before us, there is an insufficiently real and concrete dispute with respect to application of this provision. Appellees themselves acknowledge that, assuming an arguably unlawful strike will occur, employers may elect to pursue a range of responses other than seeking an injunction and agreeing to arbitrate. Moreover, appellees have never contested the constitutionality of the arbitration clause. They declare that "[t]he three judge court below on its own motion found the binding arbitration provision of § 1393(B) violative of substantive due process and the Seventh Amendment." Brief for Appellees 71 n. 153. Appellees, instead, raised other challenges to the statute's civil enforcement scheme, which we do not consider on this appeal. See n. 10, *supra*. It is clear, then, that any ruling on the compulsory arbitration provision would be wholly advisory.

III

Appellants contend that, even assuming any of appellees' claims are justiciable, the District Court should have abstained from adjudicating those claims until the Arizona courts might authoritatively construe the provisions at issue. We disagree that appellees' challenge to the statutory election procedures should first be submitted to the Arizona courts, but we think that the District Court should have abstained from considering the constitutionality of the criminal ***306** penalty provision and the consumer publicity provision pending review by the state courts.

[12] As we have observed, " '[a]bstention . . . sanctions . . . escape ****2313** [from immediate decision] only in narrowly limited "special circumstances." ' " *Kusper v. Pontikes*, 414 U.S. 51, 54, 94 S.Ct. 303, 306, 38 L.Ed.2d 260 (1973), quoting *Lake Carriers' Assn. v. MacMullan*, 406 U.S. 498, 509, 92 S.Ct. 1749, 1756, 32 L.Ed.2d 257 (1972). "The paradigm of the 'special circumstances' that make abstention appropriate is a case where the challenged state statute is susceptible of a construction by the state judiciary that would avoid or modify the necessity of reaching a federal constitutional question." *Kusper v. Pontikes, supra*, at 54, 94 S.Ct., at 306; see *Zwickler v. Koota*, 389 U.S. 241, 249, 88 S.Ct. 391, 396, 19 L.Ed.2d 444 (1967); *Harrison v. NAACP*, 360 U.S. 167, 176-177, 79 S.Ct. 1025, 1030, 3 L.Ed.2d 1152 (1959); *Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Of course, the abstention doctrine " contemplates that deference to state court adjudication only be made where the issue of state law is uncertain." *Harman v. Forssenius*, 380 U.S. 528, 534, 85 S.Ct. 1177, 1182, 14 L.Ed.2d 50 (1965). But when the state statute at issue is "fairly

subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question," *id.*, at 535, 85 S.Ct., at 1182, abstention may be required "in order to avoid unnecessary friction in federal-state relations, interference with important state functions, tentative decisions on questions of state law, and premature constitutional adjudication," *id.*, at 534, 85 S.Ct., at 1182.

[13] We think that a state-court construction of the provision governing election procedures would not obviate the need for decision of the constitutional issue or materially alter the question to be decided. As we shall discuss, our resolution of the question whether the statutory election procedures are affected with a First Amendment interest at all is dispositive of appellees' challenge. And insofar as it bears on that matter, the statute is pointedly clear. Accordingly, we perceive no basis for declining to decide appellees' challenge to the election procedures, notwithstanding the absence of a prior state-court adjudication.

[14] ***307** We conclude, however, that the District Court should have postponed resolution of appellees' challenge to the criminal penalty provision. That section provides in pertinent part that "[a]ny person . . . who violates any provision of [the Act] is guilty of a . . . misdemeanor." § 23-1392. Appellees maintain that the penalty provision leaves substantial doubt regarding what activities will elicit criminal sanctions. The District Court so concluded, observing that " [c]onsidering the enormous variety of activities covered by the Act, [the penalty section] is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning." 449 F.Supp., at 453. The court elaborated: "There is no way for anyone to guess whether criminal provisions will apply to any particular conduct, in advance, and it is clear that the statute is unconstitutionally vague and does not adequately define prohibited conduct and is, therefore, in violation of the due process clause of the Fourteenth Amendment." *Ibid.*

Appellants, themselves, do not argue that the criminal penalty provision is unambiguous. Indeed, they insist that until the provision is enforced "it is impossible to know what will be considered a 'violatio[n]' of the Act." Brief for Appellants 37. Appellants submit that various unfair labor practices, for example, have not been treated as yet as criminal violations.

It is possible, however, that the penalty provision might be construed broadly as applying to all sections of the Act that affirmatively proscribe or command courses of conduct. In terms it reaches " [a]ny person . . . who violates any provision of" the Act. Alternatively, the Arizona courts might conclude that only limited portions of the Act are susceptible of being "violated" and thus narrowly define the reach of the penalty section. In either case, it is evident that the statute is reasonably susceptible of constructions that might undercut or modify appellees' vagueness attack. It may be that, if construed broadly, ****2314** the penalty provision ***308** would operate in conjunction with substantive provisions of the Act to restrict unduly the pursuit of First Amendment activities. But it is at least evident that an authoritative construction of the penalty provision may significantly alter the constitutional questions requiring resolution.[FN15]

> FN15. The dissent suggests that § 23-1392 is unambiguous and needs no construction and that abstention is therefore improper. But the District Court invalidated § 23-1392 on vagueness grounds, and the State's position with respect to the issue is such that we are reluctant to conclude that appellees' challenge to § 23-1392 on vagueness grounds is without substance and hence that it contains no ambiguity warranting abstention.

If there were to be no abstention regarding § 23-1392 on the basis that it clearly criminalizes any departure from the command of any provision of the Act, adequate consideration of whether the section is unconstitutionally overbroad would require inquiry into whether some conduct prohibited by the Act is constitutionally shielded from criminal punishment. But that would entail dealing with the validity of provisions about which there may be no case or controversy or with respect to which

abstention is the proper course.

We have noted, of course, that when "extensive adjudications, under the impact of a variety of factual situations, [would be required in order to bring a challenged statute] within the bounds of permissible constitutional certainty," abstention may be inappropriate. *Baggett v. Bullitt*, 377 U.S. 360, 378, 84 S.Ct. 1316, 1326, 12 L.Ed.2d 377 (1964). But here the Arizona courts may determine in a single proceeding what substantive provisions the penalty provision modifies. In this case, the " uncertain issue of state law [turns] upon a choice between one or several alternative meanings of [the] state statute." *Ibid.* Accordingly, we think the Arizona courts should be "afforded a reasonable opportunity to pass upon" the section under review. *Harrison v. NAACP, supra*, 360 U.S., at 176, 79 S.Ct., at 1030.

[15] The District Court should have abstained with respect to appellees' challenges to the consumer publicity provision as well. Appellees have argued that Arizona's proscription of misrepresentations by labor organizations in the course of appeals to consumers intolerably inhibits the exercise of their ***309** First Amendment right freely to discuss issues concerning the employment of farm laborers and the production of crops. Appellants submit, however, that the statutory ban on untruthful consumer publicity might fairly be construed by an Arizona court as proscribing only misrepresentations made with knowledge of their falsity or in reckless disregard of truth or falsity. As that is the qualification that appellees insist the prohibition of misstatements must include, a construction to that effect would substantially affect the constitutional question presented.

It is reasonably arguable that the consumer publicity provision is susceptible of the construction appellants suggest. Section 23-1385(B)(8) makes it unlawful "[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by use of dishonest, untruthful *and* deceptive publicity." (Emphasis added.) On its face, the statute does not forbid the propagation of untruths without more. Rather, to be condemnable, consumer publicity must be "dishonest" and " deceptive" as well as untruthful. And the Arizona courts may well conclude that a "dishonest" and " untruthful" statement is one made with knowledge of falsity or in reckless disregard of falsity. [FN16]

> FN16. Although construing the section in this manner would apparently satisfy appellees, we should not be understood as declaring that the section and its criminal sanction would be unconstitutional if they proscribed damaging falsehoods perpetrated unknowingly or without recklessness. We have not adjudicated the role of the First Amendment in suits by private parties against nonmedia defendants, nor have we considered the constitutional implications of causes of action for injurious falsehoods outside the area of defamation and the ground covered by *Time, Inc. v. Hill*, 385 U.S. 374, 87 S.Ct. 534, 17 L.Ed.2d 456 (1967). *Linn v. Plant Guard Workers*, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), holding that application of state defamation remedies for speech uttered in a labor dispute is dependent upon a showing of knowledge or recklessness, was grounded in federal labor policy, though the case had constitutional overtones.

Furthermore, we express no view on whether the section would be vulnerable to constitutional attack if it declared false consumer publicity, whether innocent or culpable, to be an unfair labor practice and had as its only sanction a prospective cease-and-desist order or court injunction directing that the defendant cease publishing material already determined to be false.

***310 **2315** To be sure, the consumer publicity provision further provides that "[p]ermissible inducement or encouragement . . . means truthful, honest *and* nondeceptive publicity . . . ." (Emphasis added.) That phrase may be read to indicate that representations not having all three attributes are prohibited under the Act. But it could be held that the phrase denotes only that " truthful, honest and nondeceptive publicity" is

permissible, not that any other publicity is prohibited. When read in conjunction with the prohibitory clause preceding it, the latter phrase thus introduces an ambiguity suitable for state-court resolution. In sum, we think adjudication of appellees' attack on the statutory limitation on untruthful consumer appeals should await an authoritative interpretation of that limitation by the Arizona courts.

We further conclude that the District Court should have abstained from adjudicating appellees' additional contention that the consumer publicity provision unconstitutionally precludes publicity not directed at the products of employers with whom the protesting labor organization has a primary dispute. We think it is by no means clear that the statute in fact *prohibits* publicity solely because it is directed at the products of particular employers. As already discussed, § 23-1385(B)(8) declares it an unfair labor practice to induce or encourage the ultimate consumer of agricultural products to refrain from purchasing products "by the use of dishonest, untruthful and deceptive publicity." The provision then stipulates:
"Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product*311 produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name."

The section nowhere proscribes publicity directed at products of employers with whom a labor organization is not engaged in a primary dispute. It indicates only that publicity ranging beyond a primary disagreement is not accorded affirmative statutory protection. The Arizona courts might reasonably determine that the language in issue does no more than that and might thus ameliorate appellees' concerns.[FN17]

FN17. Were the section construed to prohibit all appeals directed against the products of agricultural employers whose employees the labor organization did not actually represent, its constitutionality would be substantially in doubt. Even picketing may not be so narrowly circumscribed. *AFL v. Swing*, 312 U.S. 321, 61 S.Ct. 568, 85 L.Ed. 855 (1941). Additional difficulties would arise were the section interpreted to intercept publicity by means other than picketing. Although we have previously concluded that picketing aimed at discouraging trade across the board with a truly neutral employer may be barred compatibly with the Constitution, *Carpenters v. Ritter's Cafe*, 315 U.S. 722, 62 S.Ct. 807, 86 L.Ed. 1143 (1942); cf. *NLRB v. Fruit Packers*, 377 U.S. 58, 84 S.Ct. 1063, 12 L.Ed.2d 129 (1964), we have noted that, for First Amendment purposes, picketing is qualitatively "different from other modes of communication." *Hughes v. Superior Court*, 339 U.S. 460, 465, 70 S.Ct. 718, 721, 94 L.Ed. 985 (1950); see *Buckley v. Valeo*, 424 U.S., at 17, 96 S.Ct., at 633; *Teamsters v. Vogt, Inc.*, 354 U.S. 284, 77 S.Ct. 1166, 1 L.Ed.2d 1347 (1957).

Moreover, § 23-1385(B)(8) might be construed, in light of § 23-1385(C), to prohibit only threatening speech. The latter provision states in pertinent part that "[t]he expressing of any views, argument, opinion or the making of any statement . . . or the dissemination of such views whether in written, printed, graphic, visual or auditory**2316 form, if such expression contains no threat of reprisal or force or promise of benefit, shall not constitute or be evidence of an unfair *312 labor practice . . . ." On its face, § 23-1385(C) would appear to qualify § 23-1385(B)(8), as the latter identifies "an unfair labor practice for a labor organization or its agents."
Were the consumer publicity provision interpreted to intercept only those expressions embodying a threat of force, the issue of its constitutional validity would assume a character wholly different from the question posed by appellees' construction.

Thus, we conclude that the District Court erred in

entertaining all aspects of appellees' challenge to the consumer publicity section without the benefit of a construction thereof by the Arizona courts. We are sensitive to appellees' reluctance to repair to the Arizona courts after extensive litigation in the federal arena. We nevertheless hold that in this case the District Court should not have adjudicated substantial constitutional claims with respect to statutory provisions that are patently ambiguous on their face. [FN18]

FN18. It has been suggested that the impact of abstention on appellees' pursuit of constitutionally protected activities should be reduced by directing the District Court to protect appellees against enforcement of the state statute pending a definitive resolution of issues of state law by the Arizona courts. See *Harrison v. NAACP*, 360 U.S. 167, 178-179, 79 S.Ct. 1025, 1031, 3 L.Ed.2d 1152 (1959). But this is a matter that is best addressed by the District Court in the first instance.

IV

[16] The merits of appellees' challenge to the statutory election procedures remain to be considered. Appellees contend, and the District Court concluded, that the delays assertedly attending the statutory election scheme and the technical limitations on who may vote in unit elections severely curtail appellees' freedom of association. This freedom, it is said, entails the liberty not only to join or sustain a labor union and collectively to express a position to an agricultural employer, but also to create or elect an organization entitled to invoke the statutory provision requiring an employer to bargain collectively with the certified representative of his employees.***313** As we see it, however, these general complaints that the statutory election procedures are ineffective are matters for the Arizona Legislature and not the federal courts.

[17] Accepting that the Constitution guarantees workers the right individually or collectively to voice their views to their employers, see *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979); cf. *Madison School Dist. v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167, 173-175, 97 S.Ct. 421, 425-426, 50 L.Ed.2d 376 (1976), the Constitution does not afford such employees the right to compel employers to engage in a dialogue or even to listen. Accordingly, Arizona was not constitutionally obliged to provide a procedure pursuant to which agricultural employees, through a chosen representative, might compel their employers to negotiate. That it has undertaken to do so in an assertedly niggardly fashion, then, presents as a general matter no First Amendment problems.[FN19] Moreover, the Act does not preclude voluntary recognition of a labor organization by an agricultural employer. Thus, in the event that an employer desires to bargain with a representative chosen by his employees independently of the statutory election procedures, such bargaining may readily occur. The statutory procedures need be pursued ****2317** only if farmworkers desire to designate exclusive bargaining representatives and to compel their employer to bargain-rights that are conferred by statute rather than the Federal Constitution. Accordingly, at this time, we are unable to discern any First Amendment difficulty with the Arizona statutory ***314** election scheme, whether or not the procedures are as fair or efficacious as appellees would like.

FN19. We do not consider whether the election procedures deny any of the appellees equal protection of the law. Although appellees have challenged other provisions of the Act on equal protection grounds, they have not directed such an argument in this Court against the section governing election procedures. We understand appellees' equal protection challenge to embrace the sections pertaining to access to an employer's property and consumer publicity. But we have determined that appellees' assault on the first provision is premature and that appellees' attack on the second should be held in abeyance pending resort to the

Arizona courts.

Reversed and remanded.

Mr. Justice BRENNAN with whom Mr. Justice MARSHALL joins, concurring in part and dissenting in part.

I join the opinion of the Court, with the exception that I respectfully dissent from the Court's holding that the District Court should have abstained and postponed resolution of appellees' constitutional challenge to § 23-1392, Ariz.Rev.Stat.Ann. (Supp.1978), until this statutory provision had been construed by the Arizona courts.

It must be stressed that "[a]bstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention . . . is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. . . . ' *County of Allegheny v. Frank Mashuda Co.,* 360 U.S. 185, 188-189, 79 S.Ct. 1060, 1063, 3 L.Ed.2d 1163, 1166 (1959)." *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 813, 96 S.Ct. 1236, 1244, 47 L.Ed.2d 483 (1976). If a state statute is susceptible of a construction that would avoid or significantly alter a constitutional issue, however, abstention is appropriate to avoid needless friction "between federal pronouncements and state policies." *Reetz v. Bozanich,* 397 U.S. 82, 87, 90 S.Ct. 788, 790, 25 L.Ed.2d 68 (1970). But, as the Court today correctly points out the state statute at issue must be " '*fairly* subject to an interpretation which will render unnecessary or substantially modify the federal constitutional question,' [*Harman v. Forssenius,* 380 U.S. 528], 535, 85 S.Ct. [1177], at 1182 [, 14 L.Ed.2d 50] [1965]." *Ante,* at 2313. (Emphasis supplied.) This is not the case with § 23-1392.[FN1]

FN1. Because of the ambiguous relationship between § 23-1385(C) and § 23-1385(B)(8), I concur in the Court's holding that the District Court should have abstained with respect to § 23-1385(B)(8).

Section 23-1392 provides in part:

"Any person who . . . violates any provision of this ***315** article is guilty of a ... misdemeanor. The provisions of this section shall not apply to any activities carried on outside the state of Arizona."

The District Court concluded concerning this provision that "[i]t would appear on [its] face . . . that it cuts across and covers the entire [Arizona Agricultural Employment Relations] Act, not just a limited area where a criminal penalty might be acceptable. It says in plain English that it applies to 'any person' and further [that] any person 'who violates any provision of this article is guilty of a misdemeanor . . . .' " 449 F.Supp. 449, 453 (Ariz.1978). The District Court found the provision unconstitutionally overbroad.[FN2] *Ibid.*

FN2. The District Court also found § 23-1392 to be "unconstitutionally vague." 449 F.Supp., at 453. The Court stated:

"Considering the enormous variety of activities covered by the Act, and the fact that . . . many of these involve First and Fourteenth Amendment constitutional rights, it is clearly a statutory provision so vague that men of common intelligence can only guess at its meaning.

"There is no way for anyone to guess whether criminal provisions will apply to any particular conduct, in advance, and it is clear that the statute is unconstitutionally vague and does not adequately define prohibited conduct and is, therefore, in violation of the due process clause of the Fourteenth Amendment." *Ibid.*

The District Court is clearly correct that the language of § 23-1392 is "plain and unambiguous."[FN3] ****2318***Davis v. Mann,* 377 U.S. 678, 690, 84 S.Ct. 1441, 1447, 12 L.Ed.2d 609 (1964). The statute is not "obviously susceptible of a limiting construction" that would avoid the federal constitutional question reached by the District Court. *Zwickler v. Koota,* 389 U.S. 241, 251 n. 14, 88 S.Ct. 391, 397, 19 L.Ed.2d 444 (1967). Of course, as every attorney knows, *any* statutory provision can be made ***316** ambiguous through a sufficiently assiduous application of legal discrimination. The Court resorts to such lawyerly legerdemain when it concludes that abstention is

appropriate because Arizona courts might perhaps find "that only limited portions of the [Agricultural Employment Relations] Act are susceptible of being 'violated' and thus narrowly define the reach of the penalty section." *Ante,* at 2313. But the potential ambiguity which the Court thus reads into § 23-1392 does not derive from the plain words of the statute. It is simply the Court's own invention, not an uncertainty that is "fairly" in the statute.[FN4]

> FN3. The fact that § 23-1392 is, for purposes of the abstention doctrine, "plain and unambiguous," does not necessarily mean that it cannot be unconstitutionally vague for purposes of the Due Process Clause of the Fourteenth Amendment. The section may plainly and unambiguously create criminal sanctions for violations of sections of the Act which, considered as criminal prohibitions, would be unconstitutionally vague.
>
> FN4. Even if the statute were ambiguous in the manner suggested by the Court, abstention would still be inappropriate. It is extraordinarily unlikely that, in a statute as complex and far ranging as this Act, a single adjudication could definitively specify the exact reach of § 23-1392. In such circumstances, we have held that a federal court should not abstain from exercising its jurisdiction. As we stated in *Procunier v. Martinez,* 416 U.S. 396, 401 n. 5, 94 S.Ct. 1800, 1805, 40 L.Ed.2d 224 (1974):
>
> "Where . . ., as in this case, the statute or regulation is challenged as vague because individuals to whom it plainly applies simply cannot understand what is required of them and do not wish to forswear all activity arguably within the scope of the vague terms, abstention is not required. [*Baggett v. Bullitt,* 377 U.S. 360,] 378, 84 S.Ct. [1316,] at 1326 [, 12 L.Ed.2d 377] [1964]. In such a case no single adjudication by a state court could eliminate the constitutional difficulty. Rather it would require ' extensive adjudications, under the impact of a variety of factual situations', to bring the challenged statute or regulation 'within the bounds of permissible constitutional certainty.' *Ibid.* "

Abstention is particularly inappropriate with respect to § 23-1392 because the provision impacts so directly on precious First Amendment rights. The statute creates sanctions for violations of the provisions of the Agricultural Employment Relations Act that regulate the speech of employees and employers. [FN5] This potential impairment of First Amendment ***317** interests strongly counsels against abstention. "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exist the ' special circumstances,' *Propper v. Clark,* 337 U.S. 472, 69 S.Ct. 1333, 93 L.Ed. 1480, prerequisite to its application must be made on a case-by-case basis. *Railroad Comm'n v. Pullman Co.,* 312 U.S. 496, 500, 61 S.Ct. 643, 645, 85 L.Ed. 971; *NAACP v. Bennett,* 360 U.S. 471, 79 S.Ct. 1192, 3 L.Ed.2d 1375." *Baggett v. Bullitt,* 377 U.S. 360, 375, 84 S.Ct. 1316, 1324, 12 L.Ed.2d 377 (1964). Relevant to the exercise of this equitable discretion, are "the constitutional deprivation alleged and the probable consequences of abstaining." *Harman v. Forssenius,* 380 U.S. 528, 537, 85 S.Ct. 1177, 1183, 14 L.Ed.2d 50 (1965). "This Court often has remarked that the equitable practice of abstention is limited by considerations of ' "the delay and expense to which application of the abstention doctrine inevitably gives rise." ' ****2319***Lake Carriers' Assn. v. MacMullan,* 406 U.S. [498], at 509, 92 S.Ct. [1749], at 1757 [, 32 L.Ed.2d 257], quoting *England v. Medical Examiners,* 375 U.S. 411, 418, 84 S.Ct. 461, 466, 11 L.Ed.2d 440, 446 (1964)." *Bellotti v. Baird,* 428 U.S. 132, 150, 96 S.Ct. 2857, 2867, 49 L.Ed.2d 844 (1976). Therefore, when "constitutionally protected rights of speech and association,"*Baggett v. Bullitt, supra,* at 378, 84 S.Ct., at 1326, are at stake, abstention becomes especially inappropriate. This is because " [i]n such [a] case to force the plaintiff who has commenced a federal action to suffer the delay of state court proceedings might itself effect the impermissible chilling of the very constitutional right he seeks to protect." *Zwickler v. Koota, supra,* at 252, 88 S.Ct., at 397.

FN5. Section 1385(B)(8), for example, makes it an unfair labor practice

"[t]o induce or encourage the ultimate consumer of any agricultural product to refrain from purchasing, consuming or using such agricultural product by the use of dishonest, untruthful and deceptive publicity. Permissible inducement or encouragement within the meaning of this section means truthful, honest and nondeceptive publicity which identifies the agricultural product produced by an agricultural employer with whom the labor organization has a primary dispute. Permissible inducement or encouragement does not include publicity directed against any trademark, trade name or generic name which may include agricultural products of another producer or user of such trademark, trade name or generic name." Section 23-1392 makes violation of § 23-1385(B)(8) a crime.

Even assuming that appellees have the financial resources to pursue this case through the Arizona courts, appellees may ***318** well avoid speech that is perhaps constitutionally protected throughout the long course of that litigation, because such speech might fall within the cold shadow of criminal liability.[FN6] The potential for this self-censorship is abhorrent to the First Amendment. It should be permitted by a court in equity only for the most important of reasons. It cannot be tolerated on the basis of the slender ambiguity which the Court has managed to create in this statute. Abstention on this issue is therefore manifestly unjustified.[FN7]

FN6. Appellees may be deterred from constitutionally protected speech even if the regulations which the Agricultural Employment Relations Act otherwise imposes on their speech are permissible under the First Amendment. This is because criminal sanctions discourage speech much more powerfully than do administrative regulations. Such sanctions would thus be more apt to cause employers and employees to "steer far wider of the unlawful zone," *Speiser v. Randall,* 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958), and more likely to contract the "breathing space" necessary for the survival of "First Amendment freedoms." *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). For this reason, it does not follow that because the First Amendment permits certain speech to be regulated, it must also permit such speech to be punished. See *Gertz v. Robert Welch, Inc.,* 418 U.S. 323, 348-350, 94 S.Ct. 2997, 3011-3012, 41 L.Ed.2d 789 (1974).

FN7. Because of the First Amendment interests involved, my view is that the District Court on remand should issue an injunction "to protect appellees against enforcement of the state statute pending a definitive resolution of issues of state law by the Arizona courts. See *Harrison v. NAACP*, 360 U.S. 167, 178-179, 79 S.Ct. 1025, 1031, 3 L.Ed.2d 1152 (1959)." *Ante,* at 2316 n. 18.

U.S.Ariz.,1979.
Babbitt v. United Farm Workers Nat. Union
442 U.S. 289, 99 S.Ct. 2301, 101 L.R.R.M. (BNA) 2428, 60 L.Ed.2d 895, 86 Lab.Cas. P 55,200

Briefs and Other Related Documents (Back to top)

- 1979 WL 199801 (Appellate Brief) Appellants' Reply Brief (Jan. 26, 1979)
- 1979 WL 213576 (Appellate Brief) Appellants' Reply Brief (Jan. 26, 1979)
- 1979 WL 199798 (Appellate Brief) Brief for the Appellees (Jan. 05, 1979)
- 1979 WL 199809 (Appellate Brief) Brief of ACLU Foundation of Southern California; Arizona Civil Liberties Union; American Friends Service Committee; United Automobile, Aerospace & Agricultural Implement Workers of America; Arizona State AFL-CIO; Communication Workers of America; Fre sh Fruit and Vegetable Workers Local 73-B, Amalgamated Meat Cutters and Butcher Workmen of North America AFL-CIO; International Ladies Garment Workers Union; International Woodworkers of America; Laborers International Union of North America, Local 3 (Jan. 05, 1979)
- 1979 WL 199806 (Appellate Brief) Brief of Amicus Curiae, Agricultural Labor Relations Board

(Jan. 04, 1979)
• 1978 WL 207293 (Appellate Brief) Brief for the Appellants (Nov. 24, 1978)
• 1978 WL 207294 (Appellate Brief) Brief of Amici Curiae, Agricultural Producers Labor Committee and South Central Farmers Committee (Nov. 24, 1978)
• 1978 WL 207295 (Appellate Brief) Motion for Leave to File a Brief as Amicus Curiae and Brief for the American Federation of Labor and Congress of Industrial Organizations as Amicus Curiae (Oct. Term 1978)
• 1978 WL 223286 (Appellate Brief) Appellants' Brief in Opposition to Appellees' Motion to Affirm (Sep. 21, 1978)

END OF DOCUMENT

EXHIBIT 5

455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362
(Cite as: 455 U.S. 489, 102 S.Ct. 1186)

Briefs and Other Related Documents
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.U.S.Ill.,1982.

Supreme Court of the United States
VILLAGE OF HOFFMAN ESTATES, et al.,
Appellants,
v.
FLIPSIDE, HOFFMAN ESTATES, INC.
No. 80-1681.

Argued Dec. 9, 1981.
Decided March 3, 1982.
Rehearing Denied April 26, 1982.
See 456 U.S. 950, 102 S.Ct. 2023.

Action was instituted for declaratory and injunctive relief against enforcement of village ordinance. The United States District Court for the Northern District of Illinois, Eastern Division, George N. Leighton, J., 485 F.Supp. 400, entered judgment for defendants, and plaintiff appealed. The Court of Appeals, Sprecher, Circuit Judge, 639 F.2d 373, reversed, and the Supreme Court noted probable jurisdiction. The Supreme Court, Justice Marshall, held that: (1) village ordinance licensing and regulating the sale of items displayed "with" or " within proximity of" "literature encouraging illegal use of cannabis or illegal drugs" did not violate First Amendment rights of retailer which sold smoking accessories, since ordinance did not restrict speech as such, but simply regulated commercial marketing of items that might be used for an illicit purpose, and since the ordinance's restriction on manner of marketing did not appreciably limit retailer's communication of information, except to the extent it was directed at commercial activity promoting or encouraging illegal drug use; (2) the ordinance's language " designed * * * for use" was not unconstitutionally vague on its face, since the standard encompassed at least an item that was principally used with illegal drugs by virtue of its objective features, and the " designed for use" standard was sufficiently clear to cover at least some of the items sold by plaintiff retailer, such as "roach clips" and specially designed pipes; and (3) village ordinance was sufficiently clear that the speculative danger of arbitrary enforcement did not render it void for vagueness.

Reversed and remanded.

Justice White concurred in the judgment and filed an opinion.

West Headnotes

[1] Constitutional Law 92 ⚿82(4)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(4) k. Vagueness and Overbreadth in Restriction. Most Cited Cases
In a facial challenge to overbreadth and vagueness of a law, court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct; if it does not, then overbreadth challenge must fail, and court should then examine the facial vagueness challenge.

[2] Constitutional Law 92 ⚿82(4)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(4) k. Vagueness and Overbreadth in Restriction. Most Cited Cases
In a facial challenge to overbreadth and vagueness of a law, assuming the enactment implicates no constitutionally protected conduct, the court should uphold the challenge only if the enactment is impermissibly vague in all of its applications.

[3] Constitutional Law 92 ⚿47

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions

92k44 Determination of Constitutional Questions
92k47 k. Scope of Inquiry in General. Most Cited Cases
In evaluating a facial challenge to state law, federal court must consider any limiting construction that state court or enforcement agency has proffered.

[4] Constitutional Law 92 ⚿82(1)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(1) k. In General. Most Cited Cases
In determining whether an enactment reaches a substantial amount of constitutionally protected conduct, court should evaluate the ambiguous as well as the unambiguous scope of the enactment.

[5] Constitutional Law 92 ⚿42.2(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k41 Persons Entitled to Raise Constitutional Questions
92k42.2 Particular Questions or Grounds of Attack
92k42.2(1) k. In General. Most Cited Cases
Plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.

[6] Constitutional Law 92 ⚿90.2

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.2 k. Commercial Speech in General. Most Cited Cases
(Formerly 92k90.1(1))
Village ordinance licensing and regulating the sale of items displayed "with" or "within proximity of" " literature encouraging illegal use of cannabis or illegal drugs" did not violate First Amendment rights of retailer which sold smoking accessories, since ordinance did not restrict speech as such, but simply regulated commercial marketing of items that might be used for an illicit purpose, and since the ordinance's restriction on manner of marketing did not appreciably limit retailer's communication of information, except to the extent it was directed at commercial activity promoting or encouraging illegal drug use. U.S.C.A.Const.Amend. 1.

[7] Constitutional Law 92 ⚿90.2

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.2 k. Commercial Speech in General. Most Cited Cases
(Formerly 92k90.1(1))
The overbreadth doctrine does not apply to commercial speech. U.S.C.A.Const.Amend. 1.

[8] Constitutional Law 92 ⚿296(1)

92 Constitutional Law
92XII Due Process of Law
92k296 Regulation of Trade, Business, or Profession
92k296(1) k. In General. Most Cited Cases
Village ordinance licensing and regulating the sale of items displayed "with" or "within proximity of" " literature encouraging illegal use of cannabis or illegal drugs" did not violate the substantive due process rights of retailer which sold smoking accessories, since retailer's right to sell smoking accessories, and purchaser's right to buy and use them, were entitled only to minimal due process protection, and the regulation of items that had some lawful as well as unlawful uses was not an irrational means of discouraging drug use in the community. U.S.C.A.Const.Amend. 5.

[9] Constitutional Law 92 ⚿251.4

92 Constitutional Law
92XII Due Process of Law
92k251.4 k. Vagueness or Overbreadth. Most Cited Cases
A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process; however,

to succeed, complainant must demonstrate the law is impermissibly vague in all of its applications.

[10] Municipal Corporations 268 ⚿594(2)

268 Municipal Corporations
268X Police Power and Regulations
268X(A) Delegation, Extent, and Exercise of Power
268k594 Ordinances and Regulations in General
268k594(2) k. Form and Sufficiency in General. Most Cited Cases
For purposes of village ordinance requiring retailer to obtain a license if it sells any items, paraphernalia or accessories designed or marketed for use with illegal cannabis or drugs, the language " designed * * * for use" was not unconstitutionally vague on its face, since the standard encompassed at least an item that was principally used with illegal drugs by virtue of its objective features, and the " designed for use" standard was sufficiently clear to cover at least some of the items sold by plaintiff retailer, such as "roach clips" and specially designed pipes.

[11] Licenses 238 ⚿16(.1)

238 Licenses
238I For Occupations and Privileges
238k10 Subjects of License or Tax
238k16 Dealings in Particular Articles
238k16(.1) k. In General. Most Cited Cases
(Formerly 238k16)
Under ordinance requiring retailer to obtain license if it sells any items, effects, paraphernalia or accessories designed or marketed for use with illegal cannabis or drugs, retail store was required to obtain license if it deliberately displayed its wares in a manner that appealed to or encouraged illegal drug use, and plaintiff retailer had ample warning that its marketing activities required a license, because it displayed magazines and books dealing with illegal drugs close to pipes and colored rolling paper.

[12] Constitutional Law 92 ⚿82(4)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(4) k. Vagueness and Overbreadth in Restriction. Most Cited Cases
In reviewing a business regulation for facial vagueness, the principal inquiry is whether the law affords fair warning of what is proscribed.

[13] Licenses 238 ⚿7(1)

238 Licenses
238I For Occupations and Privileges
238k7 Constitutionality and Validity of Acts and Ordinances
238k7(1) k. In General. Most Cited Cases
Village ordinance which required retailer to obtain license if it sold items, effects, paraphernalia or accessories designed or marketed for use with illegal cannabis or drugs was sufficiently clear that the speculative danger of arbitrary enforcement did not render it void for vagueness.
****1188** Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***489** An ordinance of appellant village requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Guidelines define the items (such as "roach clips," which are used to smoke cannabis, "pipes," and "paraphernalia"), the sale of which is required to be licensed. Appellee, which sold a variety of merchandise in its store, including " roach clips" and specially designed pipes used to smoke marihuana, upon being notified that it was in possible violation of the ordinance, brought suit in Federal District Court, claiming that the ordinance is unconstitutionally vague and overbroad, and requesting injunctive and declaratory relief and damages. The District Court upheld the ordinance and awarded judgment to the village defendants. The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face.

Held: The ordinance is not facially overbroad or vague but is reasonably clear in its application to appellee. Pp. 1191-1196.

(a) In a facial challenge to the overbreadth and vagueness of an enactment, a court must first determine whether the enactment reaches a substantial amount of **1189 constitutionally protected conduct. If it does not, the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and should uphold such challenge only if the enactment is impermissibly vague in all of its applications. Pp. 1191-1192.

(b) The ordinance here does not violate appellee's First Amendment rights nor is it overbroad because it inhibits such rights of other parties. The ordinance does not restrict speech as such but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose and thus does not embrace noncommercial speech. With respect to any commercial speech interest implicated, the ordinance's restriction on the manner of marketing does not appreciably limit appellee's communication of information, except to the extent it is directed at commercial activity promoting or encouraging illegal drug use, an activity which, if deemed "speech," is speech proposing an illegal transaction and thus subject to government regulation or ban. It is irrelevant whether the ordinance has an overbroad scope encompassing other persons' commercial speech, since the overbreadth doctrine does not apply to commercial speech. Pp. 1192-1193.

*490 c) With respect to the facial vagueness challenge, appellee has not shown that the ordinance is impermissibly vague in all of its applications. The ordinance's language "designed .. . for use" is not unconstitutionally vague on its face, since it is clear that such standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer. Thus, the " designed for use" standard is sufficiently clear to cover at least some of the items that appellee sold, such as "roach clips" and the specially designed pipes. As to the "marketed for use" standard, the guidelines refer to the display of paraphernalia and to the proximity of covered items to otherwise uncovered items, and thus such standard requires scienter on the part of the retailer. Under this test, appellee had ample warning that its marketing activities required a license, and by displaying a certain magazine and certain books dealing with illegal drugs physically close to pipes and colored rolling paper, it was in clear violation of the guidelines, as it was in selling "roach clips." Pp. 1194-1195.

(d) The ordinance's language is sufficiently clear that the speculative danger of arbitrary enforcement does not render it void for vagueness in a pre-enforcement facial challenge. Pp. 1195-1196.

639 F.2d 373, reversed and remanded.

Richard N. Williams, Hoffman Estates, Ill., for appellants.
Michael L. Pritzker, Chicago, Ill., for appellee.
*491 Justice MARSHALL delivered the opinion of the Court.
This case presents a pre-enforcement facial challenge to a drug paraphernalia ordinance on the ground that it is unconstitutionally vague and overbroad. The ordinance in question requires a business to obtain a license if it sells any items that are "designed or marketed for use with illegal cannabis or drugs." Village of Hoffman Estates Ordinance No. 969-1978. The United States Court of Appeals for the Seventh Circuit held that the ordinance is vague on its face. 639 F.2d 373 (1981) . We noted probable jurisdiction, 452 U.S. 904, 101 S.Ct. 3028, 69 L.Ed.2d 404 (1981), and now reverse.

I

For more than three years prior to May 1, 1978, appellee The Flipside, Hoffman Estates, Inc. (Flipside), sold a variety of merchandise, including phonographic records, smoking accessories, novelty devices, and jewelry, in its store located in the **1190 village of Hoffman Estates, Ill. (village). [FN1] On February *492 20, 1978, the village

enacted an ordinance regulating drug paraphernalia, to be effective May 1, 1978.[FN2] The ordinance makes it unlawful for any person "to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor." The license fee is $150. A business must also file affidavits that the licensee and its employees have not been convicted of a drug-related offense. Moreover, the business must keep a record of each sale of a regulated item, including the name and address of the purchaser, to be open to police inspection. No regulated item may be sold to a minor. A violation is subject to a fine of not less than $10 and not more than $500, and each day that a violation continues gives rise to a separate offense. A series of licensing guidelines prepared by the Village Attorney define "Paper," "Roach Clips," "Pipes," and "Paraphernalia," the sale of which is required to be licensed.[FN3]

FN1. More specifically, the District Court found:
"[Flipside] sold literature that included 'A Child's Garden of Grass,' 'Marijuana Grower's Guide,' and magazines such as ' National Lampoon,' 'Rolling Stone,' and ' High Times.' The novelty devices and tobacco-use related items plaintiff displayed and sold in its store ranged from small commodities such as clamps, chain ornaments and earrings through cigarette holders, scales, pipes of various types and sizes, to large water pipes, some designed for individual use, some which as many as four persons can use with flexible plastic tubes. Plaintiff also sold a large number of cigarette rolling papers in a variety of colors. One of plaintiff's displayed items was a mirror, about seven by nine inches with the word 'Cocaine' painted on its surface in a purple color. Plaintiff sold cigarette holders, 'alligator clips,' herb sifters, vials, and a variety of tobacco snuff. " 485 F.Supp. 400, 403 (N.D.Ill.1980).

FN2. The text of the ordinance is set forth in the Appendix to this opinion.

FN3. The guidelines provide:
"LICENSE GUIDELINES FOR ITEMS, EFFECT, PARAPHERNALIA, ACCESSORY OR THING WHICH IS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS
"Paper-white paper or tobacco oriented paper not necessarily designed for use with illegal cannabis or drugs may be displayed.
Other paper of colorful design, names oriented for use with illegal cannabis or drugs and displayed are covered.
"Roach Clips-designed for use with illegal cannabis or drugs and therefore covered.
"Pipes-if displayed away from the proximity of nonwhite paper or tobacco oriented paper, and not displayed within proximity of roach clips, or literature encouraging illegal use of cannabis or illegal drugs are not covered; otherwise, covered.
"Paraphernalia-if displayed with roach clips or literature encouraging illegal use of cannabis or illegal drugs it is covered."

***493** After an administrative inquiry, the village determined that Flipside and one other store appeared to be in violation of the ordinance. The Village Attorney notified Flipside of the existence of the ordinance, and made a copy of the ordinance and guidelines available to Flipside. Flipside's owner asked for guidance concerning which items were covered by the ordinance; the Village Attorney advised him to remove items in a certain section of the store "for his protection," and he did so. App. 71. The items included, according to Flipside's description, a clamp, chain ornaments, an "alligator" clip, key chains, necklaces, earrings, cigarette holders, glove stretchers, scales, strainers, a pulverizer, squeeze bottles, pipes, water pipes, pins, an herb sifter, mirrors, vials, cigarette rolling papers, and tobacco snuff. On May 30, 1978, instead of applying for a license or seeking clarification via the administrative procedures that the village had established for its licensing ordinances,[FN4] Flipside filed this lawsuit in the

United States District Court for the Northern District of Illinois.

FN4. Ordinance No. 932-1977, the Hoffman Estates Administrative Procedure Ordinance, was enacted prior to the drug paraphernalia ordinance, and provides that an interested person may petition for the adoption of an interpretive rule. If the petition is denied, the person may place the matter on the agenda of an appropriate village committee for review. The Village Attorney indicated that no interpretive rules had been adopted with respect to the drug paraphernalia ordinance because no one had yet applied for a license. App. 68.

****1191** The complaint alleged, *inter alia*, that the ordinance is unconstitutionally vague and overbroad, and requested injunctive and declaratory relief and damages. The District Court, after hearing testimony, declined to grant a preliminary injunction. The case was tried without a jury on additional evidence and stipulated testimony. The court issued ***494** an opinion upholding the constitutionality of the ordinance, and awarded judgment to the village defendants. 485 F.Supp. 400 (1980).

The Court of Appeals reversed on the ground that the ordinance is unconstitutionally vague on its face. The court reviewed the language of the ordinance and guidelines and found it vague with respect to certain conceivable applications, such as ordinary pipes or "paper clips sold next to *Rolling Stone* magazine." 639 F.2d, at 382. It also suggested that the "subjective" nature of the " marketing" test creates a danger of arbitrary and discriminatory enforcement against those with alternative lifestyles. *Id.*, at 384. Finally, the court determined that the availability of administrative review or guidelines cannot cure the defect. Thus, it concluded that the ordinance is impermissibly vague on its face.

II

[1][2][3][4][5] In a facial challenge to the overbreadth and vagueness of a law,[FN5] a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. [FN6] If it does not, then the overbreadth challenge must fail. The court should then examine the facial vagueness challenge and, assuming the enactment implicates ***495** no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.[FN7] A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

FN5. A "facial" challenge, in this context, means a claim that the law is "invalid *in toto* -and therefore incapable of any valid application." *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S.Ct. 1209, 1223, 39 L.Ed.2d 505 (1974). In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered. *Grayned v. City of Rockford*, 408 U.S. 104, 110, 92 S.Ct. 2294, 2299, 33 L.Ed.2d 222 (1972).

FN6. In making that determination, a court should evaluate the ambiguous as well as the unambiguous scope of the enactment. To this extent, the vagueness of a law affects overbreadth analysis. The Court has long recognized that ambiguous meanings cause citizens to " 'steer far wider of the unlawful zone' ... than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964), quoting *Speiser v. Randall*, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed.2d 1460 (1958); see *Grayned, supra*, 408 U.S. at 109, 92 S.Ct., at 2299; cf. *Young v. American Mini Theatres, Inc.*,

427 U.S. 50, 58-61, 96 S.Ct. 2440, 2446-2447, 49 L.Ed.2d 310 (1976).

FN7. "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975). See *United States v. Powell*, 423 U.S. 87, 92-93, 96 S.Ct. 316, 319-320, 46 L.Ed.2d 228 (1975); *United States v. National Dairy Products Corp.*, 372 U.S. 29, 32-33, 36, 83 S.Ct. 594, 597-598, 599, 9 L.Ed.2d 561 (1963). "One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy*, 417 U.S. 733, 756, 94 S.Ct. 2547, 2561, 41 L.Ed.2d 439 (1974). The rationale is evident: to sustain such a challenge, the complainant must prove that the enactment is vague " 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.' *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971). Such a provision simply has *no* core." *Smith v. Goguen*, 415 U.S. 566, 578, 94 S.Ct. 1242, 1249, 39 L.Ed.2d 605 (1974).

The Court of Appeals in this case did not explicitly consider whether the ordinance reaches constitutionally protected conduct and is overbroad, nor whether the ordinance is vague in all of its applications. Instead, the court determined that the ordinance is void for vagueness because it is unclear in *some* of its applications to the **1192 conduct of Flipside and of other hypothetical parties. Under a proper analysis, however, the ordinance is not facially invalid.

III

[6] We first examine whether the ordinance infringes Flipside's First Amendment rights or is overbroad because it inhibits the First Amendment rights of other parties. Flipside makes the exorbitant claim that the village has imposed a " prior restraint" on speech because the guidelines treat the proximity of drug-related literature as an indicium that paraphernalia are "marketed for use with illegal cannabis or *496 drugs." Flipside also argues that because the presence of drug-related designs, logos, or slogans on paraphernalia may trigger enforcement, the ordinance infringes "protected symbolic speech." Brief for Appellee 25.

These arguments do not long detain us. First, the village has not directly infringed the noncommercial speech of Flipside or other parties. The ordinance licenses and regulates the sale of items displayed " with" or "within proximity of" "literature encouraging illegal use of cannabis or illegal drugs," Guidelines, *supra* n. 3, but does not prohibit or otherwise regulate the sale of literature itself. Although drug-related designs or names on cigarette papers may subject those items to regulation, the village does not restrict speech as such, but simply regulates the commercial marketing of items that the labels reveal may be used for an illicit purpose. The scope of the ordinance therefore does not embrace noncommercial speech.

[7][8] Second, insofar as any *commercial* speech interest is implicated here, it is only the attenuated interest in displaying and marketing merchandise in the manner that the retailer desires. We doubt that the village's restriction on the manner of marketing appreciably limits Flipside's communication of information [FN8]-with one obvious and telling exception. The ordinance is expressly directed at commercial activity promoting or encouraging illegal drug use. If that activity is deemed "speech," then it is speech proposing an illegal transaction, which a government may regulate or ban entirely. *Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 563-564, 100 S.Ct. 2343, 2350, 65 L.Ed.2d 341 (1980); *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376, 388, 93 S.Ct. 2553, 2560, 37 L.Ed.2d 669 (1973). Finally, it is irrelevant whether the ordinance has an *497 overbroad scope encompassing protected commercial speech of other

persons, because the overbreadth doctrine does not apply to commercial speech. *Central Hudson, supra*, at 565, n. 8, 100 S.Ct., at 2351, n. 8.[FN9]

FN8. Flipside explained that it placed items that the village considers drug paraphernalia in locations near a checkout counter because some are "point of purchase" items and others are small and apt to be shoplifted. App. 43. Flipside did not assert that its manner of placement was motivated in any part by a desire to communicate information to its customers.

FN9. Flipside also argues that the ordinance is "overbroad" because it could extend to "innocent" and "lawful" uses of items as well as uses with illegal drugs. Brief for Appellee 10, 33-35. This argument seems to confuse vagueness and overbreadth doctrines. If Flipside is objecting that it cannot determine whether the ordinance regulates items with some lawful uses, then it is complaining of vagueness. We find that claim unpersuasive in this pre-enforcement facial challenge. See *infra*, at 1193-1196. If Flipside is objecting that the ordinance would inhibit innocent uses of items found to be covered by the ordinance, it is complaining of denial of substantive due process. The latter claim obviously lacks merit. A retailer's right to sell smoking accessories, and a purchaser's right to buy and use them, are entitled only to minimal due process protection. Here, the village presented evidence of illegal drug use in the community. App. 37. Regulation of items that have some lawful as well as unlawful uses is not an irrational means of discouraging drug use. See *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124-125, 98 S.Ct. 2207, 2213-2214, 57 L.Ed.2d 91 (1978).
The hostility of some lower courts to drug paraphernalia laws-and particularly to those regulating the sale of items that have many innocent uses, see, *e.g.*, 639 F.2d 373, 381-383 (1981); *Record Revolution No. 6, Inc. v. City of Parma*, 638 F.2d 916, 928 (CA6 1980), vacated and remanded, 451 U.S. 1013, 101 S.Ct. 2998, 69 L.Ed.2d 384 (1981)-may reflect a belief that these measures are ineffective in stemming illegal drug use. This perceived defect, however, is not a defect of clarity.
In the unlikely event that a state court construed this ordinance as prohibiting the sale of all pipes, of whatever description, then a seller of corncob pipes could not complain that the law is unduly vague. He could, of course, object that the law was not intended to cover such items.

****1193** IV

A

[9] A law that does not reach constitutionally protected conduct and therefore satisfies the overbreadth test may nevertheless be challenged on its face as unduly vague, in violation of due process. To succeed, however, the complainant must demonstrate that the law is impermissibly vague in all of its applications. Flipside makes no such showing.

***498** The standards for evaluating vagueness were enunciated in *Grayned v. City of Rockford*, 408 U.S. 104, 108-109, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222 (1972):
"Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory applications" (footnotes omitted).

These standards should not, of course, be mechanically applied. The degree of vagueness that the Constitution tolerates-as well as the relative importance of fair notice and fair enforcement-depends in part on the nature of the enactment. Thus, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow,[FN10] and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.[FN11] Indeed, the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. [FN12] The Court has also expressed greater tolerance of ***499** enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.[FN13] And the Court has recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice to the complainant that his conduct is proscribed.[FN14]

FN10. *Papachristou v. City of Jacksonville* , 405 U.S. 156, 162, 92 S.Ct. 839, 843, 31 L.Ed.2d 110 (1972) (dictum; collecting cases).

FN11. See, *e.g., United States v. National Dairy Products Corp.*, 372 U.S. 29, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963). Cf. *Smith v. Goguen*, 415 U.S., at 574, 94 S.Ct., at 1247.

FN12. See *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 49, 86 S.Ct. 1254, 1263, 16 L.Ed.2d 336 (1966); *McGowan v. Maryland*, 366 U.S. 420, 428, 81 S.Ct. 1101, 1106, 6 L.Ed.2d 393 (1961).

FN13. See *Barenblatt v. United States*, 360 U.S. 109, 137, 79 S.Ct. 1081, 1098, 3 L.Ed.2d 1115 (1959) (Black, J., with whom Warren, C.J., and Douglas, J., joined, dissenting); *Winters v. New York*, 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948).

FN14. See, *e.g., Colautti v. Franklin*, 439 U.S. 379, 395, 99 S.Ct. 675, 685, 58 L.Ed.2d 596 (1979); *Boyce Motor Lines v. United States*, 342 U.S. 337, 342, 72 S.Ct. 329, 331, 96 L.Ed. 367 (1952); *Screws v. United States*, 325 U.S. 91, 101-103, 65 S.Ct. 1031, 1035-1036, 89 L.Ed. 1495 (1945) (plurality opinion). See Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U.Pa.L.Rev. 67, 87, n. 98 (1960).

Finally, perhaps the most important factor affecting the clarity that the Constitution demands of a law is whether it threatens to inhibit the exercise of constitutionally protected rights. If, for example, the law interferes with the right of free speech ****1194** or of association, a more stringent vagueness test should apply.[FN15]

FN15. See, *e.g., Papachristou, supra; Grayned*, 408 U.S., at 109, 92 S.Ct., at 2298.

B

This ordinance simply regulates business behavior and contains a scienter requirement with respect to the alternative "marketed for use" standard. The ordinance nominally imposes only civil penalties. However, the village concedes that the ordinance is "quasi-criminal," and its prohibitory and stigmatizing effect may warrant a relatively strict test.[FN16] ***500** Flipside's facial challenge fails because, under the test appropriate to either a quasi-criminal or a criminal law, the ordinance is sufficiently clear as applied to Flipside.

FN16. The village stipulated that the purpose of the ordinance is to discourage use of the regulated items. App. 33. Moreover, the prohibitory and stigmatizing effects of the ordinance are clear. As the Court of Appeals remarked, "few retailers are willing to brand themselves as sellers of drug paraphernalia, and few customers will buy items with the condition of

signing their names and addresses to a register available to the police." 639 F.2d, at 377. The proposed register is entitled, " Retail Record for Items Designed or Marketed for Use with Illegal Cannabis or Drugs." Record, Complaint, App. B. At argument, counsel for the village admitted that the ordinance is "quasi-criminal." Tr. of Oral Arg. 4-5.

The ordinance requires Flipside to obtain a license if it sells "any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by the Illinois Revised Statutes." Flipside expresses no uncertainty about which drugs this description encompasses; as the District Court noted, 485 F.Supp., at 406, Illinois law clearly defines cannabis and numerous other controlled drugs, including cocaine. Ill.Rev.Stat., ch. 56 1/2 , ¶¶ 703 and 1102(g) (1980). On the other hand, the words " items, effect, paraphernalia, accessory or thing" do not identify the type of merchandise that the village desires to regulate. [FN17] Flipside's challenge thus appropriately focuses on the language "designed or marketed for use." Under either the "designed for use" or "marketed for use" standard, we conclude that at least some of the items sold by Flipside are covered. Thus, Flipside's facial challenge is unavailing.

FN17. The District Court apparently relied principally on the growing vernacular understanding of "paraphernalia" as drug-related items, and therefore did not separately analyze the meaning of " designed or marketed for use." 485 F.Supp., at 405-407. We agree with the Court of Appeals that a regulation of " paraphernalia" alone would not provide much warning of the nature of the items regulated. 639 F.2d, at 380.

1. "Designed for use"

[10] The Court of Appeals objected that "designed .. . for use" is ambiguous with respect to whether items must be inherently suited only for drug use; whether the retailer's intent or manner of display is relevant; and whether the intent of a third party, the manufacturer, is critical, since the manufacturer is the "designer." 639 F.2d, at 380-381. For the reasons that follow, we conclude that this language is not unconstitutionally vague on its face.

The Court of Appeals' speculation about the meaning of "design" is largely unfounded. The guidelines refer to "paper***501** of colorful design" and to other specific items as conclusively "designed " or not "designed" for illegal use.[FN18] A principal meaning****1195** of "design" is "[t]o fashion according to a plan." Webster's New International Dictionary of the English Language 707 (2d ed. 1957). Cf. *Lanzetta v. New Jersey*, 306 U.S. 451, 454, n. 3, 59 S.Ct. 618, 619, n. 3, 83 L.Ed. 888 (1939). It is therefore plain that the standard encompasses at least an item that is principally used with illegal drugs by virtue of its objective features, *i.e.*, features designed by the manufacturer. A business person of ordinary intelligence would understand that this term refers to the design of the manufacturer, not the intent of the retailer or customer. It is also sufficiently clear that items which are principally used for nondrug purposes, such as ordinary pipes, are not "designed for use" with illegal drugs. Moreover, no issue of fair warning is present in this case, since Flipside concedes that the phrase refers to structural characteristics of an item.[FN19]

FN18. The guidelines explicitly provide that "white paper ... may be displayed," and that "Roach Clips" are "designed for use with illegal cannabis or drugs *and therefore* covered" (emphasis added). The Court of Appeals criticized the latter definition for failing to explain what a " roach clip" is. This criticism is unfounded because that technical term has sufficiently clear meaning in the drug paraphernalia industry. Without undue burden, Flipside could easily determine the meaning of the term. See American Heritage Dictionary of the English Language 1122 (1980) (defining "roach" as "[t]he butt of a marijuana cigarette"); R. Lingeman,

> Drugs from A to Z: A Dictionary 213-214 (1969) (defining "roach" and "roach holder "). Moreover, the explanation that a retailer may display certain paper "not necessarily designed for use" clarifies that the ordinance at least embraces items that are necessarily designed for use with cannabis or illegal drugs.
>
> FN19. "It is readily apparent that under the Hoffman Estates scheme, the 'designed for use' phrase refers to the physical characteristics of items deemed *per se* fashioned for use with drugs; and that, if any intentional conduct is implicated by the phrase, it is the intent of the 'designer' (i.e. patent holder or manufacturer) whose intent for an item or 'design' is absorbed into the physical attributes, or structural ' design' of the finished product." Brief for Appellee 42-43. Moreover, the village President described drug paraphernalia as items "*[m]anufactured* for that purpose and marketed for that purpose." App. 82 (emphasis added).

***502** The ordinance and guidelines do contain ambiguities. Nevertheless, the "designed for use" standard is sufficiently clear to cover at least some of the items that Flipside sold. The ordinance, through the guidelines, explicitly regulates "roach clips." Flipside's co-operator admitted that the store sold such items, see Tr. 26, 30, and the village Chief of Police testified that he had never seen a " roach clip" used for any purpose other than to smoke cannabis. App. 52. The Chief also testified that a specially designed pipe that Flipside marketed is typically used to smoke marihuana. *Ibid.* Whether further guidelines, administrative rules, or enforcement policy will clarify the more ambiguous scope of the standard in other respects is of no concern in this facial challenge.

2. "Marketed for use"

[11] Whatever ambiguities the "designed ... for use" standard may engender, the alternative "marketed for use" standard is transparently clear: it describes a retailer's intentional display and marketing of merchandise. The guidelines refer to the display of paraphernalia, and to the proximity of covered items to otherwise uncovered items. A retail store therefore must obtain a license if it deliberately displays its wares in a manner that appeals to or encourages illegal drug use. The standard requires scienter, since a retailer could scarcely "market" items "for" a particular use without intending that use.

Under this test, Flipside had ample warning that its marketing activities required a license. Flipside displayed the magazine High Times and books entitled Marijuana Grower's Guide, Children's Garden of Grass, and The Pleasures of Cocaine, physically close to pipes and colored rolling papers, in clear violation of the guidelines. As noted above, Flipside's co-operator admitted that his store sold "roach clips," which are principally used for illegal purposes. Finally, in the ***503** same section of the store, Flipside had posted the sign, " You must be 18 or older to purchase any head supplies." [FN20] Tr. 30.

> FN20. The American Heritage Dictionary of the English Language 606 (1980) gives the following alternative definition of "head ": "*Slang.* One who is a frequent user of drugs."

V

[12][13] The Court of Appeals also held that the ordinance provides insufficient standards for enforcement. Specifically, the court feared that the ordinance might be used to harass individuals with alternative lifestyles and views. 639 F.2d, at 384. In reviewing a business regulation for facial vagueness, however, the principal inquiry is whether the law affords fair warning****1196** of what is proscribed. Moreover, this emphasis is almost inescapable in reviewing a pre-enforcement challenge to a law. Here, no evidence has been, or could be, introduced to indicate whether the ordinance has been enforced in a discriminatory manner or with the aim of inhibiting unpopular speech. The language of the ordinance is

sufficiently clear that the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness. Cf.*Papachristou v. City of Jacksonville*, 405 U.S. 156, 168-171, 92 S.Ct. 839, 846-848, 31 L.Ed.2d 110 (1972); *Coates v. City of Cincinnati*, 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.Ed.2d 214 (1971).

We do not suggest that the risk of discriminatory enforcement is insignificant here. Testimony of the Village Attorney who drafted the ordinance, the village President, and the Police Chief revealed confusion over whether the ordinance applies to certain items, as well as extensive reliance on the " judgment" of police officers to give meaning to the ordinance and to enforce it fairly. At this stage, however, we are not prepared to hold that this risk jeopardizes the entire ordinance.[FN21]

FN21. The theoretical possibility that the village will enforce its ordinance against a paper clip placed next to Rolling Stone magazine, 639 F.2d, at 382, is of no due process significance unless the possibility ripens into a prosecution.

***504** Nor do we assume that the village will take no further steps to minimize the dangers of arbitrary enforcement. The village may adopt administrative regulations that will sufficiently narrow potentially vague or arbitrary interpretations of the ordinance. In economic regulation especially, such administrative regulation will often suffice to clarify a standard with an otherwise uncertain scope. We also find it significant that the village, in testimony below, primarily relied on the "marketing" aspect of the standard, which does not require the more ambiguous item-by-item analysis of whether paraphernalia are "designed for" illegal drug use, and which therefore presents a lesser risk of discriminatory enforcement. "Although it is possible that specific future applications ... may engender concrete problems of constitutional dimension, it will be time enough to consider any such problems when they arise." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 52, 86 S.Ct. 1254, 1264, 16 L.Ed.2d 336 (1966). [FN22]

FN22. The Court of Appeals also referred to potential Fourth Amendment problems resulting from the recordkeeping requirement, which "implies that a customer who purchases an item 'designed or marketed for use with illegal cannabis or drugs' intends to *use* the item with illegal cannabis or drugs. A further implication could be that a customer is subject to police scrutiny or even to a search warrant on the basis of the purchase of a legal item." *Id.*, at 384. We will not address these Fourth Amendment issues here. In a pre-enforcement challenge it is difficult to determine whether Fourth Amendment rights are seriously threatened. Flipside offered no evidence of a concrete threat below. In a postenforcement proceeding Flipside may attempt to demonstrate that the ordinance is being employed in such an unconstitutional manner, and that it has standing to raise the objection. It is appropriate to defer resolution of these problems until such a showing is made.

VI

Many American communities have recently enacted laws regulating or prohibiting the sale of drug paraphernalia. ***505** To determine whether these laws are wise or effective is not, of course, the province of this Court. See *Ferguson v. Skrupa*, 372 U.S. 726, 728-730, 83 S.Ct. 1028, 1029-1031, 10 L.Ed.2d 93 (1963). We hold only that such legislation is not facially overbroad or vague if it does not reach constitutionally protected conduct and is reasonably clear in its application to the complainant.

Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice STEVENS took no part in the consideration or decision of this case.

**1197 APPENDIX TO OPINION OF THE COURT

Village of Hoffman Estates Ordinance No. 969-1978

AN ORDINANCE AMENDING THE MUNICIPAL CODE OF THE VILLAGE OF HOFFMAN ESTATES BY PROVIDING FOR REGULATION OF ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS

WHEREAS, certain items designed or marketed for use with illegal drugs are being retailed within the Village of Hoffman Estates, Cook County, Illinois, and

WHEREAS, it is recognized that such items are legal retail items and that their sale cannot be banned, and

WHEREAS, there is evidence that these items are designed or marketed for use with illegal cannabis or drugs and it is in the best interests of the health, safety and welfare of the citizens of the Village of Hoffman Estates to regulate within the Village the sale of items designed or marketed for use with illegal cannabis or drugs.

NOW THEREFORE, BE IT ORDAINED by the President and Board of Trustees of the Village of Hoffman Estates, Cook County, Illinois as follows:

*506 *Section 1* : That the Hoffman Estates Municipal Code be amended by adding thereto an additional Section, Section 8-7-16, which additional section shall read as follows:
Sec. 8-7-16-ITEMS DESIGNED OR MARKETED FOR USE WITH ILLEGAL CANNABIS OR DRUGS
A. License Required:
It shall be unlawful for any person or persons as principal, clerk, agent or servant to sell any items, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs, as defined by Illinois Revised Statutes, without obtaining a license therefor. Such licenses shall be in addition to any or all other licenses held by applicant.
B. Application:
Application to sell any item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs shall, in addition to requirements of Article 8-1, be accompanied by affidavits by applicant and each and every employee authorized to sell such items that such person has never been convicted of a drug-related offense.
C. Minors:
It shall be unlawful to sell or give items as described in Section 8-7-16A in any form to any male or female child under eighteen years of age.
D. Records:
Every licensee must keep a record of every item, effect, paraphernalia, accessory or thing which is designed or marketed for use with illegal cannabis or drugs which is sold and this record shall be open to the inspection of any police officer at any time during the hours of business. Such record shall contain the name and address of the purchaser, the name and quantity of the product, the date and time of the sale, and the licensee or agent of the licensee's signature, such records shall be retained for not less than two (2) years.
*507 E. Regulations:
The applicant shall comply with all applicable regulations of the Department of Health Services and the Police Department.

Section 2 : That the Hoffman Estates Municipal Code be amended by adding to Sec. 8-2-1 Fees: Merchants (Products) the additional language as follows:
Items designed or marketed for use with illegal cannabis or drugs $150.00

Section 3 : Penalty. Any person violating any provision of this ordinance shall be fined not less than ten dollars ($10.00) nor more than five hundred dollars ($500.00) for the first offense and succeeding offenses during the same calendar year, and each day that such violation shall continue shall be deemed a separate and distinct offense.

***1198** *Section 4* : That the Village Clerk be and is hereby authorized to publish this ordinance in pamphlet form.

Section 5 : That this ordinance shall be in full force and effect May 1, 1978, after its passage, approval and publication according to law.

Justice WHITE, concurring in the judgment.

I agree that the judgment of the Court of Appeals must be reversed. I do not, however, believe it necessary to discuss the overbreadth problem in order to reach this result. The Court of Appeals held the ordinance to be void for vagueness; it did not discuss any problem of overbreadth. That opinion should be reversed simply because it erred in its analysis of the vagueness problem presented by the ordinance.

I agree with the majority that a facial vagueness challenge to an economic regulation must demonstrate that "the enactment is impermissibly vague in all of its applications." *Ante*, at 1191. I also agree with the majority's statement that the " marketed for use" standard in the ordinance is " sufficiently clear." There is, in my view, no need to go any further: If it ***508** is "transparently clear" that some particular conduct is restricted by the ordinance, the ordinance survives a facial challenge on vagueness grounds.

Technically, overbreadth is a standing doctrine that permits parties in cases involving First Amendment challenges to government restrictions on noncommercial speech to argue that the regulation is invalid because of its effect on the First Amendment rights of others not presently before the Court. *Broadrick v. Oklahoma*, 413 U.S. 601, 612-615, 93 S.Ct. 2908, 2915-2917, 37 L.Ed.2d 830 (1973). Whether the appellee may make use of the overbreadth doctrine depends, in the first instance, on whether or not it has a colorable claim that the ordinance infringes on constitutionally protected, noncommercial speech of others. Although appellee claims that the ordinance does have such an effect, that argument is tenuous at best and should be left to the lower courts for an initial determination.

Accordingly, I concur in the judgment reversing the decision below.

U.S.Ill.,1982.
Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.
455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362

Briefs and Other Related Documents (Back to top)

- 1981 WL 390121 (Appellate Brief) Reply Brief for the Appellants (Nov. 1981)
- 1981 WL 390120 (Appellate Brief) Brief and Argument for the Appellee (Aug. 25, 1981)
- 1981 WL 390124 (Appellate Brief) Brief Amicus Curiae of American Businesses for Constitutional Rights (Aug. 24, 1981)
- 1981 WL 390125 (Appellate Brief) Brief of Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Indiana, Kansas, Louisiana, Maine, Maryland, Nebraska, Nevada, New Jersey, New Mexico, North Carolina, Oklahoma, Pennsylvania, Texas, Utah, and Washington as Amici Curiae (Jul. 16, 1981)
- 1981 WL 390126 (Appellate Brief) Motion for Leave to File Brief Amicus Curiae of Community Action Against Drug Abuse in Support of Appellant and Brief Amicus Curiae of Community Action Against Drug Abuse in Support of Appellant (Jul. 16, 1981)
- 1981 WL 390127 (Appellate Brief) Brief Amicus Curiae of the Village of Wilmette, Illinois, an Illinois Municipal Corporation (Jul. 16, 1981)
- 1981 WL 390119 (Appellate Brief) Brief for the Appellants (Jul. 1981)

END OF DOCUMENT

EXHIBIT 6

461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903
(Cite as: 461 U.S. 352, 103 S.Ct. 1855)

Kolender v. LawsonU.S.,1983.
Supreme Court of the United States
William KOLENDER, et al., Petitioner,
v.
Edward LAWSON.
No. 81-1320.

Argued Nov. 8, 1982.
Decided May 2, 1983.

Individual who had been arrested and convicted for violating a California statute requiring persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a police officer, brought suit for declaratory and injunctive relief challenging the statute's constitutionality. The District Court held the statute unconstitutional and enjoined its enforcement. The United States Court of Appeals for the Ninth Circuit, 658 F.2d 1362, affirmed and California officials appealed. The Supreme Court, Justice O'Connor, held that the statute was unconstitutionally vague by failing to clarify what was contemplated by the requirement that a suspect provide a "credible and reliable" identification.

Affirmed.

Justice Brennan filed a concurring opinion.

Justice White filed a dissenting opinion in which Justice Rehnquist joined.

West Headnotes

[1] Federal Courts 170B ⚿386

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk386 k. State Constitutions and Statutes, Validity and Construction. Most Cited Cases

In evaluating facial challenge to state law, federal court must consider any limiting construction that state court or enforcement agency has proffered.

[2] Criminal Law 110 ⚿13.1(1)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited Cases
(Formerly 92k258(2))

Void-for-vagueness doctrine requires that penal statute define criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in manner that does not encourage arbitrary and discriminatory enforcement. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases

Although void-for-vagueness focuses both on actual notice to citizens and arbitrary enforcement, more important aspect of vagueness doctrine is not actual notice, but requirement that legislature establish general guidelines to govern law enforcement. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ⚿258(3.1)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(3) Particular Statutes and Ordinances
92k258(3.1) k. In General. Most

Cited Cases
(Formerly 92k258(3))

Vagrancy 399 ⚿1

399 Vagrancy
399k1 k. Nature and Elements of Offenses. Most Cited Cases
California statute requiring persons who loiter or wander on streets to provide "credible and reliable" identification and to account for their presence when requested by peace officer under circumstances that would justify stop under standards of *Terry v. Ohio* , with "credible and reliable" identification being defined as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself," was unconstitutionally vague within meaning of the due process clause for failing to clarify what was contemplated by requirement that suspect provide " credible and reliable" identification. U.S.C.A. Const.Amend. 14; West's Ann.Cal.Penal Code § 647(e).
West CodenotesHeld UnconstitutionalWest's Ann.Cal.Penal Code § 647(e).***1855** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***352** A California statute requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer. The California Court of Appeal has construed the statute to require a person to provide such identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a stop under the standards of *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889. The California court has defined "credible and reliable" identification as "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." Appellee, who had been arrested and convicted under the statute, brought an action in Federal District Court challenging the statute's constitutionality. The District Court held the statute unconstitutional and enjoined its enforcement, and the Court of Appeals affirmed.

***1856** *Held:* The statute, as drafted and as construed by the state court, is unconstitutionally vague on its face within the meaning of the Due Process Clause of the Fourteenth Amendment by failing to clarify what is contemplated by the requirement that a suspect provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. Pp. 1857-1860.

658 F.2d 1362 (9th Cir. 1981), affirmed and remanded.

A. Wells Petersen, Deputy Attorney General of California, argued the cause for appellants. With him on the briefs were *George Deukmejian,* Attorney General, *Robert H. Philibosian,* Chief Assistant Attorney General, *Daniel J. **353** Kremer,* Assistant Attorney General, and *Jay M. Bloom,* Deputy Attorney General.
Mark D. Rosenbaum, by invitation of the Court, 459 U.S. 964, argued the cause as *amicus curiae* in support of the judgment below. With him on the brief were *Dennis M. Perluss, Fred Okrand, Mary Ellen Gale, Robert H. Lynn,* and *Charles S. Sims.**
* Briefs of *amici curiae* urging reversal were filed by *William L. Cahalan, Edward Reilly Wilson,* and *Timothy A. Baughman* for the Wayne County Prosecutor's Office; and by *Wayne W. Schmidt, James P. Manak,* and *Fred E. Inbau* for Americans for Effective Law Enforcement, Inc., et al.
Briefs of *amici curiae* urging affirmance were filed by *Eugene G. Iredale* for the California Attorneys for Criminal Justice; and by *Michael Ratner* for the Center for Constitutional Rights.
Briefs of *amici curiae* were filed by *John K. Van de Kamp, Harry B. Sondheim,* and *John W. Messer* for the Appellate Committee of the California District

Attorneys Association; by *Dan Stormer, John Huerta,* and *Peter Schey* for the National Lawyers Guild et al.; and by *Quin Denvir* and *William Blum* for the State Public Defender of California.

Justice O'CONNOR delivered the opinion of the Court.

This appeal presents a facial challenge to a criminal statute that requires persons who loiter or wander on the streets to provide a "credible and reliable" identification and to account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). [FN1] We conclude that the statute as it has been construed is unconstitutionally vague within the meaning of the Due Process clause of the Fourteenth Amendment by failing to clarify what is contemplated ***354** by the requirement that a suspect provide a "credible and reliable" identification. Accordingly, we affirm the judgment of the court below.

FN1. Cal.Penal Code § 647(e) provides:
"Every person who commits any of the following acts is guilty of disorderly conduct, a misdemeanor: .... (e) Who loiters or wanders upon the streets or from place to place without apparent reason or business and who refuses to identify himself and to account for his presence when requested by any peace officer to do so, if the surrounding circumstances are such as to indicate to a reasonable man that the public safety demands such identification.

I

Appellee Edward Lawson was detained or arrested on approximately 15 occasions between March 1975 and January 1977 pursuant to Cal.Penal Code § 647(e). [FN2] Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

FN2. The District Court failed to find facts concerning the particular occasions on which Lawson was detained or arrested under § 647(e). However, the trial transcript contains numerous descriptions of the stops given both by Lawson and by the police officers who detained him. For example, one police officer testified that he stopped Lawson while walking on an otherwise vacant street because it was late at night, the area was isolated, and the area was located close to a high crime area. Tr. 266-267. Another officer testified that he detained Lawson, who was walking at a late hour in a business area where some businesses were still open, and asked for identification because burglaries had been committed by unknown persons in the general area. Tr. 207. The appellee states that he has never been stopped by police for any reason apart from his detentions under § 647(e).

Lawson then brought a civil action in the District Court for the Southern District of California seeking a declaratory judgment that § 647(e) is unconstitutional, a mandatory injunction seeking to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The District Court found that § 647(e) was overbroad because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." Juris. Statement, at A-78. The District Court enjoined enforcement of the statute, but held that Lawson could not recover damages because the officers involved acted in the good faith belief that each detention or arrest was lawful.

Appellant H.A. Porazzo, Deputy Chief Commander of the California Highway Patrol, appealed the District Court decision to the Court of Appeals for the Ninth Circuit. Lawson ***355** cross-appealed, arguing that he ****1857** was entitled to a jury trial on the issue of damages against the officers. The Court of Appeals affirmed the District Court determination as to the unconstitutionality of § 647(e). The appellate court determined that the statute was unconstitutional in that it violates the Fourth Amendment's proscription against unreasonable searches and seizures, it contains a

vague enforcement standard that is susceptible to arbitrary enforcement, and it fails to give fair and adequate notice of the type of conduct prohibited. Finally, the Court of Appeals reversed the District Court as to its holding that Lawson was not entitled to a jury trial to determine the good faith of the officers in his damages action against them, and remanded the case to the District Court for trial.

The officers appealed to this Court from that portion of the judgment of the Court of Appeals which declared § 647(e) unconstitutional and which enjoined its enforcement. We noted probable jurisdiction pursuant to 28 U.S.C. § 1254(2). 455 U.S. 999, 102 S.Ct. 1629, 71 L.Ed.2d 865 (1982).

II

[1] In the courts below, Lawson mounted an attack on the facial validity of § 647(e).[FN3] "In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that a state court or enforcement agency has proffered." *Village of Hoffman Estates v. Flipside, Hoffman Estates,* 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). As construed by the California Court of Appeal,[FN4] § 647(e) requires that an individual***356** provide " credible and reliable" identification when requested by a police officer who has reasonable suspicion of criminal activity sufficient to justify a *Terry* detention.[FN5] ****1858*357***People v. Solomon,* 33 Cal.App.3d 429, 108 Cal.Rptr. 867 (1973). " Credible and reliable" identification is defined by the state Court of Appeal as identification "carrying reasonable assurance that the identification is authentic and providing means for later getting in touch with the person who has identified himself." *Id.,* at 438, 108 Cal.Rptr. 867. In addition, a suspect may be required to "*account for his presence* ... to the extent that it assists in producing credible and reliable identification ...." *Ibid.* Under the terms of the statute, failure of the individual to provide "credible and reliable" identification permits the arrest.[FN6]

FN3. The appellants have apparently never challenged the propriety of declaratory and injunctive relief in this case. See *Steffel v. Thompson,* 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). Nor have appellants ever challenged Lawson's standing to seek such relief. We note that Lawson has been stopped on approximately 15 occasions pursuant to § 647(e), and that these 15 stops occurred in a period of less than two years. Thus, there is a "credible threat" that Lawson might be detained again under § 647(e). See *Ellis v. Dyson,* 421 U.S. 426, 434, 95 S.Ct. 1691, 1696, 44 L.Ed.2d 214 (1975).

FN4. In *Wainwright v. Stone,* 414 U.S. 21, 22-23, 94 S.Ct. 190, 192, 38 L.Ed.2d 179 (1973), we held that "[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation 'we must take the statute as though it read precisely as the highest court of the State has interpreted it.' *Minnesota ex rel. Pearson v. Probate Court,* 309 U.S. 270, 273 [60 S.Ct. 523, 525, 84 L.Ed. 744] (1940)." The Court of Appeals for the Ninth Circuit noted in its decision that the state intermediate appellate court has construed the statute in *People v. Solomon,* 33 Cal.App.3d 429, 108 Cal.Rptr. 867 (1973), that the state supreme court has refused review, and that *Solomon* has been the law of California for nine years. In these circumstances, we agree with the Ninth Circuit that the *Solomon* opinion is authoritative for purposes of defining the meaning of § 647(e). See 658 F.2d 1362, 1364-1365 n. 3 (1981).

FN5. The *Solomon* court apparently read *Terry* to hold that the test for a *Terry* detention was whether the officer had information that would lead a reasonable man to believe that the intrusion was appropriate. The Ninth Circuit noted that according to *Terry,* the applicable test under the Fourth Amendment requires that the police officer making a detention "be

able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." 392 U.S., at 21, 88 S.Ct., at 1880. The Ninth Circuit then held that although what *Solomon* articulated as the *Terry* standard differed from what *Terry* actually held, "[w]e believe that the *Solomon* court meant to incorporate in principle the standards enunciated in *Terry.*" 658 F.2d 1366, n. 8.

We agree with that interpretation of *Solomon.* Of course, if the *Solomon* court misread *Terry* and interpreted § 647(e) to permit investigative detentions in situations where the officers lack a reasonable suspicion of criminal activity based on objective facts, Fourth Amendment concerns would be implicated. See *Brown v. Texas,* 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

In addition, the *Solomon* court appeared to believe that both the *Terry* detention *and* frisk were proper under the standard for *Terry* detentions, and since the frisk was more intrusive than the request for identification, the request for identification *must* be proper under *Terry.* See 33 Cal.App.3d, at 435, 108 Cal.Rptr., at 867.

The Ninth Circuit observed that the *Solomon* analysis was "slightly askew." 658 F.2d, at 1366, n. 9. The court reasoned that under *Terry,* the frisk, as opposed to the detention, is proper only if the detaining officer reasonably believes that the suspect may be armed and dangerous, in addition to having an articulable suspicion that criminal activity is afoot.

FN6. In *People v. Caylor,* 6 Cal.App.3d 51, 56, 85 Cal.Rptr. 497 (1970), the court suggested that the State must prove that a suspect detained under § 647(e) was loitering or wandering for "evil purposes."

However, in *Solomon,* which the court below and the parties concede is " authoritative" in the absence of a California Supreme Court decision on the issue, there is no discussion of any requirement that the State prove "evil purposes."

III

Our Constitution is designed to maximize individual freedoms within a framework of ordered liberty. Statutory limitations on those freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression. See generally M. Bassiouni, Substantive Criminal Law 53 (1978).

[2][3] As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *Village of Hoffman Estates v. Flipside,* 455 U.S. 489, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *Smith v. Goguen,* 415 U.S. 566, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974); *Grayned v. City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972); *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972); *Connally v. General Construction Co.,* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). Although the doctrine focuses ***358** both on actual notice to citizens and arbitrary enforcement, we have recognized recently that the more important aspect of vagueness doctrine "is not actual notice, but the other principal element of the doctrine-the requirement that a legislature establish minimal guidelines to govern law enforcement." *Smith, supra,* 415 U.S. at 574, 94 S.Ct., at 1247-1248. Where the legislature fails to provide such minimal guidelines, a criminal statute may permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections." *Id.,* at 575, 94 S.Ct., at 1248.[FN7]

FN7. Our concern for minimal guidelines finds its roots as far back as our decision in *United States v. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563 (1875):
"It would certainly be dangerous if the

> legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government."

[4] Section 647(e), as presently drafted and construed by the state courts, contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vests virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest. An individual, whom police may think is suspicious but do not have probable cause to believe has committed a crime, is entitled to continue to walk the public streets "only at the whim of any police officer" who happens to stop that individual under § 647(e). **1859*Shuttlesworth v. City of Birmingham,* 382 U.S. 87, 90, 86 S.Ct. 211, 213, 15 L.Ed.2d 176 (1965). Our concern here is based upon the "potential for arbitrarily suppressing First Amendment liberties ...." *Id.,* at 91, 86 S.Ct., at 213.

In addition, § 647(e) implicates consideration of the constitutional right to freedom of movement. See *Kent v. Dulles,* 357 U.S. 116, 126, 78 S.Ct. 1113, 1118, 2 L.Ed.2d 1204 (1958); *Aptheker v. Secretary of State,* 378 U.S. 500, 505-506, 84 S.Ct. 1659, 1663-1664, 12 L.Ed.2d 992 (1964).[FN8]

> FN8. In his dissent, Justice WHITE claims that "[t]he upshot of our cases ... is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." *Post,* at 1865. The description of our holdings is inaccurate in several respects. First, it neglects the fact that we permit a facial challenge if a law reaches "a substantial amount of constitutionally protected conduct." *Hoffman Estates v. Flipside,* 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982). Second, where a statute imposes criminal penalties, the standard of certainty is higher. See *Winters v. New York,* 333 U.S. 507, 515, 68 S.Ct. 665, 670, 92 L.Ed. 840 (1948). This concern has, at times, led us to invalidate a criminal statute on its face even when it could conceivably have had some valid application. See *e.g., Colautti v. Franklin,* 439 U.S. 379, 394-401, 99 S.Ct. 675, 685-688, 58 L.Ed.2d 596 (1979) ; *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). The dissent concedes that "the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment . ..." *Post,* at 1866. However, in the dissent's view, one may not "confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own." *Id.* But we have traditionally viewed vagueness and overbreadth as logically related and similar doctrines. See *e.g., Keyishian v. Board of Regents,* 385 U.S. 589, 609, 87 S.Ct. 675, 687, 17 L.Ed.2d 629 (1967); *NAACP v. Button,* 371 U.S. 415, 433, 83 S.Ct. 328, 338, 9 L.Ed.2d 405 (1963). See also Note, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 Pa.L.Rev. 67, 110-113 (1960).
> No authority cited by the dissent supports its argument about facial challenges in the arbitrary enforcement context. The dissent relies heavily on *Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), but in that case, we deliberately applied a less stringent vagueness analysis "[b]ecause of the factors differentiating military society from civilian society." *Id.,* at 756, 94 S.Ct., at 2562. *Hoffman Estates, supra,* also relied upon by the dissent, does not support its position. In addition to reaffirming the validity of facial challenges in situations where free speech or free association are affected, see 455 U.S., at 494, 495, 498-499, 102 S.Ct., at 1191,

1193-1194, the Court emphasized that the ordinance in *Hoffman Estates* "simply regulates business behavior" and that " economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow." *Id.,* at 499, 498, 102 S.Ct., at 1193 (footnote omitted).

***359** Section 647(e) is not simply a " stop-and-identify" statute. Rather, the statute requires that the individual provide a "credible and reliable" identification that carries a "reasonable assurance" of its authenticity, and that provides " means for later getting in touch with the person who has identified himself." *Solomon, supra,* 33 Cal.App.3d 438, 108 Cal.Rptr. 867. In addition, the suspect may also have to account for his presence "to the extent it assists in producing ***360** credible and reliable identification." *Ibid.*

At oral argument, the appellants confirmed that a suspect violates § 647(e) unless "the officer [is] satisfied that the identification is reliable." Tr. of Oral Arg. 6. In giving examples of how suspects would satisfy the requirement, appellants explained that a jogger, who was not carrying identification, could, depending on the particular officer, be required to answer a series of questions concerning the route that he followed to arrive at the place where the officers detained him,[FN9] or could satisfy the identification requirement simply by reciting his name and address. See *id.,* at 6-10.

FN9. To the extent that § 647(e) criminalizes a suspect's failure to answer such questions put to him by police officers, Fifth Amendment concerns are implicated. It is a "settled principle that while police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer." *Davis v. Mississippi,* 394 U.S. 721, 727, n. 6, 89 S.Ct. 1394, 1397, n. 6, 22 L.Ed.2d 676 (1969).

It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "entrust[s] ****1860** lawmaking 'to the moment-to-moment judgment of the policeman on his beat.' " *Smith, supra,* 415 U.S., at 575, 94 S.Ct., at 1248 (quoting *Gregory v. City of Chicago,* 394 U.S. 111, 120, 89 S.Ct. 946, 951, 22 L.Ed.2d 134 (1969) (Black, J., concurring)). Section 647(e) "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure,' " *Papachristou, supra,* 405 U.S., at 170, 92 S.Ct., at 847-848 (quoting *Thornhill v. Alabama,* 310 U.S. 88, 97-98, 60 S.Ct. 736, 741-742, 84 L.Ed. 1093 (1940)), and "confers on police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis v. City of New Orleans,* 415 U.S. 130, 135, 94 S.Ct. 970, 973, 39 L.Ed.2d 214 (1974) (POWELL, J., concurring). In providing that a detention under § 647(e) may occur only where there is the level of suspicion sufficient to justify a *Terry* stop, the State ensures the existence of "neutral limitations on the conduct of individual officers." ***361***Brown v. Texas,* 443 U.S. 47, 51, 99 S.Ct. 2637, 2640, 61 L.Ed.2d 357 (1979). Although the initial detention is justified, the State fails to establish standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement.

Appellants stress the need for strengthened law enforcement tools to combat the epidemic of crime that plagues our Nation. The concern of our citizens with curbing criminal activity is certainly a matter requiring the attention of all branches of government. As weighty as this concern is, however, it cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity. See *Lanzetta v. New Jersey,* 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888 (1939). Section 647(e), as presently construed, requires that "suspicious" persons satisfy some undefined identification requirement, or face criminal punishment. Although due process does not require "impossible standards" of clarity, see *United States v. Petrillo,* 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1541-1542, 91 L.Ed. 1877 (1947), this is not a case where further precision in the statutory language is either impossible or impractical.

IV

We conclude § 647(e) is unconstitutionally vague on its face because it encourages arbitrary enforcement by failing to describe with sufficient particularity what a suspect must do in order to satisfy the statute. [FN10] Accordingly, the judgment of ***362** the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

FN10. Because we affirm the judgment of the court below on this ground, we find it unnecessary to decide the other questions raised by the parties because our resolution of these other issues would decide constitutional questions in advance of the necessity of doing so. See *Burton v. United States,* 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L.Ed. 482 (1905); *Liverpool, N.Y. & P.S.S. Co. v. Commissioners of Emigration,* 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). See also *Ashwander v. Tennessee Valley Authority,* 297 U.S. 288, 346-347, 56 S.Ct. 466, 482-483, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). The remaining issues raised by the parties include whether § 647(e) implicates Fourth Amendment concerns, whether the individual has a legitimate expectation of privacy in his identity when he is detained lawfully under *Terry,* whether the requirement that an individual identify himself during a *Terry* stop violates the Fifth Amendment protection against compelled testimony, and whether inclusion of the *Terry* standard as part of a criminal statute creates other vagueness problems. The appellee also argues that § 647(e) permits arrests on less than probable cause. See *Michigan v. DeFillippo,* 443 U.S. 31, 36, 99 S.Ct. 2627, 2631, 61 L.Ed.2d 343 (1979).

It is so ordered.

Justice BRENNAN, concurring.

I join the Court's opinion; it demonstrates convincingly that the California statute at issue in this case, Cal.Penal Code § 647(e), as interpreted by California courts, is unconstitutionally vague. Even if the defect identified by the Court were cured, however, I would hold that this statute violates the Fourth ****1861** Amendment.[FN1] Merely to facilitate the general law enforcement objectives of investigating and preventing unspecified crimes, States may not authorize the arrest and criminal prosecution of an individual for failing to produce identification or further information on demand by a police officer.

FN1. We have not in recent years found a state statute invalid directly under the Fourth Amendment, but we have long recognized that the government may not " authorize police conduct which trenches upon Fourth Amendment rights, regardless of the labels which it attaches to such conduct." *Sibron v. New York,* 392 U.S. 40, 61, 88 S.Ct. 1889, 1902, 20 L.Ed.2d 917 (1968). In *Sibron,* and in numerous other cases, the Fourth Amendment issue arose in the context of a motion by the defendant in a criminal prosecution to suppress evidence against him obtained as the result of a police search or seizure of his person or property. The question thus has always been whether particular conduct by the police violated the Fourth Amendment, and we have not had to reach the question whether state law purporting to authorize such conduct also offended the Constitution. In this case, however, appellee Edward Lawson has been repeatedly arrested under authority of the California statute, and he has shown that he will likely be subjected to further seizures by the police in the future if the statute remains in force. See *Los Angeles v. Lyons,* --- U.S. ----, ----, 103 S.Ct. 1660, 1669, 75 L.Ed.2d 675 (1983); *Gomez v. Layton,* 129 U.S.App.D.C. 289, 394 F.2d 764 (1968). It goes without saying that the Fourth Amendment safeguards the rights of those who are not prosecuted for crimes as well as the rights of those who

are.

***363** It has long been settled that the Fourth Amendment prohibits the seizure and detention or search of an individual's person unless there is probable cause to believe that he has committed a crime, except under certain conditions strictly defined by the legitimate requirements of law enforcement and by the limited extent of the resulting intrusion on individual liberty and privacy. See *Davis v. Mississippi,* 394 U.S. 721, 726-727, 89 S.Ct. 1394, 1397-1398, 22 L.Ed.2d 676 (1969). The scope of that exception to the probable cause requirement for seizures of the person has been defined by a series of cases, beginning with *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), holding that a police officer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect briefly for purposes of limited questioning and, in so doing, may conduct a brief "frisk" of the suspect to protect himself from concealed weapons. See, *e.g., United States v. Brignoni-Ponce,* 422 U.S. 873, 880-884, 95 S.Ct. 2574, 2579-2580, 2581-2582, 45 L.Ed.2d 607 (1975); *Adams v. Williams,* 407 U.S. 143, 145-146, 92 S.Ct. 1921, 1922-1923, 32 L.Ed.2d 612 (1972). Where probable cause is lacking, we have expressly declined to allow significantly more intrusive detentions or searches on the *Terry* rationale, despite the assertion of compelling law enforcement interests. "For all but those narrowly defined intrusions, the requisite 'balancing' has been performed in centuries of precedent and is embodied in the principle that seizures are ' reasonable' only if supported by probable cause." *Dunaway v. New York,* 442 U.S. 200, 214, 99 S.Ct. 2248, 2257, 60 L.Ed.2d 824 (1979).[FN2]

FN2. A brief detention is usually sufficient as a practical matter to accomplish all legitimate law enforcement objectives with respect to individuals whom the police do not have probable cause to arrest. For longer detentions, even though they fall short of a full arrest, we have demanded not only a high standard of law enforcement necessity, but also objective indications that an individual would not consider the detention significantly intrusive. Compare *Dunaway v. New York,* 442 U.S. 200, 212-216, 99 S.Ct. 2248, 2256-2258, 60 L.Ed.2d 824 (1979) (seizure of suspect without probable cause and custodial interrogation in police station violates Fourth Amendment), and *Davis v. Mississippi,* 394 U.S. 721, 727-728, 89 S.Ct. 1394, 1397-1398, 22 L.Ed.2d 676 (1969) (suspect may not be summarily detained and taken to police station for fingerprinting but may be ordered to appear at a specific time), with *Michigan v. Summers,* 452 U.S. 692, 701-705, 101 S.Ct. 2587, 2593-2595, 69 L.Ed.2d 340 (1981) (suspect may be detained in his own home without probable cause for time necessary to search the premises pursuant to a valid warrant supported by probable cause). See also *Florida v. Royer,* --- U.S. ----, ----, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 225 (1983) (opinion of WHITE, J.) ("least intrusive means" requirement for searches not supported by probable cause).

***364** *Terry* and the cases following it give full recognition to law enforcement officers' need for an "intermediate" response, short ****1862** of arrest, to suspicious circumstances; the power to effect a brief detention for the purpose of questioning is a powerful tool for the investigation and prevention of crimes. Any person may, of course, direct a question to another person in passing. The *Terry* doctrine permits police officers to do far more: If they have the requisite reasonable suspicion, they may use a number of devices with substantial coercive impact on the person to whom they direct their attention, including an official "show of authority," the use of physical force to restrain him, and a search of the person for weapons. *Terry v. Ohio,* 392 U.S., at 19, n. 16, 88 S.Ct., at 1879, n. 16; see *Florida v. Royer,* --- U.S. ----, ----, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983) (opinion of WHITE, J.); *United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 1877, 64 L.Ed.2d 497 (1979) (opinion of Stewart, J.). During such an encounter, few people will ever feel free not to cooperate fully with the police by answering their

questions. Cf. 3 W. LaFave, Search and Seizure § 9.2, at 53-55 (1978). Our case reports are replete with examples of suspects' cooperation during *Terry* encounters, even when the suspects have a great deal to lose by cooperating. See, *e.g., Sibron v. New York,* 392 U.S., at 45, 88 S.Ct., at 1893-1894; *Florida v. Royer, supra,* 460 U.S., at ----, 103 S.Ct., at 1326.

The price of that effectiveness, however, is intrusion on individual interests protected by the Fourth Amendment. We have held that the intrusiveness of even these brief stops for purposes of questioning is sufficient to render them "seizures" under the Fourth Amendment. See *Terry v. Ohio,* 392 U.S., at 16, 88 S.Ct., at 1877. For precisely that reason, the scope of seizures of the person on less than probable cause that *Terry* ***365** permits is strictly circumscribed, to limit the degree of intrusion they cause. *Terry* encounters must be brief; the suspect must not be moved or asked to move more than a short distance; physical searches are permitted only to the extent necessary to protect the police officers involved during the encounter; and, most importantly, the suspect must be free to leave after a short time and to decline to answer the questions put to him.
"[T]he person may be briefly detained against his will while pertinent questions are directed to him. Of course, the person stopped is not obliged to answer, answers may not be compelled, and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation." *Id.,* at 34, 88 S.Ct., at 1886 (WHITE, J., concurring).

Failure to observe these limitations converts a *Terry* encounter into the sort of detention that can be justified only by probable cause to believe that a crime has been committed. See *Florida v. Royer,* 460 U.S., at ----, 103 S.Ct., at 1325 (opinion of WHITE, J.); *id.,* at ----, 103 S.Ct., at 1330 (opinion of BRENNAN, J.); *Dunaway v. New York,* 442 U.S., at 216, 99 S.Ct., at 2258.

The power to arrest-or otherwise to prolong a seizure until a suspect had responded to the satisfaction of the police officers-would undoubtedly elicit cooperation from a high percentage of even those very few individuals not sufficiently coerced by a show of authority, brief physical detention, and a frisk. We have never claimed that expansion of the power of police officers to act on reasonable suspicion alone, or even less, would further no law enforcement interests. See, *e.g., Brown v. Texas,* 443 U.S. 47, 52, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979). But the balance struck by the Fourth Amendment between the public interest in effective law enforcement and the equally public interest in safeguarding individual freedom and privacy from arbitrary governmental interference forbids such expansion. See *Dunaway v. New York, supra; United States v. Brignoni-Ponce,* 422 U.S., at 878, 95 S.Ct., at 2578-2579. Detention beyond the limits ***366** of *Terry* without probable cause would improve the effectiveness of legitimate police investigations by only a small margin, ****1863** but it would expose individual members of the public to exponential increases in both the intrusiveness of the encounter and the risk that police officers would abuse their discretion for improper ends. Furthermore, regular expansion of *Terry* encounters into more intrusive detentions, without a clear connection to any specific underlying crimes, is likely to exacerbate ongoing tensions, where they exist, between the police and the public. See Report of the National Advisory Commission on Civil Disorders 157-168 (1968).

In sum, under the Fourth Amendment, police officers with reasonable suspicion that an individual has committed or is about to commit a crime may detain that individual, using some force if necessary, for the purpose of asking investigative questions.[FN3] They may ask their questions in a way calculated to obtain an answer. But they may not *compel* an answer, and they must allow the person to leave after a reasonably brief period of time unless the information they have acquired during the encounter has given them probable cause sufficient to justify an arrest.[FN4]

FN3. Police officers may have a similar power with respect to persons whom they reasonably believe to be material witnesses to a specific crime. See, *e.g.,* Model Code

of Pre-Arraignment Procedure § 110.2(1)(b) (Proposed Official Draft 1975).

FN4. Of course, some reactions by individuals to a properly limited *Terry* encounter, *e.g.,* violence toward a police officer, in and of themselves furnish valid grounds for arrest. Other reactions, such as flight, may often provide the necessary information, in addition to that the officers already possess, to constitute probable cause. In some circumstances it is even conceivable that the mere fact that a suspect refuses to answer questions once detained, viewed in the context of the facts that gave rise to reasonable suspicion in the first place, would be enough to provide probable cause. A court confronted with such a claim, however, would have to evaluate it carefully to make certain that the person arrested was not being penalized for the exercise of his right to refuse to answer.

California cannot abridge this constitutional rule by making it a crime to refuse to answer police questions during a ***367** *Terry* encounter, any more than it could abridge the protections of the Fifth and Sixth Amendments by making it a crime to refuse to answer police questions once a suspect has been taken into custody. To begin, the statute at issue in this case could not be constitutional unless the intrusions on Fourth Amendment rights it occasions were necessary to advance some specific, legitimate state interest not already taken into account by the constitutional analysis described above. Yet appellants do not claim that § 647(e) advances any interest other than general facilitation of police investigation and preservation of public order-factors addressed at length in *Terry, Davis,* and *Dunaway.* Nor do appellants show that the power to arrest and to impose a criminal sanction, in addition to the power to detain and to pose questions under the aegis of state authority, is so necessary in pursuit of the State's legitimate interests as to justify the substantial additional intrusion on individuals' rights. Compare Brief for Appellants 18-19 (asserting that § 647(e) is justified by state interest in "detecting and preventing crime" and "protecting the citizenry from criminal acts"), and *People v. Solomon,* 33 Cal.App.3d 429, 436-437, 108 Cal.Rptr. 867, 872 (1973) (§ 647(e) justified by "the public need involved," *i.e.,* " protection of society against crime"), with *United States v. Brignoni-Ponce,* 422 U.S., at 884, 95 S.Ct., at 2581-2582 (federal interest in immigration control permits stops at the border itself without reasonable suspicion), and *California v. Byers,* 402 U.S. 424, 456-458, 91 S.Ct. 1535, 1552-1553, 29 L.Ed.2d 9 (1971) (Harlan, J., concurring in the judgment) (state interest in regulating automobiles justifies making it a crime to refuse to stop after an automobile accident and report it). Thus, because the State's interests extend only so far as to justify the limited searches and seizures defined by *Terry,* the balance of interests described in that case and its progeny must control.

Second, it goes without saying that arrest and the threat of a criminal sanction ****1864** have a substantial impact on interests protected by the Fourth Amendment, far more severe than ***368** we have ever permitted on less than probable cause. Furthermore, the likelihood that innocent persons accosted by law enforcement officers under authority of § 647(e) will have no realistic means to protect their rights compounds the severity of the intrusions on individual liberty that this statute will occasion. The arrests it authorizes make a mockery of the right enforced in *Brown v. Texas, supra,* in which we held squarely that a State may not make it a crime to refuse to provide identification on demand in the absence of reasonable suspicion. [FN5] If § 647(e) remains in force, the validity of such arrests will be open to challenge only after the fact, in individual prosecutions for failure to produce identification. Such case-by-case scrutiny cannot vindicate the Fourth Amendment rights of persons like appellee, many of whom will not even be prosecuted after they are arrested, see *ante,* at 1857. A pedestrian approached by police officers has no way of knowing whether the officers have " reasonable suspicion"-without which they may not demand identification even under § 647(e), *id.,* at 1857, and n. 5-because that condition depends solely on the objective facts known to the officers and evaluated in light of their experience, see *Terry v. Ohio,* 392 U.S., at 30, 88 S.Ct., at 1884; *United*

States v. Brignoni-Ponce, 422 U.S., at 884-885, 95 S.Ct., at 2581-2582. The pedestrian will know that to assert his rights may subject him to arrest and all that goes with it: new acquaintances among jailers, lawyers, prisoners, and bail-bondsmen, first-hand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution.[FN6] The only response to be ***369** expected is compliance with the officers' requests, whether or not they are based on reasonable suspicion, and without regard to the possibility of later vindication in court. Mere reasonable suspicion does not justify subjecting the innocent to such a dilemma.[FN7]

> FN5. In *Brown* we had no need to consider whether the State can make it a crime to refuse to provide identification on demand during a seizure permitted by *Terry,* when the police have reasonable suspicion but not probable cause. See 443 U.S., at 53, n. 3, 99 S.Ct., at 2641, n. 3.
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> FN6. Even after arrest, however, he may not be forced to answer questions against his will, and-in contrast to what appears to be normal procedure during *Terry* encounters-he will be so informed. See *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In fact, if he indicates a desire to remain silent, the police should cease questioning him altogether. *Id.,* at 473-474, 86 S.Ct., at 1627-1628.
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> FN7. When law enforcement officers have probable cause to believe that a person has committed a crime, the balance of interests between the State and the individual shifts significantly, so that the individual may be forced to tolerate restrictions on liberty and invasions of privacy that possibly will never be redressed, even if charges are dismissed or the individual is acquitted. Such individuals may be arrested, and they may not resist. But probable cause, and nothing less, represents the point at which the interests of law enforcement justify subjecting an individual to any significant intrusion beyond that sanctioned in *Terry,* including either arrest or the need to answer questions that the individual does not want to answer in order to avoid arrest or end a detention.

By defining as a crime the failure to respond to requests for personal information during a *Terry* encounter, and by permitting arrests upon commission of that crime, California attempts in this statute to compel what may not be compelled under the Constitution. Even if § 647(e) were not unconstitutionally vague, the Fourth Amendment would prohibit its enforcement.

Justice WHITE, with whom Justice REHNQUIST joins, dissenting.

The usual rule is that the alleged vagueness of a criminal statute must be judged in light of the conduct that is charged to be violative of the statute. See, *e.g., United States v. Mazurie,* 419 U.S. 544, 550, 95 S.Ct. 710, 714, 42 L.Ed.2d 706 (1975); *United States v. Powell,* 423 U.S. 87, 92-93, 96 S.Ct. 316, 319-320, 46 L.Ed.2d 228 (1975). If the actor is given sufficient notice that ****1865** his conduct is within the proscription of the statute, his conviction is not vulnerable on vagueness grounds, even if as applied to other conduct, the law would be unconstitutionally vague. None of our cases " suggests that one who has received fair warning of the criminality of his own conduct from the statute in question is nonetheless entitled to ***370** attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. One to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker v. Levy,* 417 U.S. 733, 756, 94 S.Ct. 2547, 2561-2562, 41 L.Ed.2d 439 (1974). The correlative rule is that a criminal statute is not unconstitutionally vague on its face unless it is "impermissibly vague in all of its applications." *Hoffman Estates v. Flipside,* 455 U.S. 489, 497, 102 S.Ct. 1186, 1193, 71 L.Ed.2d 362 (1982).

These general rules are equally applicable to cases where First Amendment or other "fundamental" interests are involved. The Court has held that in

such circumstances "more precision in drafting may be required because of the vagueness doctrine in the case of regulation of expression," *Parker v. Levy, supra,* 417 U.S., at 756, 94 S.Ct., at 2561; a " greater degree of specificity" is demanded than in other contexts. *Smith v. Goguen,* 415 U.S. 566, 573, 94 S.Ct. 1242, 1247, 39 L.Ed.2d 605 (1974). But the difference in such cases "relates to how strict a test of vagueness shall be applied in judging a particular criminal statute." *Parker v. Levy, supra,* 417 U.S., at 756, 94 S.Ct., at 2562. It does not permit the challenger of the statute to confuse vagueness and overbreadth by attacking the enactment as being vague as applied to conduct other than his own. See *ibid.* Of course, if his own actions are themselves protected by the First Amendment or other constitutional provision, or if the statute does not fairly warn that it is proscribed, he may not be convicted. But it would be unavailing for him to claim that although he knew his own conduct was unprotected and was plainly enough forbidden by the statute, others may be in doubt as to whether their acts are banned by the law.

The upshot of our cases, therefore, is that whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications. If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the ***371** law, the enactment is not unconstitutional on its face and should not be vulnerable to a facial attack in a declaratory judgment action such as is involved in this case. Under our cases, this would be true, even though as applied to other conduct the provision would fail to give the constitutionally required notice of illegality.

Of course, the overbreadth doctrine permits facial challenge of a law that reaches a substantial amount of conduct protected by the First Amendment; and, as I have indicated, I also agree that in First Amendment cases the vagueness analysis may be more demanding. But to imply, as the majority does, *ante,* at 1859, n. 8, that the overbreadth doctrine requires facial invalidation of a statute which is not vague as applied to a defendant's conduct but which is vague as applied to other acts is to confound vagueness and overbreadth, contrary to *Parker v. Levy, supra.*

The Court says that its decision "rests on our concern for arbitrary law enforcement, and not on the concern for lack of actual notice." *Ante,* at 1859. But if there is a range of conduct that is clearly within the reach of the statute, law enforcement personnel, as well as putative arrestees, are clearly on notice that arrests for such conduct are authorized by the law. There would be nothing arbitrary or discretionary about such arrests. If the officer arrests for an act that both he and the law breaker know is clearly barred by the statute, it seems to me an untenable exercise of judicial review to invalidate a state conviction because in some other circumstance the officer may arbitrarily misapply the statute. That the law might not give sufficient guidance to arresting officers ****1866** with respect to other conduct should be dealt with in those situations. See *e.g., Hoffman Estates,* 455 U.S., at 504, 102 S.Ct., at 1196. It is no basis for fashioning a further brand of "overbreadth" and invalidating the statute on its face, thus forbidding its application to identifiable conduct that is within the state's power to sanction.

I would agree with the majority in this case if it made at least some sense to conclude that the requirement to provide "credible and reliable identification" after a valid stop on reasonable suspicion of criminal conduct is "impermissibly vague in all of its applications." ***372***Hoffman Estates v. Flipside, supra,* at 495, 102 S.Ct., at 1191.[FN*] But the statute is not vulnerable on this ground; and the majority, it seems to me, fails to demonstrate that it is. Suppose, for example, an officer requests identification information from a suspect during a valid *Terry* stop and the suspect answers: "Who I am is just none of your business." Surely the suspect would know from the statute that a refusal to provide any information at all would constitute a violation. It would be absurd to suggest that in such a situation only the unfettered discretion of a police officer, who has legally stopped a person on reasonable suspicion, would serve to determine whether a violation of the statute

has occurred.

> FN* The majority attempts to underplay the conflict between its decision today and the decision last term in *Hoffman Estates v. Flipside, supra,* by suggesting that we applied a "less strict vagueness test" because economic regulations were at issue. The Court there also found that the ordinances challenged might be characterized as quasi-criminal or criminal in nature and held that because at least some of respondent's conduct clearly was covered by the ordinance, the facial challenge was unavailing even under the " relatively strict test" applicable to criminal laws. 455 U.S., at 499-500, 102 S.Ct., at 1193-1194.

"It is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [a failure to provide credible and reliable identification] and that would be covered by the statute.... In these instances there would be ample notice to the actor and no room for undue discretion by enforcement officers. There may be a variety of other conduct that might or might not be claimed [to have failed to meet the statute's requirements] by the State, but unpredictability in those situations does not change the certainty in others."
Smith v. Goguen, 415 U.S. 566, 584, 94 S.Ct. 1242, 1253, 39 L.Ed.2d 605 (1974) (WHITE, J., concurring in judgment). See *id.,* at 590, 94 S.Ct., at 1255 (BLACKMUN, J. with whom THE CHIEF JUSTICE joins, agreeing with Justice WHITE on the vagueness issue). Thus, even if as the majority cryptically asserts, the statute here ***373** implicates First Amendment interests, it is not vague on its face, however more strictly the vagueness doctrine should be applied. The judgment below should therefore not be affirmed but reversed and appellee Lawson remitted to challenging the statute as it has been or will be applied to him.

The majority finds that the statute "contains no standard for determining what a suspect has to do in order to satisfy the requirement to provide a ' credible and reliable' information." *Ante,* at 1859. At the same time, the majority concedes that " credible and reliable" has been defined by the state court to mean identification that carries reasonable assurance that the identification is authentic and that provides means for later getting in touch with the person. The narrowing construction given this statute by the state court cannot be likened to the " standardless" statutes involved in the cases cited by the majority. For example, *Papachristou v. City of Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), involved a statute that made it a crime to be a "vagrant." The statute provided:
"Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, ... common drunkards, common night walkers, ... lewd, wanton and lascivious persons, ... common railers and brawlers, persons wandering or strolling around from place to place without****1867** any lawful purpose or object, habitual loafers, ... shall be deemed vagrants." 405 U.S., at 156, n. 1, 92 S.Ct., at 840, n. 1.

In *Lewis v. City of New Orleans,* 415 U.S. 130, 132, 94 S.Ct. 970, 972, 39 L.Ed.2d 214 (1974), the statute at issue made it a crime "for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty." The present statute, as construed by the state courts, does not fall in the same category.

The statutes in *Lewis v. City of New Orleans* and *Smith v. Goguen, supra,* as well as other cases cited by the majority clearly involved threatened infringements of First Amendment***374** freedoms. A stricter test of vagueness was therefore warranted. Here, the majority makes a vague reference to potential suppression of First Amendment liberties, but the precise nature of the liberties threatened are never mentioned. *Shuttlesworth v. City of Birmingham,* 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965), is cited, but that case dealt with an ordinance making it a crime to "stand or loiter upon any street or sidewalk ... after having been requested by an police officer to move on," *id.,* at 90, 86 S.Ct., at 213, and the First Amendment concerns implicated by the statute were adequately

explained by the Court's reference to *Lovell v. City of Griffin,* 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949 (1938), and *Schneider v. State,* 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), which dealt with the First Amendment right to distribute leaflets on city streets and sidewalks. There are no such concerns in the present case.

Of course, if the statute on its face violates the Fourth or Fifth Amendment-and I express no views about that question-the Court would be justified in striking it down. But the majority apparently cannot bring itself to take this course. It resorts instead to the vagueness doctrine to invalidate a statute that is clear in many of its applications but which is somehow distasteful to the majority. As here construed and applied, the doctrine serves as an open-ended authority to oversee the states' legislative choices in the criminal-law area and in this case leaves the state in a quandary as to how to draft a statute that will pass constitutional muster.

I would reverse the judgment of the Court of Appeals.

U.S.,1983.
Kolender v. Lawson
461 U.S. 352, 103 S.Ct. 1855, 75 L.Ed.2d 903

END OF DOCUMENT

EXHIBIT 7

306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888
(Cite as: 306 U.S. 451, 59 S.Ct. 618)

Briefs and Other Related Documents
LANZETTA v. STATE OF NEW JERSEYU.S. 1939.

Supreme Court of the United States
LANZETTA et al.
v.
STATE of NEW JERSEY.
No. 308.

Argued Jan. 9, 1939.
Decided March 27, 1939.

Appeal from the Court of Errors and Appeals of the State of New jersey.

Ignatius Lanzetta, Michael Falcone and Louie Del Rossi were convicted for violation of the New Jersey statute making it a penal offense to be a gangster. From a judgment of the Court of Errors and Appeals, 120N.J.L. 189, 198 A. 837, affirming a judgment of the Supreme Court, 118 N.J.L. 212, 192 A. 89, affirming the conviction, the defendants appeal.

Judgment reversed.

West Headnotes

[1] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases
(Formerly 92k258)

A criminal statute repugnant on its face to the due process clause may not be validated by a mere specification in charge thereunder of details of offense intended to be charged. U.S.C.A.Const. Amend. 14.

[2] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases
(Formerly 92k258)

As respects whether uncertainty of criminal statute renders it repugnant to due process clause, the statute itself and not the accusation under it prescribes the rule governing conduct and warning against transgression. U.S.C.A.Const. Amend. 14.

[3] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases
(Formerly 92k258)

Persons may not be required at peril of life, liberty or property to speculate concerning meaning of penal statute, but all are entitled to be informed concerning what the state commands or forbids. U.S.C.A.Const. Amend. 14.

[4] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases
(Formerly 92k258)

A penal statute creating a new offense must be sufficiently explicit to inform those subject to it what conduct will render them liable to its penalties, and a statute forbidding or requiring doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application is repugnant to due process clause.

U.S.C.A.Const. Amend. 14.

[5] Constitutional Law 92 ⚿258(3.1)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(3) Particular Statutes and Ordinances
92k258(3.1) k. In General. Most Cited Cases
(Formerly 92k258(3), 92k258)

Criminal Law 110 ⚿13.1(2.5)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(2) Particular Statutes, Application to
110k13.1(2.5) k. In General. Most Cited Cases
(Formerly 110k13.1(2), 110k13)
The New Jersey statute making it a penal offense to be a gangster, defined as any one not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime in any state, is violative of due process clause because of its vagueness and uncertainty in regard to persons within scope thereof. R.S.1937, 2:136-4, 2:136-5; U.S.C.A.Const. Amend. 14.

Criminal Law 110 ⚿13.1(1)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited Cases
Penal statute creating new offense must be sufficiently explicit to inform those subject to it what conduct will render them liable for its penalties, and statute so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process clause.

***451** ****618** Messrs. Samuel Kagle and Harry A. Mackey, both of Philadelphia, Pa., for appellants.
Messrs. Robert Peacock, of Mount Holly, N.J., and French B. Loveland, of Ocean City, N.J., for appellee.
***452** Mr. Justice BUTLER delivered the opinion of the Court.
By this appeal we are called on to decide whether, by reason of vagueness and uncertainty, a recent enactment of New Jersey, s 4, R.S.N.J.1937, 2:136-4, c. 155, Laws 1934, is repugnant to the due process clause of the Fourteenth Amendment, U.S.C.A.Const. It is as follows: 'Any person not engaged in any lawful occupation, known to be a member of any gang consisting of two or more persons, who has been convicted at least three times of being a disorderly person, or who has been convicted of any crime, in this or in any other State, is declared****619** to be a gangster * * *'.[FN1] Every violation is punishable by fine not exceeding $10,000 or imprisonment not exceeding 20 years, or both. s 5, R.S.N.J.1937, 2:136-5.

FN1 The section continues: 'provided, however, that nothing in this section contained shall in any wise be construed to include any participant or sympathizer in any labor dispute.' The proviso is not here involved.

In the court of quarter sessions of Cape May County, appellants were accused of violating the quoted clause. The indictment charges that on four days, June 12, 16, 19, and 24, 1936 'they, and each of them, not being engaged in any lawful occupation; they, and all of them, known to be members of a gang, consisting of two or more persons, and they, and each of them, having been convicted of a crime in the State of Pennsylvania, are hereby declared to be gangsters.' There was a trial, verdict of guilty, and judgment of conviction on which each was sentenced to be imprisoned in the state prison for not more than ten years and not less than five years, at hard labor. On the authority

of its recent decision in State v. Bell, 188 A. 737, 15 N.J.Misc. 109, the Supreme Court entered judgment affirming the conviction. State v. Pius, 118 N.J.L. 212, 192 A. 89. The Court of Errors and Appeals affirmed, 120 N.J.L. 189, 198 A. 837, on the authority of its decision,***453** State v. Gaynor, 119 N.J.L. 582, 197 A. 360, affirming State v. Bell.

[1][2][3][4] If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it. Cf. United States v. Reese, 92 U.S. 214, 221, 23 L.Ed. 563; Czarra v. Board of Medical Supervisors, 25 App.D.C. 443, 453. It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117, 73 A.L.R. 1484; Lovell v. Griffin, 303 U.S. 444, 58 S.Ct. 666, 82 L.Ed. 949. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.[FN2] The applicable rule is stated in Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322: 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law; and a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.'

FN2 Champlin Ref. Co. v. Corporation Commission, 286 U.S. 210, 242, 243, 52 S.Ct. 559, 567, 568, 76 L.Ed. 1062, 86 A.L.R. 403; Cline v. Frink Dairy Co., 274 U.S. 445, 458, 47 S.Ct. 681, 685, 71 L.Ed. 1146; Connally v. General Const. Co., 269 U.S. 385, 391-393, 46 S.Ct. 126, 127, 128, 70 L.Ed. 322; Small Co. v. American Sugar Ref. Co., 267 U.S. 233, 239, 45 S.Ct. 295, 297, 69 L.Ed. 589; United States v. Cohen Grocery Co., 255 U.S. 81, 89-92, 41 S.Ct. 298, 300, 301, 65 L.Ed. 516, 14 A.L.R. 1045; Collins v. Kentucky, 234 U.S. 634, 638, 34 S.Ct. 924, 925, 58 L.Ed. 1510; International Harvester Co. v. Kentucky, 234 U.S. 216, 221-223, 34 S.Ct. 853, 854, 855, 58 L.Ed. 1284. Cf. People v. Belcastro, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223; People v. Licavoli, 264 Mich. 643, 250

[5] The phrase 'consisting of two or more persons' is all that purports to define 'gang'. The meanings of that ***454** word indicated in dictionaries and in historical and sociological writings are numerous and varied.[FN3] Nor is the ***455** meaning derivable from ****620** the common law,[FN4] for neither in that field nor anywhere in the language of the law is there definition of the word. Our attention has not been called to, and we are unable to find, any other statute attempting to make it criminal to be a member of a 'gang.'[FN5]

FN3 American dictionaries define the word as follows:
Webster's New International Dictionary (2d Ed.): ' gang * * * Act, manner or means of going; passage, course, or journey * * * A set or full complement of any articles; an outfit. A number going in or forming a company; as, a gang of sailors; a gang of elk. Specif.: * * * A group of persons associated under the same direction; as a gang of pavers; a gang of slaves. * * * A company of persons acting together for some purpose; usually criminal, or at least not good or respectable; as, a political gang; a gang of roughs. * * *'
Funk & Wagnalls New Standard Dictionary (1915): 'gang * * * A company or band of persons, or sometimes of animals, going or acting together; a group or squad: sometimes implying cooperation for evil or disreputable purposes; as, a gang of laborers; a gang of burglars; he set the whole gang at work. * * *'
Century Dictionary and Cyclopedia (1902): 'gang * * * A number going or acting in company, whether of persons or of animals: as, a gang of drovers; a gang of elks. Specifically-(a) A number of persons associated for a particular purpose or on a particular

occasion: used especially in a depreciatory or contemptuous sense or of disreputable persons: as, a gang of thieves; a chain-gang * * * (b) A number of workmen or laborers of any kind engaged on any piece of work under supervision of one person; a squad; more particularly, a shift of men; a set of laborers working together during the same hours. * * *'

Part of the text of the definitions given by the Oxford English Dictionary (1933) reads: 'gang * * * A set of things or persons * * * A company of workmen * * * A company of slaves or prisoners * * * Any band or company of persons who go about together or act in concert (chiefly in a bad or depreciatory sense, and in mod. usage mainly associated with criminal societies). * * * To be of a gang: to belong to the same society, to have the same interests. * * *'

Another English dictionary, Wyld's Universal Dictionary of the English Language, defines the word as follows: 'gang * * * 1. A band, group, squad; (a) of labourers working together; (b) of slaves, prisoners &c. 2. (in bad sense) (a) A group of persons organized for evil or criminal purpose: a gang of burglars &c; (b) (colloq., in disparagement) a body, party, group, of persons: 'I am sick of the whole gang of university wire-pullers. * * *''

See: Asbury, Herbert, The Gangs of New York, 1927, Alfred A. Knopf. Thrasher, Frederic M., ' Gangs' in Encyclopedia of the Social Sciences, 1931, vol. 6, p. 564, and The Gang: A Study of 1313 Gangs in Chicago, 1927, University of Chicago Press.

FN4 See, e.g., Champlin Ref. Co. v. Corporation Commission, 286 U.S. 210, 242, 243, 52 S.Ct. 559, 567, 568, 76 L.Ed. 1062, 86 A.L.R. 403; Connally v. General Const. Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed. 322; Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232.

FN5 Cf. Kans.Laws 1935, c. 161. Ill.Laws 1933, p. 489, Ill.Rev.Stat.1937, c. 38, s 578, held unconstitutional in People v. Belcastro, 356 Ill. 144, 190 N.E. 301, 92 A.L.R. 1223. Mich.Comp.Laws (Mason's Supp.1935) s 17115-167, held unconstitutional in People v. Licavoli, 264 Mich. 643, 250 N.W. 520.

In State v. Gaynor, supra, the Court of Errors and Appeals dealt with the word. It said: 'Public policy ordains that a combination designed to wage war upon society shall be dispersed and its members rendered incapable of harm. This is the objective of section 4 * * * and it is therefore a valid exercise of the legislative power. * * * The evident aim of this provision was to render penal the association of criminals for the pursuit of criminal enterprises; that is the gist of the legislative expression. It cannot be gainsaid that such was within the competency of the Legislature; the mere statement of the purpose carries justification of the act. * * * If society cannot impose such taint of illegality upon the confederation of convicted criminals, who have no lawful occupation, under circumstances denoting * * * the pursuit of criminal objectives, it is helpless against one of the most menacing forms of evil activity. * * * The primary function of government * * * is to render security to its subjects. ***456** And any mischief menacing that security demands a remedy commensurate with the evil.' (119 N.J.L. 582, 197 A. 361.)

Then undertaking to find the meaning of 'gang' as used in the challenged enactment, the opinion states: 'In the construction of the provision, the word is to be given a meaning consistent with the general object of the statute. In its original sense it signifies action-'to go'; in its modern usage, without qualification, it denotes-in common intent and understanding-criminal action. It is defined as ' a company of persons acting together for some purpose, usually criminal,' while the term 'gangster ' is defined as 'a member of a gang of roughs, hireling criminals, thieves, or the like.' Webster's New International Dictionary, ****621** 2d Ed. And the Oxford English Dictionary likewise defines the word 'gang' as 'any company of persons who go about together or act in concert (in modern use mainly for criminal purposes).' Such is plainly the legislative sense of the term.'

If worded in accordance with the court's explication, the challenged provision would read as follows: 'Any person not engaged in any lawful

occupation, known to be a member of any gang consisting of two or more persons (meaning a company of persons acting together for some purpose, usually criminal, or a company of persons who go about together or who act in concert, mainly for criminal purposes), who has been convicted at least three times of being a disorderly person or who has been convicted of any crime in this or in any other State, is declared to be a gangster (meaning a member of a gang of roughs, hireling criminals, thieves, or the like).'

Appellants were convicted before the opinion in State v. Gaynor. It would be hard to hold that, in advance of judicial utterance upon the subject, they were bound to understand the challenged provision according to the language later used by the court. Indeed the state Supreme ***457** Court (State v. Bell, supra) went on supposed analogy between 'gang' and offenses denounced by the Disorderly Persons Act, Comp.Stat.Supp.1930, s 59-1 R.S.N.J.1937, 2:202-1, upheld by the Court of Errors and Appeals in Levine v. State, 110 N.J.L. 467, 470, 166 A. 300. But the court in that case found the meaning of ' common burglar' there involved to be derivable from the common law.

The descriptions and illustrations used by the court to indicate the meaning of 'gang' are not sufficient to constitute definition, inclusive or exclusive. The court's opinion was framed to apply the statute to the offenders and accusation in the case then under consideration; it does not purport to give any interpretation generally applicable. The state court did not find, and we cannot, that 'gang' has ever been limited in meaning to a group having purpose to commit any particular offense or class of crimes, or that it has not quite frequently been used in reference to groups of two or more persons not to be suspected of criminality or of anything that is unlawful. The dictionary definitions adopted by the state court extend to persons acting together for some purpose, 'usually criminal', or 'mainly for criminal purposes'. So defined, the purposes of those constituting some gangs may be commendable, as, for example, groups of workers engaged under leadership in any lawful undertaking. The statute does not declare every member to be a ' gangster' or punishable as such. Under it, no member is a gangster or offender unless convicted of being a disorderly person or of crime as specified. It cannot be said that the court intended to give 'gangster' a meaning broad enough to include anyone who had not been so convicted or to limit its meaning to the field covered by the words that it found in a dictionary, 'roughs, hireling criminals, thieves, or the like'. The latter interpretation would include some obviously not within the statute and would exclude some plainly covered by it.

***458** The lack of certainty of the challenged provision is not limited to the word 'gang' or to its dependent 'gangster'. Without resolving the serious doubts arising from the generality of the language, we assume that the clause 'any person not engaged in any lawful occupation' is sufficient to identify a class to which must belong all capable of becoming gangsters within the terms of the provision. The enactment employs the expression, ' known to be a member'. It is ambiguous. There immediately arises the doubt whether actual or putative association is meant. If actual membership is required, that status must be established as a fact, and the word 'known' would be without significance. If reputed membership is enough, there is uncertainty whether that reputation must be general or extend only to some persons. And the statute fails to indicate what constitutes membership or how one may join a 'gang'.

The challenged provision condemns no act or omission; the terms it employs to indicate what it purports to denounce are so vague, indefinite and uncertain that it must be condemned as repugnant to the due process clause of the Fourteenth Amendment.

Reversed.

Mr. Justice FRANKFURTER took no part in the consideration or decision of this case.
U.S. 1939.
Lanzetta v. State of N.J.
306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888

Briefs and Other Related Documents (Back to top)

306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888
(Cite as: 306 U.S. 451, 59 S.Ct. 618)

• 1938 WL 39137 (Appellate Brief) Brief of Appellants. (Oct. Term 1938)
• 1938 WL 39138 (Appellate Brief) Brief of the State of New Jersey. (Oct. Term 1938)

END OF DOCUMENT

EXHIBIT 8

527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67, 67 USLW 4415, 72 A.L.R.5th 665, 99 Cal. Daily Op. Serv. 4488, 1999 Daily Journal D.A.R. 5760, 1999 CJ C.A.R. 3223, 12 Fla. L. Weekly Fed. S 331
(Cite as: 527 U.S. 41, 119 S.Ct. 1849)

Supreme Court of the United States
CITY OF CHICAGO, Petitioner,
v.
Jesus MORALES et al.
No. 97-1121.

Argued Dec. 9, 1998.
Decided June 10, 1999.

After they were charged with violating city's gang loitering ordinance, defendants in one set of actions moved to dismiss actions. The Circuit Court, Cook County, Thaddeus L. Kowalski, J., granted motion. City appealed. The Appellate Court, 277 Ill.App.3d 101, 213 Ill.Dec. 777, 660 N.E.2d 34, affirmed, and granted city's subsequent request for certificate of importance. After defendants in another set of actions were charged with violating ordinance, the Circuit Court dismissed charges. On review, the Appellate Court affirmed. City petitioned for leave to appeal. In further set of actions, defendants were convicted in the Circuit Court of violating ordinance and were sentenced to jail terms. Defendants appealed. The Appellate Court reversed. City petitioned for leave to appeal. After granting petitions and consolidating causes of action, the Supreme Court of Illinois affirmed, 177 Ill.2d 440, 227 Ill.Dec. 130, 687 N.E.2d 53. Granting certiorari, the United States Supreme Court, Justice Stevens, held that: (1) ordinance, which required a police officer, on observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse, and made failure to obey such an order a violation, was unconstitutionally vague in failing to provide fair notice of prohibited conduct; and (2) ordinance was also impermissibly vague in failing to establish minimal guidelines for enforcement.

Judgment of Supreme Court of Illinois affirmed.

Justice O'Connor filed an opinion concurring in part and concurring in the judgment in which Justice Breyer joined.

Justice Kennedy filed an opinion concurring in part and concurring in the judgment.

Justice Breyer filed an opinion concurring in part and concurring in the judgment.

Justice Scalia filed a dissenting opinion.

Justice Thomas filed a dissenting opinion in which Chief Justice Rehnquist and Justice Scalia joined.

West Headnotes

[1] Constitutional Law 92 ⚿82(4)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k82 Constitutional Guaranties in General
92k82(4) k. Vagueness and Overbreadth in Restriction. Most Cited Cases

Constitutional Law 92 ⚿251.4

92 Constitutional Law
92XII Due Process of Law
92k251.4 k. Vagueness or Overbreadth. Most Cited Cases

Imprecise laws can be attacked on their face under two different doctrines: first, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep; second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. (Per Justice

Stevens, with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amends. 1, 14.

[2] Constitutional Law 92 ⚿90.1(1)

92 Constitutional Law
92V Personal, Civil and Political Rights
92k90 Freedom of Speech and of the Press
92k90.1 Particular Expressions and Limitations
92k90.1(1) k. In General. Most Cited Cases

Constitutional Law 92 ⚿91

92 Constitutional Law
92V Personal, Civil and Political Rights
92k91 k. Right of Assembly and Petition. Most Cited Cases

Vagrancy 399 ⚿1

399 Vagrancy
399k1 k. Nature and Elements of Offenses. Most Cited Cases
Ordinance that required a police officer, on observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse, and made the failure to obey such an order promptly a violation of the ordinance, did not have sufficiently substantial impact on conduct protected by First Amendment speech and association rights to render it overbroad. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amends. 1, 14.

[3] Constitutional Law 92 ⚿274(2)

92 Constitutional Law
92XII Due Process of Law
92k274 Deprivation of Personal Rights in General
92k274(2) k. Particular Matters, Rights, and Freedoms. Most Cited Cases
Freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[4] Criminal Law 110 ⚿13.1(1)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited Cases
When vagueness permeates the text of a criminal law that contains no mens rea requirement and infringes on constitutionally protected rights, law is subject to facial attack. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 ⚿42.1(3)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k41 Persons Entitled to Raise Constitutional Questions
92k42.1 Particular Statutes or Actions Attacked
92k42.1(3) k. Crime and Punishment. Most Cited Cases

Federal Courts 170B ⚿507

170B Federal Courts
170BVII Supreme Court
170BVII(E) Review of Decisions of State Courts
170Bk507 k. Right of Review and Parties. Most Cited Cases
United States Supreme Court would decide facial challenge to gang loitering ordinance without invoking prudential limitations on challengers' assertion of jus tertii standing, where case came from a state court rather than a federal one. (Per Justice Stevens, with two Justices concurring and

527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67, 67 USLW 4415, 72 A.L.R.5th 665, 99 Cal. Daily Op. Serv. 4488, 1999 Daily Journal D.A.R. 5760, 1999 CJ C.A.R. 3223, 12 Fla. L. Weekly Fed. S 331
(Cite as: 527 U.S. 41, 119 S.Ct. 1849)

three Justices concurring in the judgment.)

[6] Constitutional Law 92 ⚿42(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k41 Persons Entitled to Raise Constitutional Questions
92k42 In General
92k42(1) k. In General. Most Cited Cases
When asserting a "facial challenge," a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question, and in that sense, the threshold for facial challenges is a species of third-party, or jus tertii, standing. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.)

[7] Courts 106 ⚿97(1)

106 Courts
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(1) k. In General. Most Cited Cases
State courts need not apply prudential notions of standing created by United States Supreme Court. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.)

[8] Constitutional Law 92 ⚿48(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(1) k. In General. Most Cited Cases
To mount successful facial challenge in state court, a party is not required under precedent of United States Supreme Court to establish that no set of circumstances exists under which challenged statute would be valid. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.)

[9] Criminal Law 110 ⚿13.1(1)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited Cases
Vagueness may invalidate a criminal law for either of two independent reasons: first, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[10] Constitutional Law 92 ⚿258(3.1)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(3) Particular Statutes and Ordinances
92k258(3.1) k. In General. Most Cited Cases

Vagrancy 399 ⚿1

399 Vagrancy
399k1 k. Nature and Elements of Offenses. Most Cited Cases
For due process purposes, ordinance that required a police officer, upon observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to

disperse and remove themselves from the area, and made failure to obey such an order promptly a violation, was unconstitutionally vague in failing to provide fair notice of prohibited conduct; ordinance failed to distinguish between innocent loitering and conduct threatening harm, and it was unclear what was required in order to comply with an order to disperse from the area. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[11] Constitutional Law 92 ⚿251.4

92 Constitutional Law
92XII Due Process of Law
92k251.4 k. Vagueness or Overbreadth. Most Cited Cases
A law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[12] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases
Purpose of the fair notice requirement under vagueness doctrine is to enable the ordinary citizen to conform his or her conduct to the law, as no one may be required at peril of life, liberty, or property to speculate as to the meaning of penal statutes. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.) U.S.C.A. Const.Amend. 14.

[13] Constitutional Law 92 ⚿61

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(A) Legislative Powers and Delegation Thereof
92k59 Delegation of Powers
92k61 k. To Judiciary. Most Cited Cases

Criminal Law 110 ⚿13.1(1)

110 Criminal Law
110I Nature and Elements of Crime
110k12 Statutory Provisions
110k13.1 Certainty and Definiteness
110k13.1(1) k. In General. Most Cited Cases
Constitution does not permit a legislature to set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. (Per Justice Stevens, with two Justices concurring and three Justices concurring in the judgment.)

[14] Constitutional Law 92 ⚿258(3.1)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(3) Particular Statutes and Ordinances
92k258(3.1) k. In General. Most Cited Cases

Vagrancy 399 ⚿1

399 Vagrancy
399k1 k. Nature and Elements of Offenses. Most Cited Cases
Ordinance that required a police officer, on observing a person whom he reasonably believed to be a criminal street gang member loitering in any public place with one or more other persons, to order all such persons to disperse and remove themselves from the area, and defined loitering as remaining in any one place with no apparent purpose, was unconstitutionally vague under Due Process Clause in failing to establish minimal guidelines to govern law enforcement. U.S.C.A. Const.Amend. 14.

527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67, 67 USLW 4415, 72 A.L.R.5th 665, 99 Cal. Daily Op. Serv. 4488, 1999 Daily Journal D.A.R. 5760, 1999 CJ C.A.R. 3223, 12 Fla. L. Weekly Fed. S 331
(Cite as: 527 U.S. 41, 119 S.Ct. 1849)

[15] Federal Courts 170B ⚿386

170B Federal Courts
170BVI State Laws as Rules of Decision
170BVI(B) Decisions of State Courts as Authority
170Bk386 k. State Constitutions and Statutes, Validity and Construction. Most Cited Cases
United States Supreme Court has no authority to construe the language of a state statute more narrowly than the construction given by that state's highest court.

[16] Statutes 361 ⚿174

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k174 k. In General. Most Cited Cases
Power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.

[17] Constitutional Law 92 ⚿258(3.1)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(3) Particular Statutes and Ordinances
92k258(3.1) k. In General. Most Cited Cases

Vagrancy 399 ⚿1

399 Vagrancy
399k1 k. Nature and Elements of Offenses. Most Cited Cases
City police department's general order providing guidelines for enforcement of city's gang loitering ordinance, including rules that restricted enforcement to certain designated areas, did not sufficiently limit the vast amount of discretion granted to police to save ordinance from being impermissibly vague in violation of Due Process Clause. U.S.C.A. Const.Amend. 14.

***1851 *41** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Chicago's Gang Congregation Ordinance prohibits " criminal street gang members" from loitering in public places. Under the ordinance, if a police officer observes a person whom he reasonably believes to be a gang member loitering in a public place with one or more persons, he shall order them to disperse. Anyone who does not promptly obey such an order has violated the ordinance. The police department's General Order 92-4 purports to limit officers' enforcement discretion by confining arrest authority to designated officers, establishing detailed criteria for defining street gangs and membership therein, and providing for designated, but publicly undisclosed, enforcement areas. Two trial judges upheld the ordinance's constitutionality, but 11 others ruled it invalid. The Illinois Appellate Court affirmed the latter cases and reversed the convictions in the former. The State Supreme Court affirmed, holding that the ordinance violates due process in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties.

Held: The judgment is affirmed.

177 Ill.2d 440, 227 Ill.Dec. 130, 687 N.E.2d 53, affirmed.

Justice STEVENS delivered the opinion of the Court with respect to Parts I, II, and V, concluding that the ordinance's broad sweep violates the requirement that a legislature establish minimal guidelines to govern law enforcement. *Kolender v. Lawson,* 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903. The ordinance encompasses a great deal of harmless behavior: In any public place in Chicago, persons in the company of a gang member

"shall" be ordered to disperse if their purpose is not apparent to an officer. Moreover, the Illinois Supreme Court interprets the ordinance's loitering definition-"to remain in any one place with no apparent purpose"-as giving officers absolute discretion**1852 to determine what activities constitute loitering. See *id.,* at 359, 103 S.Ct. 1855.

This Court has no authority to construe the language of a state statute more narrowly than the State's highest court. See *Smiley v. Kansas,* 196 U.S. 447, 455, 25 S.Ct. 289, 49 L.Ed. 546. The three features of the ordinance that, the city argues, limit the officer's discretion-(1) it does not permit issuance of a dispersal order to anyone who is moving along or who has an apparent purpose; (2) it does not permit an arrest if individuals obey a dispersal order; and (3) no order can issue unless the officer reasonably believes that one of the loiterers is a gang member *42 are insufficient. Finally, the Illinois Supreme Court is correct that General Order 92-4 is not a sufficient limitation on police discretion. See *Smith v. Goguen,* 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605. Pp. 1861-1862.

Justice STEVENS, joined by Justice SOUTER and Justice GINSBURG, concluded in Parts III, IV, and VI:

1. It was not improper for the state courts to conclude that the ordinance, which covers a significant amount of activity in addition to the intimidating conduct that is its factual predicate, is invalid on its face. An enactment may be attacked on its face as impermissibly vague if, *inter alia,* it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty. *Kolender v. Lawson,* 461 U.S., at 358, 103 S.Ct. 1855. The freedom to loiter for innocent purposes is part of such "liberty." See, *e.g., Kent v. Dulles,* 357 U.S. 116, 126, 78 S.Ct. 1113, 2 L.Ed.2d 1204. The ordinance's vagueness makes a facial challenge appropriate. This is not an enactment that simply regulates business behavior and contains a scienter requirement. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362. It is a criminal law that contains no *mens rea* requirement, see *Colautti v. Franklin,* 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596, and infringes on constitutionally protected rights, see *id.,* at 391, 99 S.Ct. 675. Pp. 1856-1859.

2. Because the ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted, it is impermissibly vague. See, *e.g., Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214. The term "loiter" may have a common and accepted meaning, but the ordinance's definition of that term-"to remain in any one place with no apparent purpose"-does not. It is difficult to imagine how any Chicagoan standing in a public place with a group of people would know if he or she had an "apparent purpose." This vagueness about what loitering is covered and what is not dooms the ordinance. The city's principal response to the adequate notice concern-that loiterers are not subject to criminal sanction until after they have disobeyed a dispersal order-is unpersuasive for at least two reasons. First, the fair notice requirement's purpose is to enable the ordinary citizen to conform his or her conduct to the law. See *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888. A dispersal order, which is issued only after prohibited conduct has occurred, cannot retroactively provide adequate notice of the boundary between the permissible and the impermissible applications of the ordinance. Second, the dispersal order's terms compound the inadequacy of the notice afforded by the ordinance, which vaguely requires that the officer "order all such persons to disperse and remove themselves from the area," and thereby raises a host of questions as to the duration and distinguishing features of the loiterers' separation. Pp. 1859-1861.

*43 Justice O'CONNOR, joined by Justice BREYER, concluded that, as construed by the Illinois Supreme Court, the Chicago ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement officers; in particular, it fails to provide any standard by which police can judge whether an individual has an "*apparent* purpose." This vagueness alone provides a sufficient ground for

affirming the judgment below, and there is no need to consider the other issues briefed by the parties and addressed by the plurality. It is important to courts and legislatures alike to characterize more clearly the narrow scope of the Court's holding. Chicago still has reasonable alternatives to combat the very real threat posed by gang intimidation and **1853 violence, including, *e.g.,* adoption of laws that directly prohibit the congregation of gang members to intimidate residents, or the enforcement of existing laws with that effect. Moreover, the ordinance could have been construed more narrowly to avoid the vagueness problem, by, *e.g.,* adopting limitations that restrict the ordinance's criminal penalties to gang members or interpreting the term "apparent purpose" narrowly and in light of the Chicago City Council's findings. This Court, however, cannot impose a limiting construction that a state supreme court has declined to adopt. See, *e.g., Kolender v. Lawson,* 461 U.S. 352, 355-356, n. 4, 103 S.Ct. 1855, 75 L.Ed.2d 903. The Illinois Supreme Court misapplied this Court's precedents, particularly *Papachristou v. Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110, to the extent it read them as *requiring* it to hold the ordinance vague in all of its applications. Pp. 1863-1865.

Justice KENNEDY concluded that, as interpreted by the Illinois Supreme Court, the Chicago ordinance unconstitutionally reaches a broad range of innocent conduct, and, therefore, is not necessarily saved by the requirement that the citizen disobey a dispersal order before there is a violation. Although it can be assumed that disobeying some police commands will subject a citizen to prosecution whether or not the citizen knows why the order is given, it does not follow that any unexplained police order must be obeyed without notice of its lawfulness. The predicate of a dispersal order is not sufficient to eliminate doubts regarding the adequacy of notice under this ordinance. A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to such an order based on the officer's own knowledge of the identity or affiliations of other persons with whom the citizen is congregating; nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose. P. 1865.

Justice BREYER concluded that the ordinance violates the Constitution because it delegates too much discretion to the police, and it is not saved by its limitations requiring that the police reasonably believe that the person ordered to disperse (or someone accompanying him) is a gang *44 member, and that he remain in the public place " with no apparent purpose." Nor does it violate this Court's usual rules governing facial challenges to forbid the city to apply the unconstitutional ordinance in this case. There is no way to distinguish in the ordinance's terms between one application of unlimited police discretion and another. It is unconstitutional, not because a policeman applied his discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance *is* invalid in all its applications. See *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888. Contrary to Justice SCALIA's suggestion, the ordinance does not escape facial invalidation simply because it may provide fair warning to some individual defendants that it prohibits the conduct in which they are engaged. This ordinance is unconstitutional, not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide the police. See *Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214. Pp. 1865-1867.

STEVENS, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER , JJ., joined, and an opinion with respect to Parts III, IV, and VI, in which SOUTER and GINSBURG, JJ., joined. O'CONNOR, J., filed an opinion concurring in part and concurring in the judgment, in which BREYER, J., joined, *post,* p. 1863. KENNEDY, J., *post*, p. 1865, and BREYER, J., *post,* p. 1865, filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed a dissenting opinion, *post,* p. 1867. THOMAS, J.,

filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined, *post,* p. 1879.

Lawrence Rosenthal, for petitioner.
Harvey Grossman, Chicago, IL, for respondent.For U.S. Supreme Court briefs, see:**1854 1998 WL 328342 (Pet.Brief)1998 WL 614302 (Resp.Brief)1998 WL 727542 (Reply.Brief)
*45 Justice STEVENS announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, and V, and an opinion with respect to Parts III, IV, and VI, in which Justice SOUTER and Justice GINSBURG join.
In 1992, the Chicago City Council enacted the Gang Congregation Ordinance, which prohibits "criminal street gang *46 members" from "loitering" with one another or with other persons in any public place. The question presented is whether the Supreme Court of Illinois correctly held that the ordinance violates the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

I

Before the ordinance was adopted, the city council's Committee on Police and Fire conducted hearings to explore the problems created by the city's street gangs, and more particularly, the consequences of public loitering by gang members. Witnesses included residents of the neighborhoods where gang members are most active, as well as some of the aldermen who represent those areas. Based on that evidence, the council made a series of findings that are included in the text of the ordinance and explain the reasons for its enactment. [FN1]

FN1. The findings are quoted in full in the opinion of the Supreme Court of Illinois. 177 Ill.2d 440, 445, 227 Ill.Dec. 130, 687 N.E.2d 53, 58 (1997). Some of the evidence supporting these findings is quoted in Justice THOMAS' dissenting opinion. *Post,* at 1880-1881.

The council found that a continuing increase in criminal street gang activity was largely responsible for the city's rising murder rate, as well as an escalation of violent and drug related crimes. It noted that in many neighborhoods throughout the city, " 'the burgeoning presence of street gang members in public places has intimidated many law abiding citizens.' " 177 Ill.2d 440, 445, 227 Ill.Dec. 130, 687 N.E.2d 53, 58 (1997). Furthermore, the council stated that gang members " 'establish control over identifiable areas ... by loitering in those areas and intimidating others from entering those areas; and ... [m]embers of criminal street gangs avoid arrest by committing no offense punishable under existing laws when they know the police are present....' " *Ibid.* It further found that " ' loitering in public places by *47 criminal street gang members creates a justifiable fear for the safety of persons and property in the area' " and that " '[a]ggressive action is necessary to preserve the city's streets and other public places so that the public may use such places without fear.' " Moreover, the council concluded that the city " 'has an interest in discouraging all persons from loitering in public places with criminal gang members.' " *Ibid.*

The ordinance creates a criminal offense punishable by a fine of up to $500, imprisonment for not more than six months, and a requirement to perform up to 120 hours of community service. Commission of the offense involves four predicates. First, the police officer must reasonably believe that at least one of the two or more persons present in a " ' public place' " is a " 'criminal street gang membe[r].' " Second, the persons must be " ' loitering,' " which the ordinance defines as " remain[ing] in any one place with no apparent purpose." Third, the officer must then order " 'all' " of the persons to disperse and remove themselves " 'from the area.' " Fourth, a person must disobey the officer's order. If any person, whether a gang member or not, disobeys the officer's order, that person is guilty of violating the ordinance. *Ibid.* [FN2]

FN2. The ordinance states in pertinent part:
"(a) Whenever a police officer observes a

person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey such an order is in violation of this section.

" (b) It shall be an affirmative defense to an alleged violation of this section that no person who was observed loitering was in fact a member of a criminal street gang.

"(c) As used in this Section:

"(1) 'Loiter' means to remain in any one place with no apparent purpose.

"(2) 'Criminal street gang' means any ongoing organization, association in fact or group of three or more persons, whether formal or informal, having as one of its substantial activities the commission of one or more of the criminal acts enumerated in paragraph (3), and whose members individually or collectively engage in or have engaged in a pattern of criminal gang activity.

.....

"(5) 'Public place' means the public way and any other location open to the public, whether publicly or privately owned.

"(e) Any person who violates this Section is subject to a fine of not less than $100 and not more than $500 for each offense, or imprisonment for not more than six months, or both.

"In addition to or instead of the above penalties, any person who violates this section may be required to perform up to 120 hours of community service pursuant to section 1-4-120 of this Code." Chicago Municipal Code § 8-4-015 (added June 17, 1992), reprinted in App. to Pet. for Cert. 61a-63a.

**1855 *48 Two months after the ordinance was adopted, the Chicago Police Department promulgated General Order 92-4 to provide guidelines to govern its enforcement.[FN3] That order purported to establish limitations on the enforcement discretion of police officers "to ensure that the anti-gang loitering ordinance is not enforced in an arbitrary or discriminatory way." Chicago Police Department, General Order 92-4, reprinted in App. to Pet. for Cert. 65a. The limitations confine the authority to arrest gang members who violate the ordinance to sworn " members of the Gang Crime Section" and certain other designated officers,[FN4] and establish detailed criteria for defining street gangs and membership in such gangs. *Id.,* at 66a-67a. In addition, the order directs district commanders to "designate areas in which the presence of gang members has a demonstrable effect on the activities of law abiding persons in the surrounding community," and provides that the ordinance "will be enforced only within the designated*49 areas." *Id.,* at 68a-69 a. The city, however, does not release the locations of these "designated areas" to the public.[FN5]

FN3. As the Illinois Supreme Court noted, during the hearings preceding the adoption of the ordinance, "representatives of the Chicago law and police departments informed the city counsel that any limitations on the discretion police have in enforcing the ordinance would be best developed through police policy, rather than placing such limitations into the ordinance itself." 177 Ill.2d, at 446, 227 Ill.Dec. 130, 687 N.E.2d, at 58-59.

FN4. Presumably, these officers would also be able to arrest all nongang members who violate the ordinance.

FN5. Tr. of Oral Arg. 22-23.

II

During the three years of its enforcement,[FN6] the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the ordinance.[FN7] In the ensuing enforcement proceedings, 2 trial judges upheld the constitutionality of the ordinance, but 11 others ruled that it was invalid.[FN8] In respondent

Youkhana's case, the trial judge held that the " ordinance fails to notify individuals what conduct ***50** is prohibited, and it encourages arbitrary and capricious enforcement by police." [FN9]

FN6. The city began enforcing the ordinance on the effective date of the general order in August 1992 and stopped enforcing it in December 1995, when it was held invalid in *Chicago v. Youkhana,* 277 Ill.App.3d 101, 213 Ill.Dec. 777, 660 N.E.2d 34 (1995). Tr. of Oral Arg. 43.

FN7. Brief for Petitioner 16. There were 5,251 arrests under the ordinance in 1993, 15,660 in 1994, and 22,056 in 1995. City of Chicago, R. Daley & T. Hillard, Gang and Narcotic Related Violent Crime: 1993-1997, p. 7 (June 1998).
The city believes that the ordinance resulted in a significant decline in gang-related homicides. It notes that in 1995, the last year the ordinance was enforced, the gang-related homicide rate fell by 26%. In 1996, after the ordinance had been held invalid, the gang-related homicide rate rose 11%. Pet. for Cert. 9, n. 5. However, gang-related homicides fell by 19% in 1997, over a year after the suspension of the ordinance. Daley & Hillard, at 5. Given the myriad factors that influence levels of violence, it is difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance's efficacy.
Cf. Harcourt, Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style, 97 Mich. L.Rev. 291, 296 (1998) (describing the "hotly contested debate raging among ... experts over the causes of the decline in crime in New York City and nationally").

FN8. See Poulos, Chicago's Ban on Gang Loitering: Making Sense of Vagueness and Overbreadth in Loitering Laws, 83 Calif. L.Rev. 379, 384, n. 26 (1995).

FN9. *Chicago v. Youkhana,* Nos. 93 MCI 293363 et al. (Ill. Cir. Ct., Cook Cty., Sept. 29, 1993), App. to Pet. for Cert. 45a. The court also concluded that the ordinance improperly authorized arrest on the basis of a person's status instead of conduct and that it was facially overbroad under the First Amendment to the Federal Constitution and Art. I, § 5, of the Illinois Constitution. *Id.,* at 59a.

****1856** The Illinois Appellate Court affirmed the trial court's ruling in the *Youkhana* case,[FN10] consolidated and affirmed other pending appeals in accordance with *Youkhana,*[FN11] and reversed the convictions of respondents Gutierrez, Morales, and others.[FN12] The Appellate Court was persuaded that the ordinance impaired the freedom of assembly of nongang members in violation of the First Amendment to the Federal Constitution and Article I of the Illinois Constitution, that it was unconstitutionally vague, that it improperly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the Fourth Amendment.[FN13]

FN10. *Chicago v. Youkhana,* 277 Ill.App.3d 101, 213 Ill.Dec. 777, 660 N.E.2d 34 (1995).

FN11. *Chicago v. Ramsey,* 276 Ill.App.3d 1112, 231 Ill.Dec. 730, 697 N.E.2d 11 (1995), App. to Pet. for Cert. 39a.

FN12. *Chicago v. Morales,* 276 Ill.App.3d 1111, 231 Ill.Dec. 730, 697 N.E.2d 11 (1995), App. to Pet. for Cert. 37a.

FN13. *Chicago v. Youkhana,* 277 Ill.App.3d, at 106, 213 Ill.Dec. 777, 660 N.E.2d, at 38; *id.,* at 112, 213 Ill.Dec. 777, 660 N.E.2d, at 41; *id.,* at 113, 213 Ill.Dec. 777, 660 N.E.2d, at 42.

The Illinois Supreme Court affirmed. It held "that the gang loitering ordinance violates due process of law in that it is impermissibly vague on its face and an arbitrary restriction on personal liberties." 177 Ill.2d, at 447, 227 Ill.Dec. 130, 687 N.E.2d, at 59. The court did not reach the contentions that the ordinance "creates a status offense, permits arrests without probable cause or is overbroad." *Ibid.*

In support of its vagueness holding, the court pointed out that the definition of "loitering" in the ordinance drew no distinction between innocent conduct and conduct calculated ***51** to cause harm. [FN14] "Moreover, the definition of 'loiter' provided by the ordinance does not assist in clearly articulating the proscriptions of the ordinance." *Id.,* at 451-452, 227 Ill.Dec. 130, 687 N.E.2d, at 60-61. Furthermore, it concluded that the ordinance was " not reasonably susceptible to a limiting construction which would affirm its validity." [FN15]

FN14. "The ordinance defines 'loiter' to mean 'to remain in any one place with no apparent purpose.' Chicago Municipal Code § 8-4-015(c)(1) (added June 17, 1992). People with entirely legitimate and lawful purposes will not always be able to make their purposes apparent to an observing police officer. For example, a person waiting to hail a taxi, resting on a corner during a jog, or stepping into a doorway to evade a rain shower has a perfectly legitimate purpose in all these scenarios; however, that purpose will rarely be apparent to an observer." 177 Ill.2d, at 451-452, 227 Ill.Dec. 130, 687 N.E.2d, at 60-61.

FN15. It stated: "Although the proscriptions of the ordinance are vague, the city council's intent in its enactment is clear and unambiguous. The city has declared gang members a public menace and determined that gang members are too adept at avoiding arrest for all the other crimes they commit. Accordingly, the city council crafted an exceptionally broad ordinance which could be used to sweep these intolerable and objectionable gang members from the city streets." *Id.,* at 458, 227 Ill.Dec. 130, 687 N.E.2d, at 64.

We granted certiorari, 523 U.S. 1071, 118 S.Ct. 1510, 140 L.Ed.2d 664 (1998), and now affirm. Like the Illinois Supreme Court, we conclude that the ordinance enacted by the city of Chicago is unconstitutionally vague.

III

The basic factual predicate for the city's ordinance is not in dispute. As the city argues in its brief, " the very presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways intimidates residents, who become afraid even to leave their homes and go about their business. That, in turn, imperils community residents' sense of safety and security, detracts from property values, and can ultimately destabilize entire neighborhoods." [FN16] The findings in the ordinance explain that it was motivated by these concerns. We have no doubt ***52** that a law that directly prohibited such intimidating conduct ****1857** would be constitutional,[FN17] but this ordinance broadly covers a significant amount of additional activity. Uncertainty about the scope of that additional coverage provides the basis for respondents' claim that the ordinance is too vague.

FN16. Brief for Petitioner 14.

FN17. In fact the city already has several laws that serve this purpose. See, *e.g.,* Ill. Comp. Stat., ch. 720 §§ 5/12-6 (1998) (intimidation); 570/405.2 (streetgang criminal drug conspiracy); 147/1 *et seq.* (Illinois Streetgang Terrorism Omnibus Prevention Act); 5/25-1 (mob action). Deputy Superintendent Cooper, the only representative of the police department at the Committee on Police and Fire hearing on the ordinance, testified that, of the kinds

> of behavior people had discussed at the hearing, "90 percent of those instances are actually criminal offenses where people, in fact, can be arrested." Record, Appendix II to plaintiff's Memorandum in Opposition to Motion to Dismiss 182 (Tr. of Proceedings, Chicago City Council Committee on Police and Fire, May 18, 1992).

[1] We are confronted at the outset with the city's claim that it was improper for the state courts to conclude that the ordinance is invalid on its face. The city correctly points out that imprecise laws can be attacked on their face under two different doctrines.[FN18] First, the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment rights if the impermissible applications of the law are substantial when "judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma,* 413 U.S. 601, 612-615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Second, even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to guard against the arbitrary deprivation of liberty interests. *Kolender v. Lawson,* 461 U.S. 352, 358, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983).

FN18. Brief for Petitioner 17.

[2] While we, like the Illinois courts, conclude that the ordinance is invalid on its face, we do not rely on the overbreadth doctrine. We agree with the city's submission that the law does not have a sufficiently substantial impact on conduct ***53** protected by the First Amendment to render it unconstitutional. The ordinance does not prohibit speech. Because the term "loiter" is defined as remaining in one place "with no apparent purpose," it is also clear that it does not prohibit any form of conduct that is apparently intended to convey a message. By its terms, the ordinance is inapplicable to assemblies that are designed to demonstrate a group's support of, or opposition to, a particular point of view. Cf. *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984); *Gregory v. Chicago,* 394 U.S. 111, 89 S.Ct. 946, 22 L.Ed.2d 134 (1969). Its impact on the social contact between gang members and others does not impair the First Amendment "right of association" that our cases have recognized. See *Dallas v. Stanglin,* 490 U.S. 19, 23-25, 109 S.Ct. 1591, 104 L.Ed.2d 18 (1989).

[3] On the other hand, as the United States recognizes, the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. [FN19] We have expressly identified this "right to remove from one place to another according to inclination" as "an attribute of personal liberty" protected by the Constitution. *Williams v. Fears,* 179 U.S. 270, 274, 21 S.Ct. 128, 45 L.Ed. 186 (1900); see also *Papachristou v. Jacksonville,* 405 U.S. 156, 164, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972). [FN20] ***54** Indeed, it is apparent****1858** that an individual's decision to remain in a public place of his choice is as much a part of his liberty as the freedom of movement inside frontiers that is "a part of our heritage" *Kent v. Dulles,* 357 U.S. 116, 126, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958), or the right to move "to whatsoever place one's own inclination may direct" identified in Blackstone's Commentaries. 1 W. Blackstone, Commentaries on the Laws of England 130 (1765). [FN21]

FN19. See Brief for United States as *Amicus Curiae* 23: "We do not doubt that, under the Due Process Clause, individuals in this country have significant liberty interests in standing on sidewalks and in other public places, and in traveling, moving, and associating with others." The city appears to agree, at least to the extent that such activities include "social gatherings." Brief for Petitioner 21, n. 13. Both Justice SCALIA, *post,* at 1872-1874 (dissenting opinion), and Justice THOMAS, *post,* at 1881-1883 (dissenting opinion), not only disagree with this proposition, but also incorrectly assume

(as the city does not, see Brief for Petitioner 44) that identification of an obvious liberty interest that is impacted by a statute is equivalent to finding a violation of substantive due process. See n. 35, *infra.*

FN20. Petitioner cites historical precedent against recognizing what it describes as the "fundamental right to loiter." Brief for Petitioner 12. While antiloitering ordinances have long existed in this country, their pedigree does not ensure their constitutionality. In 16th-century England, for example, the " 'Slavery acts' " provided for a 2-year enslavement period for anyone who " 'liveth idly and loiteringly, by the space of three days.' " Note, Homelessness in a Modern Urban Setting, 10 Ford. Urb. L.J. 749, 754, n. 17 (1982). In *Papachristou* we noted that many American vagrancy laws were patterned on these "Elizabethan poor laws." 405 U.S., at 161-162, 92 S.Ct. 839. These laws went virtually unchallenged in this country until attorneys became widely available to the indigent following our decision in *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). See Recent Developments, Constitutional Attacks on Vagrancy Laws, 20 Stan. L.Rev. 782, 783 (1968). In addition, vagrancy laws were used after the Civil War to keep former slaves in a state of quasi slavery. In 1865, for example, Alabama broadened its vagrancy statute to include " 'any runaway, stubborn servant or child' " and " 'a laborer or servant who loiters away his time, or refuses to comply with any contract for a term of service without just cause.' " T. Wilson, Black Codes of the South 76 (1965). The Reconstruction-era vagrancy laws had especially harsh consequences on African-American women and children. L. Kerber, No Constitutional Right to be Ladies: Women and the Obligations of Citizenship 50-69 (1998). Neither this history nor the scholarly compendia in Justice THOMAS' dissent, *post,* at 1881-1883, persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not a part of the liberty protected by the Due Process Clause.

FN21. The freewheeling and hypothetical character of Justice SCALIA's discussion of liberty is epitomized by his assumption that citizens of Chicago, who were once " free to drive about the city" at whatever speed they wished, were the ones who decided to limit that freedom by adopting a speed limit. *Post,* at 1867. History tells quite a different story.
In 1903, the Illinois Legislature passed " An Act to regulate the speed of automobiles and other horseless conveyances upon the public streets, roads, and highways of the state of Illinois." That statute, with some exceptions, set a speed limit of 15 miles per hour. See *Christy v. Elliott,* 216 Ill. 31, 74 N.E. 1035 (1905). In 1900, there were 1,698,575 citizens of Chicago, 1 Twelfth Census of the United States 430 (1900) (Table 6), but only 8,000 cars (both private and commercial) registered in the entire United States. See Ward's Automotive Yearbook 230 (1990). Even though the number of cars in the country had increased to 77,400 by 1905, *ibid.,* it seems quite clear that it was pedestrians, rather than drivers, who were primarily responsible for Illinois' decision to impose a speed limit.

[4][5][6][7][8] ***55** There is no need, however, to decide whether the impact of the Chicago ordinance on constitutionally protected liberty alone would suffice to support a facial challenge under the overbreadth doctrine. Cf. *Aptheker v. Secretary of State,* 378 U.S. 500, 515-517, 84 S.Ct. 1659, 12 L.Ed.2d 992 (1964) (right to travel); *Planned Parenthood of Central Mo. v. Danforth,* 428 U.S. 52, 82-83, 96 S.Ct. 2831, 49 L.Ed.2d 788 (1976) (abortion); *Kolender v. Lawson,* 461 U.S., at 355,

n. 3, 358-360, and n. 9, 103 S.Ct. 1610. For it is clear that the vagueness of this enactment makes a facial challenge appropriate. This is not an ordinance that "simply regulates business behavior and contains a scienter requirement." See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982). It is a criminal law that contains no *mens rea* requirement, see *Colautti v. Franklin,* 439 U.S. 379, 395, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), and infringes on constitutionally protected rights, see *id.,* at 391, 99 S.Ct. 675. When vagueness permeates the text of such a law, it is subject to facial attack. FN22

FN22. The burden of the first portion of Justice SCALIA's dissent is virtually a facial challenge to the facial challenge doctrine. See *post,* at 1867-1872. He first lauds the "clarity of our general jurisprudence" in the method for assessing facial challenges and then states that the clear import of our cases is that, in order to mount a successful facial challenge, a plaintiff must "establish that no set of circumstances exists under which the Act would be valid." See *post,* at 1870 (emphasis deleted); *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987). To the extent we have consistently articulated a clear standard for facial challenges, it is not the *Salerno* formulation, which has never been the decisive factor in any decision of this Court, including *Salerno* itself (even though the defendants in that case did not claim that the statute was unconstitutional as applied to them, see *id.,* at 745, n. 3, 107 S.Ct. 2095, the Court nevertheless entertained their facial challenge). Since we, like the Illinois Supreme Court, conclude that vagueness permeates the ordinance, a facial challenge is appropriate.
We need not, however, resolve the viability of *Salerno's* dictum, because this case comes to us from a state-not a federal-court. When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question. In this sense, the threshold for facial challenges is a species of third party *(jus tertii)* standing, which we have recognized as a prudential doctrine and not one mandated by Article III of the Constitution. See *Secretary of State of Md. v. Joseph H. Munson Co.,* 467 U.S. 947, 955, 104 S.Ct. 2839, 81 L.Ed.2d 786 (1984). When a state court has reached the merits of a constitutional claim, "invoking prudential limitations on [the respondent's] assertion of *jus tertii* would serve no functional purpose." *City of Revere v. Massachusetts Gen. Hospital,* 463 U.S. 239, 243, 103 S.Ct. 2979, 77 L.Ed.2d 605 (1983) (internal quotation marks omitted).
Whether or not it would be appropriate for federal courts to apply the *Salerno* standard in some cases-a proposition which is doubtful-state courts need not apply prudential notions of standing created by this Court. See *ASARCO Inc. v. Kadish,* 490 U.S. 605, 618, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989). Justice SCALIA's assumption that state courts must apply the restrictive *Salerno* test is incorrect as a matter of law; moreover it contradicts "essential principles of federalism." See Dorf, Facial Challenges to State and Federal Statutes, 46 Stan. L.Rev. 235, 284 (1994).

**1859 [9] *56 Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement. See *Kolender v. Lawson,* 461 U.S., at 357, 103 S.Ct. 1855. Accordingly, we first consider whether the ordinance provides fair notice to the citizen and then discuss its potential for arbitrary enforcement.

527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67, 67 USLW 4415, 72 A.L.R.5th 665, 99 Cal. Daily Op. Serv. 4488, 1999 Daily Journal D.A.R. 5760, 1999 CJ C.A.R. 3223, 12 Fla. L. Weekly Fed. S 331
(Cite as: 527 U.S. 41, 119 S.Ct. 1849)

IV

[10][11] "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits...." *Giaccio v. Pennsylvania,* 382 U.S. 399, 402-403, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). The Illinois Supreme Court recognized that the term "loiter" may have a common and accepted meaning, 177 Ill.2d, at 451, 227 Ill.Dec. 130, 687 N.E.2d, at 61, but the definition of that term in this ordinance-"to remain in any one place with no apparent purpose"-does not. It is difficult to imagine how ***57** any citizen of the city of Chicago standing in a public place with a group of people would know if he or she had an "apparent purpose." If she were talking to another person, would she have an apparent purpose? If she were frequently checking her watch and looking expectantly down the street, would she have an apparent purpose? [FN23]

FN23. The Solicitor General, while supporting the city's argument that the ordinance is constitutional, appears to recognize that the ordinance cannot be read literally without invoking intractable vagueness concerns. "[T]he purpose simply to stand on a corner cannot be an ' apparent purpose' under the ordinance; if it were, the ordinance would prohibit nothing at all." Brief for United States as *Amicus Curiae* 12-13.

Since the city cannot conceivably have meant to criminalize each instance a citizen stands in public with a gang member, the vagueness that dooms this ordinance is not the product of uncertainty about the normal meaning of "loitering," but rather about what loitering is covered by the ordinance and what is not. The Illinois Supreme Court emphasized the law's failure to distinguish between innocent conduct and conduct threatening harm.[FN24] Its decision followed the precedent set by a number of state courts that have upheld ordinances that criminalize loitering combined with some other overt act or evidence of criminal intent.[FN25]

****1860** However, state ***58** courts have uniformly invalidated laws that do not join the term "loitering" with a second specific element of the crime.[FN26]

FN24. 177 Ill.2d, at 452, 227 Ill.Dec. 130, 687 N.E.2d, at 61. One of the trial courts that invalidated the ordinance gave the following illustration: "Suppose a group of gang members were playing basketball in the park, while waiting for a drug delivery. Their apparent purpose is that they are in the park to play ball. The actual purpose is that they are waiting for drugs. Under this definition of loitering, a group of people innocently sitting in a park discussing their futures would be arrested, while the 'basketball players' awaiting a drug delivery would be left alone." *Chicago v. Youkhana,* Nos. 93 MCI 293363 et al. (Ill. Cir. Ct., Cook Cty., Sept. 29, 1993), App. to Pet. for Cert. 48a-49a.

FN25. See, *e.g., Tacoma v. Luvene,* 118 Wash.2d 826, 827 P.2d 1374 (1992) (upholding ordinance criminalizing loitering with purpose to engage in drug-related activities); *People v. Superior Court,* 46 Cal.3d 381, 394-395, 250 Cal.Rptr. 515, 758 P.2d 1046, 1052 (1988) (upholding ordinance criminalizing loitering for the purpose of engaging in or soliciting lewd act).

FN26. See, *e.g., State v. Richard,* 108 Nev. 626, 627, n. 2, 836 P.2d 622, 623, n. 2 (1992) (striking down statute that made it unlawful "for any person to loiter or prowl upon the property of another without lawful business with the owner or occupant thereof").

The city's principal response to this concern about adequate notice is that loiterers are not subject to sanction until after they have failed to comply with an officer's order to disperse. "[W]hatever problem is created by a law that criminalizes conduct people normally believe to be innocent is solved when

persons receive actual notice from a police order of what they are expected to do." [FN27] We find this response unpersuasive for at least two reasons.

FN27. Brief for Petitioner 31.

[12] First, the purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law. "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939). Although it is true that a loiterer is not subject to criminal sanctions unless he or she disobeys a dispersal order, the loitering is the conduct that the ordinance is designed to prohibit. [FN28] If the loitering is in fact harmless and innocent, the dispersal order itself is an unjustified impairment of liberty. If the police are able to decide arbitrarily which members of the public they will order to disperse, then the Chicago ordinance becomes indistinguishable from the law we held invalid in ***59***Shuttlesworth v. Birmingham,* 382 U.S. 87, 90, 86 S.Ct. 211, 15 L.Ed.2d 176 1965). [FN29] Because an officer may issue an order only after prohibited conduct has already occurred, it cannot provide the kind of advance notice that will protect the putative loiterer from being ordered to disperse. Such an order cannot retroactively give adequate warning of the boundary between the permissible and the impermissible applications of the law. [FN30]

FN28. In this way, the ordinance differs from the statute upheld in *Colten v. Kentucky,* 407 U.S. 104, 110, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972). There, we found that the illegality of the underlying conduct was clear. "Any person who stands in a group of persons along a highway where the police are investigating a traffic violation and seeks to engage the attention of an officer issuing a summons should understand that he could be convicted under ... Kentucky's statute if he fails to obey an order to move on." *Ibid.*

FN29. "Literally read ... this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. The constitutional vice of so broad a provision needs no demonstration." 382 U.S., at 90, 86 S.Ct. 211.

FN30. As we have noted in a similar context: "If petitioners were held guilty of violating the Georgia statute because they disobeyed the officers, this case falls within the rule that a generally worded statute which is construed to punish conduct which cannot constitutionally be punished is unconstitutionally vague to the extent that it fails to give adequate warning of the boundary between the constitutionally permissible and constitutionally impermissible applications of the statute." *Wright v. Georgia,* 373 U.S. 284, 292, 83 S.Ct. 1240, 10 L.Ed.2d 349 (1963).

Second, the terms of the dispersal order compound the inadequacy of the notice afforded by the ordinance. It provides that the officer "shall order all such persons to disperse and remove themselves from the area." App. to Pet. for Cert. 61a. This vague phrasing raises a host of questions. After such an order issues, how long must the loiterers remain apart? How far must they move? If each loiterer walks around the block and they meet again at the same location, are they subject to arrest or merely to being ordered to disperse again? As we do here, we have found vagueness in a criminal statute exacerbated by the use of the standards of " neighborhood" and "locality." *Connally v. General Constr. Co.,* 269 U.S. 385, 46 S.Ct. 126, 70 L.Ed. 322 (1926). We remarked in *Connally* that "[b]oth terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." *Id.,* at 395, 46 S.Ct. 126.

[13] Lack of clarity in the description of the loiterer's duty to obey a dispersal order might not render the ordinance ****1861*** unconstitutionally***60***

vague if the definition of the forbidden conduct were clear, but it does buttress our conclusion that the entire ordinance fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted. The Constitution does not permit a legislature to "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *United States v. Reese,* 92 U.S. 214, 221, 23 L.Ed. 563 (1876). This ordinance is therefore vague "not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971).

V

[14] The broad sweep of the ordinance also violates " 'the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Kolender v. Lawson,* 461 U.S., at 358, 103 S.Ct. 1855. There are no such guidelines in the ordinance. In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may-indeed, she "shall"-order them to disperse.

Recognizing that the ordinance does reach a substantial amount of innocent conduct, we turn, then, to its language to determine if it "necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat." *Kolender v. Lawson,* 461 U.S., at 360, 103 S.Ct. 1855 (internal quotation marks omitted). As we discussed in the context of fair notice,***61** see *supra,* at 1859-1860, this page, the principal source of the vast discretion conferred on the police in this case is the definition of loitering as "to remain in any one place with no apparent purpose."

[15][16] As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to decide what activities constitute loitering." 177 Ill.2d, at 457, 227 Ill.Dec. 130, 687 N.E.2d, at 63. We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. FN31 "The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined." *Smiley v. Kansas,* 196 U.S. 447, 455, 25 S.Ct. 289, 49 L.Ed. 546 (1905).

FN31. This critical fact distinguishes this case from *Boos v. Barry,* 485 U.S. 312, 329-330, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). There, we noted that the text of the relevant statute, read literally, may have been void for vagueness both on notice and on discretionary enforcement grounds. We then found, however, that the Court of Appeals had "provided a narrowing construction that alleviates both of these difficulties." *Ibid.*

Nevertheless, the city disputes the Illinois Supreme Court's interpretation, arguing that the text of the ordinance limits the officer's discretion in three ways. First, it does not permit the officer to issue a dispersal order to anyone who is moving along or who has an apparent purpose. Second, it does not permit an arrest if individuals obey a dispersal order. Third, no order can issue unless the officer reasonably believes that one of the loiterers is a member of a criminal street gang.

Even putting to one side our duty to defer to a state court's construction of the scope of a local enactment, we find each of these limitations insufficient. That the ordinance does not apply to people who are moving-that is, to activity that

would not constitute loitering under any possible definition of the term-does not even address the question of how much discretion the police enjoy in deciding which stationary persons*62 to disperse under the ordinance.[FN32] Similarly, that the **1862 ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue. The "no apparent purpose" standard for making that decision is inherently subjective because its application depends on whether some purpose is "apparent" to the officer on the scene.

FN32. It is possible to read the mandatory language of the ordinance and conclude that it affords the police *no* discretion, since it speaks with the mandatory "shall." However, not even the city makes this argument, which flies in the face of common sense that all police officers must use some discretion in deciding when and where to enforce city ordinances.

Presumably an officer would have discretion to treat some purposes-perhaps a purpose to engage in idle conversation or simply to enjoy a cool breeze on a warm evening-as too frivolous to be apparent if he suspected a different ulterior motive. Moreover, an officer conscious of the city council's reasons for enacting the ordinance might well ignore its text and issue a dispersal order, even though an illicit purpose is actually apparent.

It is true, as the city argues, that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect,[FN33] or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members. But this ordinance, for reasons that are not explained in the findings of the city council, requires no harmful purpose and applies to nongang members as well as suspected gang members.[FN34] It applies to everyone in the city *63 who may remain in one place with one suspected gang member as long as their purpose is not apparent to an officer observing them. Friends, relatives, teachers, counselors, or even total strangers might unwittingly engage in forbidden loitering if they happen to engage in idle conversation with a gang member.

FN33. Justice THOMAS' dissent overlooks the important distinction between this ordinance and those that authorize the police "to order groups of individuals who threaten the public peace to disperse." See *post,* at 1884.

FN34. Not all of the respondents in this case, for example, are gang members. The city admits that it was unable to prove that Morales is a gang member but justifies his arrest and conviction by the fact that Morales admitted "that he knew he was with criminal street gang members." Reply Brief for Petitioner 23, n. 14. In fact, 34 of the 66 respondents in this case were charged in a document that only accused them of being in the presence of a gang member. Tr. of Oral Arg. 34, 58.

Ironically, the definition of loitering in the Chicago ordinance not only extends its scope to encompass harmless conduct, but also has the perverse consequence of excluding from its coverage much of the intimidating conduct that motivated its enactment. As the city council's findings demonstrate, the most harmful gang loitering is motivated either by an apparent purpose to publicize the gang's dominance of certain territory, thereby intimidating nonmembers, or by an equally apparent purpose to conceal ongoing commerce in illegal drugs. As the Illinois Supreme Court has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says and that it has no application to loiterers whose purpose is apparent. The relative importance of its application to harmless loitering is magnified by its inapplicability to loitering that has an obviously threatening or illicit purpose.

[17] Finally, in its opinion striking down the ordinance, the Illinois Supreme Court refused to accept the general order issued by the police department as a sufficient limitation on the "vast amount of discretion" granted to the police in its enforcement. We agree. See *Smith v. Goguen,* 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). That the police have adopted internal rules limiting their enforcement to certain designated areas in the city would not provide a defense to a loiterer who might be arrested elsewhere. Nor could a person who knowingly loitered with a well-known gang member anywhere in the city ***64** safely assume that they would not be ordered to disperse no matter how innocent and harmless their loitering might be.

****1863** VI

In our judgment, the Illinois Supreme Court correctly concluded that the ordinance does not provide sufficiently specific limits on the enforcement discretion of the police "to meet constitutional standards for definiteness and clarity." [FN35] 177 Ill.2d, at 459, 227 Ill.Dec. 130, 687 N.E.2d, at 64. We recognize the serious and difficult problems testified to by the citizens of Chicago that led to the enactment of this ordinance. "We are mindful that the preservation of liberty depends in part on the maintenance of social order." *Houston v. Hill,* 482 U.S. 451, 471-472, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). However, in this instance the city has enacted an ordinance that affords too much discretion to the police and too little notice to citizens who wish to use the public streets.

FN35. This conclusion makes it unnecessary to reach the question whether the Illinois Supreme Court correctly decided that the ordinance is invalid as a deprivation of substantive due process. For this reason, Justice THOMAS, see *post,* at 1881-1883, and Justice SCALIA, see *post,* at 1873, are mistaken when they assert that our decision must be analyzed under the framework for substantive due process set out in *Washington v. Glucksberg*, 521 U.S. 702, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997).

Accordingly, the judgment of the Supreme Court of Illinois is

Affirmed.

Justice O'CONNOR, with whom Justice BREYER joins, concurring in part and concurring in the judgment.

I agree with the Court that Chicago's Gang Congregation Ordinance, Chicago Municipal Code § 8-4-015 (1992) (gang loitering ordinance or ordinance) is unconstitutionally vague. A penal law is void for vagueness if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited" or fails to ***65** establish guidelines to prevent "arbitrary and discriminatory enforcement" of the law. *Kolender* v. *Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983). Of these, "the more important aspect of the vagueness doctrine 'is ... the requirement that a legislature establish minimal guidelines to govern law enforcement.' " *Id.,* at 358, 103 S.Ct. 1855 (quoting *Smith v. Goguen,* 415 U.S. 566, 574-575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974)). I share Justice THOMAS' concern about the consequences of gang violence, and I agree that some degree of police discretion is necessary to allow the police "to perform their peacekeeping responsibilities satisfactorily." *Post,* at 1885 (dissenting opinion).

A criminal law, however, must not permit policemen, prosecutors, and juries to conduct " 'a standardless sweep ... to pursue their personal predilections.' " *Kolender v. Lawson, supra,* at 358, 103 S.Ct. 1855 (quoting *Smith v. Goguen, supra,* at 575, 94 S.Ct. 1242).

The ordinance at issue provides:

"Whenever a police officer observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place with one or more other persons, he shall order all such persons to disperse and remove themselves from the area. Any person who does not promptly obey

such an order is in violation of this section." App. to Pet. for Cert. 61a.

To "[l]oiter," in turn, is defined in the ordinance as " to remain in any one place with no apparent purpose. " *Ibid.* The Illinois Supreme Court declined to adopt a limiting construction of the ordinance and concluded that the ordinance vested "*absolute* discretion to police officers." 177 Ill.2d 440, 457, 227 Ill.Dec. 130, 687 N.E.2d 53, 63 (1997) (emphasis added). This Court is bound by the Illinois Supreme Court's construction of the ordinance. See *Terminiello v. Chicago,* 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

As it has been construed by the Illinois court, Chicago's gang loitering ordinance is unconstitutionally vague because it lacks sufficient minimal standards to guide law enforcement***66** officers. In particular, it fails to provide police with any standard by which they can judge whether an individual has an "*apparent* purpose." Indeed, because any person standing on the street has a general "purpose"-even if it is simply to stand-the ordinance permits police officers to choose which purposes are *permissible.* Under this ****1864** construction the police do not have to decide that an individual is "threaten[ing] the public peace" to issue a dispersal order. See *post,* at 1884 (THOMAS, J., dissenting). Any police officer in Chicago is free, under the Illinois Supreme Court's construction of the ordinance, to order at his whim any person standing in a public place with a suspected gang member to disperse. Further, as construed by the Illinois court, the ordinance applies to hundreds of thousands of persons who are *not* gang members, standing on any sidewalk or in any park, coffee shop, bar, or "other location open to the public, whether publicly or privately owned." Chicago Municipal Code § 8-4-015(c)(5) (1992).

To be sure, there is no violation of the ordinance unless a person fails to obey promptly the order to disperse. But, a police officer cannot issue a dispersal order until he decides that a person is remaining in one place "with no apparent purpose," and the ordinance provides no guidance to the officer on how to make this antecedent decision. Moreover, the requirement that police issue dispersal orders only when they "reasonably believ[e]" that a group of loiterers includes a gang member fails to cure the ordinance's vague aspects. If the ordinance applied only to persons reasonably believed to be gang members, this requirement might have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued. Cf. *ante,* at 1862. But, the Illinois Supreme Court did not construe the ordinance to be so limited. See 177 Ill.2d, at 453-454, 227 Ill.Dec. 130, 687 N.E.2d, at 62.

This vagueness consideration alone provides a sufficient ground for affirming the Illinois court's decision, and I agree ***67** with Part V of the Court's opinion, which discusses this consideration. See *ante,* at 1861-1862 ("[T]hat the ordinance does not permit an arrest until after a dispersal order has been disobeyed does not provide any guidance to the officer deciding whether such an order should issue"); *ante,* at 1862 ("It is true ... that the requirement that the officer reasonably believe that a group of loiterers contains a gang member does place a limit on the authority to order dispersal. That limitation would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members"). Accordingly, there is no need to consider the other issues briefed by the parties and addressed by the plurality. I express no opinion about them.

It is important to courts and legislatures alike that we characterize more clearly the narrow scope of today's holding. As the ordinance comes to this Court, it is unconstitutionally vague. Nevertheless, there remain open to Chicago reasonable alternatives to combat the very real threat posed by gang intimidation and violence. For example, the Court properly and expressly distinguishes the ordinance from laws that require loiterers to have a " harmful purpose," see *ibid.,* from laws that target only gang members, see *ibid.,* and from laws that incorporate limits on the area and manner in which the laws may be enforced, see *ibid.* In addition, the

ordinance here is unlike a law that "directly prohibit[s]" the " 'presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways,' " that " 'intimidates residents.' " *Ante,* at 1856 (quoting Brief for Petitioner 14). Indeed, as the plurality notes, the city of Chicago has several laws that do exactly this. See *ante,* at 1857, n. 17. Chicago has even enacted a provision that "enables police officers to fulfill ... their traditional functions," including "preserving the public peace." See *post,* at 1883 (THOMAS, J., dissenting). Specifically, ***68** Chicago's general disorderly conduct provision allows the police to arrest those who knowingly " provoke, make or aid in making a breach of peace." See Chicago Municipal Code § 8-4-010 (1992).

In my view, the gang loitering ordinance could have been construed more narrowly. The term "loiter" might possibly be construed in a more limited fashion to mean "to remain in any one place with no apparent purpose other than to establish control over identifiable areas, to intimidate others from entering those areas, or to conceal illegal ****1865** activities." Such a definition would be consistent with the Chicago City Council's findings and would avoid the vagueness problems of the ordinance as construed by the Illinois Supreme Court. See App. to Pet. for Cert. 60a-61a. As noted above, so would limitations that restricted the ordinance's criminal penalties to gang members or that more carefully delineated the circumstances in which those penalties would apply to nongang members.

The Illinois Supreme Court did not choose to give a limiting construction to Chicago's ordinance. To the extent it relied on our precedents, particularly *Papachristou v. Jacksonville,* 405 U.S. 156, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972), as *requiring* it to hold the ordinance vague in all of its applications because it was intentionally drafted in a vague manner, the Illinois court misapplied our precedents. See 177 Ill.2d, at 458-459, 227 Ill.Dec. 130, 687 N.E.2d, at 64. This Court has never held that the intent of the drafters determines whether a law is vague. Nevertheless, we cannot impose a limiting construction that a state supreme court has declined to adopt. See *Kolender v. Lawson,* 461 U.S., at 355-356, n. 4, 103 S.Ct. 1855 (noting that the Court has held that " '[f]or the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation we must take the statute as though it read precisely as the highest court of the State has interpreted it' " (citations and internal quotation marks omitted)); ***69***New York v. Ferber,* 458 U.S. 747, 769, n. 24, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982) (noting that where the Court is "dealing with a state statute on direct review of a state-court decision that has construed the statute[,][s]uch a construction is binding on us"). Accordingly, I join Parts I, II, and V of the Court's opinion and concur in the judgment.

Justice KENNEDY, concurring in part and concurring in the judgment.

I join Parts I, II, and V of the Court's opinion and concur in the judgment.

I also share many of the concerns Justice STEVENS expresses in Part IV with respect to the sufficiency of notice under the ordinance. As interpreted by the Illinois Supreme Court, the Chicago ordinance would reach a broad range of innocent conduct. For this reason it is not necessarily saved by the requirement that the citizen must disobey a police order to disperse before there is a violation.

We have not often examined these types of orders. Cf. *Shuttlesworth v. Birmingham,* 382 U.S. 87, 86 S.Ct. 211, 15 L.Ed.2d 176 (1965). It can be assumed, however, that some police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given. Illustrative examples include when the police tell a pedestrian not to enter a building and the reason is to avoid impeding a rescue team, or to protect a crime scene, or to secure an area for the protection of a public official. It does not follow, however, that any unexplained police order must be obeyed without notice of the lawfulness of the order. The predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this ordinance. A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a dispersal order based on the officer's

own knowledge of the identity or affiliations of other persons with whom the citizen is congregating; ***70** nor may the citizen be able to assess what an officer might conceive to be the citizen's lack of an apparent purpose.

Justice BREYER, concurring in part and concurring in the judgment.

The ordinance before us creates more than a "*minor* limitation upon the free state of nature." *Post,* at 1867 (SCALIA, J., dissenting) (emphasis added). The law authorizes a police officer to order any person to remove himself from any "location open to the public, whether publicly or privately owned," Chicago Municipal Code § 8-4-015(c)(5) (1992), *i.e.,* any sidewalk, front stoop, public park, public square, lakeside promenade, hotel, restaurant, bowling alley, bar, barbershop, sports arena, shopping mall, etc., but with two, and only two, limitations: First, that person must be accompanied by (or must himself be) someone police reasonably believe is a gang member. Second, that person ****1866** must have remained in that public place " with no apparent purpose." § 8-4-015(c)(1).

The first limitation cannot save the ordinance. Though it limits the number of persons subject to the law, it leaves many individuals, gang members and nongang members alike, subject to its strictures. Nor does it limit in any way the range of conduct that police may prohibit. The second limitation is, as the Court, *ante,* at 1862, and Justice O'CONNOR, *ante,* at 1863 (opinion concurring in part and concurring in judgment), point out, not a limitation at all. Since one always has some apparent purpose, the so-called limitation invites, in fact requires, the policeman to interpret the words " no apparent purpose" as meaning "no apparent purpose except for ... ." And it is in the ordinance's delegation to the policeman of open-ended discretion to fill in that blank that the problem lies. To grant to a policeman virtually standardless discretion to close off major portions of the city to an innocent person is, in my view, to create a major, not a "minor," "limitation upon the free state of nature."

***71** Nor does it violate "our rules governing facial challenges," *post,* at 1867 (SCALIA, J., dissenting), to forbid the city to apply the unconstitutional ordinance in this case. The reason *why* the ordinance is invalid explains how that is so. As I have said, I believe the ordinance violates the Constitution because it delegates too much discretion to a police officer to decide whom to order to move on, and in what circumstances. And I see no way to distinguish in the ordinance's terms between one application of that discretion and another. The ordinance is unconstitutional, not because a policeman applied this discretion wisely or poorly in a particular case, but rather because the policeman enjoys too much discretion in *every* case. And if every application of the ordinance represents an exercise of unlimited discretion, then the ordinance is invalid in all its applications. The city of Chicago may be able validly to apply some *other* law to the defendants in light of their conduct. But the city of Chicago may no more apply *this* law to the defendants, no matter how they behaved, than it could apply an (imaginary) statute that said, " It is a crime to do wrong," even to the worst of murderers. See *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618, 83 L.Ed. 888 (1939) ("If on its face the challenged provision is repugnant to the due process clause, specification of details of the offense intended to be charged would not serve to validate it").

Justice SCALIA's examples, *post,* at 1871-1872, reach a different conclusion because they assume a different basis for the law's constitutional invalidity. A statute, for example, might not provide fair warning to many, but an individual defendant might still have been aware that it prohibited the conduct in which he engaged. Cf., *e.g., Parker v. Levy,* 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) ("[O]ne who has received fair warning of the criminality of his own conduct from the statute in question is [not] entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. ***72** One to whose conduct a statute clearly applies may not successfully challenge it for vagueness"). But I believe this ordinance is unconstitutional, not because it provides insufficient notice, but because

it does not provide "sufficient minimal standards to guide law enforcement officers." See *ante,* at 1863 (O'CONNOR, J., concurring in part and concurring in judgment).

I concede that this case is unlike those First Amendment "overbreadth" cases in which this Court has permitted a facial challenge. In an overbreadth case, a defendant whose conduct clearly falls within the law and may be constitutionally prohibited can nonetheless have the law declared facially invalid to protect the rights of others (whose protected speech might otherwise be chilled). In the present case, the right that the defendants assert, the right to be free from the officer's exercise of unchecked discretion, is more clearly their own.

This case resembles *Coates v. Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), where this Court declared facially unconstitutional on, among other grounds, the due process standard of vagueness an ordinance that prohibited persons assembled ****1867** on a sidewalk from " conduct[ing] themselves in a manner annoying to persons passing by." The Court explained:
"It is said that the ordinance is broad enough to encompass many types of conduct clearly within the city's constitutional power to prohibit. And so, indeed, it is. The city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct. It can d o so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited.... It cannot constitutionally do so through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed." *Id.,* at 614, 91 S.Ct. 1686 (citation omitted).

***73** The ordinance in *Coates* could not constitutionally be applied whether or not the conduct of the particular defendants was indisputably "annoying" or of a sort that a different, more specific ordinance could constitutionally prohibit. Similarly, here the city might have enacted a different ordinance, or the Illinois Supreme Court might have interpreted this ordinance differently. And the Constitution might well have permitted the city to apply that different ordinance (or this ordinance as interpreted differently) to circumstances like those present here. See *ante,* at 1864 (O'CONNOR, J., concurring in part and concurring in judgment). But *this* ordinance, as I have said, cannot be constitutionally applied to anyone.

Justice SCALIA, dissenting.
The citizens of Chicago were once free to drive about the city at whatever speed they wished. At some point Chicagoans (or perhaps Illinoisans) decided this would not do, and imposed prophylactic speed limits designed to assure safe operation by the average (or perhaps even subaverage) driver with the average (or perhaps even subaverage) vehicle. This infringed upon the " freedom" of all citizens, but was not unconstitutional.

Similarly, the citizens of Chicago were once free to stand around and gawk at the scene of an accident.
At some point Chicagoans discovered that this obstructed traffic and caused more accidents. They did not make the practice unlawful, but they did authorize police officers to order the crowd to disperse, and imposed penalties for refusal to obey such an order. Again, this prophylactic measure infringed upon the "freedom" of all citizens, but was not unconstitutional.

Until the ordinance that is before us today was adopted, the citizens of Chicago were free to stand about in public places with no apparent purpose-to engage, that is, in conduct that appeared to be loitering. In recent years, however, the city has been afflicted with criminal street gangs. As reflected in the record before us, these gangs congregated ***74** in public places to deal in drugs, and to terrorize the neighborhoods by demonstrating control over their "turf." Many residents of the inner city felt that they were prisoners in their own homes. Once again, Chicagoans decided that to eliminate the problem it was worth restricting some of the freedom that they

once enjoyed. The means they took was similar to the second, and more mild, example given above rather than the first: Loitering was not made unlawful, but when a group of people occupied a public place without an apparent purpose and in the company of a known gang member, police officers were authorized to order them to disperse, and the failure to obey such an order was made unlawful. See Chicago Municipal Code § 8-4-015 (1992). The minor limitation upon the free state of nature that this prophylactic arrangement imposed upon all Chicagoans seemed to them (and it seems to me) a small price to pay for liberation of their streets.

The majority today invalidates this perfectly reasonable measure by ignoring our rules governing facial challenges, by elevating loitering to a constitutionally guaranteed right, and by discerning vagueness where, according to our usual standards, none exists.

I

Respondents' consolidated appeal presents a facial challenge to the Chicago ordinance on vagueness grounds. When a facial challenge is successful, the law in question is declared to be unenforceable in *all* its applications,**1868 and not just in its particular application to the party in suit. To tell the truth, it is highly questionable whether federal courts have any business making such a declaration. The rationale for our power to review federal legislation for constitutionality, expressed in *Marbury v. Madison,* 1 Cranch 137, 2 L.Ed. 60 (1803), was that we *had* to do so in order to decide the case before us. But that rationale only extends so far as to require us to determine that the statute is unconstitutional as applied to *this* party, in the circumstances of *this* case.

*75 That limitation was fully grasped by Tocqueville, in his famous chapter on the power of the judiciary in American society:
"The second characteristic of judicial power is, that it pronounces on special cases, and not upon general principles. If a judge, in deciding a particular point, destroys a general principle by passing a judgment which tends to reject all the inferences from that principle, and consequently to annul it, he remains within the ordinary limits of his functions. But if he directly attacks a general principle without having a particular case in view, he leaves the circle in which all nations have agreed to confine his authority; he assumes a more important, and perhaps a more useful influence, than that of the magistrate; but he ceases to represent the judicial power.
.....
"Whenever a law which the judge holds to be unconstitutional is invoked in a tribunal of the United States, he may refuse to admit it as a rule .... But as soon as a judge has refused to apply any given law in a case, that law immediately loses a portion of its moral force. Those to whom it is prejudicial learn that means exist of overcoming its authority; and similar suits are multiplied, until it becomes powerless. ... The political power which the Americans have intrusted to their courts of justice is therefore immense; but the evils of this power are considerably diminished by the impossibility of attacking the laws except through the courts of justice. ... [W]hen a judge contests a law in an obscure debate on some particular case, the importance of his attack is concealed from public notice; his decision bears upon the interest of an individual, and the law is slighted only incidentally. Moreover, although it is censured, it is not abolished; its moral force may be diminished, but its authority is not taken away; and its final destruction can *76 be accomplished only by the reiterated attacks of judicial functionaries." Democracy in America 73, 75-76 (R. Heffner ed.1956).

As Justice Sutherland described our system in his opinion for a unanimous Court in *Massachusetts v. Mellon,* 262 U.S. 447, 488, 43 S.Ct. 597, 67 L.Ed. 1078 (1923):
"We have no power *per se* to review and annul acts of Congress on the ground that they are unconstitutional. That question may be considered only when the justification for some direct injury suffered or threatened, presenting a justiciable issue, is made to rest upon such an act. Then the

power exercised is that of ascertaining and declaring the law applicable to the controversy. It amounts to little more than the negative power to disregard an unconstitutional enactment, which otherwise would stand in the way of the enforcement of a legal right.... If a case for preventive relief be presented the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

And as Justice Brennan described our system in his opinion for a unanimous Court in *United States v. Raines,* 362 U.S. 17, 20-22, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960):"The very foundation of the power of the federal courts to declare Acts of Congress unconstitutional lies in the power and duty of those courts to decide cases and controversies before them .... This Court, as is the case with all federal courts, 'has no jurisdiction to pronounce any statute, either of a State or of the United States, void, because irreconcilable with the Constitution, except as it is called upon to adjudge the legal rights of litigants in actual controversies. In the exercise of that jurisdiction, it is bound by two rules, to which it has rigidly adhered, one, never to ****1869** anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of ***77** constitutional law broader than is required by the precise facts to which it is to be applied.' ... Kindred to these rules is the rule that one to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional.... The delicate power of pronouncing an Act of Congress unconstitutional is not to be exercised with reference to hypothetical cases thus imagined."

It seems to me fundamentally incompatible with this system for the Court not to be content to find that a statute is unconstitutional as applied to the person before it, but to go further and pronounce that the statute is unconstitutional in *all* applications. Its reasoning may well suggest as much, but to pronounce a *holding* on that point seems to me no more than an advisory opinion-which a federal court should never issue at all, see *Hayburn's Case,* 2 Dall. 408, 1 L.Ed. 436 (1792), and *especially* should not issue with regard to a constitutional question, as to which we seek to avoid even *non* advisory opinions, see, *e.g., Ashwander v. TVA,* 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). I think it quite improper, in short, to ask the constitutional claimant before us: Do you just want us to say that this statute cannot constitutionally be applied to you in this case, or do you want to go for broke and try to get the statute pronounced void in all its applications?

I must acknowledge, however, that for some of the present century we have done just this. But until recently, at least, we have-except in free-speech cases subject to the doctrine of overbreadth, see, *e.g., New York v. Ferber,* 458 U.S. 747, 769-773, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)-*required* the facial challenge to *be* a go-for-broke proposition. That is to say, before declaring a statute to be void in all its applications (something we should not be doing in the first place), we have at least imposed upon the litigant the eminently reasonable requirement that he establish***78** that the statute was *unconstitutional* in all its applications. (I say that is an eminently reasonable requirement, not only because we should not be holding a statute void in all its applications unless it is unconstitutional in all its applications, but also because *unless* it is unconstitutional in all its applications we do not even know, without conducting an as-applied analysis, whether it is void with regard to the very litigant *before* us-whose case, after all, was the occasion for undertaking this inquiry in the first place. [FN1])

FN1. In other words, a facial attack, since it requires unconstitutionality in all circumstances, necessarily presumes that the litigant presently before the court would be able to sustain an as-applied challenge. See *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 495, 102 S.Ct. 1186, 71 L.Ed.2d 362

(1982) ("A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law"); *Parker v. Levy,* 417 U.S. 733, 756, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness").

The plurality asserts that in *United States v. Salerno,* 481 U.S. 739, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), which I discuss in text immediately following this footnote, the Court "entertained" a facial challenge even though "the defendants ... did not claim that the statute was unconstitutional as applied to them." *Ante,* at 1858, n. 22. That is not so. The Court made it absolutely clear in *Salerno* that a facial challenge requires the assertion that "*no set of circumstances exists* under which the Act would be valid," 481 U.S., at 745, 107 S.Ct. 2095 (emphasis added). The footnoted statement upon which the plurality relies ("Nor have respondents claimed that the Act is unconstitutional because of the way it was applied to the particular facts of their case," *id.,* at 745, n. 3, 107 S.Ct. 2095) was obviously meant to convey the fact that the defendants were not making, *in addition to their facial challenge,* an alternative as-applied challenge-*i.e.,* asserting that *even if* the statute was not unconstitutional in *all* its applications it was *at least* unconstitutional in its particular application to them.

As we said in *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987):
****1870** "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the *challenger must establish that no set of circumstances*79 exists under which the Act would be valid.* The fact that [a legislative Act] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid, since we have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment." (Emphasis added.) [FN2]

FN2. *Salerno,* a criminal case, repudiated the Court's statement in *Kolender v. Lawson,* 461 U.S. 352, 359, n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), to the effect that a facial challenge to a criminal statute could succeed "even when [the statute] could conceivably have had some valid application." *Kolender* seems to have confused the standard for First Amendment overbreadth challenges with the standard governing facial challenges on all other grounds. See *ibid.* (citing the Court's articulation of the standard for *First Amendment overbreadth* challenges from *Hoffman Estates, supra,* at 494, 102 S.Ct. 1186). As *Salerno* noted, *supra,* at 745, 107 S.Ct. 2095, the overbreadth doctrine is a specialized exception to the general rule for facial challenges, justified in light of the risk that an overbroad statute will chill free expression. See, *e.g., Broadrick v. Oklahoma,* 413 U.S. 601, 612, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

This proposition did not originate with *Salerno,* but had been expressed in a line of prior opinions. See, *e.g., Members of City Council of Los Angeles v. Taxpayers for Vincent,* 466 U.S. 789, 796, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984) (opinion for the Court by STEVENS, J.) (statute not implicating First Amendment rights is invalid on its face if "it is unconstitutional in every conceivable application"); *Schall v. Martin,* 467 U.S. 253, 269, n. 18, 104 S.Ct. 2403, 81 L.Ed.2d 207 (1984); *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 494-495, 497, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982); *United States v. National Dairy Products Corp.,* 372 U.S. 29, 31-32, 83 S.Ct. 594, 9 L.Ed.2d 561 (1963); *Raines,* 362 U.S., at 21, 80 S.Ct. 519. And the proposition has been reaffirmed in many

cases and opinions since. See, *e.g., Anderson v. Edwards,* 514 U.S. 143, 155-156, n. 6, 115 S.Ct. 1291, 131 L.Ed.2d 178 (1995) (unanimous Court); *Babbitt v. Sweet Home Chapter, Communities for Great Ore.,* 515 U.S. 687, 699, 115 S.Ct. 2407, 132 L.Ed.2d 597 (1995) (opinion for the Court by STEVENS, J.) (facial challenge asserts that a challenged statute or regulation is invalid "in every circumstance"); *Reno v. Flores,* 507 U.S. 292, 301, 113 S.Ct. 1439, 123 L.Ed.2d 1 (1993); ***80***Rust v. Sullivan,* 500 U.S. 173, 183, 111 S.Ct. 1759, 114 L.Ed.2d 233 (1991); *Ohio v. Akron Center for Reproductive Health,* 497 U.S. 502, 514, 110 S.Ct. 2972, 111 L.Ed.2d 405 (1990) (opinion of KENNEDY, J.); *Webster v. Reproductive Health Servs.,* 492 U.S. 490, 523-524, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (O'CONNOR, J., concurring in part and concurring in judgment); *New York State Club Assn., Inc. v. City of New York,* 487 U.S. 1, 11-12, 108 S.Ct. 2225, 101 L.Ed.2d 1 (1988).[FN3] Unsurprisingly, given the clarity of our general jurisprudence on this ****1871** point, the Federal Courts of Appeals *all* apply the *Salerno* standard in adjudicating facial challenges. [FN4]

FN3. The plurality asserts that the *Salerno* standard for facial challenge "has never been the decisive factor in any decision of this Court." *Ante,* at 1858, n. 22. It means by that only this: in rejecting a facial challenge, the Court has never contented itself with identifying *only one* situation in which the challenged statute would be constitutional, but has mentioned several. But that is not at all remarkable, and casts no doubt upon the validity of the principle that *Salerno* and these many other cases enunciated. It is difficult to conceive of a statute that would be constitutional in only a single application-and hard to resist mentioning more than one.

The plurality contends that it *does not matter* whether the *Salerno* standard is federal law, since facial challenge is a species of third-party standing, and federal limitations upon third-party standing do not apply in an appeal from a state decision which takes a broader view, as the Illinois Supreme Court's opinion did here. *Ante,* at 1858, n. 22. This is quite wrong. Disagreement over the *Salerno* rule is not a disagreement over the "standing" question whether the person challenging the statute can *raise* the rights of third parties: under both *Salerno* and the plurality's rule he *can.* The disagreement relates to *how many* third-party rights he must *prove to be infringed* by the statute before he can *win: Salerno* says "all" (in addition to his own rights), the plurality says "many." That is not a question of standing but of substantive law. The notion that, if *Salerno* is the federal rule (a federal statute is not totally invalid unless it is invalid in all its applications), it can be *altered* by a state court (a federal statute is totally invalid if it is invalid in *many* of its applications), and that that alteration must be accepted by the Supreme Court of the United States is, to put it as gently as possible, remarkable.

FN4. See, *e.g., Abdullah v. Commissioner of Ins. of Commonwealth of Mass.,* 84 F.3d 18, 20 (C.A.1 1996); *Deshawn E. v. Safir,* 156 F.3d 340, 347 (C.A.2 1998); *Artway v. Attorney Gen. of State of N. J.,* 81 F.3d 1235, 1252, n. 13 (C.A.3 1996); *Manning v. Hunt,* 119 F.3d 254, 268-269 (C.A.4 1997); *Causeway Medical Suite v. Ieyoub,* 109 F.3d 1096, 1104 (C.A.5), cert. denied, 522 U.S. 943, 118 S.Ct. 357, 139 L.Ed.2d 278 (1997); *Aronson v. Akron,* 116 F.3d 804, 809 (C.A.6 1997); *Government Suppliers Consolidating Servs., Inc. v. Bayh,* 975 F.2d 1267, 1283 (C.A.7 1992), cert. denied, 506 U.S. 1053, 113 S.Ct. 977, 122 L.Ed.2d 131 (1993); *Woodis v. Westark Community College,* 160 F.3d 435, 438-439 (C.A.8 1998); *Roulette v. Seattle,* 97 F.3d 300, 306 (C.A.9 1996); *Public Lands Council v. Babbitt,* 167 F.3d 1287, 1293 (C.A.10 1999); *Dimmitt v. Clearwater,* 985 F.2d 1565, 1570-1571

(C.A.11 1993); *Time Warner Entertainment Co. v. FCC,* 93 F.3d 957, 972 (C.A.D.C.1996).

***81** I am aware, of course, that in some recent facial-challenge cases the Court has, without any attempt at explanation, created entirely irrational exceptions to the "unconstitutional in every conceivable application" rule, when the statutes at issue concerned hot-button social issues on which " informed opinion" was zealously united. See *Romer v. Evans,* 517 U.S. 620, 643, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (SCALIA, J., dissenting) (homosexual rights); *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 895, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (abortion rights). But the present case does not even lend itself to such a "political correctness" exception-which, though illogical, is at least predictable. It is not *à la mode* to favor gang members and associated loiterers over the beleaguered law-abiding residents of the inner city.

When our normal criteria for facial challenges are applied, it is clear that the Justices in the majority have transposed the burden of proof. Instead of requiring respondents, who are challenging the ordinance, to show that it is invalid in all its applications, they have required petitioner to show that it is valid in all its applications. Both the plurality opinion and the concurrences display a lively imagination, creating hypothetical situations in which the law's application would (in their view) be ambiguous. But that creative role has been usurped from petitioner, who can defeat respondents' facial challenge by conjuring up *a single valid application* of the law. My contribution would go something like this [FN5]: Tony, a member of the Jets criminal street gang, is standing ***82** alongside and chatting with fellow gang members while staking out their turf at Promontory Point on the South Side of Chicago; the group is flashing gang signs and displaying their distinctive tattoos to passersby. Officer Krupke, applying the ordinance at issue here, orders the group to disperse. After some speculative discussion (probably irrelevant here) over whether the Jets are depraved because they are deprived, Tony and the other gang members break off further conversation with the statement-not entirely coherent, but evidently intended to be rude-"Gee, Officer Krupke, krup you." A tense standoff ensues until Officer Krupke arrests the group for failing to obey his dispersal order. Even assuming (as the Justices in the majority do, but I do not) that a law requiring obedience to a dispersal order is impermissibly vague unless it is clear to the objects of the order, before its issuance, that their conduct justifies it, I find it hard to believe that the Jets would not have known they had it coming. That should settle the matter of respondents' facial challenge to the ordinance's vagueness.

FN5. With apologies for taking creative license with the work of Messrs. Bernstein, Sondheim, and Laurents. West Side Story, copyright 1959.

Of course respondents would still be able to claim that the ordinance was vague as applied to them. But the ultimate demonstration of the inappropriateness of the Court's holding of *facial* invalidity is the fact that it is doubtful whether some of these respondents could even sustain an *as-applied* challenge on the basis of the majority's own criteria. For instance, respondent Jose Renteria-who admitted that he was a member of the Satan Disciples gang-was observed by the arresting officer loitering on a street corner with other gang members. The officer issued a dispersal order, but when she returned to the same corner 15 to ****1872** 20 minutes later, Renteria was still there with his friends, whereupon he was arrested. In another example, respondent Daniel Washington and several others-who admitted they were members of the Vice Lords gang-were observed by the arresting officer loitering in the street, yelling at passing vehicles, stopping traffic, and preventing pedestrians from using ***83** the sidewalks. The arresting officer issued a dispersal order, issued *another* dispersal order later when the group did not move, and finally arrested the group when they were found loitering in the same place still later. Finally, respondent Gregorio Gutierrez-who had previously admitted to the arresting officer his

membership in the Latin Kings gang-was observed loitering with two other men. The officer issued a dispersal order, drove around the block, and arrested the men after finding them in the same place upon his return. See Brief for Petitioner 7, n. 5; Brief for United States as *Amicus Curiae* 16, n. 11. Even on the majority's assumption that to avoid vagueness it must be clear to the object of the dispersal order *ex ante* that his conduct is covered by the ordinance, it seems most improbable that any of these as-applied challenges would be sustained. Much less is it possible to say that the ordinance is invalid in *all* its applications.

II

The plurality's explanation for its departure from the usual rule governing facial challenges is seemingly contained in the following statement: "[This] is a criminal law that contains no *mens rea* requirement . .. *and* infringes on constitutionally protected rights .. .. When vagueness permeates the text of *such* a law, it is subject to facial attack." *Ante,* at 1858 (emphasis added). The proposition is set forth with such assurance that one might suppose that it repeats some well-accepted formula in our jurisprudence: (Criminal law without *mens rea* requirement) + (infringement of constitutionally protected right) + (vagueness) = (entitlement to facial invalidation). There is no such formula; the plurality has made it up for this case, as the absence of any citation demonstrates.

But no matter. None of the three factors that the plurality relies upon exists anyway. I turn first to the support for the proposition that there is a constitutionally protected right to loiter-or, as the plurality more favorably describes ***84** it, for a person to "remain in a public place of his choice." *Ibid.* The plurality thinks much of this Fundamental Freedom to Loiter, which it contrasts with such lesser, constitutionally *un* protected, activities as doing (ugh!) *business:* "This is not an ordinance that simply regulates business behavior and contains a scienter requirement.... It is a criminal law that contains no *mens rea* requirement ... and infringes on constitutionally protected rights." *Ibid.* (internal quotation marks omitted). (Poor Alexander Hamilton, who has seen his "commercial republic" devolve, in the eyes of the plurality, at least, into an "indolent republic," see The Federalist No. 6, p. 56; No. 11, pp. 84-91 (C. Rossiter ed.1961).)

Of course every activity, even scratching one's head, can be called a "constitutional right" if one means by that term nothing more than the fact that the activity is covered (as all are) by the Equal Protection Clause, so that those who engage in it cannot be singled out without "rational basis." See *FCC v. Beach Communications, Inc.,* 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). But using the term in that sense utterly impoverishes our constitutional discourse. We would then need a *new* term for those activities-such as political speech or religious worship-that cannot be forbidden even *with* rational basis.

The plurality tosses around the term "constitutional right" in this renegade sense, because there is not the slightest evidence for the existence of a genuine constitutional right to loiter. Justice THOMAS recounts the vast historical tradition of criminalizing the activity. *Post,* at 1881-1883 (dissenting opinion). It is simply not maintainable that the right to loiter would have been regarded as an essential attribute of liberty at the time of the framing or at the time of adoption of the Fourteenth Amendment. For the plurality, however, the historical practices of our people are nothing more than a speed bump on the road to the "right" result. Its opinion ****1873** blithely proclaims: "Neither this history nor the scholarly ***85** compendia in Justice THOMAS' dissent, *[ibid.],* persuades us that the right to engage in loitering that is entirely harmless in both purpose and effect is not a part of the liberty protected by the Due Process Clause." *Ante,* at 1858, n. 20. The entire practice of using the Due Process Clause to add judicially favored rights to the limitations upon democracy set forth in the Bill of Rights (usually under the rubric of so-called "substantive due process") is in my view judicial usurpation. But we have, recently at least, sought to limit the damage by tethering the courts' " right-making" power to an objective criterion. In *Washington v. Glucksberg,* 521 U.S. 702, 720-721,

117 S.Ct. 2258, 138 L.Ed.2d 772 (1997), we explained our "established method" of substantive due process analysis: carefully and narrowly describing the asserted right, and then examining whether that right is manifested in "[o]ur Nation's history, legal traditions, and practices." See also *Collins v. Harker Heights,* 503 U.S. 115, 125-126, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); *Michael H. v. Gerald D.,* 491 U.S. 110, 122-123, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989); *Moore v. East Cleveland,* 431 U.S. 494, 502-503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977). The plurality opinion not only ignores this necessary limitation, but it leaps far beyond any substantive-due-process atrocity we have ever committed, by actually placing the burden of proof upon the defendant to establish that loitering is *not* a "fundamental liberty." It never does marshal any support *for* the proposition that loitering *is* a constitutional right, contenting itself with a (transparently inadequate) explanation of why the historical record of laws banning loitering does not positively *contradict* that proposition,[FN6] and the (transparently erroneous) assertion that the city of Chicago appears to have conceded the ***86** point.[FN7] It is enough for the Members of the plurality that "history ... [fails to] persuad[e] us that the right to engage in loitering that is entirely harmless in both purpose and effect is *not* a part of the liberty protected by the Due Process Clause," *ante,* at 1858, n. 20 (emphasis added); they apparently think it quite unnecessary for anything to persuade them that it *is.*[FN8]

FN6. The plurality's explanation for ignoring these laws is that many of them carried severe penalties and, during the Reconstruction era, they had "harsh consequences on African-American women and children." *Ante,* at 1858, n. 20. Those severe penalties and those harsh consequences are certainly regrettable, but they in no way lessen (indeed, the harshness of penalty tends to increase) the capacity of these laws to *prove* that loitering was never regarded as a fundamental liberty.

FN7. *Ante,* at 1857, n. 19. The plurality bases its assertion of apparent concession upon a footnote in Part I of petitioner's brief which reads: "Of course, laws regulating social gatherings affect a liberty interest, and thus are subject to review under the rubric of substantive due process. ... We address that doctrine in Part II below." Brief for Petitioner 21-22, n. 13.

If a careless reader were inclined to confuse the term "social gatherings" in this passage with "loitering," his confusion would be eliminated by pursuing the reference to Part II of the brief, which says, in its introductory paragraph: "[A]s we explain below, substantive due process does not support the court's novel holding that the Constitution secures the right to stand still on the public way even when one is not engaged in speech, assembly, or other conduct that enjoys affirmative constitutional protection." *Id.,* at 39.

FN8. The plurality says, *ante,* at 1863, n. 35, that since it decides the case on the basis of *procedural* due process rather than *substantive* due process, I am mistaken in analyzing its opinion "under the framework for substantive due process set out in *Washington v. Glucksberg.*" *Ibid.* But I am not analyzing it under that framework. I am simply assuming that when the plurality says (as an essential part of its reasoning) that "the right to loiter for innocent purposes is ... a part of the liberty protected by the Due Process Clause" it does not believe that the same word (" liberty") means one thing for purposes of substantive due process and something else for purposes of procedural due process. There is no authority for that startling proposition. See *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 572-575, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (rejecting procedural-due-process claim for lack of "liberty" interest, and citing substantive-due-process cases).
The plurality's opinion seeks to have it

> both ways, invoking the Fourteenth Amendment's august protection of "liberty" in defining the standard of certainty that it sets, but then, in identifying the conduct protected by that high standard, ignoring our extensive case law defining "liberty," and substituting, instead, all "harmless and innocent" conduct, *ante,* at 1860.

It would be unfair, however, to criticize the plurality's failed attempt to establish that ****1874** loitering is a constitutionally ***87** protected right while saying nothing of the concurrences. The plurality at least makes an attempt. The concurrences, on the other hand, make no pretense at attaching their broad "vagueness invalidates" rule to a liberty interest. As far as appears from Justice O'CONNOR's and Justice BREYER's opinions, *no* police officer may issue *any* order, affecting *any* insignificant sort of citizen conduct (except, perhaps, an order addressed to the unprotected class of "gang members") unless the standards for the issuance of that order are precise. No modern urban society-and probably none since London got big enough to have sewers-could function under such a rule. There are innumerable reasons why it may be important for a constable to tell a pedestrian to "move on"-and even if it were possible to list in an ordinance all of the reasons that are known, many are simply unpredictable. Hence the (entirely reasonable) Rule of the city of New York which reads: "No person shall fail, neglect or refuse to comply with the lawful direction or command of any Police Officer, Urban Park Ranger, Parks Enforcement Patrol Officer or other [Parks and Recreation] Department employee, indicated verbally, by gesture or otherwise." 56 RCNY § 1-03(c)(1) (1996). It is one thing to uphold an " as-applied" challenge when a pedestrian disobeys such an order that is unreasonable-or even when a pedestrian asserting some true "liberty" interest (holding a political rally, for instance) disobeys such an order that is reasonable *but unexplained.* But to say that such a general ordinance permitting " lawful orders" is void *in all its applications* demands more than a safe and orderly society can reasonably deliver.

Justice KENNEDY apparently recognizes this, since he acknowledges that "some police commands will subject a citizen to prosecution for disobeying whether or not the citizen knows why the order is given," including, for example, an order "tell[ing] a pedestrian not to enter a building" when the reason is "to avoid impeding a rescue team." *Ante,* at 1865 (opinion concurring in part and concurring in judgment). ***88** But his only explanation of why the present interference with the "right to loiter" does not fall within that permitted scope of action is as follows: "The predicate of an order to disperse is not, in my view, sufficient to eliminate doubts regarding the adequacy of notice under this ordinance." *Ibid.* I have not the slightest idea what this means. But I *do* understand that the followup explanatory sentence, showing how this principle invalidates the present ordinance, applies equally to the rescue-team example that Justice KENNEDY thinks is constitutional-as is demonstrated by substituting for references to the facts of the present case (shown in italics) references to his rescue-team hypothetical (shown in brackets): "A citizen, while engaging in a wide array of innocent conduct, is not likely to know when he may be subject to a *dispersal order* [order not to enter a building] based on the officer's own knowledge of *the identity or affiliations of other persons with whom the citizen is congregating* [what is going on in the building]; nor may the citizen be able to assess what an officer might conceive to be *the citizen's lack of an apparent purpose* [the impeding of a rescue team]." *Ibid.*

III

I turn next to that element of the plurality's facial-challenge formula which consists of the proposition that this criminal ordinance contains no *mens rea* requirement. The first step in analyzing this proposition is to determine what the *actus reus,* to which that *mens rea* is supposed to be attached, consists of. The majority believes that loitering forms part of (indeed, the essence of) the offense, and must be proved if conviction is to be obtained. See *ante,* at 1854, 1856, 1857-1858, 1859-1860, 1861, 1862 (plurality and majority opinions); *ante,*

at 1863-1864 (O'CONNOR, J., concurring in part and concurring in judgment); *ante,* at 1865 (KENNEDY, J., concurring in part and concurring in judgment); *ante,* at 1866-1867 (BREYER, J., concurring in part and concurring in judgment).
That is not what the ordinance provides. The ***89** only part of the ordinance that refers to loitering is the portion that addresses, not the punishable conduct of the defendant, but what the police officer must observe before he can issue an order to disperse; and what he must observe is carefully defined in terms of what ****1875** the defendant *appears* to be doing, not in terms of what the defendant is *actually* doing. The ordinance does not require that the defendant have been loitering (*i.e.,* have been remaining in one place with no purpose), but rather that the police officer have observed him remaining in one place without any *apparent* purpose. Someone who in fact *has* a genuine purpose for remaining where he is (waiting for a friend, for example, or waiting to hold up a bank) *can* be ordered to move on (assuming the other conditions of the ordinance are met), so long as his remaining has no *apparent* purpose. It is likely, to be sure, that the ordinance will come down most heavily upon those who are *actually* loitering (those who *really* have no purpose in remaining where they are); but that activity is not a condition for issuance of the dispersal order.

The *only* act of a defendant that is made punishable by the ordinance-or, indeed, that is even mentioned by the ordinance-is his failure to "promptly obey" an order to disperse. The question, then, is whether that *actus reus* must be accompanied by any wrongful intent-and of course it must. As the Court itself describes the requirement, "a person must *disobey* the officer's order." *Ante,* at 1854 (emphasis added). No one thinks a defendant could be successfully prosecuted under the ordinance if he did not hear the order to disperse, or if he suffered a paralysis that rendered his compliance impossible. The willful failure to obey a police order is wrongful intent enough.

IV

Finally, I address the last of the three factors in the plurality's facial-challenge formula: the proposition that the ordinance is vague. It is not. Even under the ersatz overbreadth***90** standard applied in *Kolender v. Lawson,* 461 U.S. 352, 358, n. 8, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983), which allows facial challenges if a law reaches "a substantial amount of constitutionally protected conduct," respondents' claim fails because the ordinance would not be vague in most or even a substantial number of applications. A law is unconstitutionally vague if its lack of definitive standards either (1) fails to apprise persons of ordinary intelligence of the prohibited conduct, or (2) encourages arbitrary and discriminatory enforcement. See, *e.g., Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972).

The plurality relies primarily upon the first of these aspects. Since, it reasons, "the loitering is the conduct that the ordinance is designed to prohibit," and "an officer may issue an order only after prohibited conduct has already occurred," *ante,* at 1860, the order to disperse cannot itself serve "to apprise persons of ordinary intelligence of the prohibited conduct." What counts for purposes of vagueness analysis, however, is not what the ordinance is "designed to prohibit," but what it actually subjects to criminal penalty. As discussed earlier, that consists of nothing but the refusal to obey a dispersal order, as to which there is no doubt of adequate notice of the prohibited conduct. The plurality's suggestion that even the dispersal order *itself* is unconstitutionally vague, because it does not specify *how far to disperse(!),* see *ante,* at 1860, scarcely requires a response. [FN9] If it were true, it would render unconstitutional for vagueness many of the Presidential proclamations issued under that provision of the United States Code which requires the President,***91** before using the militia or the Armed Forces for law enforcement, to issue a proclamation ordering the insurgents to disperse.
See 10 U.S.C. § 334. President Eisenhower's proclamation relating to the obstruction of court-ordered enrollment of black students in public schools at Little Rock, Arkansas, read as follows: " I ... command all persons engaged in such obstruction of justice to cease and desist therefrom,

and to disperse forthwith." Presidential**1876 Proclamation No. 3204, 3 CFR 132 (1954-1958 Comp.). See also Presidential Proclamation No. 3645, 3 CFR 103 (1964-1965 Comp.) (ordering those obstructing the civil rights march from Selma to Montgomery, Alabama, to "disperse ... forthwith"). See also *Boos v. Barry,* 485 U.S. 312, 331, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988) (rejecting overbreadth/vagueness challenge to a law allowing police officers to order congregations near foreign embassies to disperse); *Cox v. Louisiana,* 379 U.S. 536, 551, 85 S.Ct. 453, 13 L.Ed.2d 471 (1965) (rejecting vagueness challenge to the dispersal-order prong of a breach-of-the-peace statute and describing that prong as "narrow and specific").

> FN9. I call it a "suggestion" because the plurality says only that the terms of the dispersal order "compound the inadequacy of the notice," and acknowledges that they "might not render the ordinance unconstitutionally vague if the definition of the forbidden conduct were clear." *Ante,* at 1860, 1861. This notion that a prescription ("Disperse!") which is itself not unconstitutionally vague can somehow contribute to the unconstitutional vagueness of the entire scheme is full of mystery-suspending, as it does, the metaphysical principle that nothing can confer what it does not possess (*nemo dat qui non habet*).

For its determination of unconstitutional vagueness, the Court relies secondarily-and Justice O'CONNOR's and Justice BREYER's concurrences exclusively-upon the second aspect of that doctrine, which requires sufficient specificity to prevent arbitrary and discriminatory law enforcement. See *ante,* at 1861 (majority opinion); *ante,* at 1863 (O'CONNOR, J., concurring in part and concurring in judgment); *ante,* at 1866, 1867 (BREYER, J., concurring in part and concurring in judgment). In discussing whether Chicago's ordinance meets that requirement, the Justices in the majority hide behind an artificial construct of judicial restraint. They point to the Supreme Court of Illinois' statement that the "apparent purpose" standard "provides absolute discretion to police officers to decide what activities constitute loitering," 177 Ill.2d 440, 457, 227 Ill.Dec. 130, 140, 687 N.E.2d 53, 63 (1997), and protest that it would be wrong to construe the language of the ordinance more narrowly than did the State's highest court. *Ante,* at 1861, 1862***92** (majority opinion); *ante,* at 1864-1865 (O'CONNOR, J., concurring in part and concurring in judgment). The "absolute discretion" statement, however, is nothing more than the Illinois Supreme Court's *characterization* of what the language achieved-after that court refused (as I do) to read in any limitations that the words do not fairly contain. It is not a construction of the language (to which we are bound) but a legal conclusion (to which we most assuredly are not bound).

The criteria for issuance of a dispersal order under the Chicago ordinance could hardly be clearer. First, the law requires police officers to "reasonably believ[e]" that one of the group to which the order is issued is a "criminal street gang member." This resembles a probable-cause standard, and the Chicago Police Department's General Order 92-4 (1992)-promulgated to govern enforcement of the ordinance-makes the probable-cause requirement explicit.[FN10] Under the Order, officers must have probable cause to believe that an individual is a member of a criminal street gang, to be substantiated by the officer's "experience and knowledge of the alleged offenders" and by " specific, documented and reliable information" such as reliable witness testimony or an individual's admission of gang membership or display of distinctive colors, tattoos, signs, or other markings worn by members of particular criminal street gangs. App. to Pet. for Cert. 67a-69a, 71a-72a.

> FN10. "Administrative interpretation and implementation of a regulation are ... highly relevant to our [vagueness] analysis, for '[i]n evaluating a facial challenge to a state law, a federal court must ... consider any limiting construction that a state court *or enforcement agency* has proffered.' "

> *Ward v. Rock Against Racism,* 491 U.S. 781, 795-796, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (emphasis added) (quoting *Hoffman Estates,* 455 U.S., at 494, n. 5, 102 S.Ct. 1186). See also *id.,* 455 U.S., at 504, 102 S.Ct. 1186 (administrative regulations "will often suffice to clarify a standard with an otherwise uncertain scope").

Second, the ordinance requires that the group be " remain[ing] in any one place with no apparent purpose." Justice O'CONNOR's assertion that this applies to "any person standing***93** in a public place," *ante,* at 1864, is a distortion. The ordinance does not apply to "standing," but to " remain [ing]"-a term which in this context obviously means "[to] endure or persist," see American Heritage Dictionary 1525 (1992). There may be some ambiguity at the margin, but " remain[ing] in one place" requires more than a temporary ****1877** stop, and is clear in most of its applications, including all of those represented by the facts surrounding respondents' arrests described *supra,* at 1872-1873.

As for the phrase "with no apparent purpose": Justice O'CONNOR again distorts this adjectival phrase, by separating it from the word that it modifies. "[A]ny person standing on the street," her concurrence says, "has a general 'purpose' -even if it is simply to stand," and thus "the ordinance permits police officers to choose which purposes are *permissible.*" *Ante,* at 1863. But Chicago police officers enforcing the ordinance are not looking for people with no apparent purpose (who are regrettably in oversupply); they are looking for people who "remain in any one place with no apparent purpose"-that is, who remain there without any apparent reason *for remaining there.* That is not difficult to perceive.[FN11]

> FN11. Justice BREYER asserts that "one always has some apparent purpose," so that the policeman must "interpret the words 'no apparent purpose' as meaning ' no apparent purpose except for....' " *Ante,* at 1865-1866. It is simply not true that " one always has some apparent purpose" -and especially not true that one always has some apparent purpose in remaining at rest, for the simple reason that one often (indeed, perhaps usually) has no *actual* purpose in remaining at rest. Remaining at rest will be a person's normal state, unless he has a purpose which causes him to move. That is why one frequently reads of a person's "wandering aimlessly" (which is worthy of note) but not of a person's " sitting aimlessly" (which is not remarkable at all). And that is why a synonym for " purpose" is "motive": that which causes one *to move.*

The Court's attempt to demonstrate the vagueness of the ordinance produces the following peculiar statement: "The 'no apparent purpose' standard for making [the decision to ***94** issue an order to disperse] is inherently subjective because its application depends on whether some purpose is ' apparent' to the officer on the scene." *Ante,* at 1862. In the Court's view, a person's lack of any purpose in staying in one location is presumably an *objective* factor, and what the ordinance requires as a condition of an order to disperse-the absence of any *apparent* purpose-is a *subjective* factor. This side of the looking glass, just the opposite is true.

Elsewhere, of course, the Court acknowledges the clear, objective commands of the ordinance, and indeed relies upon them to paint it as unfair:
"In any public place in the city of Chicago, persons who stand or sit in the company of a gang member may be ordered to disperse unless their purpose is apparent. The mandatory language in the enactment directs the police to issue an order without first making any inquiry about their possible purposes. It matters not whether the reason that a gang member and his father, for example, might loiter near Wrigley Field is to rob an unsuspecting fan or just to get a glimpse of Sammy Sosa leaving the ballpark; in either event, if their purpose is not apparent to a nearby police officer, she may-indeed, she 'shall'-order them to disperse." *Ante,* at 1861.

Quite so. And the fact that this clear instruction to the officers "reach [es] a substantial amount of innocent conduct," *ibid.,* would be invalidating if that conduct were constitutionally protected against abridgment, such as speech or the practice of religion. Remaining in one place is *not* so protected, and so (as already discussed) it is up to the citizens of Chicago-not us-to decide whether the tradeoff is worth it.[FN12]

FN12. The Court speculates that a police officer may exercise his discretion to *enforce* the ordinance and *direct* dispersal when (in the Court's view) the ordinance is inapplicable-viz., where there *is* an apparent purpose, but it is an unlawful one. See *ante,* at 1862. No one in his right mind would read the phrase "without any apparent purpose" to mean anything other than "without any apparent lawful purpose." The implication that acts referred to approvingly in statutory language are "lawful" acts is routine. The Court asserts that the Illinois Supreme Court has forced it into this interpretive inanity because, since it "has not placed any limiting construction on the language in the ordinance, we must assume that the ordinance means what it says...." *Ante,* at 1862. But the Illinois Supreme Court did not mention this particular interpretive issue, which has nothing to do with giving the ordinance a "limiting" interpretation, and everything to do with giving it its ordinary legal meaning.

**1878 *95 Justice BREYER's concurrence tries to perform the impossible feat of affirming our unquestioned rule that a criminal statute that is so vague as to give constitutionally inadequate notice to *some* violators may nonetheless be enforced against those whose conduct is clearly covered, see *ante,* at 1866, citing *Parker v. Levy,* 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), while at the same time asserting that a statute which "delegates too much discretion to a police officer" is invalid in *all* its applications, even where the officer uses his discretion "wisely," *ante,* at 1866. But the vagueness that causes notice to be inadequate is the very same vagueness that causes "too much discretion" to be lodged in the enforcing officer. Put another way: A law that gives the policeman clear guidance in all cases gives the public clear guidance in all cases as well. Thus, what Justice BREYER gives with one hand, he takes away with the other. In his view, vague statutes that nonetheless give adequate notice to *some* violators are not unenforceable against those violators because of inadequate notice, but *are* unenforceable against them "because the policeman enjoys too much discretion in *every* case," *ibid.* This is simply contrary to our case law, including *Parker v. Levy, supra.*[FN13]

FN13. The opinion that Justice BREYER relies on, *Coates v. Cincinnati,* 402 U.S. 611, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971), discussed *ante,* at 1866-1867, did not say that the ordinance there at issue gave adequate notice but did not provide adequate standards for the police. It invalidated that ordinance *on both inadequate-notice and inadequate-enforcement-standard grounds,* because First Amendment rights were implicated. It is common ground, however, that the present case does not implicate the First Amendment, see *ante,* at 1857 (plurality opinion); *ante,* at 1866 (BREYER, J., concurring in part and concurring in judgment).

***96** V

The plurality points out that Chicago already has several laws that reach the intimidating and unlawful gang-related conduct the ordinance was directed at. See *ante,* at 1857, n. 17. The problem, of course, well recognized by Chicago's city council, is that the gang members cease their intimidating and unlawful behavior under the watchful eye of police officers, but return to it as soon as the police drive away. The only solution, the council concluded, was to clear the streets of

congregations of gangs, their drug customers, and their associates.

Justice O'CONNOR's concurrence proffers the same empty solace of existing laws useless for the purpose at hand, see *ante,* at 1864, but seeks to be helpful by suggesting some measures *similar* to this ordinance that *would* be constitutional. It says that Chicago could, for example, enact a law that " directly prohibit[s] the presence of a large collection of obviously brazen, insistent, and lawless gang members and hangers-on on the public ways, that intimidates residents." *Ibid.* (internal quotation marks omitted). (If the majority considers the present ordinance too vague, it would be fun to see what it makes of "a large collection of obviously brazen, insistent, and lawless gang members.") This prescription of the concurrence is largely a quotation from the plurality-which itself answers the concurrence's suggestion that such a law would be helpful by pointing out that the city already "has several laws that serve this purpose." *Ante,* at 1857, n. 17 (plurality opinion) (citing extant laws against "intimidation," "streetgang criminal drug conspiracy," and "mob action"). The problem, again, is that the intimidation and lawlessness do not occur when the police are in sight.

***97** Justice O'CONNOR's concurrence also proffers another cure: "If the ordinance applied only to persons reasonably believed to be gang members, this requirement might ****1879** have cured the ordinance's vagueness because it would have directed the manner in which the order was issued by specifying to whom the order could be issued." *Ante,* at 1864 (the Court agrees that this might be a cure, see *ante,* at 1862). But the ordinance already specifies to whom the order can be issued: persons remaining in one place with no apparent purpose in the company of a gang member. And if "remain[ing] in one place with no apparent purpose" is so vague as to give the police unbridled discretion in controlling the conduct of nongang members, it surpasses understanding how it ceases to be so vague when applied to gang members *alone.* Surely gang members cannot be decreed to be outlaws, subject to the merest whim of the police as the rest of us are not.

* * *

The fact is that the present ordinance is entirely clear in its application, cannot be violated except with full knowledge and intent, and vests no more discretion in the police than innumerable other measures authorizing police orders to preserve the public peace and safety. As suggested by their tortured analyses, and by their suggested solutions that bear no relation to the identified constitutional problem, the majority's real quarrel with the Chicago ordinance is simply that it permits (or indeed requires) too much harmless conduct by innocent citizens to be proscribed. As Justice O'CONNOR's concurrence says with disapprobation, "the ordinance applies to hundreds of thousands of persons who are *not* gang members, standing on any sidewalk or in any park, coffee shop, bar, or other location open to the public." *Ante,* at 1864 (internal quotation marks omitted).

But in our democratic system, how much harmless conduct to proscribe is not a judgment to be made by the courts. So long as constitutionally guaranteed rights are not affected, ***98** and so long as the proscription has a rational basis, *all sorts* of perfectly harmless activity by millions of perfectly innocent people can be forbidden-riding a motorcycle without a safety helmet, for example, starting a campfire in a national forest, or selling a safe and effective drug not yet approved by the Food and Drug Administration. All of these acts are entirely innocent and harmless in themselves, but because of the *risk* of harm that they entail, the freedom to engage in them has been abridged. The citizens of Chicago have decided that depriving themselves of the freedom to "hang out" with a gang member is necessary to eliminate pervasive gang crime and intimidation-and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.

I dissent from the judgment of the Court.

Justice THOMAS, with whom THE CHIEF JUSTICE and Justice SCALIA join, dissenting.

The duly elected members of the Chicago City Council enacted the ordinance at issue as part of a larger effort to prevent gangs from establishing dominion over the public streets. By invalidating Chicago's ordinance, I fear that the Court has unnecessarily sentenced law-abiding citizens to lives of terror and misery. The ordinance is not vague. "[A]ny fool would know that a particular category of conduct would be within [its] reach." *Kolender v. Lawson,* 461 U.S. 352, 370, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (White, J., dissenting). Nor does it violate the Due Process Clause. The asserted "freedom to loiter for innocent purposes," *ante,* at 1857 (plurality opinion), is in no way " 'deeply rooted in this Nation's history and tradition,' " *Washington v. Glucksberg,* 521 U.S. 702, 721, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (citation omitted). I dissent.

I

The human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs have "[v]irtually***99** overtak[en] certain neighborhoods, contributing to the economic and social decline of ****1880** these areas and causing fear and lifestyle changes among law-abiding residents." U.S. Dept. of Justice, Office of Justice Programs, Bureau of Justice Assistance, Monograph: Urban Street Gang Enforcement 3 (1997). Gangs fill the daily lives of many of our poorest and most vulnerable citizens with a terror that the Court does not give sufficient consideration, often relegating them to the status of prisoners in their own homes. See U.S. Dept. of Justice, Attorney General's Report to the President, Coordinated Approach to the Challenge of Gang Violence: A Progress Report 1 (Apr.1996) ("From the small business owner who is literally crippled because he refuses to pay 'protection' money to the neighborhood gang, to the families who are hostages within their homes, living in neighborhoods ruled by predatory drug trafficking gangs, the harmful impact of gang violence ... is both physically and psychologically debilitating").

The city of Chicago has suffered the devastation wrought by this national tragedy. Last year, in an effort to curb plummeting attendance, the Chicago Public Schools hired dozens of adults to escort children to school. The youngsters had become too terrified of gang violence to leave their homes alone. Martinez, Parents Paid to Walk Line Between Gangs and School, Chicago Tribune, Jan. 21, 1998, p. 1. The children's fears were not unfounded. In 1996, the Chicago Police Department estimated that there were 132 criminal street gangs in the city. Illinois Criminal Justice Information Authority, Research Bulletin: Street Gangs and Crime 4 (Sept.1996). Between 1987 and 1994, these gangs were involved in 63,141 criminal incidents, including 21,689 nonlethal violent crimes and 894 homicides. *Id.,* at 4-5.[FN1] Many ***100** of these criminal incidents and homicides result from gang "turf battles," which take place on the public streets and place innocent residents in grave danger. See U.S. Dept. of Justice, Office of Justice Programs, National Institute of Justice, Research in brief, C. Block & R. Block, Street Gang Crime in Chicago 1 (Dec. 1993); U.S. Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention, Juvenile Justice Journal, J. Howell, Youth Gang Drug Trafficking and Homicide: Policy and Program Implications (Dec. 1997); see also Testimony of Steven R. Wiley, Chief, Violent Crimes and Major Offenders Section, FBI, Hearing on S. 54 before the Senate Committee on the Judiciary, 105th Cong., 1st Sess., 13 (1997) ("While street gangs may specialize in entrepreneurial activities like drug-dealing, their gang-related lethal violence is more likely to grow out of turf conflicts").

FN1. In 1996 alone, gangs were involved in 225 homicides, which was 28 percent of the total homicides committed in the city. Chicago Police Department, Gang and Narcotic Related Violent Crime, City of Chicago: 1993-1997 (June 1998). Nationwide, law enforcement officials estimate that as many as 31,000 street

> gangs, with 846,000 members, exist. U.S. Dept. of Justice, Office of Justice Programs, Highlights of the 1996 National Youth Gang Survey (OJJDP Fact Sheet, No. 86, Nov. 1998).

Before enacting its ordinance, the Chicago City Council held extensive hearings on the problems of gang loitering. Concerned citizens appeared to testify poignantly as to how gangs disrupt their daily lives. Ordinary citizens like Ms. D'Ivory Gordon explained that she struggled just to walk to work:
"When I walk out my door, these guys are out there . ...
. . . . .
"They watch you.... They know where you live. They know what time you leave, what time you come home. I am afraid of them. I have even come to the point now that I carry a meat cleaver to work with me ....
"... I don't want to hurt anyone, and I don't want to be hurt. We need to clean these corners up. Clean these communities up and take it back from them." Transcript of Proceedings before the City Council of ***101** Chicago, Committee on Police and Fire 66-67 (May 15, 1992) (hereinafter Transcript).

Eighty-eight-year-old Susan Mary Jackson echoed her sentiments, testifying: "We used to have a nice neighborhood. We don't have it anymore .... I am scared to go out in the daytime.... [Y]ou can't pass because they are standing. I am afraid to go to the store. I don't go to the store because I am afraid. At my age if they look at me real hard, I be ready to holler." *Id.,* at 93-95. Another long-time resident testified:****1881** "I have never had the terror that I feel everyday when I walk down the streets of Chicago....
. . . . .
"I have had my windows broken out. I have had guns pulled on me. I have been threatened. I get intimidated on a daily basis, and it's come to the point where I say, well, do I go out today. Do I put my ax in my briefcase. Do I walk around dressed like a bum so I am not looking rich or got any money or anything like that." *Id.,* at 124-125.

Following these hearings, the council found that " criminal street gangs establish control over identifiable areas ... by loitering in those areas and intimidating others from entering those areas." App. to Pet. for Cert. 60a. It further found that the mere presence of gang members "intimidate[s] many law abiding citizens" and "creates a justifiable fear for the safety of persons and property in the area." *Ibid.* It is the product of this democratic process-the council's attempt to address these social ills-that we are asked to pass judgment upon today.

II

As part of its ongoing effort to curb the deleterious effects of criminal street gangs, the citizens of Chicago sensibly decided to return to basics. The ordinance does nothing more than confirm the well-established principle that the police ***102** have the duty and the power to maintain the public peace, and, when necessary, to disperse groups of individuals who threaten it. The plurality, however, concludes that the city's commonsense effort to combat gang loitering fails constitutional scrutiny for two separate reasons-because it infringes upon gang members' constitutional right to "loiter for innocent purposes," *ante,* at 1857, and because it is vague on its face, *ante,* at 1858. A majority of the Court endorses the latter conclusion. I respectfully disagree.

A

We recently reconfirmed that "[o]ur Nation's history, legal traditions, and practices ... provide the crucial 'guideposts for responsible decisionmaking' ... that direct and restrain our exposition of the Due Process Clause." *Glucksberg,* 521 U.S., at 721, 117 S.Ct. 2258 (quoting *Moore v. East Cleveland,* 431 U.S. 494, 503, 97 S.Ct. 1932, 52 L.Ed.2d 531 (1977) (plurality opinion)). Only laws that infringe "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' " offend the Due Process Clause. *Glucksberg, supra,* at 720-721, 117 S.Ct. 2258.

The plurality asserts that "the freedom to loiter for innocent purposes is part of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment." *Ante,* at 1857. Yet it acknowledges-as it must-that "antiloitering ordinances have long existed in this country." *Ante,* at 1857, n. 20; see also 177 Ill.2d 440, 450, 227 Ill.Dec. 130, 687 N.E.2d 53, 60 (1997) (case below) ("Loitering and vagrancy statutes have been utilized throughout American history in an attempt to prevent crime by removing 'undesirable persons' from public before they have the opportunity to engage in criminal activity"). In derogation of the framework we articulated only two Terms ago in *Glucksberg,* the plurality asserts that this history fails to "persuad[e] us that the right to engage in loitering that is entirely harmless ... is not a part of the liberty protected by the Due Process Clause." *Ante,* at 1858, ***103** n. 20. Apparently, the plurality believes it sufficient to rest on the proposition that antiloitering laws represent an anachronistic throwback to an earlier, less sophisticated, era. For example, it expresses concern that some antivagrancy laws carried the penalty of slavery. *Ibid.* But this fact is irrelevant to our analysis of whether there is a constitutional right to loiter for innocent purposes. This case does not involve an antiloitering law carrying the penalty of slavery. The law at issue in this case criminalizes the failure to obey a police officer's order to disperse and imposes modest penalties, such as a fine of up to $500 and a prison sentence of up to six months.

The plurality's sweeping conclusion that this ordinance infringes upon a liberty interest protected by the Fourteenth Amendment's Due Process Clause withers when exposed to the relevant history: Laws prohibiting loitering and vagrancy have been a fixture of Anglo-American law at least since the time of the Norman Conquest. See generally **1882 C. Ribton-Turner, A History of Vagrants and Vagrancy and Beggars and Begging (reprint 1972) (discussing history of English vagrancy laws); see also *Papachristou v. Jacksonville,* 405 U.S. 156, 161-162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972) (recounting history of vagrancy laws). The American colonists enacted laws modeled upon the English vagrancy laws, and at the time of the founding, state and local governments customarily criminalized loitering and other forms of vagrancy. [FN2] Vagrancy laws ***104** were common in the decades preceding the ratification of the Fourteenth Amendment,[FN3] and remained on the books long after.[FN4]

FN2. See, *e.g.,* Act for the Restraint of idle and disorderly Persons (1784) (reprinted in 2 First Laws of the State of North Carolina 508-509 (J. Cushing comp.1984)); Act for restraining, correcting, suppressing and punishing Rogues, Vagabonds, common Beggars, and other lewd, idle, dissolute, profane and disorderly Persons; and for setting them to work (reprinted in First Laws of the State of Connecticut 206-210 (J. Cushing comp.1982)); Act for suppressing and punishing of Rogues, Vagabonds, common Beggars and other idle, disorderly and lewd persons (1788) (reprinted in First Laws of the Commonwealth of Massachusetts 347-349 (J. Cushing comp.1981)); Act for better securing the payment of levies and restraint of vagrants, and for making provisions for the poor (1776) (reprinted in First Laws of the State of Virginia 44-45 (J. Cushing comp.1982)); Act for the better ordering of the Police of the Town of Providence, of the Work-House in said Town (1796) (reprinted in 2 First Laws of the State of Rhode Island 362-367 (J. Cushing comp.1983)); Act for the Promotion of Industry, and for the Suppression of Vagrants and Other Idle and Disorderly Persons (1787) (reprinted in First Laws of the State of South Carolina, Part 2, 431-433 (J. Cushing comp.1981)); An act for the punishment of vagabond and other idle and disorderly persons (1764) (reprinted in First Laws of the State of Georgia 431-433 (J. Cushing comp.1981)); Laws of the Colony of New York 4, ch. 1021 (1756); 1 Laws of the Commonwealth of Pennsylvania, ch.

DLV (1767) (An Act to prevent the mischiefs arising from the increase of vagabonds, and other idle and disorderly persons, within this province); Laws of the State of Vermont § 10 (1797).

FN3. See, *e.g.,* Kan. Stat., ch. 161, § 1 (1855); Ky.Rev.Stat., ch. CIV, § 1 (1852); Pa. Laws, ch. 664, § V (1853); N.Y.Rev.Stat., ch. XX, § 1 (1859); Ill. Stat., ch. 30, § CXXXVIII (1857). During the 19th century, this Court acknowledged the States' power to criminalize vagrancy on several occasions. See *Mayor of New York v. Miln,* 11 Pet. 102, 148, 9 L.Ed. 648 (1837); *Passenger Cases,* 7 How. 283, 425, 12 L.Ed. 702 (1849) (opinion of Wayne, J.); *Prigg v. Pennsylvania,* 16 Pet. 539, 625, 10 L.Ed. 1060 (1842).

FN4. See generally C. Tiedeman, Limitations of Police Power in the United States 116-117 (1886) ("The vagrant has been very appropriately described as the chrysalis of every species of criminal. A wanderer through the land, without home ties, idle, and without apparent means of support, what but criminality is to be expected from such a person? If vagrancy could be successfully combated ... the infractions of the law would be reduced to a surprisingly small number; and it is not to be wondered at that an effort is so generally made to suppress vagrancy"). See also R.I. Gen.Stat., ch. 232, § 24 (1872); Ill.Rev.Stat., ch. 38, § 270 (1874); Conn. Gen.Stat., ch. 3, § 7 (1875); N.H. Gen. Laws, ch. 269, § 17 (1878); Cal.Penal Code § 647 (1885); Ohio Rev. Stat., Tit. 1, ch. 8, §§ 6994, 6995 (1886); Colo.Rev.Stat., ch. 36, § 1362 (1891); Del.Rev.Stat., ch. 92, Vol. 12, p. 962 (1861); Ky. Stat., ch. 132, § 4758 (1894); Ill.Rev.Stat., ch. 38, § 270 (1895); Ala.Code, ch. 199, § 5628 (1897); Ariz.Rev.Stat., Tit. 17, § 599 (1901); N.Y.Crim.Code § 887 (1902); Pa. Stat. §§ 21409, 21410 (1920); Ky. Stat. § 4758-1 (1922); Ala.Code, ch. 244, § 5571 (1923); Kan.Rev.Stat. § 21-2402 (1923); Ill. Stat. Ann., § 606 (1924); Ariz.Rev.Stat., ch. 111, § 4868 (1928); Cal.Penal Code, Pt. 1, Tit. 15, ch. 2, § 647 (1929); Pa. Stat. Ann., Tit. 18, § 2032 (Purdon 1945); Kan. Gen.Stat. Ann. § 21-2409 (1949); N.Y.Crim.Code § 887 (1952); Colo.Rev.Stat. Ann. § 40-8-20 (1954); Cal.Penal Code § 647 (1953); 1 Ill.Rev.Stat., ch. 38, § 578 (1953); Ky.Rev.Stat. § 436.520 (1953); 5 Ala.Code, Tit. 14, § 437 (1959); Pa. Stat. Ann., Tit. 18, § 2032 (Purdon 1963); Kan. Stat. Ann. § 21-2409 (1964).

***105** Tellingly, the plurality cites only three cases in support of the asserted right to "loiter for innocent purposes." See *ante,* at 1857-1858. Of those, only one-decided more than 100 years after the ratification of the Fourteenth Amendment-actually addressed the validity of a vagrancy ordinance. That case, *Papachristou, supra,* contains some dicta that can be read to support the fundamental right that the plurality asserts.[FN5] ****1883** However, the Court in *Papachristou* did not undertake the now-accepted analysis applied in substantive due process cases-it did not look to tradition to define the rights protected by the Due Process Clause. In any event, a careful reading of the opinion reveals that the Court never said anything about a constitutional right. The Court's holding was that the antiquarian language employed in the vagrancy ordinance at issue was unconstitutionally vague. See *id.,* at 162-163, 92 S.Ct. 839. Even assuming, then, that *Papachristou* was correctly decided as an original matter-a doubtful proposition ***106** it does not compel the conclusion that the Constitution protects the right to loiter for innocent purposes. The plurality's contrary assertion calls to mind the warning that "[t]he Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution ... .[We] should be extremely reluctant

to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare." *Moore,* 431 U.S., at 544, 97 S.Ct. 1932 (White, J., dissenting). When "the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority." *Ibid.*

FN5. The other cases upon which the plurality relies concern the entirely distinct right to interstate and international travel. See *Williams v. Fears,* 179 U.S. 270, 274-275, 21 S.Ct. 128, 45 L.Ed. 186 (1900); *Kent v. Dulles,* 357 U.S. 116, 78 S.Ct. 1113, 2 L.Ed.2d 1204 (1958). The plurality claims that dicta in those cases articulating a right of free movement, see *Williams, supra,* at 274, 21 S.Ct. 128; *Kent, supra,* at 125, 78 S.Ct. 1113, also supports an individual's right to "remain in a public place of his choice." Ironically, *Williams* rejected the argument that a tax on persons engaged in the business of importing out-of-state labor impeded the freedom of transit, so the precise holding in that case does not support, but undermines, the plurality's view. Similarly, the precise holding in *Kent* did not bear on a constitutional right to travel; instead, the Court held only that Congress had not authorized the Secretary of State to deny certain passports. Furthermore, the plurality's approach distorts the principle articulated in those cases, stretching it to a level of generality that permits the Court to disregard the relevant historical evidence that should guide the analysis. *Michael H. v. Gerald D.,* 491 U.S. 110, 127, n. 6, 109 S.Ct. 2333, 105 L.Ed.2d 91 (1989) (plurality opinion).

B

The Court concludes that the ordinance is also unconstitutionally vague because it fails to provide adequate standards to guide police discretion and because, in the plurality's view, it does not give residents adequate notice of how to conform their conduct to the confines of the law. I disagree on both counts.

1

At the outset, it is important to note that the ordinance does not criminalize loitering *per se.* Rather, it penalizes loiterers' failure to obey a police officer's order to move along. A majority of the Court believes that this scheme vests too much discretion in police officers. Nothing could be further from the truth. Far from according officers too much discretion, the ordinance merely enables police officers to fulfill one of their traditional functions. Police officers are not, and have never been, simply enforcers of the criminal law. They wear other hats-importantly, they have long been vested with the responsibility for preserving the public peace. See, *e.g.,* O. Allen, Duties and Liabilities of Sheriffs ***107** 59 (1845) ("As the principal conservator of the peace in his county, and as the calm but irresistible minister of the law, the duty of the Sheriff is no less important than his authority is great"); E. Freund, Police Power § 86, p. 87 (1904) ("The criminal law deals with offenses after they have been committed, the police power aims to prevent them. The activity of the police for the prevention of crime is partly such as needs no special legal authority"). Nor is the idea that the police are also *peace officers* simply a quaint anachronism. In most American jurisdictions, police officers continue to be obligated, by law, to maintain the public peace. [FN6]

FN6. See, *e.g.,* Ark.Code Ann. § 12-8-106(b) (Supp.1997) ("The Department of Arkansas State Police shall be conservators of the peace"); Del.Code Ann., Tit. IX, § 1902 (1989) ("All police appointed under this section shall see that the peace and good order of the State ... be duly kept"); Ill. Comp. Stat., ch. 65, § 5/11-1-2(a) (1998) ("Police officers in municipalities shall be conservators of the

peace"); La.Rev.Stat. Ann. § 40:1379 (West 1992) ("Police employees ... shall ... keep the peace and good order"); Mo.Rev.Stat. § 85.561 (1998) (" [M]embers of the police department shall be conservators of the peace, and shall be active and vigilant in the preservation of good order within the city"); N.H.Rev.Stat. Ann. § 105:3 (1990) ("All police officers are, by virtue of their appointment, constables and conservators of the peace"); Ore.Rev.Stat. § 181.110 (1997) ("Police to preserve the peace, to enforce the law and to prevent and detect crime"); 351 Pa.Code, Tit. 351, § 5.5-200 (1998) ("The Police Department ... shall preserve the public peace, prevent and detect crime, police the streets and highways and enforce traffic statutes, ordinances and regulations relating thereto"); Tex. Code Crim. Proc. Ann., Art. 2.13 (Vernon 1977) ("It is the duty of every peace officer to preserve the peace within his jurisdiction"); Vt. Stat. Ann., Tit. 24, § 299 (1992) ("A sheriff shall preserve the peace, and suppress, with force and strong hand, if necessary, unlawful disorder"); Va.Code Ann. § 15.2-1704(A) (Supp.1998) ("The police force ... is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances").

****1884** In their role as peace officers, the police long have had the authority and the duty to order groups of individuals who threaten the public peace to disperse. For example, the 1887 police manual for the city of New York provided:

***108** "It is hereby made the duty of the Police Force at all times of day and night, and the members of such Force are hereby thereunto empowered, to especially preserve the public peace, prevent crime, detect and arrest offenders, suppress riots, mobs and insurrections, *disperse unlawful or dangerous assemblages, and assemblages which obstruct the free passage of public streets, sidewalks, parks and places.*" Manual Containing the Rules and Regulations of the Police Department of the City of New York, Rule 414 (emphasis added).

See also J. Crocker, Duties of Sheriffs, Coroners and Constables § 48, p. 33 (2d ed. rev.1871) (" Sheriffs are, *ex officio,* conservators of the peace within their respective counties, and it is their duty, as well as that of all constables, coroners, marshals and other peace officers, to prevent every breach of the peace, and to *suppress every unlawful assembly,* affray or riot which may happen in their presence" (emphasis added)). The authority to issue dispersal orders continues to play a commonplace and crucial role in police operations, particularly in urban areas. [FN7] Even the ABA Standards for ***109** Criminal Justice recognize that "[i]n day-to-day police experience there are innumerable situations in which police are called upon to order people not to block the sidewalk, not to congregate in a given place, and not to 'loiter' .... The police may suspect the loiterer of considering engaging in some form of undesirable conduct that can be at least temporarily frustrated by ordering him or her to 'move on.' " Standard 1-3.4(d), p. 1.88, and comments (2d ed.1980, Supp.1986).[FN8]

FN7. For example, the following statutes provide a criminal penalty for the failure to obey a dispersal order: Ala.Code § 13A-11-6 (1994); Ariz.Rev.Stat. Ann. § 13-2902(A)(2) (1989); Ark.Code Ann. § 5-71-207(a)(6) (1993); Cal.Penal Code Ann. § 727 (West 1985); Colo.Rev.Stat. § 18-9-107(b) (1997); Del.Code Ann., Tit. 11, § 1321 (1995); Ga.Code Ann. § 16-11-36 (1996); Guam Code Ann., Tit. 9, § 61.10(b) (1996); Haw.Rev.Stat. § 711-1102 (1993); Idaho Code § 18-6410 (1997); Ill. Comp. Stat., ch. 720, § 5/25-1(e) (1998); Ky.Rev.Stat. Ann. §§ 525.060, 525.160 (Baldwin 1990); Me.Rev.Stat. Ann., Tit. 17A, § 502 (1983); Mass. Gen. Laws, ch. 269, § 2 (1992); Mich. Comp. Laws § 750.523 (1991); Minn.Stat. § 609.715 (1998);

Miss.Code Ann. § 97-35-7(1) (1994); Mo. Rev. Stat. § 574.060 (1994); Mont.Code Ann. § 45-8-102 (1997); Nev.Rev.Stat. § 203.020 (1995); N.H.Rev.Stat. Ann. §§ 644:1, 644:2(II)(e) (1996); N.J. Stat. Ann. § 2C:33-1(b) (West 1995); N.Y. Penal Law § 240.20(6) (McKinney 1989); N.C. Gen.Stat. § 14-288.5(a) (1999); N.D. Cent.Code § 12.1-25-04 (1997); Ohio Rev.Code Ann. § 2917.13(A)(2) (1997); Okla. Stat., Tit. 21, § 1316 (1991); Ore.Rev.Stat. § 166.025(1)(e) (1997); 18 Pa. Cons.Stat. § 5502 (1983); R.I. Gen. Laws § 11-38-2 (1994); S.C.Code Ann. § 16-7-10(a) (1985); S.D. Codified Laws § 22-10-11 (1998); Tenn.Code Ann. § 39-17-305(2) (1997); Tex. Penal Code Ann. § 42.03(a)(2) (1994); Utah Code Ann. § 76-9-104 (1995); Vt. Stat. Ann., Tit. 13, § 901 (1998); Va.Code Ann. § 18.2-407 (1996); V.I.Code Ann. Tit. 5, § 4022 (1997); Wash. Rev.Code § 9A.84.020 (1994); W. Va.Code § 61-6-1 (1997); Wis. Stat. § 947.06(3) (1994).

FN8. See also Ind.Code § 36-8-3-10(a) (1993) ("The police department shall, within the city: (1) preserve peace; (2) prevent offenses; (3) detect and arrest criminals; (4) suppress riots, mobs, and insurrections; (5) disperse unlawful and dangerous assemblages and assemblages that obstruct the free passage of public streets, sidewalks, parks, and places ..."); Okla. Stat., Tit. 19, § 516 (1991) ("It shall be the duty of the sheriff ... to keep and preserve the peace of their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections ...").

****1885** In order to perform their peacekeeping responsibilities satisfactorily, the police inevitably must exercise discretion. Indeed, by empowering them to act as peace officers, the law assumes that the police will exercise that discretion responsibly and with sound judgment. That is not to say that the law should not provide objective guidelines for the police, but simply that it cannot rigidly constrain their every action. By directing a police officer not to issue a dispersal order unless he "observes a person whom he reasonably believes to be a criminal street gang member loitering in any public place," App. to Pet. for Cert. 61a, Chicago's ordinance strikes an appropriate balance between those two extremes. Just as we trust officers to rely on their experience and expertise in order to make spur-of-the-moment determinations about amorphous legal standards such as "probable cause" ***110** and "reasonable suspicion," so we must trust them to determine whether a group of loiterers contains individuals (in this case members of criminal street gangs) whom the city has determined threaten the public peace. See *Ornelas v. United States,* 517 U.S. 690, 695, 700, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) ("Articulating precisely what ' reasonable suspicion' and 'probable cause' mean is not possible. They are commonsense, nontechnical conceptions that deal with the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act ... . [O]ur cases have recognized that a police officer may draw inferences based on his own experience in deciding whether probable cause exists" (citations and internal quotation marks omitted). In sum, the Court's conclusion that the ordinance is impermissibly vague because it " 'necessarily entrusts lawmaking to the moment-to-moment judgment of the policeman on his beat,' " *ante,* at 1861, cannot be reconciled with common sense, longstanding police practice, or this Court's Fourth Amendment jurisprudence.

The illogic of the Court's position becomes apparent when it opines that the ordinance's dispersal provision "would no doubt be sufficient if the ordinance only applied to loitering that had an apparently harmful purpose or effect, or possibly if it only applied to loitering by persons reasonably believed to be criminal gang members." *Ante,* at 1862 (footnote omitted). See also *ante,* at 1864 (O'CONNOR, J., concurring in part and concurring in judgment) (endorsing Court's proposal). With respect, if the Court believes that the ordinance is vague as written, this suggestion would not cure the vagueness problem. First, although the Court has

suggested that a scienter requirement may mitigate a vagueness problem "with respect to the adequacy of notice to the complainant that his conduct is proscribed," *Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 499, 102 S.Ct. 1186, 71 L.Ed.2d 362 (1982) (footnote omitted), the alternative proposal does not incorporate a scienter requirement. If the ordinance's prohibition were limited*111 to loitering with "an apparently harmful purpose," the criminality of the conduct would continue to depend on its external appearance, rather than the loiterer's state of mind. See Black's Law Dictionary 1345 (6th ed.1990) (scienter "is frequently used to signify the defendant's guilty knowledge"). For this reason, the proposed alternative would neither satisfy the standard suggested in *Hoffman Estates* nor serve to channel police discretion. Indeed, an ordinance that required officers to ascertain whether a group of loiterers have "an apparently harmful purpose" would require them to exercise *more* discretion, not less. Furthermore, the ordinance in its current form-requiring the dispersal of groups that contain at least one gang member-actually vests less discretion in the police than would a law requiring that the police disperse groups that contain *only* gang members. Currently, an officer must reasonably suspect that one individual is a member of a gang. Under the plurality's proposed law, an officer would be required to make such a determination multiple times.

In concluding that the ordinance adequately channels police discretion, I do not suggest that a police officer enforcing the Gang Congregation Ordinance will never make a mistake. Nor do I overlook the *possibility* that a police officer, acting in bad faith, might enforce the ordinance in an arbitrary or discriminatory way. But our decisions should **1886 not turn on the proposition that such an event will be anything but rare. Instances of arbitrary or discriminatory enforcement of the ordinance, like any other law, are best addressed when (and if) they arise, rather than prophylactically through the disfavored mechanism of a facial challenge on vagueness grounds. See *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid").

*112 2

The plurality's conclusion that the ordinance "fails to give the ordinary citizen adequate notice of what is forbidden and what is permitted," *ante,* at 1861, is similarly untenable. There is nothing "vague" about an order to disperse.[FN9] While "we can never expect mathematical certainty from our language," *Grayned v. City of Rockford,* 408 U.S. 104, 110, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972), it is safe to assume that the vast majority of people who are ordered by the police to "disperse and remove themselves from the area" will have little difficulty understanding how to comply. App. to Pet. for Cert. 61a.

FN9. The plurality suggests, *ante,* at 1860, that dispersal orders are, by their nature, vague. The plurality purports to distinguish its sweeping condemnation of dispersal orders from *Colten v. Kentucky,* 407 U.S. 104, 92 S.Ct. 1953, 32 L.Ed.2d 584 (1972), but I see no principled ground for doing so. The logical implication of the plurality's assertion is that the police can never issue dispersal orders. For example, in the plurality's view, it is apparently unconstitutional for a police officer to ask a group of gawkers to move along in order to secure a crime scene.

Assuming that we are also obligated to consider whether the ordinance places individuals on notice of what conduct might subject them to such an order, respondents in this facial challenge bear the weighty burden of establishing that the statute is vague in all its applications, "in the sense that no standard of conduct is specified at all." *Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 29 L.Ed.2d 214 (1971). I subscribe to the view of

retired Justice White-"If any fool would know that a particular category of conduct would be within the reach of the statute, if there is an unmistakable core that a reasonable person would know is forbidden by the law, the enactment is not unconstitutional on its face." *Kolender,* 461 U.S., at 370-371, 103 S.Ct. 1855 (dissenting opinion). This is certainly such a case. As the Illinois Supreme Court recognized, "persons of ordinary intelligence may maintain a common and accepted ***113** meaning of the word 'loiter.' " 77 Ill.2d, at 451, 227 Ill.Dec. 130, 687 N.E.2d, at 61.

Justice STEVENS' contrary conclusion is predicated primarily on the erroneous assumption that the ordinance proscribes large amounts of constitutionally protected and/or innocent conduct. See *ante,* at 1858, 1859, 1861. As already explained, *supra,* at 1881-1883, the ordinance does not proscribe constitutionally protected conduct-there is no fundamental right to loiter. It is also anomalous to characterize loitering as "innocent " conduct when it has been disfavored throughout American history. When a category of conduct has been consistently criminalized, it can hardly be considered "innocent." Similarly, when a term has long been used to describe criminal conduct, the need to subject it to the "more stringent vagueness test" suggested in *Hoffman Estates,* 455 U.S., at 499, 102 S.Ct. 1186, dissipates, for there is no risk of a trap for the unwary. The term "loiter" is no different from terms such as "fraud," "bribery," and "perjury." We expect people of ordinary intelligence to grasp the meaning of such legal terms despite the fact that they are arguably imprecise.[FN10]

> FN10. For example, a 1764 Georgia law declared that "all able bodied persons ... who shall be found loitering ..., all other idle vagrants, or disorderly persons wandering abroad without betaking themselves to some lawful employment or honest labor, shall be deemed and adjudged vagabonds," and required the apprehension of "any such vagabond ... found within any county in this State, wandering, strolling, loitering about" (reprinted in First Laws of the State of Georgia, Part 1, 376-377 (J. Cushing comp.1981)). See also, *e.g.,* Digest of Laws of Pennsylvania 829 (F. Brightly 8th ed. 1853) ("The following described persons shall be liable to the penalties imposed by law upon vagrants .... All persons who shall ... be found loitering"); Ky.Rev.Stat., ch. CIV, § 1, p. 69 (1852) (" If any able bodied person be found loitering or rambling about, ... he shall be taken and adjudged to be a vagrant, and guilty of a high misdemeanor").

****1887** The plurality also concludes that the definition of the term loiter-"to remain in any one place with no apparent purpose,"***114** see 177 Ill.2d, at 445, 227 Ill.Dec. 130, 687 N.E.2d, at 58 -fails to provide adequate notice.[FN11] "It is difficult to imagine," the plurality posits, "how any citizen of the city of Chicago standing in a public place ... would know if he or she had an 'apparent purpose.' " *Ante,* at 1859. The plurality underestimates the intellectual capacity of the citizens of Chicago. Persons of ordinary intelligence are perfectly capable of evaluating how outsiders perceive their conduct, and here "[i]t is self-evident that there is a whole range of conduct that anyone with at least a semblance of common sense would know is [loitering] and that would be covered by the statute." See *Smith v. Goguen,* 415 U.S. 566, 584, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974) (White, J., concurring in judgment). Members of a group standing on the corner staring blankly into space, for example, are likely well aware that passersby would conclude that they have "no apparent purpose." In any event, because this is a facial challenge, the plurality's ability to hypothesize that some individuals, in some circumstances, may be unable to ascertain how their actions appear to outsiders is irrelevant to our analysis. Here, we are asked to determine whether the ordinance is "vague in all of its applications." *Hoffman Estates, supra,* at 497, 102 S.Ct. 1186. The answer is unquestionably no.

> FN11. The Court asserts that we cannot second-guess the Illinois Supreme Court's conclusion that the definition " 'provides absolute discretion to police officers to decide what activities constitute loitering,' " *ante,* at 1861 (quoting 177 Ill.2d, at 440, 457, 227 Ill.Dec., at 140, 687 N.E.2d, at 63). While we are bound by a state court's construction of a statute, the Illinois court " did not, strictly speaking, construe the [ordinance] in the sense of defining the meaning of a particular statutory word or phase. Rather, it merely characterized [its] 'practical effect' .... This assessment does not bind us." *Wisconsin v. Mitchell,* 508 U.S. 476, 484, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993).

* * *

Today, the Court focuses extensively on the "rights" of gang members and their companions. It can safely do so-the people who will have to live with the consequences of ***115** today's opinion do not live in our neighborhoods. Rather, the people who will suffer from our lofty pronouncements are people like Ms. Susan Mary Jackson; people who have seen their neighborhoods literally destroyed by gangs and violence and drugs. They are good, decent people who must struggle to overcome their desperate situation, against all odds, in order to raise their families, earn a living, and remain good citizens. As one resident described: "There is only about maybe one or two percent of the people in the city causing these problems maybe, but it's keeping 98 percent of us in our houses and off the streets and afraid to shop." Transcript 126. By focusing exclusively on the imagined "rights" of the two percent, the Court today has denied our most vulnerable citizens the very thing that Justice STEVENS, *ante,* at 1858, elevates above all else-the " 'freedom of movement.' " And that is a shame. I respectfully dissent.

U.S.Ill.,1999.
City of Chicago v. Morales
527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67, 67 USLW 4415, 72 A.L.R.5th 665, 99 Cal. Daily Op. Serv. 4488, 1999 Daily Journal D.A.R. 5760, 1999 CJ C.A.R. 3223, 12 Fla. L. Weekly Fed. S 331

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- 1998 WL 727542 (Appellate Brief) REPLY BRIEF FOR THE PETITIONER (Oct. 14, 1998)
- 1998 WL 608346 (Appellate Brief) BRIEF AMICUS CURIAE OF SEE FOREVER/THE MAYA ANGELOU PUBLIC CHARTER SCHOOL IN SUPPORT OF RESPONDENTS (Sep. 11, 1998)
- 1998 WL 614292 (Appellate Brief) BRIEF AMICUS CURIAE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF THE RESPONDENTS (Sep. 11, 1998)
- 1998 WL 614293 (Appellate Brief) BRIEF AMICUS CURIAE OF THE ILLINOIS ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF THE RESPONDENTS (Sep. 11, 1998)
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- 1998 WL 614296 (Appellate Brief) BRIEF OF AMICI CURIAE NATIONAL BLACK POLICE ASSOCIATION, CHICAGO NBPA, HISPANIC NATIONAL LAW ENFORCEMENT ASSOCIATION, and NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS (Sep. 11, 1998)
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- 1998 WL 642555 (Appellate Brief) BRIEF OF CHICAGO ALLIANCE FOR NEIGHBORHOOD SAFETY, U.S. REPRESENTATIVE JESSE JACKSON, JR., COMMUNITY RENEWAL SOCIETY, NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE,

527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67, 67 USLW 4415, 72 A.L.R.5th 665, 99 Cal. Daily Op. Serv. 4488, 1999 Daily Journal D.A.R. 5760, 1999 CJ C.A.R. 3223, 12 Fla. L. Weekly Fed. S 331
(Cite as: 527 U.S. 41, 119 S.Ct. 1849)

NATIONAL COUNCIL OF LA RAZA, MEXICAN-AMERICAN LEGAL DEFENSE FUND, CHICAG O COUNCIL OF LAWYERS, COOK COUNTY BAR ASSOCIATION, PUERTO RICAN BAR ASSOCIATION OF ILLINOIS, THE BLACK LEADERSHIP FORUM, INC., CHICAGO CONFERENCE OF BLACK LAWYERS AND CHICAGO COMMUNITY ORGANIZATIONS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS (Sep. 11, 1998)

• 1998 WL 328342 (Appellate Brief) BRIEF FOR THE PETITIONER (Jun. 19, 1998)

• 1998 WL 328364 (Appellate Brief) BRIEF OF AMICI CURIAE NATIONAL DISTRICT ATTORNEYS ASSOCIATION AND INTERNATIONAL ASSOCIATION OF CHIEFS OF POLICE IN SUPPORT OF PETITIONER CITY OF CHICAGO (Jun. 19, 1998)

• 1998 WL 328366 (Appellate Brief) BRIEF AMICUS CURIAE OF THE CHICAGO NEIGHBORHOOD ORGANIZATIONS IN SUPPORT OF PETITIONER (Jun. 19, 1998)

• 1998 WL 328367 (Appellate Brief) BRIEF AMICUS CURIAE OF OHIO, ALABAMA, ALASKA, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, GEORGIA, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MARYLAND, MICHIGAN, MINNESOTA, MISSISSIPPI, MISSOURI, MONTANA, NEBRASKA, NEVADA, NEW YORK, NOR TH CAROLINA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, COMMONWEALTHS OF KENTUCKY, PENNSYLVANIA, PUERTO RICO AND VIRGINIA AND TERRITORY OF VIRGIN ISLANDS IN SUPPORT OF THE PETITIONER (Jun. 19, 1998)

• 1998 WL 331127 (Appellate Brief) BRIEF OF WASHINGTON LEGAL FOUNDATION U.S. REPRESENTATIVES HENRY HYDE AND LUIS V. GUTIERREZ, ALLIED EDUCATIONAL FOUNDATION, NORTHWEST NEIGHBORHOOD FEDERATION, AND WEST AVALON CIVIC GROUP, INC. AS AMICI CURIAE IN SUPPORT OF PETITIONER (Jun. 19, 1998)

• 1998 WL 331132 (Appellate Brief) BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER (Jun. 19, 1998)

• 1998 WL 331137 (Appellate Brief) BRIEF OF THE U.S. CONFERENCE OF MAYORS, NATIONAL LEAGUE OF CITIES, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL GOVERNORS' ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONER (Jun. 19, 1998)

• 1998 WL 331141 (Appellate Brief) BRIEF OF THE CENTER FOR THE COMMUNITY INTEREST AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Jun. 19, 1998)

• 1998 WL 331130 (Appellate Brief) AMICUS CURIE BRIEF ON THE MERITS IN SUPPORT OF THE CITY OF CHICAGO BY THE LOS ANGELES COUNTY DISTRICT ATTORNEY ON BEHALF OF LOS ANGELES COUNTY (Jun. 17, 1998)

• 1998 WL 34081098 (Appellate Petition, Motion and Filing) Reply Brief for the Petitioner (Mar. 19, 1998) Original Image of this Document (PDF)

• 1998 WL 34080988 (Appellate Petition, Motion and Filing) Brief Amicus Curiae of Ohio, California, Illinois, Kansas, Louisiana, Michigan, Mississippi, Nebraska, Nevada, South Carolina, South Dakota and the Commonwealths of Pennsylvania and Virginia in Support of the Petition (Mar. 09, 1998) Original Image of this Document (PDF)

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• 1998 WL 34081017 (Appellate Petition, Motion and Filing) Brief of the United States Conference of Mayors, the National League of Cities, the National Association of Counties, the International City%61County Management Association, the International Municipal Lawyers Association and the International Associ ation of Chiefs of Police as Amici Curiae in Support of Petitioner (Mar. 09, 1998) Original Image of this Document (PDF)

• 1998 WL 34081061 (Appellate Petition, Motion

527 U.S. 41, 119 S.Ct. 1849, 144 L.Ed.2d 67, 67 USLW 4415, 72 A.L.R.5th 665, 99 Cal. Daily Op. Serv. 4488, 1999 Daily Journal D.A.R. 5760, 1999 CJ C.A.R. 3223, 12 Fla. L. Weekly Fed. S 331
(Cite as: 527 U.S. 41, 119 S.Ct. 1849)

and Filing) Brief in Opposition of Respondents Youkhana and Cota (Mar. 09, 1998) Original Image of this Document (PDF)
• 1998 WL 34081021 (Appellate Petition, Motion and Filing) Petition for a Writ of Certiorari (Jan. 05, 1998) Original Image of this Document with Appendix (PDF)

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EXHIBIT 9

92 U.S. 214, 2 Otto 214, 1875 WL 17775 (U.S.Ky.), 23 L.Ed. 563
(Cite as: 92 U.S. 214)

▷
United States v. Reese et al.U.S.,1875
Supreme Court of the United States
UNITED STATES
v.
REESE ET AL.
October Term, 1875

****1** ERROR to the Circuit Court of the United States for the District of Kentucky.

***215** This case was argued at the October Term, 1874, by *Mr. Attorney-General Williams* and *Mr. Solicitor-General Phillips* for the United States, and by *Mr. Henry Stanbery* and *Mr. B. F. Buckner* for the defendants.

1. Rights and immunities created by or dependent upon the Constitution of the United States can be protected by Congress. The form and manner of that protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide, and may be varied to meet the necessities of a particular right.

2. The Fifteenth Amendment to the Constitution does not confer the right of suffrage; but it invests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude, and empowers Congress to enforce that right by 'appropriate legislation.'

3. The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector at such elections is because of his race, color, or previous condition of servitude.

4. The third and fourth sections of the act of May 31, 1870 (16 Stat. 140), not being confined in their operation to unlawful discrimination on account of race, color, or previous condition of servitude, are beyond the limit of the Fifteenth Amendment, and unauthorized.

5. As these sections are in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, and cannot be limited by judicial construction so as to make them operate only on that which Congress may rightfully prohibit and punish,-*Held*, that Congress has not provided by 'appropriate legislation' for the punishment of an inspector of a municipal election for refusing to receive and count at such election the vote of a citizen of the United States of African descent.

6. Since the passage of the act which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion (Rev. Stat., sect. 650), this court, if it finds that the judgment as rendered is correct, need do no more than affirm it. If, however, that judgment is reversed, all questions certified, which are considered in the final determination of the case here, should be answered.

West Headnotes
Civil Rights 78 ⚿1005

78 Civil Rights
78I Rights Protected and Discrimination Prohibited in General
78k1002 Constitutional and Statutory Provisions
78k1005 k. Power to Enact and Validity. Most Cited Cases
(Formerly 78k101, 78k1)
Rights and immunities created by or dependent upon the constitution of the United States can be protected by Congress and the form and manner of the protection may be such as the Congress in the legitimate exercise of its legislative discretion shall provide.

92 U.S. 214, 2 Otto 214, 1875 WL 17775 (U.S.Ky.), 23 L.Ed. 563
(Cite as: 92 U.S. 214)

Constitutional Law 92 ⚿67

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(B) Judicial Powers and Functions
92k67 k. Nature and Scope in General. Most Cited Cases
The courts enforce the legislative will when ascertained, if it is within the constitutional grant of power to the legislative department.

Constitutional Law 92 ⚿70.1(1)

92 Constitutional Law
92III Distribution of Governmental Powers and Functions
92III(B) Judicial Powers and Functions
92k70 Encroachment on Legislature
92k70.1 In General
92k70.1(1) k. In General. Most Cited Cases
(Formerly 92k70(1))
Congress, within its legitimate sphere, is supreme and beyond the control of the court, but if it steps outside of its constitutional limitations and attempts that which is beyond its reach, courts are authorized to and when called upon in due course of legal proceedings must, annul its encroachments upon the reserved power of the state and the people.

Criminal Law 110 ⚿3

110 Criminal Law
110I Nature and Elements of Crime
110k2 Power to Define and Punish Crime
110k3 k. In General. Most Cited Cases
If the legislature undertakes to define by statute a new offense and to provide for its punishment, it should express its will in language that will not deceive the common mind, every man being entitled to know with certainty when he is committing a crime.

Criminal Law 110 ⚿4

110 Criminal Law
110I Nature and Elements of Crime
110k2 Power to Define and Punish Crime
110k4 k. United States. Most Cited Cases
If Congress has not declared an act done within the state to be a crime against the United States, the courts have no power to treat it as such.

Criminal Law 110 ⚿1182

110 Criminal Law
110XXIV Review
110XXIV(U) Determination and Disposition of Cause
110k1182 k. Affirmance. Most Cited Cases
Since the passage of the act which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion, Rev.St. § 650, this court, if it finds that the judgment as rendered is correct, need do no more than affirm it. If, however, that judgment is reversed, all questions certified which are considered in the final determination of the case here should be answered.

Elections 144 ⚿9

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k8 Statutory Provisions Conferring or Defining Right
144k9 k. Constitutionality and Validity. Most Cited Cases
The power of Congress to legislate at all upon the subject of voting at state elections rests solely upon the Fifteenth Amendment to the Federal Constitution.

Elections 144 ⚿10

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k8 Statutory Provisions Conferring or Defining Right
144k10 k. Construction and Operation. Most Cited Cases
The act of May 31, 1870, 16 Stat. 140, relating to persons entitled to vote at elections was a "penal" statute required to be strictly construed.

Elections 144 ⚿11

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k11 k. Operation of Provisions of Constitution of United States. Most Cited Cases
The fifteenth amendment to the federal constitution does not confer the right of suffrage, but it vests citizens of the United States with the right of exemption from discrimination in the exercise of the elective franchise on account of their race, color, or previous condition of servitude, and empowers congress to enforce that right by appropriate legislation; hence the power of congress to legislate at all upon the subject of voting at state elections rests upon this amendment, and can be exercised by providing a punishment only when the wrongful refusal to receive the vote of a qualified elector is because of his race, color, or previous condition of servitude.

Elections 144 ⚿11

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k11 k. Operation of Provisions of Constitution of United States. Most Cited Cases
The Fifteenth Amendment to the Federal Constitution does not confer rights of suffrage upon anyone, but merely prevents a state or the United States from giving preference in this particular to one citizen of the United States over another on account of race, color, or previous condition of servitude.

Elections 144 ⚿24

144 Elections
144I Right of Suffrage and Regulation Thereof in General
144k23 Power to Regulate Conduct of Election
144k24 k. In General. Most Cited Cases
As congress has authority, under Const. art. 1, § 4, to regulate federal elections, Rev.St. § 5506, passed in pursuance of such authority, and for that purpose, is constitutional and valid as to such elections, but has no application to state or municipal elections.

Elections 144 ⚿60

144 Elections
144IV Qualifications of Voters
144k60 k. Constitutional and Statutory Provisions. Most Cited Cases
Act May 31, 1870, 16 Stat. 140 providing that citizens of the United States, otherwise qualified, shall be allowed to vote at elections without distinction of race, color, or previous condition of servitude, not being confined to unlawful discrimination on account of race, color, or previous condition of servitude, is beyond the limits of the fifteenth amendment, and unconstitutional.

Elections 144 ⚿60

144 Elections
144IV Qualifications of Voters
144k60 k. Constitutional and Statutory Provisions. Most Cited Cases
The Fifteenth Amendment to the Federal Constitution, U.S.C.A.Const., does not confer in Congress authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at state elections, and it is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere and provide for its punishment.

Elections 144 ⚿61

144 Elections
144IV Qualifications of Voters
144k61 k. Race or Color. Most Cited Cases
The fifteenth constitutional amendment, preventing the states from giving preference to one citizen of the United States over another on account of race, color, or previous condition of servitude, does not confer on a colored person the right to vote.

Elections 144 ⚿83

144 Elections
144IV Qualifications of Voters
144k83 k. Payment of Taxes. Most Cited

Cases
A state law which provides that one of the qualifications of an elector shall be the payment of a capitation tax is not in contravention of the fifteenth amendment, as it does not discriminate against any person on account of race, color, or previous condition of servitude.

MR. CHIEF JUSTICE WAITE delivered the opinion of the court.
**2 This case comes hare by reason of a division of opinion between the judges of the Circuit Court in the District of Kentucky. It presents an indictment containing four counts, under sects. 3 and 4 of the act of May 31, 1870 (16 Stat. 140), against two of the inspectors of a municipal election in the State of Kentucky, for refusing to receive and count at such election the vote of William Garner, a citizen of the United States of African descent. All the questions presented by the certificate of division arose upon general demurrers to the several counts of the indictment.

*216 In this court the United States abandon the first and third counts, and expressly waive the consideration of all claims not arising out of the enforcement of the Fifteenth Amendment of the Constitution.

After this concession, the principal question left for consideration is, whether the act under which the indictment is found can be made effective for the punishment of inspectors of elections who refuse to receive and count the votes of citizens of the United States, having all the qualifications of voters, because of their race, color, or previous condition of servitude.

If Congress has not declared an act done within a State to be a crime against the United States, the courts have no power to treat it as such. *U. S. v. Hudson*, 7 Cranch, 32. It is not claimed that there is any statute which can reach this case, unless it be the one in question.

Looking, then, to this statute, we find that its first section provides that all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election, &c., shall be entitled and allowed to vote thereat, without distinction of race, color, or previous condition of servitude, any constitution, &c., of the State to the contrary notwithstanding. This simply declares a right, without providing a punishment for its violation.

The second section provides for the punishment of any officer charged with the duty of furnishing to citizens an opportunity to perform any act, which, by the constitution or laws of any State, is made a prerequisite or qualification of voting, who shall omit to give all citizens of the United States the same and equal opportunity to perform such prerequisite, and become qualified on account of the race, color, or previous condition of servitude, of the applicant. This does not apply to or include the inspectors of an election, whose only duty it is to receive and count the votes of citizens, designated by law as voters, who have already become qualified to vote at the election.

The third section is to the effect, that, whenever by or under the constitution or laws of any State, &c., any act is or shall be required to be done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of such citizen to perform the act required to be done 'as aforesaid' shall, if it *217 fail to be carried into execution by reason of the wrongful act or omission 'aforesaid' of the person or officer charged with the duty of receiving or permitting such performance, or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner, and to the same extent, as if he had, in fact, performed such act; and any judge, inspector, or other officer of election, whose duty it is to receive, count, &c., or give effect to, the vote of any such citizen, who shall wrongfully refuse or omit to receive, count, & c., the vote of such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the person or officer whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall, for every such offence, forfeit and pay, &c.

**3 The fourth section provides for the punishment

of any person who shall, by force, bribery, threats, intimidation, or other unlawful means, hinder, delay, &c., or shall combine with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote, or from voting, at any election.

The second count in the indictment is based upon the fourth section of this act, and the fourth upon the third section.

Rights and immunities created by or dependant upon the Constitution of the United States can be protected by Congress. The form and the manner of the protection may be such as Congress, in the legitimate exercise of its legislative discretion, shall provide. These may be varied to meet the necessities of the particular right to be protected.

The Fifteenth Amendment does not confer the right of suffrage upon any one. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude. Before its adoption, this could be done. It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, ***218** or education. Now it is not. If citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be. Previous to this amendment, there was no constitutional guaranty against this discrimination: now there is. It follows that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. This, under the express provisions of the second section of the amendment, Congress may enforce by 'appropriate legislation.'

This leads us to inquire whether the act now under consideration is 'appropriate legislation' for that purpose. The power of Congress to legislate at all upon the subject of voting at State elections rests upon this amendment. The effect of art. 1, sect. 4, of the Constitution, in respect to elections for senators and representatives, is not now under consideration. It has not been contended, nor can it be, that the amendment confers authority to impose penalties for every wrongful refusal to receive the vote of a qualified elector at State elections. It is only when the wrongful refusal at such an election is because of race, color, or previous condition of servitude, that Congress can interfere, and provide for its punishment. If, therefore, the third and fourth sections of the act are beyond that limit, they are unauthorized.

The third section does not in express terms limit the offence of an inspector of elections, for which the punishment is provided, to a wrongful discrimination on account of race, &c. This is conceded; but it is urged, that when this section is construed with those which precede it, and to which, as is claimed, it refers, it is so limited. The argument is, that the only wrongful act, on the part of the officer whose duty it is to receive or permit the requisite qualification, which can dispense with actual qualification under the State laws, and substitute the prescribed affidavit therefor, is that mentioned and prohibited in sect. 2,-to wit, discrimination on account of race, &c.; and that, consequently, sect. 3 is confined in its operation to the same wrongful discrimination.

****4 *219** This is a penal statute, and must be construed strictly; not so strictly, indeed, as to defeat the clear intention of Congress, but the words employed must be understood in the sense they were obviously used. *United States* v. *Wiltberger*, 5 Wheat. 85. If, taking the whole statute together, it is apparent that it was not the intention of Congress thus to limit the operation of the act, we cannot give it that effect.

The statute contemplates a most important change in the election laws. Previous to its adoption, the States, as a general rule, regulated in their own way all the details of all elections. They prescribed the qualifications of voters, and the manner in which those offering to vote at an election should make known their qualifications to the officers in charge. This act interferes with this practice, and prescribes rules not provided by the laws of the States. It

substitutes, under certain circumstances, performance wrongfully prevented for performance itself. If the elector makes and presents his affidavit in the form and to the effect prescribed, the inspectors are to treat this as the equivalent of the specified requirement of the State law. This is a radical change in the practice, and the statute which creates it should be explicit in its terms. Nothing should be left to construction, if it can be avoided. The law ought not to be in such a condition that the elector may act upon one idea of its meaning, and the inspector upon another.

The elector, under the provisions of the statute, is only required to state in his affidavit that he has been wrongfully prevented by the officer from qualifying. There are no words of limitation in this part of the section. In a case like this, if an affidavit is in the language of the statute, it ought to be sufficient both for the voter and the inspector. Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. If this statute limits the wrongful act which will justify the affidavit to discrimination on account of race, &c., then a citizen who makes an affidavit that he has been ***220** wrongfully prevented by the officer, which is true in the ordinary sense of that term, subjects himself to indictment and trial, if not to conviction, because it is not true that he has been prevented by such a wrongful act as the statute contemplated; and if there is no such limitation, but any wrongful act of exclusion will justify the affidavit, and give the right to vote without the actual performance of the prerequisite, then the inspector who rejects the vote because he reads the law in its limited sense, and thinks it is confined to a wrongful discrimination on account of race, &c., subjects himself to prosecution, if not to punishment, because he has misconstrued the law. Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime.

****5** But when we go beyond the third section, and read the fourth, we find there no words of limitation, or reference even, that can be construed as manifesting any intention to confine its provisions to the terms of the Fifteenth Amendment. That section has for its object the punishment of all persons, who, by force, bribery, &c., hinder, delay, &c., any person from qualifying or voting. In view of all these facts, we feel compelled to say, that, in our opinion, the language of the third and fourth sections does not confine their operation to unlawful discriminations on account of race, &c. If Congress had the power to provide generally for the punishment of those who unlawfully interfere to prevent the exercise of the elective franchise without regard to such discrimination, the language of these sections would be broad enough for that purpose.

It remains now to consider whether a statute, so general as this in its provisions, can be made available for the punishment of those who may be guilty of unlawful discrimination against citizens of the United States, while exercising the elective franchise, on account of their race, &c.

There is no attempt in the sections now under consideration to provide specifically for such an offence. If the case is provided for at all, it is because it comes under the general prohibition ***221** against any wrongful act or unlawful obstruction in this particular. We are, therefore, directly called upon to decide whether a penal statute enacted by Congress, with its limited powers, which is in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction, can be limited by judicial construction so as to make it operate only on that which Congress may rightfully prohibit and punish. For this purpose, we must take these sections of the statute as they are. We are not able to reject a part which is unconstitutional, and retain the remainder, because it is not possible to separate that which is unconstitutional, if there be any such, from that which is not. The proposed effect is not to be

attained by striking out or disregarding words that are in the section, but by inserting those that are not now there. Each of the sections must stand as a whole, or fall altogether. The language is plain. There is no room for construction, unless it be as to the effect of the Constitution. The question, then, to be determined, is, whether we can introduce words of limitation into a penal statute so as to make it specific, when, as expressed, it is general only.

It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government. The courts enforce the legislative will when ascertained, if within the constitutional grant of power. Within its legitimate sphere, Congress is supreme, and beyond the control of the courts; but if it steps outside of its constitutional limitations, and attempts that which is beyond its reach, the courts are authorized to, and when called upon in due course of legal proceedings, must, annul its encroachments upon the reserved power of the States and the people.

**6 To limit this statute in the manner now asked for would be be make a new law, not to enforce an old one. This is no part of our duty.

We must, therefore, decide that Congress has not as yet provided by 'appropriate legislation' for the punishment of the offence charged in the indictment; and that the Circuit Court ***222** properly sustained the demurrers, and gave judgment for the defendants.

This makes it unnecessary to answer any of the other questions certified. Since the law which gives the presiding judge the casting vote in cases of division, and authorizes a judgment in accordance with his opinion (Rev. Stat., sect. 650), if we find that the judgment as rendered is correct, we need not bo more than affirm. If, however, we reverse, all questions certified, which may be considered in the final determination of the case according to the opinion we express, should be answered.

Judgment affirmed.

MR. JUSTICE CLIFFORD and MR. JUSTICE HUNT dissenting.MR. JUSTICE CLIFFORD:--
I concur that the indictment is bad, but for reasons widely different from those assigned by the court.

States, as well as the United States, are prohibited by the Fifteenth Amendment of the Constitution from denying or abridging the right of citizens of the United States to vote on account of race, color, or previous condition of servitude; and power is vested in Congress, by the second article of that amendment, to enforce that prohibition 'by appropriate legislation.'

Since the adoption of that amendment, Congress has legislated upon the subject; and, by the first section of the Enforcement Act, it is provided that citizens of the United States, without distinction of race, color, or previous condition of servitude, shall, if *otherwise* qualified to vote in state, territorial, or municipal elections, be entitled and allowed to vote at all such elections, any constitution, law, custom, usage, or regulalation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

Beyond doubt, that section forbids all discrimination between white citizens and citizens of color in respect to their right to vote; but the section does not provide that the person or officer making such discrimination shall be guilty of any offence, nor does it prescribe that the person or officer guilty of making such discrimination shall be subject to any fine, penalty, or ***223** punishment whatever. None of the counts of the indictment in this case, however, are framed under that section; nor will it be necessary to give it any further consideration, except so far as it may aid in the construction of the other sections of the act. 16 Stat. 140.

Sect. 2 of the act will deserve more examination, as it assumes that certain acts are or may be required to be done by or under the authority of the constitution or laws of certain States, or the laws of certain Territories, as a prerequisite or qualification for voting, and that certain persons or officers are or

may be, by such constitution or laws, charged with the performance of duties in furnishing to such citizens and oopportunity to perform such prerequisites to become qualified to vote; and provides that it shall be the duty of every such person or officer to give all such citizens, without distinction of race, color, or previous condition of servitude, the same and equal opportunity to perform such prerequisites to become qualified to vote.

**7 Equal opportunity is required by that section to be given to all such citizens, without distinction of race, color, or previous condition of servitude, to perform the described prerequisite; and the further provision of the same section is, that, if any such person or officer charged with the performance of the described duties shall refuse or knowingly omit to give full effect to the requirements of that section, he shall for every such offence forfeit and pay $500 to the person aggrieved, and also be deemed guilty of a misdemeanor, and punished as therein provided. Other sections applicable to the subject are contained in the Enforcement Act, to which reference will hereafter be made. 16 id. 141.

1. Four counts are exhibited in the indictment against the defendants; and the record shows that the defendants filed a demurrer to each of the counts, which was joined in behalf of the United States. Two of the counts-to wit, the first and the third-having been abandoned at the argument, the examination will be confined to the second and the fourth. By the record, it also appears that the defendants, together with one William Farnaugh, on the 30th of January; 1873, were the lawful inspectors of a municipal election held on that day in the city of Lexington, in the State of Kentucky, pursuant to ***224** the constitution and laws of that State, and that they, as such inspectors, were then and there charged by law with the duty of receiving, counting, certifying, registering, reporting, and giving effect to the vote of all citizens qualified to vote at said election in Ward 3 of the city; and the accusation set forth in the second count of the indictment is, that one William Garner, at said municipal election, offered to the said inspectors at the polls of said election in said Ward 3 to vote for members of the said city council, the said poll being then and there the lawful and proper voting place and precinct of the said William Garner, who was then and there a free male citizen of the United States and of the State, of African descent, and having then and there resided in said State more than two years, and in said city more than one year, next preceding said election, and having been a resident of said voting precinct and ward in which he offered to vote more than sixty days immediately prior to said election, and being then and there, at the time of such offer to vote, qualified and entitled, as alleged, by the laws of the State, to vote at said election.

Offer in due form to vote at the said election having been made, as alleged, by the said William Garner, the charge is that the said William Farnaugh consented to receive, count, register, and give effect to the vote of the party offering the same; but that the defendants, constituting the majority of the inspectors at the election, and, as such, having the power to receive or reject all votes offered at said poll, did then and there, when the said party offered to vote, unlawfully agree and confer with each other that they, as such inspectors, would not take, receive, certify, register, report, or give effect to the vote of any voters of African descent, offered at said election, unless the voter so offering to vote, besides being *otherwise* qualified to vote, had paid to said city the capitation-tax of one dollar and fifty cents for the preceding year, on or before the 15th of January prior to the day of the election; which said agreement, the pleader alleges, was then and there made with intent thereby to hinder, prevent, and obstruct all voters of African descent on account of their race and color, though lawfully entitled to vote at said election, from so voting. Taken separately, that allegation would afford some support to the ***225** theory of the United States; but it must be considered in connection with the allegation which immediately follows it in the same count, where it is alleged as follows: That the defendants, in pursuance of said unlawful agreement, did then and there, at the election aforesaid, wrongfully and illegally require and demand of said party, when he offered to vote as aforesaid, that he should, as a prerequisite and qualification to his voting at said election, produce evidence of his having paid to said city or its proper

officers the said capitation-tax of one dollar and fifty cents for the year preceding, on or before the 15th of January preceding the day of said election; and the averment is to the effect that the party offering his vote then and there refused to comply with that illegal requirement and demand, or to produce the evidence so demanded and required.

****8** Offences created by statute, as well as offences created at common law, with rare exceptions, consist of more than one ingredient, and, in some cases, of many; and the rule is universal, that every ingredient of which the offence is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad on demurrer, or it may be quashed on motion, or the judgment may be arrested before sentence, or be reversed on a writ of error. *United States* v. *Cook*, 17 Wall. 174.

Matters well pleaded, it is true, are admitted by the demurrer; but it is equally true, that every ingredient of the offence must be accurately and clearly described, and that no indictment is sufficient if it does not accurately and clearly describe all the ingredients of which the offence is composed.

Citizens of the United States, without distinction of race, color, or previous condition of servitude, if *otherwise* qualified to vote at a state, territorial, or municipal election, shall be entitled and allowed to vote at such an election, even though the constitution, laws, customs, usages, or regulations of the State or Territory do not allow, or even prohibit, such voter from exercising that right. 16 Stat. 140, sect. 1.

Evidently the purpose of that section is to place the male citizen of color, as an elector, on the same footing with the white male citizen. Nothing else was intended by that provision, ***226** as is evident from the fact that it does not profess to enlarge or vary the prior existing right of white male citizens in any respect whatever. Conclusive support to that theory is also derived from the second section of the same act, which was obviously passed to enforce obedience to the rule forbidding discrimination between colored male citizens and white male citizens in respect to their right to vote at such elections.

By the charter of the city of Lexington, it is provided that a tax shall be levied on each free male inhabitant of twenty-one years of age and upwards, except paupers, inhabiting said city, at a ratio not exceeding one dollar and fifty cents each. Sess. Laws 1867, p. 441.

Such citizens, without distinction of race, color, or previous condition of servitude, in order that they may be entitled to vote at any such election, must be free male citizens 'over twenty-one years of age, have been a resident of the city at least six months, and of the ward in which he resides at least sixty days, prior to the day of the election, and have paid the capitation-tax assessed by the city on or before the 15th of January preceding the day of election.' 2 Sess. Laws 1870, p. 71.

White male citizens, not possessing the qualifications to vote required by law, find no guaranty of the right to exercise that privilege by the first section of the Enforcement Act; but the mandate of the section is explicit and imperative, that all citizens, without distinction of race, color, or previous condition of servitude, if *otherwise* qualified to vote at any state, territorial, or municipal election, shall be entitled and allowed to vote at all such elections, even though forbidden so to do, on account of race, color, or previous condition of servitude, by the constitution of the State, or by the laws, custom, usage, or regulation of the State or Territory, where the election is held.

****9** Disability to vote of every kind, arising from race, color, or previous condition of servitude, is declared by the first section of that act to be removed from the colored male citizen; but unless *otherwise* qualified by law to vote at such an election, he is no more entitled to enjoy that privilege than a white male citizen who does not possess the qualifications required by law to constitute him a legal voter at such an election.

***227** Legal disability to vote at any such election, arising from race, color, or previous condition of servitude, is removed by the Fifteenth Amendment, as affirmed in the first section of the Enforcement Act: but the Congress knew full well that cases would arise where the want of other qualifications,

if not removed, might prevent the colored citizen from exercising the right of suffrage at such an election; and the intent and purpose of the second section of the act are to furnish to all citizens an opportunity to remove every such other disability to enable them to become qualified to exercise that right, and to punish persons and officers charged with any duty in that regard who unlawfully and wrongfully refuse or wilfully omit to co-operate to that end. Hence it is provided, that where any act is or shall be required to be done as a prerequisite or qualification for voting, and persons or officers are charged in the manner stated with the performance of duties in furnishing to citizens an opportunity to perform such prerequisite or to become qualified to vote, it shall be the duty of every such person and officer to give all citizens, without distinction of race, color, or previous condition of servitude, the same and equal opportunity to perform such prerequisite, and to become qualified to vote.

Persons or officers who wrongfully refuse or knowingly omit to perform the duty with which they are charged by by that clause of the second section of the Enforcement Act commit the offence defined by that section, and incur the penalty, and subject themselves to the punishment, prescribed for that offence.

Enough appears in the second court of the indictment to show beyond all question that it cannot be sustained under the second section of the Enforcement Act, as the count expressly alleges that the defendants as such inspectors, at the time the complaining party offered his vote, refused to receive and count the same because he did not produce evidence that he had paid to the city the capitation-tax of one dollar and fifty cents assessed against him for the preceding year, which payment, it appears by the law of the State, is a prerequisite and necessary qualification to enable any citizen to vote at that election, without distinction of race, color, or previous condition of servitude; and the express allegation of the count is, that the party offering his vote then and there refused to comply with that prerequisite, ***228** and then and there demanded that his vote should be received and counted without his complying with that prerequisite.

****10** Argument to show that such allegations are insufficient to constitute the offence defined in the second section of the Enforcement Act, or any other section of that act, is quite unnecessary, as it appears in the very terms of the allegations that the party offering his vote was not, irrespective of his race, color, or previous condition of servitude, a qualified voter at such an election by the law of the State where the election was held.

Persons within the category described in the first section of the Enforcement Act, of whom it is enacted that they shall be entitled and allowed to vote at such an election, without distinction of race, color, or previous condition of servitude, are citizens of the United States *otherwise qualified to vote* at the election pending; and inasmuch as it is not alleged in the count that the party offering his vote in this case was *otherwise* qualified by law to vote at the time he offered his vote, and inasmuch as no excuse is pleaded for not producing evidence to establish that prerequisite of qualification, it is clear that the supposed offence is not set forth with sufficient certainty to justify a conviction and sentence of the accused.

2. Defects also exist in the fourth count; but it becomes necessary, before considering the questions which those defects present, to examine with care the third section of the Enforcement Act. Sect. 3 of that act differs in some respects from the second section; as, for example, sect. 3 provides that whenever under the constitution and laws of a State, or the laws of a Territory, any act is or shall be required to be done by any such citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, *if it fail to be carried into execution* by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and *being otherwise qualified*, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed the said act. By that clause of the section, it is enacted that the offer of the party interested to ***229** perform the prerequisite act to

qualify or entitle him to vote shall, if it fail for the reason specified, have the same effect as the actual performance of the prerequisite act would have; and the further provision is, that any judge, inspector, or other officer of election, whose duty it is or shall be to receive, count, certify, register, report, or give effect to the vote of such citizen, upon the presentation by him of his affidavit, stating such offer and the time and place thereof, and the name of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall for every such offence forfeit and pay the sum of $500 dollars to the person aggrieved, and also be guilty of a misdemeanor.

****11** Payment of the capitation-tax on or before the 15th of January preceding the day of the election is beyond all doubt one of the prerequisite acts, if not the only one, referred to in that part of the section; and it is equally clear that the introductory clause of the section is wholly inapplicable to a case where the citizen, claiming the right to vote at such an election, has actually paid the capitation-tax as required by the election law of the State. Voters who have seasonably paid the tax are in no need of any opportunity to perform such a prerequisite to qualify them to vote; but the third section of the act was passed to provide for a class of citizens who had not paid the tax, and who had offered to pay it, and the offer had failed to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting the performance of such prerequisite.

Qualified voters by the law of the State are male citizens over twenty-one years of age, who have been residents of the city at least six months, and of the ward in which they reside at least sixty days, immediately prior to the day of the election, and who have paid the capitation-tax assessed by the city on or before the fifteenth day of January preceding the day of the election. Obviously, the payment of the capitation-tax on or before the time mentioned is a prerequisite to qualify the citizen to vote; and the purpose of the second section is to secure to the citizen an opportunity to perform that prerequisite, and to punish the persons and officers charged with the duty of ***230** furnishing the citizen with such an opportunity to perform such prerequisite, in case such person or officer refuses or knowingly omits to do his duty in that regard. Grant that, still it is clear that the punishment of the offender would not retroact and give effect to the right of the citizen to vote, nor secure to the public the right to have his vote received, counted, registered, reported, and made effectural at that election.

3. Injustice of the kind, it was foreseen, might be done; and, to remedy that difficulty, the third section was passed, the purpose of which is to provide that the offer of any such citizen to perform such prerequisite, if the offer fails to be carried into exection by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, shall be deemed and held as a performance in law of such act and prerequisite; and the person so offering to perform such prerequisite, and so failing by reason of the wrongful act or omission of the person or officer charged with such duty, if *otherwise* qualified, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed such prerequisite act. Nothing short of the performance of the prerequisite act will entitle any citizen to vote at any such election in that State, if the opportunity to perform the prerequisite is furnished as required by the act of Congress; but if those whose duty it is to furnish the opportunity to perform the act refuse or omit so to do, then the offer to perform such prerequisite act, if the offer fails to be carried into execution by the wrongful act or omission of those whose duty it is to receive and permit the performance of the prerequisite act, shall have the same effect in law as the actual performance.

****12** Such an offer to perform can have the same effect in law as actual performance *only* in case where it fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance; from which it follows that the offer must be made in such terms, and under such circumstances, that, if it should be received and carried into execution, it would constitute a legal and complete performance of the prerequisite

act. What the law of the State requires in that regared is, that ***231** the citizen offering to vote at such an election should have paid the capitation-tax assessed by the city, which in this case was one dollar and fifty cents, on or before the 15th of January preceding the day of election. Unless the offer is made in such terms and under such circumstances, that, if it is accepted and carried into execution, it would constitute a legal and complete performance of the prerequisite act, the person or officer who refused or omitted to carry the offer into execution would not incur the penalty nor be guilty of the offence defined by that section of the act; for it could not be properly alleged that it failed to be carried into effect by the wrongful act or omission of the person or officer charged with the duty of receiving and permitting such performance.

Viewed in the light of these suggestions, it must be that the offer contemplated by the third section of the act is an offer made in such terms, and under such circumstances, that, if it be accepted and carried into execution by the person or officer to whom it is made, it will constitute a complete performance of the prerequisite, and show that the party making the offer, if *otherwise* qualified, is entitled to vote at the election.

Evidence is entirely wanting to show that the authors of the Enforcement Act ever intended to abrogate any State election law, except so far as it denies or abridges the right of the citizen to vote on account of race, color, or previous condition of servitude. Every discrimination on that account is forbidden by the Fifteenth Amendment; and the first section of the act under consideration provides, as before remarked, that all citizens, *otherwise* qualified to vote, . . . shall be entitled and allowed to vote, . . . without distinction of race, color, or previous condition of servitude, any constitution, law, &c., to the contrary notwithstanding. State election laws creating such discriminations are superseded in that regard by the Fifteenth Amendment; but the Enforcement Act furnishes no ground to infer that the law-makers intended to annul the State election laws in any other respect whatever. Had Congress intended by the third section of that act to abrogate the election law of the State creating the prerequisite in question, it is quite clear that the second section would have been wholly unnecessary, as it would be a useless regulation to provide the ***232** means to enable citizens to comply with a prerequisite which is abrogated and treated as null by the succeeding section. Statutes should be interpreted, if practicable, so as to avoid any repugnancy between the different parts of the same, and to give a sensible and intelligent effect to every one of their provisions; nor is it ever to be presumed that any part of a statute is supererogatory or without meaning. Potter's Dwarris, 145.

****13** Difficulties of the kind are all avoided if it be held that the second section was enacted to afford citizens an opportunity to perform the prerequisite act to qualify themselves to vote, and to punish the person or officer who refuses or knowingly omits to perform his duty in furnishing them with that opportunity, and that the intent and purpose of the third section are to protect such citizens from the consequences of the wrongful refusal or wilful omission of such person or officer to receive and give effect to the actuall offer of such citizen to perform such prerequisite, if made in terms, and under such circumstances, that the offer, if accepted and carried into execution, whould constitute an actual and complete performance of the act made a prerequisite to the right of voting by the State law. Apply these suggestions to the fourth count of the indictment, and it is clear that the allegations in that regard are insufficent to describe the offence defined by the third section of the Enforcement Act.

4. Beyond all doubt, the general rule is, that, in an indictment for an offence created by statute, it is sufficient to describe the offence in the words of the statute; and it is safe to admit that that general rule is supported by many decided cases of the highest authority: but it is equally certain that exceptions exist to the rule, which are as well established as the rule itself, most of which result from another rule of criminal pleading, which, in framing indictments founded upon statutes, is paramount to all others, and is one of universal application,-that every ingredient of the offence must be accurately and clearly expressed; or, in other words, that the indictment must contain an allegation of every fact which is legally essential to the punishment to be

inflicted. *United States* v. *Cook*, 17 Wall. 174.

Speaking of that principle, Mr. Bishop says it pervades the ***233** entire system of the adjudged law of criminal procedure, as appears by all the cases; that, wherever we move in that department of our jurisprudence, we come in contact with it; and that we can no more escape from it than from the atmosphere which surrounds us. 1 Bishop, Cr. Pro., 2d ed., sect. 81; Archbold's Crim. Plead., 15th ed., 54; 1 Stark Crim. Plead., 236; 1 Am. Cr. Law, 6th rev. ed., sect. 364; *Steel* v. *Smith*, 1 Barn. & Ald. 99.

Examples of the kind, where it has been held that exceptions exist to the rule that it is sufficient in an indictment founded upon a statute to follow the words of the statute, are very numerous, and show that many of the exceptions have become as extensively recognized, and are as firmly settled, as any rule of pleading in the criminal law. Moreover, says Mr. Bishop, there must be such an averment of facts as shows *prima facie* guilt in the defendant; and if, supposing all the facts set out to be true, there is, because of the possible nonexistence of some fact not mentioned, room to escape from the *prima facie* conclusion of guilt, the indictment is insufficient, which is the exact case before the court. 1 Bishop, Cr. Pro., 2d ed., sect. 325.

****14** It is plain, says the same learned author, that if, after a full expression has been given to the statutory terms, any of the other rules relating to the indictment are left uncomplied with, the indictment is still insufficient. To it must be added what will conform also to the other rules. Consequently, the general doctrine, that the indictment is sufficient if it follows the words of the statute creating and defining the offence, is subject to exceptions, requiring the allegation to be expanded beyond the prohibiting terms. 1 id., sect. 623.

In general, says Marshall, C. J., it is sufficient in a libel (being a libel of information) to charge the offence in the very words which direct the forfeiture; but the proposition is not, we think, universally true. If the words which describe the subject of the law are general, . . . we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature. *The Mary Ann*, 8 Wheat. 389.

Similar views are expressed by this court in ***234** *United States* v. *Gooding*, 12 Wheat. 474, in which the opinion was given by Mr. Justice Story. Having first stated the general rule, that it is sufficient certainty in an indictment to allege the offence in the very terms of the Statute, he proceeds to remark, 'We say, in general; for there are doubtless cases where more particularity is required, either *from the obvious intention of the legislature*, or from the application of *known principles of law*. Known principles of law require more particularity in this case, in order that all the ingredients of the offence may be accurately and clearly alleged; and it is equally clear that the intention of the legislature also requires the same thing, as it is obvious that the mere statement of the party that he offered to perform the prerequisite was never intended to be made equivalent to performance, unless such statement was accompanied by an offer to pay the tax, and under circumstances which shown that he was ready and able to make the payment. Authorities are not necessary to prove that an indictment upon a statute must state all such facts and circumstances as constitute the statute offence, so as to bring the party indicted precisely within the provisions of the statute defining the offence.

Statutes are often framed, says Colby, to meet the relations of parties to each other, to prevent frauds by the one upon the other; and, in framing such statutes, the language used is often elliptical, leaving some of the circumstances expressive of the relations of the parties to each other to be supplied by intendment or construction. In all such cases, the facts and circumstances constituting such relation must be alleged in the indictment, though not expressed in the words of the statute. 2 Colby, Cr. Law, 114; *People* v. *Wibur*, 4 Park, Cr. Cas. 21; *Com.* v. *Cook*, 18 B. Monr. 149; *Pearce* v. *The State* , 1 Sneed, 63; *People* v. *Stone*, 9 Wend. 191; *Whiting* v. *The State*, 14 Conn. 487; *Anthony* v. *The State*, 29 Ala. 27; 1 Am. Cr. Law, 6th rev. ed., sect. 364, note *d*, and cases cited.

****15** Like the preceding counts, the preliminary allegations of the fourth count are without objection; and the jury proceed to present that the

party offering to vote, having then and there all the qualifications, as to age, citizenship, and residence, required by the State law, did, *on the thirtieth day of January*, 1873, in order that he might become qualified to vote at said election, ***235** offer to the collector at his office in said city to pay any capitation-tax due from him to said city, or any capitation-tax that had been theretofore assessed against him by said city, or which could be assessed against him by said city, or which said city or said collector claimed was due from him to said city; and that the said collector then and there wrongfully refused, on account of his race or color, to give the said party an opportunity to pay said capitation-tax for the preceding year, and then and there wrongfully refused to receive said tax from the said party in order that he might become qualified to vote at said election, the said collector having then and there given to citizens of the white race an opportunity to pay such taxes due from them to said city, in order that they might become qualified for that purpose.

All that is there alleged may be admitted, and yet it may be true that the complaining party never made any offer at the time and place mentioned to pay the capitation-tax of one dollar and fifty cents due to the city at the time and place mentioned, in such terms, and under such circumstances, that if the offer as made had been accepted by the person or officer to whom the offer was made, and that such person or officer had done every thing which it was his duty to do, or every thing which it was in his power to do, to carry it into effect, the offer would have constituted performance of the prerequisite act.

Actual payment of the capitation-tax on or before the 15th of January preceding the day of election is the prerequisite act to be performed to qualify the citizen, without distinction of race, color, or previous condition of servitude, to vote at said election. Such an offer, therefore, in order that it may be deemed and held as a performance in law of such prerequisite, must be an offer to pay the amount of the capitation-tax; and the party making the offer must then and there possess *the ability and means* to pay the amount to the person or officer to whom the offer is made; for, unless payment of the amount of tax is then and there made to the said person or officer, he would not be authorized to discharge the tax, and could not carry the offer into execution without violating his duty to the city.

5. Readiness to pay, therefore, is necessarily implied from ***236** the language of the third section, as it is only in case the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance that the offer can be deemed and held as performance in law of such prerequisite act. Where the party making the offer is not ready to pay the tax to the person or officer to whom the offer is made, and has not then and there the means to make the payment, it cannot be held that the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer to whom the offer is made, as it would be a perversion of law and good sense to hold that it is the duty of such a person or officer to carry such an offer into execution by discharging the tax without receiving the amount of the tax from the party making the offer of performance.

****16** Giving full effect to the several allegations of the count, nothing approximating to such a requirement is therein alleged, nor can any thing of the kind be implied from the word 'offer' as used in any part of the indictment. Performance of that prerequisite, by citizens *otherwise* qualified, entitles all such, without distinction of race, color, or previous condition of servitude, to vote at such an election; and the offer to perform the same, if the offer is made in terms, and under such circumstances, that, if it be accepted and carried into execution, it will constitute performance, will also entitle such citizens to vote in the same manner and to the same extent as if they had performed such prerequisite, provided the offer fails to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving and permitting such performance.

Judges, inspectors, and other officers of elections, must take notice of these provisions, as they constitute the most essential element or ingredient of the offence defined by the third section of the act. Officers of the elections, whether judges or

inspectors, are required to carry those regulations into full effect; and the provision is, that any judge, inspector, or other officer of election, whose duty it is or shall be to receive, count, certify, register, report, or give effect to the vote of such citizens, who shall wrongfully refuse or omit to receive, count, certify, ***237** register, or give effect to the vote of any such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the officer or person whose duty it was to act on such offer, and that he, the citizen, was wrongfully prevented by such person or officer from performing such prerequisite act, shall for every such offence forfeit and pay the sum of $500 to the person aggrieved, and also be guilty of a misdemeanor, and be fined and imprisoned as therein provided.

6. Of course, it must be assumed that the terms of the affidavit were exactly the same as those set forth in the third count of the indictment; and, if so, it follows that the word 'offer' used in the affidavit must receive the same construction as that already given to the same word in that part of the section which provides that the offer, if it fail to be carried into execution by reason of the wrongful act or omission of the person or officer charged with the duty of receiving or permitting such performance, shall be deemed and held as a performance in law of such prerequisite act. Decisive confirmation of that view is derived from the fact that the complaining party is only required to state in his affidavit the offer, the time, and the place thereof, the name of the person or officer whose duty it was to act thereon, and that he, the affiant, was wrongfully prevented by such person or officer from performing such prerequisite act.

****17** None will deny, it is presumed, that the word ' offer' in the affidavit means the same thing as the word 'offer' used in the declaratory part of the same section; and, if so, it must be held that the offer described in the affidavit must have been one made in such terms, and under such circumstances, that, if the offer had been accepted, it might have been carried into execution by the person or officer to whom it was made; or, in other words, it must have been an offer to do whatever it was necessary to do to perform the prerequisite act; and it follows, that if the word 'offer,' as used in the act of Congress, necessarily includes readiness to pay the tax, it is equally clear that the affidavit should contain the same statement. Plainly it must be so; for unless the offer has that scope, if it failed to be carried into execution, it could not be held that the failure was by ***238** the wrongful act or omission of the person or officer to whom the offer was made. Such a construction must be erroneous; for, if adopted, it would lead to consequences which would shock the publice sense, as it would require the collector to discharge the tax without payment, which would be a manifest violation of his duty. Taken in any point of view, it is clear that the third count of the indictment is too vague, uncertain, and indefinite in its allegations to constitute the proper foundation for the conviction and sentence of the defendants. Even suppose that the signification of the word 'offer' is sufficiently comprehensive to include readiness to perform, which is explicitly denied, still it is clear that the offer, as pleaded in the fourth count, was not in season to constitute a compliance with the prerequisite qualification, for the reason that the State statute requires that the capitation-tax shall be paid *on or before the fifteenth day of January preceding the day of the election.*

Having come to these conclusions, it is not necessary to examine the fourth section of the Enforcement Act, for the reason that it is obvious, without much examination, that no one of the counts of the indictment is sufficient to warrant the conviction and sentence of the defendants for the offence defined in that section.

MR. JUSTICE HUNT:--
I am compelled to dissent from the judgment of the court in this case.

The defendants were indicted in the Circuit Court of the United States for the District of Kentucky. Upon the trial, the defendants were, by the judgment of the court, discharged from the indictment on account of its alleged insufficiency.

The fourth count of the indictment contains the allegations concerning the election in the city of Lexington; that by the statute of Kentucky, to entitle

one to vote at an election in that State, the voter must possess certain qualifications recited, and have paid a capitation-tax assessed by the city of Lexington; that James F. Robinson was the collector of said city, entitled to collect said tax; that Garner, in order that he might be entitled to vote, did offer to said Robinson, at his office, to pay any capitation-tax which had been or could be assessed against ***239** him, or which was claimed against him; that Robinson refused to receive such tax on account of the race and color of Garner; that at the time of the election, having the other necessary qualifications, Garner offered his vote, and at the same time presented an affidavit to the inspector stating his offer aforesaid made to Robinson, with the particulars required by the statute, and the refusal of Robinson to receive the tax; that Farnaugh consented to receive his vote, but the defendants, constituting a majority of the inspectors, wrongfully refused to receive the same, which refusal was on account of the race and color of the said Garner.

****18** This indictment is based upon the act of Congress of May 31, 1870. 16 Stat. 140.

The first four sections of the act are as follows:--

'SECTION 1. That all citizens of the United States, who are or shall be otherwise qualified by law to vote at any election by the people in any state, territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.

'SECT. 2. That if, by or under the authority of the constitution or laws of any State or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and, by such constitution or laws, persons or officers are or shall be charged with the performance of duties, in furnishing to citizens an opportunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote, without distinction of race, color, or previous condition of servitude; and, if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offence, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered by an action on the case with full costs, and such allowance for counsel-fees as the court shall deem just; and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five ***240** hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

'SECT. 3. That whenever, by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to [be] done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance, or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had, in fact, performed such act; and any judge, inspector, or other officer of election, whose duty it is or shall be to receive, count, certify, register, report, or give effect to the vote of any such citizen who shall wrongfully refuse or omit to receive, count, certify, register, report, or give effect to the vote of such citizen, upon the presentation by him of his affidavit stating such offer, and the time and place thereof, and the name of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall, for every such offence, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel-fees as the court shall deem just; and shall also, for every such offence, be guilty of a

misdemeanor, and shall, on conviction thereof, be fined not less than $500, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.

****19** 'SECT. 4. That if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid, such person shall, for every such offence, forfeit and pay the sum of $500 to the person aggrieved thereby, to be recovered by an action on the case, with full costs and such allowance for counsel-fees as the court shall deem just; and shall also, for every such offence, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than $500, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.'

***241** It is said, in opposition to this indictment and in hostility to the statute under which it is drawn, that while the second section makes it a penal offence for any officer to refuse an opportunity to perform the prerequisite therein referred to on account of the race and color of the party, and therefore an indictment against that officer may be good as in violation of the Fifteenth Amendment, the third section, which relates to the inspectors of elections, omits all reference to race and color, and therefore no indictment can be sustained against those officers. It is said that Congress has no power to punish for violation of the rights of an elector generally, but only where such violation is attributable to race, color, or condition. It is said, also, that the prohibition of an act by Congress in general language is not a prohibition of that act on account of race or color.

Hence it is insisted that both the statute and the indictment are insufficient. This I understand to be the basis of the opinion of the majority of the court.

On this I observe,--

1. That the intention of Congress on this subject is too plain to be discussed. The Fifteenth Amendment had just been adopted, the object of which was to secure to a lately enslaved population protection against violations of their right to vote on account of their color or previous condition. The act is entitled 'An Act to enforce the right of citizens of the United States to vote in the several States of the Union, and for other purposes.' The first section contains a general announcement that such right is not to be embarrassed by the fact of race, color, or previous condition. The second section requires that equal opportunity shall be given to the races in providing every prerequisite for voting, and that any officer who violates this provision shall be subject to civil damages to the extent of $500, and to fine and imprisonment. To suppose that Congress, in making these provisions, intended to impose no duty upon, and subject to no penalty, the very officers who were to perfect the exercise of the right to vote,-to wit, the inspectors who receive or reject the votes,-would be quite absurd.

****20** 2. Garner, a citizen of African descent, had offered to the collector of taxes to pay any capitation-tax existing or claimed ***242** to exist against him as a prerequisite to voting at an election to be held in the city of Lexington on the thirtieth day of January, 1873. The collector illegally refused to allow Garner, on account of his race and color, to make the payment. This brought Garner and his case within the terms of the third section of the statute, that 'the person so offering and failing as aforesaid'-that is, who had made the offer which had been illegally rejected on account of his race and color-shall be entitled to vote 'as if he had, in fact, performed such act.' He then made an affidavit setting forth these facts, stating, with the particularity required in the statute, that he was w rongfully prevented from paying the tax, and presented the same to the inspector, who wrongfully refused to receive the same, and to permit him to vote, on account of his race and color.

A wrongful refusal to receive a vote which was, in fact, incompetent only by reason of the act ' aforesaid,'-that is, on account of his race and color,-brings the inspector within the statutory provisions respecting race and color. By the words ' as aforesaid,' the provisions respecting race and

color of the first and second sections of the statute are incorporated into and made a part of the third and fourth sections.

To illustrate: Sect. 4 enacts, that if any person by unlawful means shall hinder or prevent any citizen from voting at any election 'as aforesaid,' he shall be subject to fine and imprisonment. What do the words, 'as aforesaid,' mean? They mean, for the causes and pretences or upon the grounds in the first and second sections mentioned; that is, on account of the race or color of the person so prevented. All those necessary words are by this expression incorporated into the fourth section. The same is true of the words 'the wrongful act or omission as aforesaid,' and 'the person so offering and failing as aforesaid,' in the third section.

By this application of the words 'as aforesaid,' they become pertinent and pointed. Unless so construed, they are wholly and absolutely without meaning. No other meaning can possibly be given to them. 'The person (Garner) so offering and failing as aforesaid shall be entitled to vote as if he had performed the act.' He failed 'as aforesaid' on account of his ***243** race. The inspectors thereupon 'wrongfully refused to receive his vote' because he had not paid his capitation-tax. His race and color had prevented that payment. The words 'hindered and prevented his voting as aforesaid,' in the fourth section, and in the third section the words 'wrongfully refuse' and 'as aforesaid,' sufficiently accomplish this purpose of the statute. They amount to an enactment that the refusal to receive the vote on account of race or color shall be punished as in the third and fourth sections is declared.

****21** I am the better satisfied with this construction of the statute, when, looking at the Senate debates at the time of its passage, I find, 1st, That attention was called to the point whether this act did make the offence dependent on race, color, or previous condition; 2d, That it was conceded by those having charge of the bill that its language must embrace that class of cases; 3d, That they were satisfied with the bill as it then stood, and as it now appears in the act we are considering.

The particularity required in an indictment or in the statutory description of offences has at times been extreme, the distinctions almost ridiculous. I cannot but think that in some cases good sense is sacrificed to technical nicety, and a sound principle carried to an extravagant extent. The object of an indictment is to apprise the court and the accused of what is charged against him, and the object of a statute is to declare or define the offence intended to be made punishable. It is laid down, that 'when the charge is not the absolute perpetration of an offence, but its primary characteristic lies in the intent, instigation, or motives of the party towards its perpetration, the acts of the accused, important only as developing the *mala mens*, and not constituting of themselves the crime, need not be spread upon the record.' *United States* v. *Almeida*, Whart. Prec. 1061, 1062, note; 1 Whart. C. L. §285, note.

In the case before us, the acts constituting the offence are all spread out in the indictment, and the alleged defects are in the facts constituting the *mala mens*. The refusal to receive an affidavit as evidence that the tax had been paid by Garner, and the rejection of his vote, are the essential acts of the defendants which constitute their guilt. The rest is matter of motive or instigation only. As to these, the extreme particularity and ***244** the strict construction expected in indictments, and penal statutes would seem not to be necessary. In *Sickles* v. *Sharp*, 13 Johns. 49, it is said, 'The rule that penal statutes are to be strictly construed admits of some qualification. The plain and manifest intention of the legislature ought to be regarded.' In *United States* v. *Hartwell*, 6 Wall. 385, it is said, 'The object in construing penal as well as other statutes is to ascertain the legislative intent. The words must not be narrowed to the exclusion of what the legislature intended to embrace, but that intention must be gathered from the words. When the words are general, and embrace various classes of persons, there is no authority in the court to restrict them to one class, when the purpose is alike applicable to all. ' In *Ogden* v. *Strong*, 2 Paine, C. C. 584, it is said, ' Statutes must be so construed as to make all parts harmonize, and give a sensible effect to each. It should not be presumed that the legislature meant that any part of the statute should be without meaning or effect.'

**22 In *United States* v. *Morris*, 14 Pet. 474, the statute made it unlawful for a person 'voluntarily to serve on a vessel employed and made use of in the transportation of slaves from one foreign country to another.' No slaves had been actually received or transported on board the defendant's vessel; but the court held that the words of the statute embraced the case of a vessel sailing with the intent to be so employed. The court say, 'A penal statute will not be extended beyond the plain meaning of its words; . . . yet the evident intention of the legislature ought not to be defeated by a forced and overstrict construction.'

In the case of *The Donna Mariana*, 1 Dods. 91, the vessel was condemned by Sir William Scott under the English statute condemning vessels in which slaves 'shall be exported, transported, carried,' &c., although she was on her outward voyage, and had never taken a slave on board. 'The result is, that, where the general intent of a statute is to prevent certain acts, the subordinate proceedings necessarily connected with them, and coming within that intent, are embraced in its provisions.' Id.

In *Hodgman* v. *People*, 4 Den. 235, 5 id. 116, an act subjecting *245 an offender to 'the penalties' of a prior act was held to subject him to an indictment, as well as to the pecuniary penalties in the prior statute provided for. Especially should this liberal rule of construction prevail, where, though in form the statute is penal, it is in fact to protect freedom.

An examination of the surrounding circumstances, a knowledge of the evil intended to be prevented, a clear statement in the statute of the acts prohibited and made punishable, a certain knowledge of the legislative intention, furnish a rule by which the language of the statute before us is to be construed. The motives instigating the acts forbidden, and by which those acts are brought within the jurisdiction of the Federal authority, need not be set forth with the technical minuteness to which reference has been made. The intent is fully set forth in the second section; and the court below ought to have held, that, by the references in the third and fourth sections to the motives and instigations declared in the second section, they were incorporated into and became a part of the third and fourth sections, and that a sufficient offence against the United States authority was therein stated.

I hold, therefore, that the third and fourth sections of the statute we are considering do provide for the punishment of inspectors of elections who refuse the votes of qualified electors on account of their race or color. The indictment is sufficient, and the statute sufficiently describes the offence.

**23 The opinion of the majority of the court discusses no subjects except the sufficiency of the indictment and the validity of the act of May 31, 1870. Holding that there was no valid law upon which the crime charged could be predicated, it became unnecessary that the opinion should discuss other points. If it had been held by the court that the indictment was good, and that the statute created the offence charged, the question would have arisen, whether such statute was constitutional; and it was to this question that much the larger part of the argument of the counsel in the cause was directed. If the conclusions I have reached are correct, this question directly presents itself; and I trust it is not unbecoming that my views upon the constitutional points thus arising should be set forth. I have no warrant to say that those views are, or are not, entertained *246 by any or all of my associates. The opinions and the arguments are those of the writer only.

The question of the constitutionality of the act of May 31, 1870, arises mainly upon the Fifteenth Amendment to the Constitution of the United States. It is as follows:--

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

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

I observe, in the first place, that the right here protected is in behalf of a particular class of persons; to wit, citizens of the United States. The limitation is to the persons concerned, and not to the class of cases in which the question shall arise. The

right of citizens of the United States to vote, and not the right to vote at an election for United States officers, is the subject of the provision. The person protected must be a citizen of the United States; and, whenever a right to vote exists in such person, the case is within the amendment. This is the literal and grammatical construction of the language; and that such was the intention of Congress will appear from many considerations. As originally introduced by Mr. Senator Henderson, it read, 'No State shall deny or abridge the right of its citizens to vote and hold office on account of race, color, or previous condition.' Globe, 1868-69, pt. i. p. 542, Jan. 23, 1869.

The Judiciary Committee reported back the resolution in this from: 'The right of citizens of the United States to vote and hold office shall not be denied or abridged by the United States or any State on account of race, color, or previous condition of servitude. The Congress, by appropriate legislation, may enforce the provisions of this article.' Id. Omitting the words 'and hold office,' this is the form in which it was adopted. The class of persons indicated in the original resolution to be protected were described as citizens of a State; in the resolution when reported by the committee, as citizens of the United States. In neither resolution was there any limitations as to the character of the elections at which the vote was to be given. If there was a right to vote, and the person offering ***247** the vote was a citizen, the clause attached. It is both illiberal and illogical to say that this protection was intended to be limited to an election for particular officers; to wit, those to take part in the affairs of the Federal government.

****24** Congress was now completing the third of a series of amendments intended to protect the rights of the newly emancipated freedmen of the South.

In the adoption of the Thirteenth Amendment,-that slavery or involuntary servitude should not exist within the United States, or any place subject to their jurisdiction,-it took the first and the great step for the protection and confirmation of the political rights of this class of persons.

In the adoption of the Fourteenth Amendment,-that ' all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the States in which they reside,' and that '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,'-another strong measure in the same direction was taken.

A higher privilege was yet untouched; a security, vastly greater than any thus far given to the colored race, was not provided for, but, on the contrary, its exclusion was permitted. This was the elective franchise,-the right to vote at the elections of the country, and for the officers by whom the country should be governed.

By the second section of the Fourteenth Amendment, each State had the power to refuse the right of voting at its elections to any class of persons; the only consequence being a reduction of its representation in Congress, in the proportion which such excluded class should bear to the whole number of its male citizens of the age of twenty-one years. This was understood to mean, and did mean, that if one of the late slaveholding States should desire to exclude all its colored population from the right of voting, at the expense of reducing its representation in Congress, it could do so.

The existence of a large colored population in the Southern ***248** States, lately slaves and necessarily ignorant, was a disturbing element in our affairs. It could not be overlooked. It confronted us always and everywhere. Congress determined to meet the emergency by creating a political equality, by conferring upon the freedmen all the political rights possessed by the white inhabitants of the State. It was believed that the newly enfranchised people could be most effectually secured in the protection of their rights of life, liberty, and the pursuit of happiness, by giving to them that greatest of rights among freemen,-the ballot. Hence the Fifteenth Amendment was passed by Congress, and adopted by the States. The power of any State to deprive a citizen of the right to vote on account of race, color,

or previous condition of servitude, or to impede or to obstruct such right on that account, was expressly negatived. It was declared that this right of the citizen should not be thus denied or abridged.

****25** The persons affected were citizens of the United States; the subject was the right of these persons to vote, not at specified elections or for specified officers, not for Federal officers or for State officers, but the right to vote in its broadest terms.

The citizen of this country, where nearly every thing is submitted to the popular test and where office is eagerly sought, who possesses the right to vote, holds a powerful instrument for his own advantage. The political and personal importance of the large bodies of emigrants among us, who are intrusted at an early period with the right to vote, is well known to every man of observation. Just so far as the ballot to them or to the freedman is abridged, in the same degree is their importance and their security diminished. State rights and municipal rights touch the numerous and the every-day affairs of life: those of the Federal government are less numerous, and, to most men, less important. That Congress, possessing, in making a constitutional amendment, unlimited power in what it should propose, intended to confine this great guaranty to a single class of elections,-to wit, elections for United States officers,-is scarcely to be credited.

I hold, therefore, that the Fifteenth Amendment embraces the case of elections held for state or municipal as well as for federal officers; and that the first section of the act of May ***249** 31, 1870, wherein the right to vote is freed from all restriction by reason of race, color, or condition, at all elections by the people,-state, county, town, municipal, or of other subdivision,-is justified by the Constitution.

It is contended, also, that, in the case before us, there has been no denial or abridgment by the State of Kentucky of the right of Garner to vote at the election in question. The State, it is said, by its statute authorized him to vote; and, if he has been illegally prevented from voting, it was by an unauthorized and illegal act of the inspectors.

The word 'State' 'describes sometimes a people or community of individuals united more or less closely in political relations, inhabiting temporarily or permanently the same country; often it denotes only the country or territorial region inhabited by such a community; not unfrequently it is applied to the government under which the people live; at other times it represents the combined idea of people, territory, and government. It is not difficult to see, that, in all these senses, the primary conception is that of a people or community. The people, in whatever territory dwelling, either temporarily or permanently, and whether organized under a regular government or united by looser and less definite relations, constitute the State. . . . In the Constitution, the term 'State' most frequently expresses the combined idea just noticed, of people, territory, and government. A State, in the ordinary sense of the Constitution, is a political community of free citizens, occupying a territory of defined boundaries, organized under a government sanctioned and limited by a written constitution, and established by the consent of the governed. It is the union of such States under a common constitution which forms the distinct and greater political unit which that constitution designates as the United States, and makes of the people and States which compose it one people and one country.' *Texas* v. *White*, 7 Wall. 720, 721.

****26** That the word 'State' is not confined in its meaning to the legislative power of a community is evident, not only from the authority just cited, but from a reference to the various places in which it is used in the Constitution of the United States. A few only of these will be referred to.

The power of Congress to 'regulate commerce among the ***250** several States' (sect. 8, subd. 3) refers to the commerce between the inhabitants of the different States, and not to transactions between the political organizations called 'States.' The people of a State are here intended by the word ' State.' The numerous cases in which this provision has been considered by this court were cases where the questions arose upon individual transactions between citizens of different States, or as to rights in, upon, or through the territory of different States.

'Vessels bound to or from one State shall not be obliged to enter, clear, or pay duties, in another.' Sect. 9, subd. 5. This refers to region or locality only.

So 'the electors (of President and Vice-President) shall meet in their respective States, and vote,' &c. Art. 2, sect. 1, subd. 3.

Again: when it is ordained that the judicial power of the United States shall extend 'to controversies between two or more States, between a State and the citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign States, citizens, or subjects' (art. 3, sect. 2, subd. 1), we find different meaning attached to the same word in different parts of the same sentence. The controversy 'between two or more States' spoken of refers to the political organizations known as States; the controversy 'between a State and the citizens of another State' refers to the political organization of the first-named party, and again to the persons living within the locality where the citizens composing the second party may reside; the controversy 'between citizens of different States, between citizens of the same State claiming lands under grants of different States,' refers to the local region or territory described in the first branch of the sentence, and to the political organization as to the grantor under the second branch.

'Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings, of every other State.' Art. 4, sect. 1. Full faith shall be given in or throughout the territory of each State. By whom? By the sovereign State, by its agencies and authorities. To what is ***251** faith and credit to be given? To the acts of the political organization known as the State. Not only this, but to all its agencies, to the acts of its executive, to the acts of its courts of record. The expression 'State,' in this connection, refers to and includes all these agencies; and it is to these agencies that the legislation of Congress under this authority has been directed, and it is to the question arising upon the agencies of the courts that the questions have been judicially presented. *Hampton* v. *McConnell*, 3 Wheat. 234; *Green* v. *Sacramento*, 3 W. C. C. 17; *Bank of Alabama* v. *Dalton*, 9 How. 528. The judicial proceedings of a State mean the proceedings of the courts of the State. It has never been doubted, that, under the constitutional authority to provide that credit should be given to the records of a 'State,' it was lawful to provide that credit should be given to the records of the courts of a State. For this purpose, the court is the State.

****27** The provision, that 'the United States shall guarantee to every State a republican form of government,' is a guaranty to the people of the State, and may be exercised in their favor against the political power called the 'State.'

It seems plain that when the Constitution speaks of a State, and prescribes what it may do or what it may not do, it includes, in some cases, the agencies and instrumentalities by which the State acts. When it is intended that the prohibition shall be upon legislative action only, it is so expressed. Thus, in art. 1, sect. 10, subd. 1, it is provided that 'no State shall pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts.' The provision is, not that no State shall impair the obligation of contracts, but that no State shall pass a law impairing the obligation of contracts.

The word 'State' in the Fifteenth Amendment is to be construed as in the paragraph heretofore quoted respecting commerce among the States, and in that which declares that acts of a State shall receive full faith and credit in every other State; that is, to include the acts of all those who proceed under the authority of the State. The political organization called the 'State' can act only through its agents. It may act through a convention, through its legislature, its governor, or its magistrates and officers of lower degree. Whoever is authorized to ***252** wield the power of the State is the State, and this whether he acts within his powers or exceeds them. If a convention of the State of Kentucky should ordain or its legislature enact that no person of African descent, or who had formerly been a slave, should be entitled to vote at its elections, such ordinance or law would be void. It would be in excess of the power of the body enacting it. It

would possess no validity whatever. It cannot be doubted, however, that it would afford ground for the jurisdiction of the courts under the Fifteenth Amendment. It is the State that speaks and acts through its agents; although such agents exercise powers they do not possess, or that the State does not possess, and although their action is illegal. Inspectors of elections represent the State. They exercise the whole power of the State in creating its actual government by the reception of votes and the declaration of the results of the votes. If they wilfully and corruptly receive illegal votes, reject legal votes, make false certificates by which a usurper obtains an office, the act is in each case the act of the State, and the result must be abided by until corrected by the action of the courts. No matter how erroneous, how illegal or corrupt, may be their action, if it is upon the subject which they are appointed to manage, it binds all parties, as the action of the State, until legal measures are taken to annul it. They are authorized by the State to act in the premises; and, if their act is contrary to their instructions or their duty, they are nevertheless officers of the State, acting upon a subject committed to them by the State, and their acts are those of the State. The legislature speaks; its officers act. The voice and the act are equally those of the State.

****28** I am of the opinion, therefore, that the refusal of the defendants, inspectors of elections, to receive the vote of Garner, was a refusal by the State of Kentucky, and was a denial by that State, within the meaning of the Fifteenth Amendment, of the right to vote.

It is contended, further, that Congress has no power to enforce the provisions of this amendment by the enactment of penal laws; that the power of enforcement provided for is limited to correcting erroneous decisions of the State court, when presented to the Federal courts by appeal or writ of error. 'For ***253** example (it is said), when it is declared that no State shall deprive any person of life, liberty, or property, without due process of law, this declaration is not intended as a guaranty against the commission of murder, false imprisonment, robbery, or other crimes committed by individual malefactors, so as to give Congress power to pass laws for the punishment of such crimes in the several States generally.'

So far as the act of May, 1870, shall be held to include cases not dependent upon race, color, or previous condition, and so far as the power to impose pains and penalties for those offences may arise, I am not here called upon to discuss the subject.

So far as this argument is applied to legislation for offences committed on account of race or color, I hold it to be entirely unsound. If sound, it brings to an impotent conclusion the vigorous amendments on the subject of slavery. If there be no protection to the ignorant freedman against hostile legislation and personal prejudice other than a tedious, expensive, and uncertain course of litigation through State courts, thence by appeal or writ of error to the Federal courts, he has practically no remedy. It were as well that the amendments had not been passed. Of rights infringed, not one in a thousand could be remedied or protected by this process.

In adopting the Fifteenth Amendment, it was ordained as the second section thereof, 'The Congress shall have power to enforce this article by appropriate legislation.' This was done to remove doubts, if any existed, as to the former power; to add, at least, the weight of repetition to an existing power.

It was held in the *United States Bank Cases* and in the *Legal-Tender Cases (McCullough* v. *Maryland*, 4 Wheat. 316; *Gibbons* v. *Ogden*, 7 id. 204; *New York* v. *Miln*, 11 Pet. 102; *Knox* v. *Lee*, 12 Wall. 457; *Dooley* v. *Smith*, 13 id. 604) that it was for Congress to determine whether the necessity had arisen which called for its action. If Congress adjudges that the necessities of the country require the establishment of a bank, or the issue of legal-tender notes, that judgment is conclusive upon the court. It is not within their power to review it.

****29** If Congress, being authorized to do so, desires to protect the freedman in his rights as a citizen and a voter, and as against ***254** those who may be prejudiced and unscrupulous in their hostility to him

and to his newly conferred rights, its manifest course would be to enact that they should possess that right; to provide facilities for its exercise by appointing proper superintendents and special officers to examine alleged abuses, giving jurisdiction to the Federal courts, and providing for the punishment of those who interfere with the right. The statute-books of all countries abound with laws for the punishment of those who violate the rights of others, either as to property or person, and this not so much that the trespassers may be punished as that the peaceable citizen may be protected. Punishment is the means; protection is the end. The arrest, conviction, and sentence to imprisonment, of one inspector, who refused the vote of a person of African descent on account of his race, would more effectually secure the right of the voter than would any number of civil suits in the State courts, prosecuted by timid, ignorant, and penniless parties against those possessing the wealth, the influence, and the sentiment of the community. It is certain that in fact the legislation taken by Congress, which we are considering, was not only the appropriate, but the most effectual, means of enforcing the amendment.

That the legislation in this respect is constitutional is also proved by the previous action of Congress and of this court.

Art. 4, sect. 5, subd. 3, of the Constitution provides as follows: 'No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.'

At the time of the adoption of the Constitution containing this provision, slavery was recognized as legal in many States. The rights of the slaveholder in his slave were intended to be protected by this clause. To enforce this protection, Congress, from time to time, passed laws providing not only the means of restoring the escaped slave to his master, but inflicting punishment upon those who violated that master's rights. Thus, as early as 1793, Congress enacted not only that the master or his agent might seize and arrest such fugitive slave, and, upon obtaining a certificate from a judge or magistrate, carry him back ***255** to the State from whence he escaped, and return him into slavery, but that every person who hindered or obstructed such master or agent, or who harbored or concealed such fugitive, after notice that he was such, should be subject to damages not only, but to a penalty of $500, to be recovered for the benefit of the claimant in any court proper to try the same. 1 Stat. 302. By the act of 1850 (9 Stat. 462), the circuit courts were ordered to enlarge the number of commissioners, ' with a view to afford reasonable facilities to reclaim fugitives from labor.'

****30** The ninth section of the act provided that any person who should wilfully obstruct or hinder the removal of such fugitive, either with or without process, or should rescue or aid or abet an attempt to escape, or should harbor or conceal the fugitive, having notice, should for either of said offences be subject to a fine not exceeding $1,000, and imprisonment not exceeding six months, by indictment and conviction in the United States Court, 'and shall pay and forfeit, by way of civil damages to the party injured by such illegal conduct, the sum of $1,000 for each fugitive so lost as aforesaid, to be recovered by action of debt,' &c.

In *Prigg* v. *Pennsylvania*, 16 Pet. 539, the legislation of 1793 was held to be valid.

It was held in *Sims's Case*, 7 Cush. 285, that the act of 1850 was constitutional, and that the State tribunals cannot by writ of *habeas corpus* interfere with the Federal authorities when acting upon cases arising under that act.

In *Ableman* v. *Booth*, 21 How. 506, it was held by this court that the Fugitive-slave Act of 1850 was constitutional in all its provisions, and that a *habeas corpus* under the State laws must not be obeyed, but the authority of the United States must be executed.

The case of Prigg, decided under the act of 1793, and that of Booth, under the act of 1850, are pertinent to the present question.

In the former case, it was held that the act of 1793, so far as it authorized the owner to seize and

recapture his slave in any State of the Union, was self-executing, requiring no aid from legislation, either State or National. The clause relating to fugitive slaves, it is there said, is found in the National and not ***256** in the State Constitution. It was said to be a necessary conclusion, in the absence of all positive provision to the contrary, that the national government is bound through its own departments, legislative, judicial, or executive, to carry into effect all the rights and duties imposed upon it by the Constitution.

This doctrine is useful at the present time, and is pertinent to the point we are considering. The clause protecting the freedmen, like that sustaining the rights of slaveholders, is found in the Federal Constitution only. Like the former, it provides the means of enforcing its authority, through fines and imprisonments, in the Federal courts; and here, as there, the national government is bound, through its own departments, to carry into effect all the rights and duties imposed upon it by the Constitution. In connection with the clause of the Constitution just quoted, there was not found, as here, an express authority in Congress to enforce it by appropriate legislation; and yet the court decide not only that Congress had power to enforce its provisions by fine and imprisonment, but that the right to legislate on the subject belongs to Congress exclusively. Courts should be ready, now and here, to apply these sound and just principles of the Constitution.

****31** This provision of the Contitution and these decisions seem to furnish the rule of deciding the constitutionality of the law in question, rather than that which provides that life, liberty, or property, shall not be interfered with except by due process of law. It is not necessary to consider how far Congress may legislate upon individual crimes under that provision. If I am right in this view, the legislation we are considering-to wit, the enforcement of the Fifteenth Amendment by the means of penalties and indictments-is legal.

It is a well-settled principle, that, if an indictment contain both good counts and bad counts, a judgment of guilty upon the whole indictment will be sustained.

The record shows that the court below considered each and every count of the indictment as insufficient, and that judgment was entered discharging the defendants without day; *i. e.*, from the whole indictment. Upon the view I have taken of the validity of the fourth count, this judgment was erroneous. It should be reversed, and a trial ordered upon the indictment.

U.S.,1875
U.S. v. Reese
92 U.S. 214, 2 Otto 214, 1875 WL 17775 (U.S.Ky.), 23 L.Ed. 563

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EXHIBIT 10

236 F.3d 1009, 01 Cal. Daily Op. Serv. 13, 01 Cal. Daily Op. Serv. 2888, 2001 Daily Journal D.A.R. 27, 2001 Daily Journal D.A.R. 3575
(Cite as: 236 F.3d 1009)

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Briefs and Other Related Documents
Forbes v. NapolitanoC.A.9 (Ariz.),2000.

United States Court of Appeals,Ninth Circuit.
Fred FORBES; Margaret Bohn; John L. Summers; Ann S. Anderson, Stuart R. Snider; George Melcher, Jr.; Christopher Tisch; Planned Parenthood of Central and Northern Arizona, Inc.; Robert Tamis, Plaintiffs-Appellees,
v.
Janet NAPOLITANO, in her capacity as Attorney General, State of Arizona; Stephen Neely, in his capacity as County Attorney, Pima County, Arizona, Defendants-Appellants.
No. 99-17372.

Argued and Submitted Oct. 3, 2000
Filed Dec. 29, 2000

Suit was brought challenging constitutionality of Arizona statutes criminalizing any medical " experimentation" or "investigation" involving fetal tissue from induced abortions unless necessary to perform "routine pathological examination" or to diagnose maternal or fetal condition that prompted the abortion. The United States District Court for the District of Arizona, William D. Browning, J., 71 F.Supp.2d 1015, found statute vague, and state appealed. The Court of Appeals, Schroeder, Circuit Judge, held that words "experimentation," " investigation," and "routine" in statutes were ambiguous.

Affirmed.

Sneed, Circuit Judge, filed concurring opinion.

West Headnotes

[1] Constitutional Law 92 ⚿251.4

92 Constitutional Law
92XII Due Process of Law
92k251.4 k. Vagueness or Overbreadth. Most Cited Cases
Due process clause of Fourteenth Amendment guarantees individuals the right to fair notice of whether their conduct is prohibited by law. U.S.C.A. Const.Amend. 14.

[2] Constitutional Law 92 ⚿251.4

92 Constitutional Law
92XII Due Process of Law
92k251.4 k. Vagueness or Overbreadth. Most Cited Cases
Although due process clause requires only constructive rather than actual notice, individuals must be given reasonable opportunity to discern whether their conduct is proscribed so they can choose whether to comply with the law. U.S.C.A. Const.Amend. 14.

[3] Constitutional Law 92 ⚿251.4

92 Constitutional Law
92XII Due Process of Law
92k251.4 k. Vagueness or Overbreadth. Most Cited Cases
Due process clause does not require that statutes be written with "mathematical" precision, nor can they be thus written; however, they must be intelligible, defining "core" of proscribed conduct that allows people to understand whether their actions will result in adverse consequences. U.S.C.A. Const.Amend. 14.

[4] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases
If statute subjects transgressors to criminal penalties, statute must define core of proscribed behavior to give people constructive notice of the

law and provide standards to prevent arbitrary enforcement; without such standards, statute would be impermissibly vague even if it did not reach substantial amount of constitutionally protected conduct, because it would subject people to risk of arbitrary deprivation of their liberty. U.S.C.A. Const.Amend. 14.

[5] Constitutional Law 92 ⚿258(1)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(1) k. In General. Most Cited Cases
Regardless of what type of conduct criminal statute targets, arbitrary deprivation of liberty is itself offensive to Constitution's due process guarantee. U.S.C.A. Const.Amend. 14.

[6] Constitutional Law 92 ⚿48(1)

92 Constitutional Law
92II Construction, Operation, and Enforcement of Constitutional Provisions
92k44 Determination of Constitutional Questions
92k48 Presumptions and Construction in Favor of Constitutionality
92k48(1) k. In General. Most Cited Cases
Challenged statute enjoys presumption of constitutionality.

[7] Constitutional Law 92 ⚿258(2)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(2) k. Certainty and Definiteness in General. Most Cited Cases
Under due process clause, statute which criminalizes conduct may not be impermissibly vague in any of its applications. U.S.C.A. Const.Amend. 14.

[8] Abortion and Birth Control 4 ⚿150

4 Abortion and Birth Control
4k141 Abortion Offenses; Nature and Elements
4k150 k. Disposal and Experimentation. Most Cited Cases
(Formerly 4k1.30)

Constitutional Law 92 ⚿258(3.1)

92 Constitutional Law
92XII Due Process of Law
92k256 Criminal Prosecutions
92k258 Creation or Definition of Offense
92k258(3) Particular Statutes and Ordinances
92k258(3.1) k. In General. Most Cited Cases
(Formerly 4k1.30)
Arizona statutes criminalizing any medical " experimentation" or "investigation" involving fetal tissue from induced abortions unless necessary to perform "routine pathological examination" or to diagnose maternal or fetal condition that prompted the abortion were vague, in violation of due process; words "experimentation," "investigation," and "routine" were ambiguous. U.S.C.A. Const.Amend. 14; A.R.S. § 36-2302, subds. A, C.

***1010** Bebe J. Anderson, The Center for Reproductive Law & Policy, New York, N.Y. and Michael Owen Miller, Miller Smith LLP, Tucson, Arizona for the plaintiffs-appellees.
Charles R. Pyle, Assistant Attorney General, Tucson, Arizona, for the defendants-appellants.

Appeal from the United States District Court for the District of Arizona; William D. Browning, District Judge, Presiding. D.C. No. CV-96-00288-WDB.

Before: SNEED, SCHROEDER, and PAEZ, Circuit Judges.

Opinion by Judge SCHROEDER; Concurrence by Judge SNEED.SCHROEDER, Circuit Judge
Plaintiffs challenge the constitutionality of an Arizona statute that criminalizes any medical "

experimentation" or "investigation" involving fetal tissue from induced abortions unless necessary to perform a "routine pathological examination" or to diagnose a maternal or fetal condition that prompted the abortion. The plaintiffs include individuals suffering from Parkinson's disease who because of the statute are unable in Arizona to receive transplants of fetal brain tissue that many medical experts believe hold out promise for eventual amelioration or treatment of the disease. Plaintiffs also include doctors in Arizona who fear possible criminal prosecution if they provide services to their patients that the doctors would like to provide.

The district court held on summary judgment that the statutes are unconstitutionally vague, and permanently enjoined their enforcement. It did not reach various other theories presented in plaintiffs' complaint for invalidation of the statute. In so ruling the district court followed the holdings of three other circuits that considered similar statutes and held them all unconstitutionally vague. *See Jane L. v. Bangerter,* 61 F.3d 1493, 1499-1502 (10th Cir.1995), *Rev'd and remanded on other grounds sub. nom., Leavitt v. Jane L.,* 518 U.S. 137, 116 S.Ct. 2068, 135 L.Ed.2d 443 (1996); *Margaret S. v. Edwards,* 794 F.2d 994, 998-99 (5th Cir.1986); *Lifchez v. Hartigan,* 735 F.Supp. 1361, 1363-76 (N.D.Ill.), *aff'd mem.,* 914 F.2d 260 (7th Cir.1990). In this appeal by the state, we affirm the district court holding. Its decision is published at 71 F.Supp.2d 1015 (D.Ariz.1999). We do not repeat the procedural background.

The principal statute with which we are concerned is A.R.S. § 36-2302, subpart (A). It provides:
A person shall not knowingly use any human fetus or embryo, living or dead, or any parts, organs, or fluids of any such fetus or embryo resulting from an induced abortion in any manner for any medical experimentation or scientific or medical investigation purposes except as is strictly necessary to diagnose a disease or condition in the mother of the fetus or embryo and only if the abortion was performed because of such disease or condition.

Section 36-2302, subpart (C) provides an exception:This section shall not prohibit any routine pathological examinations conducted by a medical examiner or hospital laboratory provided such pathological examination is not a part of or in any way related to any medical or scientific experimentation.

Thus the statute does not outlaw all use of fetal tissue derived from induced abortions. Instead it generally outlaws the use of such tissue for experimentation, subject to certain exceptions.

Persons violating Section 36-2302 commit a class 5 felony, a crime punishable by one-and-a-half years in prison, and face fines up to $150,000, *see* A.R.S. § 36-2303. Doctors found to have violated the statute also face censure, probation, suspension of license, revocation of license, or any combination of these. *See* A.R.S. §§ 13-701, 13-801, 32-1451, 32-1844.

In their complaint and supporting affidavits and depositions, the plaintiff physicians explain the types of procedures involving the use of fetal tissue that they ***1011** would use, were it not for the statute. They believe these procedures would fulfill their obligations to promote the health of their patients, and would also advance medical knowledge. Dr. Snider, one of the plaintiffs in this case, stated in his deposition that the statute prevented him from prescribing and managing a course of treatment for his Parkinson's disease patients that includes fetal tissue transplantation. Another plaintiff, Dr. Melcher, submitted an affidavit indicating that fetal tissue transplantation holds considerable promise for some of his Parkinson's disease patients.

Fetal tissue is also useful in diagnosing and testing for fertility problems. One of the plaintiff physicians who specializes in fertility treatments, Dr. Tamis, was the target of a potentially criminal investigation some years ago when he endeavored to study the effects on the fetus of a drug ingested by pregnant women before an induced abortion was performed. The study was to determine whether the drug passed through the placental wall. Although the state eventually dismissed the grand

jury subpoenas issued to Dr. Tamis, he is still uncertain about the proper interpretation of the statute.

Other physicians and expert witnesses explain that many established treatments for illness have developed from fetal research and experimentation, including the polio vaccine. They point out the difficulties of knowing at what stage or point in time "experiments" become recognized as " treatment." They also point out that the terms " investigation" and "routine examination" are fundamentally ambiguous. In particular, the experts highlight doctors' lack of consensus about what procedures are purely experimental. In the view of one expert submitted to the district court, virtually every procedure with a therapeutic objective is experimental to some extent.

[1][2][3] The due process clause of the Fourteenth Amendment guarantees individuals the right to fair notice of whether their conduct is prohibited by law. *Colautti v. Franklin,* 439 U.S. 379, 390-91, 99 S.Ct. 675, 58 L.Ed.2d 596 (1979), *citing United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808, 98 L.Ed. 989 (1954). Although only constructive rather than actual notice is required, individuals must be given a reasonable opportunity to discern whether their conduct is proscribed so they can choose whether or not to comply with the law. *Giaccio v. Pennsylvania,* 382 U.S. 399, 402-03, 86 S.Ct. 518, 15 L.Ed.2d 447 (1966). Statutes need not be written with "mathematical" precision, nor can they be thus written. *Grayned v. City of Rockford,* 408 U.S. 104, 108-09, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). But they must be intelligible, defining a "core" of proscribed conduct that allows people to understand whether their actions will result in adverse consequences. *Planned Parenthood v. Arizona,* 718 F.2d 938, 947 (9th Cir.1983)(holding that a statute is void for vagueness if persons of common intelligence must necessarily guess at its meaning).

[4][5] If a statute subjects transgressors to criminal penalties, as this one does, vagueness review is even more exacting. *See Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 75 L.Ed.2d 903 (1983) (holding that penal statutes must define criminal offenses with "sufficient definiteness," and "in a manner that does not encourage arbitrary and discriminatory enforcement"); *Winters v. New York,* 333 U.S. 507, 515, 68 S.Ct. 665, 92 L.Ed. 840 (1948)(holding that where a statute imposes criminal penalties, the standard of certainty involved in vagueness review is higher). In addition to defining a core of proscribed behavior to give people constructive notice of the law, a criminal statute must provide standards to prevent arbitrary enforcement. *City of Chicago v. Morales,* 527 U.S. 41, 52, 119 S.Ct. 1849, 144 L.Ed.2d 67 (1999). Without such standards, a statute would be impermissibly vague even if it did not reach a substantial amount of constitutionally protected conduct, because it would subject people to ***1012** the risk of arbitrary deprivation of their liberty. *Id.* Regardless of what type of conduct the criminal statute targets, the arbitrary deprivation of liberty is itself offensive to the Constitution's due process guarantee. *Smith v. Goguen,* 415 U.S. 566, 575, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1972).

[6][7] The district court correctly applied these principles in this case. It recognized that a challenged statute enjoys a presumption of constitutionality. *Baggett v. Bullitt,* 377 U.S. 360, 372, 84 S.Ct. 1316, 12 L.Ed.2d 377 (1964). But where a statute criminalizes conduct, the law may not be impermissibly vague in any of its applications. *Kolender,* 461 U.S. at 357, 103 S.Ct. 1855, 75 L.Ed.2d 903; *Jane L.,* 61 F.3d at 1500.

[8] The district court concluded that these criminal statutes fail to establish any "core" of unquestionably prohibited activities. It explained this conclusion with reference to three of the statute's key terms: "experimentation," " investigation" and "routine," none of which the statute defines. With respect to "experimentation," the district court pointed out two difficulties. First, the term is ambiguous, lacking a precise definition to focus application of the statute. *Forbes,* 71 F.Supp.2d at 1019, *citing Jane L.,* 61 F.3d at 1500. Second, the distinction between experimentation and treatment changes over time. *Id., citing Margaret S.,* 794 F.2d at 999. The district court

also found the term "investigation" to be ambiguous, since common definitions of the term can encompass pure research as well as more common, therapeutic medical techniques. *Id.* In examining the statute's use of "routine pathological examinations" to carve out an exception to criminal liability, the district court determined that the term " routine" was also ambiguous. *Id.,* at 1020. The statute itself does not define "routine," *see* A.R.S. § 36-2302, nor does the medical community provide any official standards to help. The district court was thus concerned that any examination of post-abortion fetal tissue beyond simply mounting fetal tissue on a slide could expose doctors to criminal liability.

The district court relied upon the decisions of our sister circuits and held they applied to the contentions of the plaintiffs in this case. *See Jane L.,* 61 F.3d at 1500 (finding that a Utah statute prohibiting "experimentation" on "live unborn children" was void for vagueness); *Margaret S,* 794 F.2d at 998 (holding that a Louisiana statute prohibiting "experimentation" on unborn child or post-abortion fetal tissue also was vague to the point of being unconstitutional, in part because it did not distinguish between medical experiments and medical tests); *Lifchez,* 735 F.Supp. at 1363 (holding unconstitutionally vague an Illinois statute that prohibited "experimentation" on human fetuses unless such activity was "therapeutic" to the fetus).

The state in this appeal endeavors to distinguish the statutes involved in those cases on the ground that those statutes were not limited to fetal experimentation and investigation occurring after abortions. The vagueness of the words when applied to medical procedures is exactly the same, however, regardless of whether the fetus has been aborted or not.

The state also contends that the statute is clear, because a doctor can avoid violating the statute by performing no tests or other procedure on fetal tissue from induced abortions. This argument ignores the exceptions built into the statute that creates the confusion. For example, it is not clear if a doctor would run afoul of the statute if called upon to perform a DNA test involving post-abortion fetal tissue to test for paternity, or to diagnose a medical condition unrelated to the patient's decision to have an abortion.

Under both the Arizona statute and the statutes invalidated in our sister circuits, doctors might undertake a procedure involving fetal tissue that they consider to be primarily therapeutic, perhaps even routine, but the state might consider such a procedure illegal under the statute. The distinction between experiment and treatment***1013** in the use of fetal tissue is indeterminate, regardless of whether the tissue is obtained after an induced abortion. That distinction is not clarified by the statute's scienter requirement. *See* A.R.S. § 36-2302 (providing that a person shall not " knowingly use any human fetus ... for any medical experimentation ..."). A doctor might knowingly use fetal tissue from an induced abortion for a test that the physician considers primarily in furtherance of a patient's medical interest, but which the state considers to be impermissible. Neither the statute nor the record before the district court provide any clues about how the statute would be applied to such a test.

A criminal statute such as A.R.S. § 36-2302 that prohibits medical experimentation but provides no guidance as to where the state should draw the line between experiment and treatment gives doctors no constructive notice, and gives police, prosecutors, juries, and judges no standards to focus the statute's reach. The dearth of notice and standards for enforcement arising from the ambiguity of the words "experimentation," "investigation," and " routine" thus renders the statute unconstitutionally vague. *Kolender,* 461 U.S. at 358, 103 S.Ct. 1855, 75 L.Ed.2d 903, *Papachristou v. City of Jacksonville,* 405 U.S. 156, 162, 92 S.Ct. 839, 31 L.Ed.2d 110 (1972).

The state also contends that these particular statutes are not impermissibly vague, at least not in Arizona, because the Arizona physicians in this record do not harbor any uncertainty or disagreement about what procedures they will in fact avoid in light of this statute. This does not mean that the statute has any

more clarity than the statutes struck down by other circuits; it does not. This means only that at this particular stage of medical research, the physicians do not disagree about the risks of prosecution they are willing to endure.

The judgment of the district court is AFFIRMED.

SNEED, J., Circuit Judge, concurring:

I agree with the majority's conclusion that Section 36-2302 of the Arizona Revised Statutes is unconstitutional. This section appears to be part of Arizona's regulation of abortion. Following the Supreme Court's decision in *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973), many states enacted statutes designed to regulate or prohibit experimentation on fetuses and fetal tissues. These statutes were frequently incorporated into the states' abortion laws.[FN1] Often, the statutes applied only to aborted tissue. Similarly, § 36-2302 of the Arizona Revised Statutes appears in Chapter 23 entitled "Protection of Fetus or Embryo," while Chapter 20, entitled "Abortion," sets forth several provisions designed to regulate and curb access to abortion. In determining what question is specifically at issue, "a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA v. Brown & Williamson Tobacco Corp.,* 529 U.S. 120, 120 S.Ct. 1291, 1300, 146 L.Ed.2d 121 (2000). Rather, the " words of the statute must be read in their context and with a view to their place in the overall statutory scheme." *Id.* at 1301 (quoting ***1014** *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989)). Section 36-2302, with which we are concerned, appears to be consistent with the purposes of Chapter 20, and with a statutory scheme that curbs access to abortion.

FN1. Ark. Stat. Ann. § 20-17-802 (1987); Cal. Health & Safety code § 25965 (1984); Fla. Stat. Ann. § 390.001(6) (1986); Ill.Ann.Stat. ch 38 §§ 81-26m 81-32, 81-32.1 (1977 & Supp.1987); Ind.Code Ann. § 35-1-58.5-6 (1985); Ky.Rev.Stat. Ann. § 436.026 (1985); La.Rev.Stat. Ann. §§ 40:1299.35.13 (1988), 14:87.2 (1986); Me.Rev.Stat. Ann. tit. 22. § 1593 (1980); Mass. Ann. Laws ch. 112 §§ 12J & 12K (1985); Mich Comp. Laws Ann. §§ 333-2685 -2692 (1980); Minn.Stat. Ann. § 145.421-.422 (1988); Mo. Ann. Stat. §§ 188.015, .037 (1983); Mont.Code Ann. § 50-20-108(3) (1987); Neb.Rev.Stat. § 28-346 (1985); N.M. Stat. Ann. § 24-9A-3 (1986); N.D. Cent.Code §§ 14-02.2-01-02 (1985); Ohio Rev.Code Ann. § 2919.14 (Baldwin 1986); Okla. Stat. Ann. tit. 63, § 1-735 (1984); R.I. Gen. Laws §§ 11-54-1-2 (1987); S.D. Codified Laws Ann. § 34-23A-17 (1986); Tenn.Code Ann § 39-4-208 (1982); Utah Code Ann. § 76-7-310 (1978); Wyo. Stat. § 35-6-115 (1977). Many of these statutes have been declared unconstitutional.

Roe v. Wade held that the constitutional right to personal privacy encompasses a woman's decision whether or not to terminate her pregnancy. *Roe* and its progeny established that the pregnant woman has a right to be free from state interference with her choice to have an abortion. These cases do not hold that the State is under an affirmative obligation to ensure access to abortions for all who may desire them. Rather they require that the State refrain from wielding its power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion.

A prohibition on aborted fetal tissue research could burden the rights of women and couples to make both present and future reproductive choices. Fetal tissue experimentation may aid in the development and continued improvement of techniques and procedures necessary to make such choices.[FN2] Prohibiting research on aborted fetal tissue could prevent the advancement of important diagnostic techniques, the creation of safer abortion techniques, and the discovery of medical defects that would influence a woman's decision regarding future pregnancies.

FN2. MARILYN J. CLAPP, *State Prohibition of Fetal Experimentation and*

> *the Fundamental Right of Privacy,* 88 COLUM. L. REV. 1073, 1086 (1988).

Experimentation on aborted fetal tissue may foster the development of reproductive technology that is related to reproductive decisions. Governmental restrictions on reproductive decisions are only justifiable given compelling state interests. *Carey v. Population Services Int'l,* 431 U.S. 678, 688, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977). The Supreme Court has identified three state interests in regulating abortion: safeguarding the health of the woman; protecting the potential life of the fetus; and regulating the medical profession. None justify Arizona's prohibitions of fetal experimentation.

C.A.9 (Ariz.),2000.
Forbes v. Napolitano
236 F.3d 1009, 01 Cal. Daily Op. Serv. 13, 01 Cal. Daily Op. Serv. 2888, 2001 Daily Journal D.A.R. 27, 2001 Daily Journal D.A.R. 3575

Briefs and Other Related Documents (Back to top)

- 2000 WL 33982010 (Appellate Brief) Appellants' Reply Brief (May. 17, 2000) Original Image of this Document (PDF)
- 2000 WL 33980876 (Appellate Brief) Brief of Appellees (Apr. 19, 2000)
- 2000 WL 34004308 (Appellate Brief) Appellants' Opening Brief (Apr. 19, 2000) Original Image of this Document (PDF)
- 99-17372 (Docket) (Nov. 10, 1999)

END OF DOCUMENT

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

I, Claudia Ayala, am employed in the City of Long Beach, Los Angeles County, California. I am over the age eighteen (18) years and am not a party to the within action. My business address is 180 East Ocean Blvd., Suite 200, Long Beach, California 90802.

On January 22, 2007, I served the foregoing document(s) described as

NOTICE OF LODGING AUTHORITY IN SUPPORT OF PLAINTIFFS' REPLY TO DEFENDANTS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION

on the interested parties in this action by placing
[ ] **the original**
[X] **a true and correct copy**
thereof enclosed in sealed envelope(s) addressed as follows:

Douglas J. Woods
Attorney General's Office
1300 "I" Street, Ste. 125
Sacramento, CA 94244-2550

__ (BY MAIL) As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under the practice it would be deposited with the U. S. Postal Service on that same day with postage thereon fully prepaid at Long Beach, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date is more than one day after date of deposit for mailing an affidavit.

Executed on January 22, 2007, at Long Beach, California.

__ (PERSONAL SERVICE) I caused such envelope to be delivered by hand to the offices of the addressee.

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Executed on January 22, 2007, at Long Beach, California.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

__ (FEDERAL) I declare that I am employed in the office of the member of the bar of this court at whose direction the service was made.

CLAUDIA AYALA