C. D. Michel - SBN 144258
Clinton B. Monfort - SBN 255609
Sean A. Brady - SBN 262007
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
Telephone: (562) 216-4444
Fax: (562) 216-4445
cmichel@michellawyers.com

Attorneys for Plaintiffs/Petitioners

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF FRESNO

SHERIFF CLAY PARKER, TEHAMA COUNTY SHERIFF; HERB BAUER SPORTING GOODS; CALIFORNIA RIFLE AND PISTOL ASSOCIATION FOUNDATION; ABLE'S SPORTING, INC.; RTG SPORTING COLLECTIBLES, LLC; AND STEVEN STONECIPHER, Plaintiffs and Petitioners, vs. THE STATE OF CALIFORNIA; JERRY BROWN, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF CALIFORNIA; THE CALIFORNIA DEPARTMENT OF JUSTICE; and DOES 1-25, Defendants and Respondents.	CASE NO. 10CECG02116 **NOTICE OF OTHER AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** Date: September 29, 2010 Time: 3:30 p.m. Location: Dept. 97A Judge: Hon. Jeffrey Y. Hamilton Action Filed: June 17, 2010

NOTICE IS HEREBY GIVEN that PLAINTIFFS are hereby lodging the following Federal Authorities:

1. *City of Chi. v. Morales* (1998) 527 U.S. 41 1
2. *Coates, et al. v. City of Cincinatti* (1971) 402 U.S. 611, 614 2
3. *Connally v. General Const. Co.* (1926) 269 U.S. 385 3
4. *Ex parte Siebold* (1880) 100 U.S. 371 4

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5. *Grayned v. City of Rockford* (1972) 408 U.S. 104 5
6. *In re Kelly* (9th Cir. 1988) 841 F.2d 908 6
7. *Kolender v. Lawson* (1983) 461 U.S. 352 7
8. *Monterey Mech. Co. v. Wilson* (9th Cir. 1997) 125 F.3d 702 8
9. *Nelson v. NASA* (9th Cir. 2007) 530 F.3d 865 9
10. *Schrader v. State* (1986) 69 Md. App. 377 10
11. *State ex rel. Martin v. Kansas City* (1957) 181 Kan. 870 11

Dated: September 7, 2010

Respectfully Submitted,

MICHEL & ASSOCIATES, P.C.

C.D. MICHEL
Attorney for Plaintiffs

1

CITY OF CHICAGO, PETITIONER v. JESUS MORALES ET AL.

No. 97-1121

SUPREME COURT OF THE UNITED STATES

527 U.S. 41; 119 S. Ct. 1849; 144 L. Ed. 2d 67; 1999 U.S. LEXIS 4005; 67 U.S.L.W. 4415; 72 A.L.R.5th 665; 99 Cal. Daily Op. Service 4488; 99 Daily Journal DAR 5760; 1999 Colo. J. C.A.R. 3223; 12 Fla. L. Weekly Fed. S 331

December 9, 1998, Argued
June 10, 1999, Decided

PRIOR HISTORY: ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

DISPOSITION: 177 Ill. 2d 440, 687 N. E. 2d 53, affirmed.

CASE SUMMARY:

PROCEDURAL POSTURE: On a writ of certiorari to the Supreme Court of Illinois, petitioner city contended that its Gang Congregation Ordinance was constitutional and did not fail for vagueness due to a lack of notice of proscribed conduct and for failing to govern law enforcement.

OVERVIEW: Petitioner city enacted a Gang Congregation Ordinance, which prohibited criminal street gang members from loitering in any public place. The Supreme Court of Illinois struck down the ordinance on the basis that it violated the due process clause of the Fourteenth Amendment, U.S. Const. amend. XIV. Upon review, the court agreed with the Illinois Supreme Court and held that the ordinance was unconstitutionally vague. The ordinance did not meet the fair notice requirement because it did not provide adequate notice of what constituted prohibited conduct. Because no standard of conduct was specified, at all, by the ordinance, the entire ordinance failed to give the ordinary citizen adequate notice of what was forbidden and what was permitted. The ordinance also violated the requirement that a legislature establish minimal guidelines to govern law enforcement. Because the ordinance provided absolute discretion to police officers to determine what activities constituted loitering, the ordinance failed to meet constitutional standards for definitiveness and clarity. Thus, the ordinance was unconstitutional for vagueness.

OUTCOME: The Court affirmed the judgment that the Gang Congregation Ordinance violated the due process clause of the Fourteenth Amendment and held that it was unconstitutionally vague because it did not provide adequate notice of the proscribed conduct and did not set minimal guidelines for law enforcement.

CORE TERMS: ordinance, loitering, gang members, plurality's, apparent purpose, gang, disperse, dispersal, vagueness, police officer, facial challenge, street, notice, vague, loiter, innocent, public places, invalid, loiterer's, arrest, vagrancy, harmless, obey, unconstitutionally vague, police department's, overbreadth, policeman, resident, criminal street gangs, public peace

LexisNexis(R) Headnotes

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Governments > Legislation > Overbreadth
[HN1]The overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise of First Amendment, U.S. Const. amend. I, rights if the impermissible applications of the law are substantial when judged in relation to the statute's plainly legitimate sweep. 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.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Constitutional Law > Substantive Due Process > Scope of Protection
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Disruptive Conduct > Loitering, Panhandling & Vagrancy > Elements
[HN2]The freedom to loiter for innocent purposes is part of the "liberty" protected by the due process clause of the Fourteenth Amendment, U.S. Const. amend XIV. The court has expressly identified this right to remove from one place to another according to inclination as an attribute of personal liberty protected by the Constitution.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
Constitutional Law > Involuntary Servitude
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Disruptive Conduct > Loitering, Panhandling & Vagrancy > Elements
[HN3]While antiloitering ordinances have long existed in this country, their pedigree does not ensure their constitutionality.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Governments > Legislation > Overbreadth
Governments > Legislation > Vagueness
[HN4]When vagueness permeates the text of a criminal law, it is subject to facial attack.

Civil Procedure > Justiciability > Standing > Third Party Standing
Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation > General Overview
[HN5]When asserting a facial challenge to an ordinance, 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 the court has recognized as a prudential doctrine and not one mandated by Article III of the Constitution. When a state court has reached the merits of a constitutional claim, invoking prudential limitations on a party's assertion of jus tertii would serve no functional purpose. 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 the court.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Governments > Legislation > Overbreadth
Governments > Legislation > Vagueness
[HN6]Vagueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that enables ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
Governments > Legislation > Overbreadth
[HN7]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.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Governments > Legislation > Overbreadth
[HN8]The purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Governments > Legislation > Overbreadth
Governments > Legislation > Vagueness
[HN9]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.

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness
Governments > Legislation > Overbreadth
[HN10]A legislature is required to establish minimal guidelines to govern law enforcement.

Governments > Legislation > Interpretation
[HN11]The court has no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. 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.

DECISION:

Chicago ordinance that prohibited loitering together in any public place by two or more people, of whom at least one was criminal street gang member, held to be impermissibly vague, in violation of Fourteenth Amendment's due process clause.

SUMMARY:

The city of Chicago enacted a "gang congregation" ordinance that prohibited loitering together in any public place by two or more people, of whom at least one was a "criminal street gang member." The ordinance created a criminal offense that was punishable by a fine of up to 500, imprisonment for not more than 6 months, and a requirement to perform up to 120 hours of community service. Under the ordinance, which defined "loitering" as remaining in any one place with no apparent purpose, (1) a police officer who observed a person whom the officer reasonably believed to be a criminal street gang member loitering in a public place with one or more persons was required to order all of the persons to disperse, and (2) any person, regardless of whether the person was a gang member, who disobeyed such a dispersal order was guilty of violating the ordinance. The Chicago Police Department promulgated guidelines that purported to prevent arbitrary or discriminatory enforcement of the ordinance by confining arrest authority to designated officers, establishing detailed criteria for defining street gangs and membership in such gangs, and providing for designated but publicly undisclosed enforcement areas. After 2 trial judges upheld the federal constitutionality of the ordinance but 11 others held that it was invalid, the Illinois Appellate Court, in affirming the judgments in the cases in which the ordinance was held invalid and reversing the convictions in the other cases, determined that the ordinance violated the Federal Constitution and the state constitution. The Illinois Supreme Court, in affirming the Appellate Court judgment, expressed the view that the ordinance violated due process of law, in that the ordinance was impermissibly vague on its face and was an arbitrary restriction on personal liberties (177 Ill 2d 440, 687 NE 2d 53).

On certiorari, the United States Supreme Court affirmed. In those portions of an opinion by Stevens, J., which constituted the opinion of the court and were joined by O'Connor, Kennedy, Souter, Ginsburg and Breyer, JJ., it was held that the ordinance was impermissibly vague, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, because the broad sweep of the ordinance violated the requirement that a legislature establish minimal guidelines to govern law enforcement, where (1) the ordinance's mandatory language directed the police to issue a dispersal order without making any inquiry about the possible purposes of persons who stood or sat in the company of a gang member, (2) the ordinance required no harmful purpose and applied to nongang members as well as suspected gang members, (3) the most harmful gang loitering was motivated by an apparent purpose, and (4) the police guidelines did not sufficiently limit the discretion granted to the police in enforcing the ordinance. Also, Stevens, J., joined by Souter and Ginsburg, JJ., expressed the view that (1) the freedom to loiter for innocent purposes is part of the liberty protected by the due process clause, (2) the ordinance was vague in the sense that it specified no standard of conduct, and (3) the ordinance afforded too little notice to citizens who wished to use the public streets.

O'Connor, J., joined by Breyer, J., concurring in part and concurring in the judgment, expressed the view that the ordinance was unconstitutionally vague, because it lacked sufficient minimal standards to guide law enforcement officers.

Kennedy, J., concurring in part and concurring in the judgment, expressed the view that the fact that a citizen had to disobey an order to disperse before being guilty of violating the ordinance was not sufficient to eliminate doubts regarding the adequacy of notice under the ordinance.

Breyer, J., concurring in part and concurring in the judgment, expressed the view that the ordinance was unconstitutional, because it allowed a police officer too much discretion in every case, there being no way to distinguish in the ordinance's terms between one application of discretion and another.

Scalia, J., dissenting, expressed the view that (1) the minor limitation upon the free state of nature that the ordinance imposed was a small price to pay for liberation of the streets of a city which had been afflicted with criminal street gangs, and (2) the court invalidated a perfectly reasonable measure by (a) ignoring rules govern-

ing facial challenges, (b) elevating loitering to a constitutionally guaranteed right, and (c) discerning vagueness where, according to the court's usual standards, none existed.

Thomas, J., joined by Rehnquist, Ch. J., and Scalia, J., dissenting, expressed the view that (1) the ordinance (a) was not vague in all of it applications, and (b) did not violate the due process clause; and (2) there is no fundamental right to loiter, as loitering has been consistently criminalized throughout the nation's history.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

MUNICIPAL CORPORATIONS §37.7

-- gang congregation ordinance -- vagueness

Headnote:[1A][1B][1C][1D][1E][1F]

A city "gang congregation" ordinance that prohibits loitering together in any public place by two or more people, of whom at least one is a "criminal street gang member"--where (1) the ordinance (a) defines "loitering" as remaining in any one place with no apparent purpose, (b) provides that a police officer who observes a person whom the officer reasonably believes to be a criminal street gang member loitering in a public place with one or more persons shall order all of the persons to disperse, and (c) makes guilty of a crime any person, regardless of whether the person is a gang member, who disobeys such a dispersal order; and (2) the city police department has promulgated guidelines that purport to prevent arbitrary or discriminatory enforcement of the ordinance by (a) confining arrest authority to designated officers, (b) establishing detailed criteria for defining criminal street gangs and membership in such gangs, and (c) providing for designated but publicly undisclosed enforcement areas--is impermissibly vague, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, because the broad sweep of the ordinance violates the requirement that a legislature establish minimal guidelines to govern law enforcement, as (1) the ordinance's mandatory language directs the police to issue a dispersal order without making any inquiry about the possible purposes of persons who stand or sit in the company of gang members; (2) the fact that the ordinance does not apply to people who are moving does not address the question of how much discretion the police enjoy in deciding which stationary persons to disperse; (3) the fact that the ordinance does not permit an arrest until a dispersal order has been disobeyed provides no guidance to an officer deciding whether to issue such an order; (4) the ordinance requires no harmful purpose and applies to nongang members as well as suspected gang members; (5) the most harmful gang loitering is motivated by an apparent purpose either to publicize the gang's dominance of certain territory or to conceal ongoing commerce in illegal drugs; and (6) as to the police guidelines limiting enforcement of the ordinance to publicly undisclosed designated areas, (a) the guidelines will not provide a defense to a loiterer who might be arrested elsewhere, and (b) a person who knowingly loiters with a well-known gang member anywhere in the city cannot safely assume that they will not be ordered to disperse, no matter how innocent and harmless their loitering might be. (Scalia and Thomas, JJ., and Rehnquist, Ch. J., dissented from this holding.)

[***LEdHN2]

COURTS §805

-- construction of state statute

Headnote:[2]

The 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.

[***LEdHN3]

COURTS §92.3

-- power -- construction of statute

Headnote:[3]

The power of a court to determine the meaning of a statute carries with it the power to describe its extent and limitations as well as the method by which they shall be determined.

[***LEdHN4]

COURTS §817

-- gang congregation ordinance -- construction

Headnote:[4]

For purposes of determining whether a city "gang congregation" ordinance that prohibits loitering--which the ordinance defines as remaining in any one place with no apparent purpose--together in any public place by two or more people, of whom at least one is a "criminal street gang member is vague, in violation of the due process clause of the Federal Constitution's Fourteenth Amendment, the United States Supreme Court must assume that the ordinance means what it says and that it has no application to people whose purpose is apparent, where the highest court for the state in which the city is located has not placed any limiting construction on the language of the ordinance.

SYLLABUS

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 eleven 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, 687 N.E.2d 53, 227 Ill. Dec. 130, 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, 75 L. Ed. 2d 903, 103 S. Ct. 1855. 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 to determine what activities constitute loitering. See id. at 359. 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, 49 L. Ed. 546, 25 S. Ct. 289. 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 -- 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. Pp. 16-20, 39 L. Ed. 2d 605, 94 S. Ct. 1242.

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. The freedom to loiter for innocent purposes is part of such "liberty." See, *e.g., Kent* v. *Dulles*, 357 U.S. 116, 126, 2 L. Ed. 2d 1204, 78 S. Ct. 1113. 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, 71 L. Ed. 2d 362, 102 S. Ct. 1186. It is a criminal law that contains no *mens rea* requirement, see *Colautti* v. *Franklin*, 439 U.S. 379, 395, 58 L. Ed. 2d 596, 99 S. Ct. 675, and infringes on constitutionally protected rights, see id. at 391. Pp. 7-12.

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, 29 L. Ed. 2d 214, 91 S. Ct. 1686. 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, 83 L. Ed. 888, 59 S. Ct. 618. 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. 12-16.

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 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, 75 L. Ed. 2d 903, 103 S. Ct. 1855. The Illinois Supreme Court misapplied this Court's precedents, particularly Papachristou v. Jacksonville, 405 U.S. 156, 31 L. Ed. 2d 110, 92 S. Ct. 839, to the extent it read them as *requiring* it to hold the ordinance vague in all of its applications. Pp. 1-5.

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. Pp. 1-2.

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 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, 83 L. Ed. 888, 59 S. Ct. 618. 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. Pp. 1-5, 29 L. Ed. 2d 214, 91 S. Ct. 1686.

COUNSEL: Lawrence Rosenthal argued the cause for petitioner.

Harvey Grossman argued the cause for respondents.

JUDGES: 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. KENNEDY, J., and BREYER, J., filed opinions concurring in part and concurring in the judgment. SCALIA, J., filed a dissenting opinion. THOMAS, J., filed a dissenting opinion, in which REHNQUIST, C. J., and SCALIA, J., joined.

OPINION BY: STEVENS

OPINION

[*45] [**1854] [***73] 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.

[***74] [***LEdHR1A] [1A]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 oth-

er 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. [1]

1 The findings are quoted in full in the opinion of the Supreme Court of Illinois. 177 Ill. 2d 440, 445, 687 N.E.2d 53, 58, 227 Ill. Dec. 130 (1997). Some of the evidence supporting these findings is quoted in JUSTICE THOMAS' dissenting opinion. *Post*, at 3-4.

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, 687 N.E.2d 53, 58, 227 Ill. Dec. 130 (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 . . . members 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 "aggressive 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 member." Second, the persons must be "loitering," which the ordinance defines as "remaining 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.* [2]

2 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.

[*48] [**1855] Two months after the ordinance [***75] was adopted, the Chicago Police Department promulgated General Order 92-4 to provide

guidelines to govern its enforcement. [3] 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, [4] 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-69a. The city, however, does not release the locations of these "designated areas" to the public. [5]

3 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 445, 687 N.E.2d at 58-59.

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

5 Tr. of Oral Arg. 22-23.

II

During the three years of its enforcement, [6] the police issued over 89,000 dispersal orders and arrested over 42,000 people for violating the [***76] ordinance. [7] In the ensuing enforcement proceedings, two trial judges upheld the constitutionality of the ordinance, but eleven others ruled that it was invalid. [8] 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." [9]

6 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, 660 N.E.2d 34, 213 Ill. Dec. 777 (1995). Tr. of Oral Arg. 43.

7 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").

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

9 *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. 1, § 5, of the Illinois Constitution. Id. at 59a.

[**1856] The Illinois Appellate Court affirmed the trial court's ruling in the *Youkhana* case, [10] consolidated and affirmed other pending appeals in accordance with *Youkhana*, [11] and reversed the convictions of respondents Gutierrez, Morales, and others. [12] The Appellate Court was persuaded that the ordinance impaired the freedom of assembly of non-gang members in violation of the First Amendment to the Federal Constitution and Article I of the Illinois Consti- tution, that it was unconstitutionally vague, that it improperly criminalized status rather than conduct, and that it jeopardized rights guaranteed under the Fourth Amendment. [13]

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

11 *Chicago* v. *Ramsey*, Nos. 1-93-4125 et al. (Ill. App., Dec. 29, 1995), reprinted in App. to Pet. for Cert. 39a.

12 *Chicago* v. *Morales,* Nos. 1-93-4039 et al. (Ill. App., Dec 29, 1995), reprinted in App. to Pet. for Cert. 37a.

13 *Chicago* v. *Youkhana,* 277 Ill. App. 3d at 106, 660 N.E.2d at 38; id. at 112, 660 N.E.2d at 41; id. at 113, 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, 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] [***77] to cause harm. [14] "Moreover, the definition of 'loiter' provided by the ordinance does not assist in clearly articulating the proscriptions of the ordinance." 177 Ill. 2d at 451-452, 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." [15]

14 "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 job, 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, 687 N.E.2d at 60-61.

15 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, 687 N.E.2d at 64.

[***LEdHR1B] [1B]We granted certiorari, 523 U.S. (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." [16] 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, [17] 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.

16 Brief for Petitioner 14.

17 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 (Transcript of Proceedings, Chicago City Council Committee on Police and Fire, May 18, 1992).

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. [18] First, [HN1]the overbreadth doctrine permits the facial invalidation of laws that inhibit the exercise [***78] 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, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (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, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983).

18 Brief for Petitioner 17.

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, 82 L. Ed. 2d 221, 104 S. Ct. 3065 (1984); *Gregory* v. *Chicago*, 394 U.S. 111, 22 L. Ed. 2d 134, 89 S. Ct. 946 (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, 104 L. Ed. 2d 18, 109 S. Ct. 1591 (1989).

On the other hand, as the United States recognizes, [HN2]the freedom to loiter for innocent purposes is part of the "liberty" protected by the Due Process Clause of the Fourteenth Amendment. [19] 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, 45 L. Ed. 186, 21 S. Ct. 128 (1900); see also *Papachristou* v. *Jacksonville*, 405 U.S. 156, 164, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972). [20] [*54] Indeed, it is apparent [**1858] that an individual's [***79] 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, 2 L. Ed. 2d 1204, 78 S. Ct. 1113 (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). [21]

19 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 12-15, and JUSTICE THOMAS, *post*, at 5-9, 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*.

20 *Petitioner cites historical precedent against recognizing what it describes as the "fundamental right to loiter." Brief for Petitioner 12.* [HN3]*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 Fordham 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. 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, 9 L. Ed. 2d 799, 83 S. Ct. 792 (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 5-9, 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.

21 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 1. 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.

[*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, 12 L. Ed. 2d 992, 84 S. Ct. 1659 (1964) (right to travel); *Planned Parenthood of Central Mo.* v. *Danforth*, 428 U.S. 52, 82-83, 49 L. Ed. 2d 788, 96 S. Ct. 2831 (1976) (abortion); *Kolender* v. *Lawson*, 461 U.S. at 358-360, nn. 3, 9. 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, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982). It is a criminal law that contains no *mens rea* requirement, see *Colautti* v. *Franklin*, 439 U.S. 379, 395, 58 L. Ed. 2d 596, 99 S. Ct. 675 (1979), and infringes on constitutionally protected rights, see id. at 391. [HN4]When vagueness permeates the text of such a law, it is subject to facial attack. [22]

22 The burden of the first portion of JUSTICE SCALIA's dissent is virtually a facial challenge to the facial challenge doctrine. See *post*, at 2-11. 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 7; *United States* v. *Salerno*, 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (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, 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. [HN5]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, 81 L. Ed. 2d 786, 104 S. Ct. 2839 (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, 77 L. Ed. 2d 605, 103 S. Ct. 2979 (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, 104 L. Ed. 2d 696, 109 S. Ct. 2037 (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).

[*56] [**1859] [HN6]

Vagueness may invalidate a criminal law for either of two independent [***80] 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. Accordingly, we first consider whether the ordinance provides fair notice to the citizen and then discuss its potential for arbitrary enforcement.

IV

"[HN7]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, 15 L. Ed. 2d 447, 86 S. Ct. 518 (1966). The Illinois Supreme Court recognized that the term "loiter" may have a common and accepted meaning, 177 Ill. 2d at 451, 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? [23]

23 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. "The 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 [***81] 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. [24] 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. [25] [**1860] However, state [*58] courts have uniformly invalidated laws that do not join the term "loitering" with a second specific element of the crime. [26]

24 177 Ill. 2d at 452, 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), reprinted in App. to Pet. for Cert. 45a.

25 See, *e.g.*, *Tacoma* v. *Luvene*, 118 Wn.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, 758 P.2d 1046, 1052, 250 Cal. Rptr. 515 (1988) (upholding ordinance criminalizing loitering for the purpose of engaging in or soliciting lewd act).

26 See, *e.g.*, *State* v. *Richard*, 108 Nev. 626, 629, 836 P.2d 622, 624, 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. "Whatever 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." [27] We find this response unpersuasive for at least two reasons.

27 Brief for Petitioner 31.

First, [HN8]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, 83 L. Ed. 888, 59 S. Ct. 618 (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. [28] 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 *Shuttlesworth* v. *Birmingham*, 382 U.S. 87, 90, 15 L. Ed. 2d 176, 86 S. Ct. [***82] 211 [*59] (1965). [29] 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. [30]

28 In this way, the ordinance differs from the statute upheld in *Colten* v. *Kentucky*, 407 U.S. 104, 110, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (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.*

29 *"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. 87 at 90.

30 *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, 10 L. Ed. 2d 349, 83 S. Ct. 1240 (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, 70 L. Ed. 322, 46 S. Ct. 126 (1926). We remarked in *Connally* that "both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles." Id. at 395.

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. [HN9]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, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971).

V

[***LEdHR1C] [1C]The broad sweep of the ordinance also violates "'the requirement that [HN10]a legislature establish minimal guidelines to govern law enforcement.'" *Kolender* v. *Lawson*, 461 U.S. at 358. 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 [***83] 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 359 (internal quotation marks omitted). As we discussed in the context of fair notice, [*61] see *supra*, at 12, 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."

[***LEdHR2] [2] [***LEdHR3] [3]As the Illinois Supreme Court interprets that definition, it "provides absolute discretion to police officers to determine what activities constitute loitering." 177 Ill. 2d at 457, 687 N.E.2d at 63. [HN11]We have no authority to construe the language of a state statute more narrowly than the construction given by that State's highest court. [31] "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, 49 L. Ed. 546, 25 S. Ct. 289 (1905).

31 This critical fact distinguishes this case from *Boos* v. *Barry*, 485 U.S. 312, 329-330, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (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.

[***LEdHR1D] [1D]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. [32] 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 [***84] its application depends on whether some purpose is "apparent" to the officer on the scene.

32 *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, [33] 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 non-gang members as well as suspected gang members. [34] 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.

33 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 11.

34 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.

[***LEdHR1E] [1E] [***LEdHR4] [4]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.

[***LEdHR1F] [1F]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, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (1974). That the police

[***85] 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." [35] 177 Ill. 2d at 459, 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, 96 L. Ed. 2d 398, 107 S. Ct. 2502 (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.

35 This conclusion makes it unnecessary to reach the question whether the Illinois Supreme Court correctly decided that ordinance is invalid as a deprivation of substantive due process. For this reason, JUSTICE THOMAS, see *post*, at 5, and JUSTICE SCALIA, see *post*, at 13, are mistaken when they asserts that our decision must be analyzed under the framework for substantive due process set out in *Washington* v. Glucksberg, 521 U.S. 702, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997).

Accordingly, the judgment of the Supreme Court of Illinois is

Affirmed.

CONCUR BY: O'CONNOR; KENNEDY; BREYER

CONCUR

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, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983). Of these, "the more important aspect of vagueness doctrine 'is . . . the requirement that a legislature establish minimal guidelines to govern law enforcement.'" Id. at 358 (quoting *Smith* v. *Goguen*, 415 U.S. 566, 574-575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (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." See *post*, at 12 (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 (quoting *Smith* v. *Goguen*, *supra*, at 575).

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 [***86] 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 "loiter," 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, 687 N.E.2d 53, 63, 227 Ill. Dec. 130 (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, 93 L. Ed. 1131, 69 S. Ct. 894 (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 "threatening the public peace" to issue a dispersal order. See *post*, at 11 (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 hun-

dreds 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 believe" 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 18-19. But, the Illinois Supreme Court did not construe the ordinance to be so limited. See 177 Ill. 2d at 453-454, 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 18 ("That 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 18-19 [***87] ("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 id. at 18, 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 *ante*, at 19. In addition, the ordinance here is unlike a law that "directly prohibits" 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 7 (quoting Brief for Petitioner 14). Indeed, as the plurality notes, the city of Chicago has several laws that do exactly this. See *ante*, at 7-8, 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 10 (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, 31 L. Ed. 2d 110, 92 S. Ct. 839 (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, 687 N.E.2d at 64. This Court has never [***88] 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*, 461 U.S. at 355-356, n. 4 (noting that the Court has held that "'for 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)); *New York* [*69] v. *Ferber*, 458 U.S. 747, 769, n. 24, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (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[,] such 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 JUSTICE STEVENS' opinion.

I also share many of the concerns he 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, 15 L. Ed. 2d 176, 86 S. Ct. 211 (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 2 (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) [***89] 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 non-gang 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 JUSTICE STEVENS, *ante* at 18, and JUSTICE O'CONNOR, *ANTE* at 2, 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 2 (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 could it 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, 83 L. Ed. 888, 59 S. Ct. 618 (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 10-11, 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, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (1974) ("One 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 [***90] unconstitutional, not because it provides insufficient notice, but because it does not provide "sufficient minimal standards to guide law enforcement officers." See *ante*, at 2 (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, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (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 "conducting 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 do 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 (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 4 (O'CONNOR, J., concurring in part and concurring in judgment). But *this* ordinance, as I have said, cannot be constitutionally applied to anyone.

DISSENT BY: SCALIA; THOMAS

DISSENT

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 [***91] 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*, 5 U.S. 137, 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 [***92] 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 entrusted 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. . . . When 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, 67 L. Ed. 1078, 43 S. Ct. 597 (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, 21-22, 4 L. Ed. 2d 524, 80 S. Ct. 519 (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 [***93] 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. 409 (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, 80 L. Ed. 688, 56 S. Ct. 466 (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, 73 L. Ed. 2d 1113, 102 S. Ct. 3348 (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. [1])

1 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, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (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, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (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, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (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 11, 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 (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) 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*, [***94] 481 U.S. 739, 745, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (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.) [2]

2 *Salerno*, a criminal case, repudiated the Court's statement in *Kolender* v. *Lawson*, 461 U.S. 352, 359, n. 8, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (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). As *Salerno* noted, 481 U.S. at 745, 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, 37 L. Ed. 2d 830, 93 S. Ct. 2908 (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, 80 L. Ed. 2d 772, 104 S.

Ct. 2118 (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, 81 L. Ed. 2d 207, 104 S. Ct. 2403 (1984); *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-495, 497, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982); *United States* v. *National Dairy Products Corp.*, 372 U.S. 29, 31-32, 9 L. Ed. 2d 561, 83 S. Ct. 594 (1963); *Raines, supra,* at 21. 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, 131 L. Ed. 2d 178, 115 S. Ct. 1291 (1995) (unanimous Court); *Babbitt* v. *Sweet Home Chapter of Communities for Great Oregon*, 515 U.S. 687, 699, 132 L. Ed. 2d 597, 115 S. Ct. 2407 (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, 123 L. Ed. 2d 1, 113 S. Ct. 1439 (1993); *Rust* v. *Sullivan*, [*80] 500 U.S. 173, 183, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991); *Ohio* v. *Akron Center for Reproductive Health*, 497 U.S. 502, 514, 111 L. Ed. 2d 405, 110 S. Ct. 2972 (1990) (opinion of KENNEDY, J.); *Webster* v. *Reproductive Health Servs.*, [***95] 492 U.S. 490, 523-524, 106 L. Ed. 2d 410, 109 S. Ct. 3040 (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, 101 L. Ed. 2d 1, 108 S. Ct. 2225 (1988). [3] 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. [4]

3 The plurality asserts that the *Salerno* standard for facial challenge "has never been the decisive factor in any decision of this Court." 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 11, n. 22. This is quite wrong. Disagreement over the *Salerno* rule is not a disagreement over the "standing" question of 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.

4 See, *e.g.*, *Abdullah* v. *Commissioner of Ins. of Commonwealth of Mass.*, 84 F.3d 18, 20 (CA1 1996); *Deshawn E.* v. *Safir*, 156 F.3d 340, 347 (CA2 1998); *Artway* v. *Attorney Gen. of State of N. J.*, 81 F.3d 1235, 1252, n. 13 (CA3 1996); *Manning* v. *Hunt*, 119 F.3d 254, 268-269 (CA4 1997); *Causeway Medical Suite* v. *Ieyoub*, 109 F.3d 1096, 1104 (CA5), cert. denied, 522 U.S. 943, 139 L. Ed. 2d 278, 118 S. Ct. 357 (1997); *Aronson* v. *City of Akron*, 116 F.3d 804, 809 (CA6 1997); *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F.2d 1267, 1283 (CA7 1992), cert. denied, 506 U.S. 1053, 122 L. Ed. 2d 131, 113 S. Ct. 977 (1993); *Woodis* v. *Westark Community College*, 160 F.3d 435, 438-439 (CA8 1998); *Roulette* v. *Seattle*, 97 F.3d 300, 306 (CA9 1996); *Public Lands Council* v. *Babbitt*, 167 F.3d 1287, 1293 (CA10 1999); *Dimmitt* v. *Clearwater*, 985 F.2d 1565, 1570-1571 (CA11 1993); *Time Warner Entertainment Co.* v. *FCC*, 320 U.S. App. D.C. 294, 93 F.3d 957, 972 (CADC 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, 134 L. Ed. 2d 855, 116 S. Ct. 1620 (1996) (SCALIA, J., dissenting) (homosexual rights); *Planned Parenthood of Southeastern Pa.* v. *Casey*,

[***H] R1B 505 U.S. 833, 895, 120 L. Ed. 2d 674, 112 S. Ct. 2791 (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 *a 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 the respondents, who are challenging the Ordinance, to show that it is invalid in all its applications, they have required the petitioner to show that it is valid in all its applications. Both the plurality [***96] 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 the petitioner, who can defeat the respondents' facial challenge by conjuring up *a single valid application* of the law. My contribution would go something like this [5] : 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.

> 5 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 [***97] 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 11 (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, 124 L. Ed. 2d 211, 113 S. Ct. 2096 (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 5-9. 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, [***98] *post*, at 5-9, 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 10, 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, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (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 "our Nation's history, legal traditions, and practices." See also *Collins* v. *Harker Heights*, 503 U.S. 115, 125-126, 117 L. Ed. 2d 261, 112 S. Ct. 1061 (1992); *Michael H.* v. *Gerald D.*, 491 U.S. 110, 122-123, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (1989); *Moore* v. *East Cleveland*, 431 U.S. 494, 502-503, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (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, [6] and the (transparently erroneous) assertion that the City of Chicago appears to have conceded the [*86] point. [7] It is enough for the members of the plurality that "history . . . [fails to] persuade 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 10, n. 20 (emphasis added); they apparently think it quite unnecessary for anything to persuade them that it *is*. [8]

6 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 9-10, 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.

7 *Ante*, at 9, 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. 14. 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: "As 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.

8 The plurality says, *ante*, at 20, 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 li-

berty 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, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (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 14.

It would be unfair, however, to criticize the plurality's failed attempt [***99] 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 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 "telling a pedestrian not to enter a building" when the reason is "to avoid impeding a rescue team." *Ante*, at 1. [*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 follow-up explanatory sentence, showing how this principle invalidates the present ordinance, applies equally to the rescue-team example [***100] 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 2, 6, 9-13, 14-15, 16-18 (plurality and majority opinions); *ante*, at 2-3, 4 (O'CONNOR, J., concurring in part and concurring in judgment); *ante*, at 1-2 (KENNEDY, J., concurring in part and concurring in judgment); *ante*, at 3-4 (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 3 (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 [***101] 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, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (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, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (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 14, 15, 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 15, scarcely requires a response. [9] 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, 99 L. Ed. 2d 333, 108 S. Ct. 1157 (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, [***102] 13 L. Ed. 2d 471, 85 S. Ct. 453 (1965) (rejecting vagueness challenge to the dispersal-order prong of a breach-of-the-peace statute and describing that prong as "narrow and specific").

9 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 15, 16. 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 16 (majority opinion); *ante*, at 2 (O'CONNOR, J., concurring in part and concurring in judgment); *ante*, at 3 (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, 687 N.E.2d 53, 63, 227 Ill. Dec. 130 (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 17, 19 [*92] (majority opinion); *ante*, at 4-5 (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 believe" 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. [10] 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.

> 10 "Administrative interpretation and implementation of a regulation are . . . highly relevant to our [vagueness] analysis, for 'in 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, 105 L. Ed. 2d 661, 109 S. Ct. 2746 (1989) (emphasis added) (quoting *Hoffman Estates*, 455 U.S. at 494, n. 5). See also *Hoffman Estates*, 455 U.S. at 504 (administrative regulations "will often suffice to clarify a standard with an otherwise uncertain scope").

Second, the Ordinance requires that the group be "remaining in 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 2, is a distortion. [***103] The Ordinance does not apply to "standing," but to "remaining" -- 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 "remaining 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 the respondents' arrests described *supra*, at 12.

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. "Any 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 2. 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. [11]

> 11 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 1-2. 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 18. 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:

"By its very terms, the ordinance encompasses a great deal of harmless behavior. 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 [***104] them to disperse." *Ante*, at 16.

Quite so. And the fact that this clear instruction to the officers "encompasses a great deal of harmless behavior" would be invalidating if that harmless behavior 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 trade-off is worth it.

The Court also asserts -- in apparent contradiction to the passage just quoted -- that the "apparent purpose" test is too elastic because it presumably allows police officers to treat *de minimis* "violations" as not warranting enforcement. [12] See *ante*, at 18-19. But such discretion -- and, for that matter, the potential for ultra vires action -- is no different with regard to the enforcement of this clear ordinance than it is with regard to the enforcement of all laws in our criminal-justice system. Police officers (and prosecutors, see *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364, 54 L. Ed. 2d 604, 98 S. Ct. 663 (1978)), have broad discretion over what laws to enforce and when. As we said in *Whren* v. *United States*, 517 U.S. 806, 818, 135 L. Ed. 2d 89, 116 S. Ct. 1769 (1996), "we are aware of no principle that would allow us to decide at what point a code of law becomes so expansive and so commonly violated that infraction itself can no longer be the ordinary measure of the lawfulness of enforcement."

12 The Court also 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 18. 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 19. 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.

[*95] [**1878] 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 3, citing *Parker* v. *Levy*, 417 U.S. 733, 41 L. Ed. 2d 439, 94 S. Ct. 2547 (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 2. 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 [***105] the policeman enjoys too much discretion in *every* case," *ibid.* This is simply contrary to our case-law, including *Parker* v. *Levy*, *supra*. [13]

13 The opinion that JUSTICE BREYER relies on, *Coates* v. *Cincinnati*, 402 U.S. 611, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (1971), discussed *ante*, at 3-4, 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 8-9 (plurality opinion); *ante*, at 3 (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 7-8, n. 17. The problem, of course, well recognized by Chicago's City Council, is that the gang members cease their intimidating and unlawful behavior un-

der 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 3-4, 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 prohibits 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 7-8, 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 3 (the Court agrees that this might be a cure, see *ante*, at 18-19). 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 "remaining in one place with no apparent purpose" is so vague as to give the police unbridled discretion in controlling the conduct of non-gang-members, it surpasses understanding how it ceases to be so vague when applied to gang members *alone*. [***106] 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 2-3 (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 FDA. 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. "Any fool would know that a particular category of conduct would be within [its] reach." *Kolender* v. *Lawson*, 461 U.S. 352, 370, 75 L. Ed. 2d 903, 103 S. Ct. 1855 (1983) (White, J., dissenting). Nor does it violate the Due Process Clause. The asserted "freedom to loiter for innocent purposes," *ante*, at 9, is in no way "'deeply rooted in this Nation's history and tradition,'" *Washington* v. *Glucksberg*, 521 U.S. 702, 721, 138 L. Ed. 2d 772, 117 S. Ct. 2258 (1997) (citation omitted). I dissent.

I

The human costs exacted by criminal street gangs are inestimable. In many of our Nation's cities, gangs [***107] have "virtually [*99] overtaken 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. [1] 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").

1 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:

[***108] "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, 1997) (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 . . . . you 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-61a. It further found that the mere presence of gang members "intimidates 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 9, and because it is vague on its face, *ante*, at 11. A majority of the Court endorses the latter conclusion. I respectfully disagree.

A

We recently reconfirmed that "our 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 (quoting *Moore* v. *East Cleveland*, 431 U.S. 494, 503, 52 L. Ed. 2d 531, 97 S. Ct. 1932 (1977) (plurality [***109] 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.

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 9. Yet it acknowledges -- as it must -- that "antiloitering ordinances have long existed in this country." *Ante*, at 9, n. 20; see also 177 Ill. 2d 440, 450, 687 N.E.2d 53, 60, 227 Ill. Dec. 130 (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 "persuade 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 10, [*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 disobey 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, 31 L. Ed. 2d 110, 92 S. Ct. 839 (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. [2] Vagrancy laws [*104] were common in the decades preceding the ratification of the [***110] Fourteenth Amendment, [3] and remained on the books long after. [4]

2 See, *e.g.*, Act for the Restraint of idle and disorderly Persons (1784) (reprinted in 2 The First Laws of the State of North Carolina 508-509 (J. Cushing comp. 1984)); Act for restraining, correcting, supressing and punishing Rogues, Vagabonds, common Beggars, and other lewd, idle, dissolute, profane and disorderly Persons; and for setting them to work (reprinted in The 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 The 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 The 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 The 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 The 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 The 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).

3 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 Peters 102, 148 (1837); Smith v. Turner, 48 U.S. 283, 12 L. Ed. 702, 7 How. 283, 425 (1849) (opinion of Wayne, J.); *Prigg* v. *Pennsylvania*, 16 Peters 539, 625 (1842).

4 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 9-10. 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. [5] [**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 [***111] 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 *Papachristou, supra,* 405 U.S. at 162-163. 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 "the Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution . . . . [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 (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.*

5 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, 45 L. Ed. 186, 21 S. Ct. 128 (1900); *Kent* v. *Dulles,* 357 U.S. 116, 2 L. Ed. 2d 1204, 78 S. Ct. 1113 (1958). The plurality claims that dicta in those cases articulating a right of free movement, see *Williams, supra,* at 274; *Kent, supra,* at 125, 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, 105 L. Ed. 2d 91, 109 S. Ct. 2333 (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. [6]

6 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. Ann. ch. 65, § 5 11-1-2(a) (Supp. 1998) ("Police officers in municipalities shall be conservators of the peace"); La. Rev. Stat. Ann. § 40:1379 ("(West) Police employees . . . shall . . . keep the peace and good order"); Mo. Rev. Stat. § 85.561 (1998) ("Members 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 Art. V, ch. 2, § 5.5-200 ("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"); Texas 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 [***112] 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. [7] Even the ABA Standards for [*109] Criminal Justice recognize that "in 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 [***113] 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). [8]

7 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. Ann. § 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. Ann. § 711-1102 (Michie 1994); Idaho Code § 18-6410 (1997); Ill. Comp. Stat. Ann., ch. 720 § 5/25-1(e) (West 1993); Ky. Rev. Stat. Ann. §§ 525.060, 525.160 (Baldwin 1990); Me. Rev. Stat. Ann., Tit. 17A, § 502 (1983 Mass. Ann., Laws, ch. 269, § 2 (1992); Mich. Comp. Laws § 750.523 (1991); Minn. Stat. Ann. § 609.715 (West 1987); Miss. Code Ann. § 97-35-7(1) (1994); Mo. Ann. Stat. § 574.060 (Vernon 1995); Mont. Code Ann. § 45-8-102 (1997); Nev. Rev. Stat. Ann. § 203.020 (Michie 1997); 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) (Baldwin 1997); Okla. Stat. Ann. Tit. 21, § 1316 (West 1983); Ore. Rev. Stat. § 166.025(1)(e) (1997); 18 Pa. Cons. Stat. Ann. § 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) (Vernon 1994); Utah Code Ann. § 76-9-104 (1995) V. I. Code Ann. Tit. 5, § 4022 (1997); Vt. Stat. Ann., Tit. 13, § 901 (1998); Va. Code Ann. § 18.2-407 (Michie 1996); Wash. Rev. Code Ann. § 9A.84.020 (West 1988); W. Va. Code § 61-6-1 (1997); Wis. Stat. Ann. § 947.06(3) (West 1982).

8 See also Ind. Code Ann. § 36-8-3-10(a) (1997) ("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. Ann., Tit. 19, § 516 (1988) ("It shall be the duty of the sheriff . . . to keep and preserve the peace of the their respective counties, and to quiet and suppress all affrays, riots and unlawful assemblies and insurrections . . . ").

[**1885] In order to perform their peace-keeping 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, 134 L. Ed. 2d 911, 116 S. Ct. 1657 (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 . . . . Our 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 15, 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 JUSTICE STEVENS 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 18-19. See also *ante*, at 4 (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 [***114] 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, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982) (footnote omitted), the alternative proposal does not incorporate a scienter requirement. If the statute'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, 95 L. Ed. 2d 697, 107 S. Ct. 2095 (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 16, is similarly untenable. There is nothing "vague" about an order to disperse. [9] While "we can never expect mathematical certainty from our language," *Grayned* v. *City of Rockford*, 408 U.S. 104, 110, 33 L. Ed. 2d 222, 92 S. Ct. 2294 (1972), it is safe to assume that [***115] 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.

9 The plurality suggests, *ante*, at 15, 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, 32 L. Ed. 2d 584, 92 S. Ct. 1953 (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, 29 L. Ed. 2d 214, 91 S. Ct. 1686 (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 (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.'" *Morales*, 177 Ill. 2d at 451, 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 11, 13, 16-17. As already explained, *supra,* at 5-9, 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, supra,* at 499, 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. [10]

10 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 employer 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 The First Laws of the State of Georgia, Part 1, 376-377 (J. Cushing comp. 1981)). See also, *e.g.*, Digest of the Laws of Pennsylvania 829 (F. Brightly ed., 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, 687 N.E.2d at 58 -- fails to provide [***116] adequate notice. [11] "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 12-13. 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 "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 [loitering] and that would be covered by the statute." See *Smith* v. *Goguen*, 415 U.S. 566, 584, 39 L. Ed. 2d 605, 94 S. Ct. 1242 (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*, 455 U.S. at 497. The answer is unquestionably no.

11 The Court asserts that we cannot second-guess the Illinois Supreme Court's conclusion that the definition "'provides absolute discretion to police officers to determine what activities constitute loitering,'" *ante,* at 17 (quoting 177 Ill. 2d 440, 457, 687 N.E.2d 53, 63, 227 Ill. Dec. 130 (1997). 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, 124 L. Ed. 2d 436, 113 S. Ct. 2194 (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." Tr. 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 10, elevates above all else -- the "freedom of movement." And that is a shame. I respectfully dissent.

REFERENCES

21 Am Jur 2d, Criminal Law 17; 56 Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions 367, 368; 77 Am Jur 2d, Vagrancy and Related Offenses 3, 7

USCS, Constitution, Amendment 14

L Ed Digest, Municipal Corporations 37.7

L Ed Index, Certainty and Definiteness; Due Process; Vagrancy

Annotation References:

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine. 75 L Ed 2d 1049.

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime-- Supreme Court cases. 96 L Ed 374, 16 L Ed 2d 1231.

Validity of loitering statutes and ordinances. 25 ALR 3d 836.

LEXSEE 402 U.S. 611, 614

COATES ET AL. v. CITY OF CINCINNATI

No. 117

SUPREME COURT OF THE UNITED STATES

402 U.S. 611*; *91 S. Ct. 1686*; *29 L. Ed. 2d 214*; *1971 U.S. LEXIS 38*; *58 Ohio Op. 2d 481

January 11, 1971, Argued
June 1, 1971, Decided

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF OHIO.

DISPOSITION: *21 Ohio St. 2d 66, 255 N. E. 2d 247*, reversed.

SUMMARY:

A student demonstrator and four labor pickets were convicted in the Hamilton County Municipal Court, Ohio, of violating a Cincinnati ordinance making it a criminal offense for three or more persons to assemble on a sidewalk "and there conduct themselves in a manner annoying to persons passing by." The Hamilton County Court of Appeals affirmed, and the Supreme Court of Ohio affirmed (*21 Ohio St 2d 66, 50 Ohio Ops 2d 161, 255 NE2d 247*).

On appeal, the United States Supreme Court reversed. In an opinion by Stewart, J., expressing the view of five members of the court, it was held that the ordinance was unconstitutional on its face as violating both the due process standard of vagueness and the right of free assembly and association.

Black, J., filed a separate opinion stating that he would vacate the judgment and remand the case so that the record could be supplemented to show the conduct actually punished.

White, J., joined by Burger, Ch. J., and Blackmun, J., dissented on the ground that the ordinance was not unconstitutionally vague on its face, and in the state of the record, the court could not judge the ordinance as applied.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

LAW §940

STATUTES §18

loitering ordinance --

Headnote:[1]

A city ordinance making it a criminal offense for three or more persons to assemble on any of the sidewalks, street corners, vacant lots, or mouths of alleys of the city, "and there conduct themselves in a manner annoying to persons passing by," is unconstitutional on its face for vagueness in subjecting the exercise of the right of assembly to an unascertainable standard and for overbreadth in authorizing the punishment of constitutionally protected conduct.

[***LEdHN2]

STATUTES §18

vagueness --

Headnote:[2]

A city criminal ordinance which is vague, not in the sense that it requires a person to conform his conduct to an imprecise though comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all, is unconstitutional on its face, because men of common intelligence must necessarily guess at its meaning.

[***LEdHN3]

STATUTES §17

antiannoyance ordinance --

Headnote:[3]

Through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited, a city is free to prevent people from blocking sidewalks, obstructing traffic, littering streets, committing assaults, or engaging in countless other forms of antisocial conduct, but 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.

[***LEdHN4]

LAW §940

freedom of assembly --

Headnote:[4]

Mere public intolerance or animosity cannot be the basis for abridgment of the constitutional right of free assembly and association; the *First* and *Fourteenth Amendments* do not permit a state to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people.

SYLLABUS

Cincinnati, Ohio, ordinance making it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ," which has not been narrowed by any construction of the Ohio Supreme Court, *held* violative on its face of the due process standard of vagueness and the constitutional right of free assembly and association. Pp. 614-616.

COUNSEL: Robert R. Lavercombe argued the cause and filed a brief for appellants.

A. David Nichols argued the cause for appellee. With him on the brief was William A. McClain.

JUDGES: Stewart, J., delivered the opinion of the Court, in which Douglas, Harlan, Brennan, and Marshall, JJ., joined. Black, J., filed a separate opinion, post, p. 616. White, J., filed a dissenting opinion, in which Burger, C. J., and Blackmun, J., joined, post, p. 617.

OPINION BY: STEWART; BLACK

OPINION

[*611] [***216] [**1687] MR. JUSTICE STEWART delivered the opinion of the Court.

A Cincinnati, Ohio, ordinance makes it a criminal offense for "three or more persons to assemble . . . on any of the sidewalks . . . and there conduct themselves in a manner annoying to persons passing by . . . ." [1] [*612] The issue before us is whether this ordinance is unconstitutional on its face.

1 "It shall be unlawful for three or more persons to assemble, except at a public meeting of citizens, on any of the sidewalks, street corners, vacant lots, or mouths of alleys, and there conduct themselves in a manner annoying to persons passing by, or occupants of adjacent buildings. Whoever violates any of the provisions of this section shall be fined not exceeding fifty dollars ($ 50.00), or be imprisoned not less than one (1) nor more than thirty (30) days or both." Section 901-L6, Code of Ordinances of the City of Cincinnati (1956).

The appellants were convicted of violating the ordinance, and the convictions were ultimately affirmed by a closely divided vote in the Supreme Court of Ohio, upholding the constitutional validity of the ordinance. *21 Ohio St. 2d 66, 255 N. E. 2d 247.* An appeal from that judgment was brought

here under *28 U. S. C. § 1257 (2)*, [2] and we noted probable jurisdiction, *398 U.S. 902*. The record brought before the reviewing courts tells us no more than that the appellant Coates was a student involved in a demonstration and the other appellants were pickets involved in a labor dispute. For throughout this litigation it has been the appellants' position that the ordinance on its face violates the *First* and *Fourteenth Amendments of the Constitution*. Cf. *Times Film Corp.* v. *Chicago, 365 U.S. 43*.

> 2 "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> . . . .
>
> "(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

In rejecting this claim and affirming the convictions the Ohio Supreme Court did not give the ordinance any construction at variance with the apparent plain import of its language. The court simply stated:

"The ordinance prohibits, *inter alia*, 'conduct . . . annoying to persons passing by.' The word 'annoying' is a widely used and well understood word; it is not necessary to guess its meaning. 'Annoying' is the present participle of the transitive verb 'annoy' which means to trouble, to vex, to impede, to incommode, to provoke, to harass or to irritate.

[*613] "We conclude, as did the Supreme Court of the United States in *Cameron v. Johnson, 390 U.S. 611, 616*, [***217] in which the issue of the vagueness of a statute was presented, that the ordinance 'clearly and precisely delineates its reach in words of common understanding. It is a "precise and narrowly drawn regulatory statute [ordinance] evincing a legislative judgment that certain specific conduct be . . . proscribed."'" *21 Ohio St. 2d, at 69, 255 N. E. 2d, at 249*.

[**1688] Beyond this, the only construction put upon the ordinance by the state court was its unexplained conclusion that "the standard of conduct which it specifies is not dependent upon each complainant's sensitivity." *Ibid.* But the court did not indicate upon whose sensitivity a violation does depend -- the sensitivity of the judge or jury, the sensitivity of the arresting officer, or the sensitivity of a hypothetical reasonable man. [3]

> 3 Cf. *Chaplinsky v. New Hampshire, 315 U.S. 568*, where this Court upheld a statute that punished "offensive, derisive or annoying" words. The state courts had construed the statute as applying only to such words "as have a direct tendency to cause acts of violence by the persons to whom, individually, the remark is addressed." The state court also said: "The word 'offensive' is not to be defined in terms of what a particular addressee thinks. . . . The test is what men of common intelligence would understand would be words likely to cause an average addressee to fight. . . . The English language has a number of words and expressions which by general consent are 'fighting words' when said without a disarming smile. . . . Such words, as ordinary men know, are likely to cause a fight. So are threatening, profane or obscene revilings. Derisive and annoying words can be taken as coming within the purview of the statute as heretofore interpreted only when they have this characteristic of plainly tending to excite the addressee to a breach of the peace." This Court was "unable to say that the limited scope of the statute as thus construed contravenes the Constitutional right of free expression." *315 U.S., at 573*.

[*614] [***LEdHR1] [1]We are thus relegated, at best, to the words of the ordinance itself. If three or more people meet together on a sidewalk or street corner, they must conduct themselves so as not to annoy any police officer or other person who should happen to pass by. In our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard, and unconstitutionally broad

because it authorizes the punishment of constitutionally protected conduct.

[***LEdHR2] [2]Conduct that annoys some people does not annoy others. Thus, the ordinance 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. As a result, "men of common intelligence must necessarily guess at its meaning." *Connally v. General Construction Co., 269 U.S. 385, 391.*

[***LEdHR3] [3]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 do so through the enactment and enforcement of ordinances directed with reasonable specificity toward the conduct to be prohibited. *Gregory v. Chicago, 394 U.S. 111, 118, 124-125* (BLACK, J., concurring). It cannot constitutionally do so [***218] through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a policeman is annoyed. [4]

> 4 In striking down a very similar ordinance of Cleveland, Ohio, as constitutionally invalid, the Court of Appeals for Cuyahoga County said:
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> "As it is written, the disorderly assembly ordinance could be used to incriminate nearly any group or individual. With little effort, one can imagine many . . . assemblages which, at various times, might annoy some persons in the city of Cleveland. Anyone could become an unwitting participant in a disorderly assembly, and suffer the penalty consequences. It has been left to the police and the courts to decide when and to what extent ordinance Section 13.1124 is applicable. Neither the police nor a citizen can hope to conduct himself in a lawful manner if an ordinance which is designed to regulate conduct does not lay down ascertainable rules and guidelines to govern its enforcement. This ordinance represents an unconstitutional exercise of the police power of the city of Cleveland, and is therefore void." *Cleveland v. Anderson, 13 Ohio App. 2d 83, 90, 234 N. E. 2d 304, 309-310.*

[*615] [***LEdHR4] [4]But [**1689] the vice of the ordinance lies not alone in its violation of the due process standard of vagueness. The ordinance also violates the constitutional right of free assembly and association. Our decisions establish that mere public intolerance or animosity cannot be the basis for abridgment of these constitutional freedoms. See *Street v. New York, 394 U.S. 576, 592*; *Cox v. Louisiana, 379 U.S. 536, 551-553*; *Edwards v. South Carolina, 372 U.S. 229, 238*; *Terminiello v. Chicago, 337 U.S. 1*; *Cantwell v. Connecticut, 310 U.S. 296, 311*; *Schneider v. State, 308 U.S. 147, 161.* The *First* and *Fourteenth Amendments* do not permit a State to make criminal the exercise of the right of assembly simply because its exercise may be "annoying" to some people. If this were not the rule, the right of the people to gather in public places for social or political purposes would be continually subject to summary suspension through the good-faith enforcement of a prohibition against annoying conduct. [5] [*616] And such a prohibition, in addition, contains an obvious invitation to discriminatory enforcement against those whose association together is "annoying" because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens. [6]

> 5 In striking down a very similar ordinance of Toledo, Ohio, as constitutionally invalid, the Municipal Court of that city said:
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> "Under the provisions of Sections 17-5-10 and 17-5-11, arrests and prosecutions, as in the present instance, would have been effective as against Edmund Pendleton, Peyton Randolph, Richard Henry Lee, George Wythe, Patrick Henry, Thomas Jefferson, George Washington and others for loitering and congregating in front of Raleigh Tavern on Duke of Gloucester Street in Williamsburg, Virginia, at any time during the summer of 1774 to the great annoyance of Governor Dunsmore and his colonial consta-

bles." *City of Toledo v. Sims, 14 Ohio Op. 2d 66, 69, 169 N. E. 2d 516, 520.*

6 The alleged discriminatory enforcement of this ordinance figured prominently in the background of the serious civil disturbances that took place in Cincinnati in June 1967. See Report of the National Advisory Commission on Civil Disorders 26-27 (1968).

The ordinance before us makes a crime out of what under the Constitution cannot be a crime. It is aimed directly at activity protected by the Constitution. We need not lament that we do not have before us the details of the conduct found to be annoying. It is the ordinance on its face that sets the standard [***219] of conduct and warns against transgression. The details of the offense could no more serve to validate this ordinance than could the details of an offense charged under an ordinance suspending unconditionally the right of assembly and free speech.

The judgment is reversed.

MR. JUSTICE BLACK.

First. I agree with the majority that this case is properly before us on appeal from the Supreme Court of Ohio.

Second. This Court has long held that laws so vague that a person of common understanding cannot know what is forbidden are unconstitutional on their face. *Lanzetta v. New Jersey, 306 U.S. 451 (1939), United States v. Cohen Grocery Co., 255 U.S. 81 (1921).* Likewise, laws which broadly forbid conduct or activities which are protected by the Federal Constitution, such as, for instance, the discussion of political matters, are void on their face. *Thornhill v. Alabama, 310 U.S. 88* [*617] *(1940).* On the other hand, laws which plainly forbid conduct which is constitutionally within the power of the State to forbid [**1690] but also restrict constitutionally protected conduct may be void either on their face or merely as applied in certain instances. As my Brother WHITE states in his opinion (with which I substantially agree), this is one of those numerous cases where the law could be held unconstitutional because it prohibits both conduct which the Constitution safeguards and conduct which the State may constitutionally punish. Thus, the *First Amendment* which forbids the State to abridge freedom of speech, would invalidate this city ordinance if it were used to punish the making of a political speech, even if that speech were to annoy other persons. In contrast, however, the ordinance could properly be applied to prohibit the gathering of persons in the mouths of alleys to annoy passersby by throwing rocks or by some other conduct not at all connected with speech. It is a matter of no little difficulty to determine when a law can be held void on its face and when such summary action is inappropriate. This difficulty has been aggravated in this case, because the record fails to show in what conduct these defendants had engaged to annoy other people. In my view, a record showing the facts surrounding the conviction is essential to adjudicate the important constitutional issues in this case. I would therefore vacate the judgment and remand the case with instructions that the trial court give both parties an opportunity to supplement the record so that we may determine whether the conduct actually punished is the kind of conduct which it is within the power of the State to punish.

DISSENT BY: WHITE

DISSENT

MR. JUSTICE WHITE, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, dissenting.

The claim in this case, in part, is that the Cincinnati ordinance is so vague that it may not constitutionally [*618] be applied to any conduct. But the ordinance prohibits persons from assembling with others and "conduct[ing] themselves in a manner annoying to persons passing by . . . ." Cincinnati Code of Ordinances § 901-L6. Any man of average [***220] comprehension should know that some kinds of conduct, such as assault or blocking passage on the street, will annoy others and are clearly covered by the "annoying conduct" standard of the ordinance. It would be frivolous to say that these and many other kinds of conduct are not within the foreseeable reach of the law.

It is possible that a whole range of other acts, defined with unconstitutional imprecision, is forbidden by the ordinance. But as a general rule, when a criminal charge is based on conduct constitutionally subject to proscription and clearly for-

bidden by a statute, it is no defense that the law would be unconstitutionally vague if applied to other behavior. Such a statute is not vague on its face. It may be vague as applied in some circumstances, but ruling on such a challenge obviously requires knowledge of the conduct with which a defendant is charged.

In *Williams v. United States, 341 U.S. 97 (1951)*, a police officer was charged under federal statutes with extracting confessions by force and thus, under color of law, depriving the prisoner there involved of rights, privileges, and immunities secured or protected by the Constitution and laws of the United States, contrary to *18 U. S. C. § 242*. The defendant there urged that the standard -- rights, privileges, and immunities secured by the Constitution -- was impermissibly vague and, more particularly, that the Court was often so closely divided on illegal-confession issues that no defendant could be expected to know when he was violating the law. The Court's response was that, while application of the statute [*619] to less obvious methods of coercion might raise doubts about the adequacy of the standard of guilt, in the case before it, it was "plain as a pikestaff that the present confessions would not be allowed in evidence whatever the school of thought concerning the scope and meaning of the Due Process Clause." *Id., at 101*. The claim of facial vagueness was thus rejected.

[**1691] So too in *United States v. National Dairy Corp., 372 U.S. 29 (1963)*, where we considered a statute forbidding sales of goods at "unreasonably" low prices to injure or eliminate a competitor, *15 U. S. C. § 13a*, we thought the statute gave a seller adequate notice that sales below cost were illegal. The statute was therefore not facially vague, although it might be difficult to tell whether certain other kinds of conduct fell within this language. We said: "In determining the sufficiency of the notice a statute must of necessity be examined in the light of the conduct with which a defendant is charged." *Id., at 33*. See also *United States v. Harriss, 347 U.S. 612 (1954)*. This approach is consistent with the host of cases holding 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." *United States v. Raines, 362 U.S. 17, 21 (1960)*, and cases there cited.

Our cases, however, including *National Dairy*, recognize a different approach where the statute at issue purports to regulate or proscribe rights of speech or press protected by the *First Amendment*. See *United States v. Robel, 389 U.S. 258 (1967)*; [***221] *Keyishian v. Board of Regents, 385 U.S. 589 (1967)*; *Kunz v. New York, 340 U.S. 290 (1951)*. Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is [*620] permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute. *Dombrowski v. Pfister, 380 U.S. 479, 491-492 (1965)*. The statute, in effect, is stricken down on its face. This result is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights. See *United States v. National Dairy Corp., supra, at 36*.

Even accepting the overbreadth doctrine with respect to statutes clearly reaching speech, the Cincinnati ordinance does not purport to bar or regulate speech as such. It prohibits persons from assembling and "conduct[ing]" themselves in a manner annoying to other persons. Even if the assembled defendants in this case were demonstrating and picketing, we have long recognized that picketing is not solely a communicative endeavor and has aspects which the State is entitled to regulate even though there is incidental impact on speech. In *Cox v. Louisiana, 379 U.S. 559 (1965)*, the Court held valid on its face a statute forbidding picketing and parading near a courthouse. This was deemed a valid regulation of conduct rather than pure speech. The conduct reached by the statute was "subject to regulation even though [it was] intertwined with expression and association." *Id., at 563*. The Court then went on to consider the statute as applied to the facts of record.

In the case before us, I would deal with the Cincinnati ordinance as we would with the ordinary criminal statute. The ordinance clearly reaches certain conduct but may be illegally vague with respect to other conduct. The statute is not infirm on

its face and since we have no information from this record as to what conduct was [*621] charged against these defendants, we are in no position to judge the statute as applied. That the ordinance may confer wide discretion in a wide range of circumstances is irrelevant when we may be dealing with conduct at its core.

I would therefore affirm the judgment of the Ohio Supreme Court.

REFERENCES

54 Am Jur 2d, Mobs and Riots 6

7 Am Jur Pl & Pr Forms (Rev ed), Constitutional Law Form 14

US L Ed Digest, Constitutional Law 940; Statutes 18

ALR Digests, Constitutional Law 803; Statutes 79

L Ed Index to Anno, Constitutional Law; Statutes

ALR Quick Index, Certainty and Definiteness; Freedom of Assembly

Federal Quick Index, Certainty and Definiteness; Freedom of Assembly and Petition

Annotation References:

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. *96 L Ed 374, 16 L Ed 2d 1231.*

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. *32 ALR3d 551.*

Vagueness as invalidating statutes or ordinances dealing with disorderly persons or conduct. *12 ALR3d 1448.*

What constitutes offense of unlawful assembly. *71 ALR2d 875.*

3

LEXSEE 269 U.S. 385

CONNALLY, COMMISSIONER, ET AL. v. GENERAL CONSTRUCTION COMPANY

No. 314

SUPREME COURT OF THE UNITED STATES

269 U.S. 385; *46 S. Ct. 126*; *70 L. Ed. 322*; *1926 U.S. LEXIS 929*

November 30, December 1, 1925, Argued
January 4, 1926, Decided

PRIOR HISTORY: APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

APPEAL from a decree of the District Court awarding an interlocutory injunction, upon the bill and a motion to dismiss it (demurrer), in a suit to restrain state and county officials of Oklahoma from enforcing a statute purporting, inter alia, to prescribe a minimum for the wages of workmen employed by contractors in the execution of contracts with the State, and imposing fine or imprisonment for each day's violation.

DISPOSITION: *3 Fed. 2d 666*, affirmed.

LAWYERS' EDITION HEADNOTES:

Criminal law -- sufficiency of penal statute. --

Headnote:

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.

Constitutional law -- validity of vague statute. --

Headnote:

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.

Constitutional law -- requiring current rate of wages -- uncertainty. --

Headnote:

A statute requiring a contractor, under penalty, to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed," is so uncertain as to deprive contractors of their property without due process of law.

SYLLABUS

1. A criminal statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law. P. 391.

2. Oklahoma Comp. Stats. 1921, §§ 7255, 7257, imposing severe, cumulative punishments upon contractors with the State who pay their workmen less than the "current rate of per diem wages in the locality where the work is performed," -- *held* void for uncertainty. P. 393.

COUNSEL: Messrs. George F. Short, Attorney General of Oklahoma, and J. Berry King, with whom Mr. Leon S. Hirsh was on the brief, for appellants.

The constitutionality of statutes is the strongest presumption known to the courts. *United States v. Brewer, 139 U.S. 278*; *State ex rel. Hastings v. Smith, 35 Neb. 13*; *State v. Lancashire Fire Ins. Co., 66 Ark. 466*; *Commonwealth v. Libbey, 216 Mass. 356.* The "Current Wage Law" meets all the requirements of definiteness considered in cases involving other statutes dependent upon a state of mind, the Oklahoma law being dependent upon a given state of facts, readily ascertainable. *Waters-Pierce Oil Co. v. Texas, 212 U.S. 86.* Decisions upon the Sherman Anti-Trust Act are undoubtedly of considerable bearing in a case of this type, for had not a more liberal construction been there indulged than is required of the "Current Wage Law," the term "undue and unreasonable restraint of trade" would never have been considered sufficiently definite to sustain a prosecution as due process of law. *Standard Oil Co. v. United States, 221 U.S. 31.* See *United States v. Reading Co., 226 U.S. 84*; *United States v. American Tobacco Co., 221 U.S. 106*; *United States v. Eastman Kodak Co., 226 Fed. 65*; and *Northern Securities Co. v. United States, 193 U.S. 197* -- all defining, in one way or another, what acts are "undue and unreasonable" acts, contracts or combinations resulting in, or tending to result in a monopoly or restraint of trade. *United States v. Trans-Missouri Freight Ass'n., 166 U.S. 290. Nash v. United States, 229 U.S. 373*, foreclosed the entire question of vagueness and uncertainty. *United States v. Patterson, 201 Fed. 697.* In *State v. Tibbetts, 205 Pac. 776*, the question of uncertainty by reason of the term "current rate of per diem wages" was not involved; but the statute was attacked on rehearing for uncertainty of the term "locality" and held to be valid. Indefiniteness as to the term "locality" cannot be asserted by appellee since the Tibbetts Case and the Waters-Pierce Oil Company Case definitely foreclose that question.

Were it not for this proviso as to wages, the entire salutary effect of the "Eight Hour Law" would be aborted. General classes of labor maintain a fairly uniform rate of pay -- what might properly be termed a "market price." Such was the recognition given to the term "prevailing rate of wages" in *Ryan v. City of New York, 79 N. Y. S. 599* and *McMahon v. City of New York, 47 N. Y. S. 1018.* There can be but one prevailing or market scale for each type of labor. In each locality there must be a current rate dictated by the law of supply and demand, modified by the standard of living in the particular community, the price of commodities and other various elements.

See *People ex rel. Rodgers v. Coler, 166 N. Y. 1*; *People v. Crane, 214 N. Y. 154*; *Fox v. Washington, 236 U.S. 273*; *Mutual Film Corp. v. Industrial Commission, 236 U.S. 246*; *Ellis v. United States, 206 U.S. 246*; *Bradford v. State, 78 Tex. Cr. 285*; *Commonwealth v. Reilly, 142 N. E. 915*; *Galveston, H. & S. A. Ry. v. Enderle, 170 S. W. 278*; *State v. Texas & Pacific R. Co., 106 Tex. 18*; *Morse v. Brown, 206 Fed. 232.*

Statutes containing such provisions as prohibiting the driving of vehicles "at a speed greater than is reasonable or prudent" have been held, in numerous cases, to be valid against the charge of vagueness and uncertainty of the offense prescribed. See also *State v. Quinlan, 86 N. J. L. 120*; *United States v. Sacks of Flour, 180 Fed. 518*; *Aiton v. Bd. of Medical Examiners, 13 Ariz. 354*; *People v. Apflebaum, 251 Ill. 18*; *Klafter v. State Bd. of Examiners, 259 Ill. 15*; *Katzman v. Commonwealth, 140 Ky. 124*; *State v. Lawrence, 9 Okla. Cr. 16*; *Stewart v. State, 4 Okla. Cr. 564*; *Mustard v. Elwood, 223 Fed. 225*; *Miller v. United States, 41 App. D. C. 52*; *Keefer v. State, 174 Ind. 255*; *State v. Newman Lbr. Co., 102 Miss. 802*; *Tanner v. Little, 240 U.S. 369*; *Pitney v. Washington, 240 U.S. 387*; *United States v. United States Brewers' Ass'n., 239 Fed. 163*; *Denver Jobbers' Ass'n. v. People ex rel. Dixon, 21 Colo. App. 350.*

A close study of all of the foregoing decisions demonstrates that a mental attitude as the standard of certainty almost invariably sustains the constitutionality of a statute. Where the standard is dependent upon a condition or state of facts, ascertainable by investigation, as a "current rate or per diem wages" in a given locality, a law based thereon is within all requirements of "due process."

There is no unlawful delegation of legislative power in the provision, in the Oklahoma labor laws, that the Commissioner of Labor is to carry into effect all the laws in relation to labor, passed by the Legislature of the State.

The provisions in question are not in conflict with the Federal Constitution as a taking of private property without compensation, nor as an interference with the freedom of contract.

Mr. J. D. Lydick, with whom Messrs. Charles E. McPherren, K. C. Sturdevant and Irvin L. Wilson were on the brief, for appellee.

JUDGES: Taft, Holmes, Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Sanford, Stone.

OPINION BY: SUTHERLAND

OPINION

[*388] [**126] [***327] MR. JUSTICE SUTHERLAND delivered the opinion of the Court.

This is a suit to enjoin certain state and county officers of Oklahoma from enforcing the provisions of § 7255 and § 7257, Compiled Oklahoma Statutes, 1921, challenged as unconstitutional. Section 7255 creates an eight-hour day for all persons employed by or on behalf of the state, etc., and provides "that not less than the current rate of per diem wages in the locality where the work is performed shall be paid to laborers, workmen, mechanics, prison guards, janitors in public institutions, or other persons so employed by or on behalf of the State, . . . and laborers, workmen, mechanics, or other persons employed by contractors or subcontractors in the execution of any contract or contracts with the State, . . . shall be deemed to be employed by or on behalf of the State, . . ." For any violation of the section, a penalty is imposed by § 7257 of a fine of not less than fifty nor more than five hundred dollars or imprisonment for not less than three nor more than six months. Each day that the violation continues is declared to be a separate offense.

[*389] [**127] The material averments of the bill, shortly stated, are to the following effect: The construction company, under contracts with the state, is engaged in constructing certain bridges within the state. In such work, it employs a number of laborers, workmen and mechanics, with each of whom it has agreed as to the amount of wages to be paid upon the basis of an eight-hour day; and the amount so agreed upon is reasonable and commensurate with the services rendered and agreeable to the employee in each case.

The Commissioner of Labor complained that the rate of wages paid by the company to laborers was only $ 3.20 per day, whereas, he asserted, the current rate in the locality where the work was being done was $ 3.60, and gave notice that, unless advised of an intention immediately to comply with the law, action would be taken to enforce compliance. From the correspondence set forth in the bill, it appears that the commissioner based his complaint upon an investigation made by his representative concerning wages "paid to laborers in the vicinity of Cleveland," Oklahoma, near which town one of the bridges was being constructed. This investigation disclosed the following list of employers with the daily rate of wages paid by each: City, $ 3.60 and $ 4.00; Johnson Refining Co., $ 3.60 and $ 4.05; Prairie Oil & Gas, $ 4.00; Gypsy Oil Co., $ 4.00; Gulf Pipe Line Co., $ 4.00; Brickyard, $ 3.00 and $ 4.00; I. Hansen, $ 3.60; General Construction Co., $ 3.20; Moore & Pitts Ice Co., $ 100 per month; Cotton Gins, $ 3.50 and $ 4.00; Mr. Pitts, $ 4.00; Prairie Pipe Line Co., $ 4.00; C. B. McCormack, $ 3.00; Harry McCoy, $ 3.00. The scale of wages paid by the construction company to its laborers was stated to be as follows: 6 men at $ 3.20 per day; 7 men at $ 3.60; 4 men at $ 4.00; 2 men at $ 4.40; 4 men at $ 4.80; 1 man at $ 5.20; and 1 man at $ 6.50.

In determining the rate of wages to be paid by the company, the commissioner claimed to be acting under [*390] authority of a statute of Oklahoma which imposes [***328] upon him the duty of carrying into effect all laws in relation to labor. In the territory surrounding the bridges being constructed by plaintiff, there is a variety of work performed by laborers, etc., the value of whose services depends upon the class and kind of labor performed and the efficiency of the workmen. Neither the wages paid nor the work performed are uniform; wages have varied since plaintiff entered into its contracts for constructing the bridges and employing its men; and it is impossible to determine under the circumstances whether the sums paid by the

plaintiff or the amount designated by the commissioner or either of them constitute the current per diem wage in the locality. Further averments are to the effect that the commissioner has threatened the company and its officers, agents and representatives with criminal prosecutions under the foregoing statutory provisions, and, unless restrained, the county attorneys for various counties named will institute such prosecutions; and that, under § 7257, providing that each day's failure to pay current wages shall constitute a separate offense, maximum penalties may be inflicted aggregating many thousands of dollars in fines and many years of imprisonment.

The constitutional grounds of attack, among others, are that the statutory provisions, if enforced, will deprive plaintiff, its officers, agents and representatives, of their liberty and property without due process of law, in violation of the *Fourteenth Amendment to the federal Constitution*; that they contain no ascertainable standard of guilt; that it cannot be determined with any degree of certainty what sum constitutes a current wage in any locality; and that the term "locality" itself is fatally vague and uncertain. The bill is a long one, and, without further review, it is enough to say that, if the constitutional attack upon the statute be sustained, the averments justify the equitable relief prayed.

[*391] Upon the bill and a motion to dismiss it, in the nature of a demurrer attacking its sufficiency, an application for an interlocutory injunction was heard by a court of three judges, under § 266 Jud. Code, and granted; the allegations of the bill being taken as true. *3 Fed. 2d 666.*

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. *International Harvester Co.* v. *Kentucky, 234 U.S. 216, 221*; *Collins v. Kentucky, 234 U.S. 634, 638.*

The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld; in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, *Hygrade Provision Co.* v. *Sherman, 266 U.S. 497, 502*; [**128] *Omaechevarria v. Idaho, 246 U.S. 343, 348*, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, *Nash v. United States, 229 U.S. 373, 376*; *International Harvester Co. v. Kentucky, supra, p. 223*, or, as broadly stated by Mr. Chief Justice White in *United States v. Cohen Grocery Co., 255 U.S. 81, 92*, "that, for reasons found to [*392] result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded." See also, *Waters-Pierce Oil Co.* v. *Texas (No. 1), 212 U.S. 86, 108.* Illustrative cases on the other hand are *International Harvester Co. v. Kentucky, supra, Collins v. Kentucky, supra*, and *United States v. Cohen Grocery Co., supra*, and cases there cited. The *Cohen Grocery Case* involved the validity of § 4 of the Food Control Act of 1917, which imposed a penalty upon any person who should make "any [***329] unjust or unreasonable rate or charge in handling or dealing in or with any necessaries." It was held that these words fixed no ascertainable standard of guilt, in that they forbade no specific or definite act.

Among the cases cited in support of that conclusion is *United States v. Capital Traction Co., 34 App. D. C. 592*, where a statute making it an offense for any street railway company to run an insufficient number of cars to accommodate passengers "without crowding," was held to be void for uncertainty. In the course of its opinion, that court said (pp. 596, 598):

"The statute makes it a criminal offense for the street railway companies in the District of Columbia to run an insufficient number of cars to accommodate persons desiring passage thereon, without crowding the same. What shall be the guide to the court or jury in ascertaining what constitutes a

crowded car? What may be regarded as a crowded car by one jury may not be so considered by another. What shall constitute a sufficient number of cars in the opinion of one judge may be regarded as insufficient by another. . . . There is a total absence of any definition of what shall constitute a crowded car. This important element cannot be left to conjecture, or be supplied by either the court or the jury. It is of the very essence of the law itself, and without it the statute is too indefinite and uncertain to support an information or indictment.

[*393] ". . . The dividing line between what is lawful and unlawful cannot be left to conjecture. The citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions. A criminal statute cannot rest upon an uncertain foundation. The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, in advance, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another."

In the light of these principles and decisions, then we come to the consideration of the legislation now under review, requiring the contractor, at the risk of incurring severe and cumulative penalties, to pay his employees "not less than the current rate of per diem wages in the locality where the work is performed."

We are of opinion that this provision presents a double uncertainty, fatal to its validity as a criminal statute. In the first place, the words "current rate of wages" do not denote a specific or definite sum, but minimum, maximum and intermediate amounts, indeterminately, varying from time to time and dependent upon the class and kind of work done, the efficiency of the workmen, etc., as the bill alleges is the case in respect of the territory surrounding the bridges under construction. * The statutory phrase reasonably cannot be confined to any of these amounts, since it imports each and all of them. The [*394] "current rate of wages" is not simple but progressive -- from so much (the minimum) to so much (the maximum), including all between; and to direct the payment of an amount which shall not be less than one of several different amounts, without saying which, is to leave the question of what is meant incapable of any definite answer. See *People ex rel. Rodgers v. Coler, 166 N. Y. 1, 24-25.*

> * The commissioner's own investigation shows that wages ranged from $ 3.00 to $ 4.05 per day; and the scale of wages paid by the construction company to its laborers, twenty-five in number, ranged from $ 3.20 to $ 6.50 per day, all but six of them being paid at $ 3.60 or more.

Nor can the question be solved by resort to the established canons of construction that enable a court to look through awkward or clumsy expression, or language wanting in precision, to the intent of the legislature. For the vice of the statute here lies in the impossibility of ascertaining, by any reasonable test, that the legislature meant one thing rather than another, and in the futility of an attempt to apply a requirement, which assumes the existence of a rate of wages single in amount, to a rate in fact composed of a multitude of gradations. To construe the phrase "current rate of wages" as meaning either the lowest rate or the highest rate or any intermediate rate or, if it were possible to determine the various factors to be considered, an average of all rates, would be as likely to defeat the purpose of the legislature as to promote it. See *State v. Partlow, 91 N. C. 550, 553*; [***330] *Commonwealth* [**129] *v. Bank of Pennsylvania, 3 Watts & S. 173, 177.*

In the second place, additional obscurity is imparted to the statute by the use of the qualifying word "locality." Who can say, with any degree of accuracy, what areas constitute the locality where a given piece of work is being done? Two men moving in any direction from the place of operations, would not be at all likely to agree upon the point where they had passed the boundary which separated the locality of that work from the next locality. It is said that this question is settled for us by the decision of the criminal court of appeals on rehearing in *State v. Tibbetts, 205 Pac. 776, 779.* But all the court did there was to define the word "locality" as meaning "place," [*395] "near the place," "vicinity," or "neighborhood." Accepting this as correct, as of course we do, the result is not to remove the obscurity, but rather to offer a choice

of uncertainties. The word "neighborhood" is quite as susceptible of variation as the word "locality." Both terms are elastic and, dependent upon circumstances, may be equally satisfied by areas measured by rods or by miles. See *Schmidt v. Kansas City Distilling Co., 90 Mo. 284, 296*; *Woods v. Cochrane and Smith, 38 Iowa 484, 485*; *State ex rel. Christie v. Meek, 26 Wash. 405, 407-408*; *Millville Imp. Co.* v. *Pitman, etc., Gas Co., 75 N. J. Law 410, 412*; *Thomas* v. *Marshfield*, 10 Pick. 364, 367. The case last cited held that a grant of common to the inhabitants of a certain neighborhood was void because the term "neighborhood" was not sufficiently certain to identify the grantees. In other connections or under other conditions the term "locality" might be definite enough, but not so in a statute such as that under review imposing criminal penalties. Certainly, the expression "near the place" leaves much to be desired in the way of a delimitation of boundaries; for it at once provokes the inquiry, "how near?" And this element of uncertainty cannot here be put aside as of no consequence, for, as the rate of wages may vary -- as in the present case it is alleged it does vary -- among different employers and according to the relative efficiency of the workmen, so it may vary in different sections. The result is that the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries as to whether given areas are or are not to be included within particular localities. The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

Interlocutory decree affirmed.

[*396] MR. JUSTICE HOLMES and MR. JUSTICE BRANDEIS concur in the result on the ground that the plaintiff was not violating the statute by any criterion available in the vicinity of Cleveland.

Questioned
As of: Aug 16, 2010

EX PARTE SIEBOLD.

SUPREME COURT OF THE UNITED STATES

100 U.S. 371; 25 L. Ed. 717; 1879 U.S. LEXIS 1833; 10 Otto 371

March 8, 1880, Decided; OCTOBER, 1879 Term

PRIOR HISTORY: [***1] PETITION for writ of habeas corpus.

The facts are stated in the opinion of the court.

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioners, state election judges, filed an original proceeding for a writ of habeas corpus to be relieved from punishment after their conviction under U.S. Rev. Stat. §§ 5515 and 5522 for violating federal election laws. Petitioners alleged that §§ 5515 and 5522 were unconstitutional.

OVERVIEW: In an election for U.S. representatives, petitioners, election judges, interfered with the federal supervisors and placed extra ballots in the ballot box. As a result, petitioners convicted of election crimes under U.S. Rev. Stat. §§ 5515 and 5522. Petitioners filed for a writ of habeas corpus; the court denied the writ, and held as follows: The court had jurisdiction to over the writ because the petition was appellate in character in that it requested the court to revise an act of a circuit court, and because petitioners' claim that they were convicted under unconstitutional statutes challenged the jurisdiction of the circuit court. The Constitutional right of Congress the right to regulate the election of representatives and to amend state regulations of such elections allowed both Congress and a state to regulate the election jointly, but the laws of Congress superseded any conflicting state law. Congress had the power to impose punishment for violations of its election laws, and the petitioners could be punished under both state and federal law for the same act. Congress had the power to vest the appointment of the elections supervisors in the circuit court.

OUTCOME: The court denied petitioners' prayer for a writ of habeas corpus seeking to be relieved from punishment after their convictions for violating federal election laws.

CORE TERMS: election, sect, national government, imprisonment, void, habeas corpus, paramount, marshal, interfere, registration, indictment, sovereignty, appointment, supervisors of election, precinct, deputy marshals, appointed, sentence, inferior, ballot-box, convicted, voting, writ of error, certificate, concurrent, amenable, appoint, whole subject, supervisors, ballot

LexisNexis(R) Headnotes

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview
Criminal Law & Procedure > Sentencing > Appeals > Appealability
Criminal Law & Procedure > Appeals > Appellate Jurisdiction > Jurisdiction

[HN1]The question is whether a party imprisoned under a sentence of a United States court, upon conviction of a crime created by and indictable under an unconstitutional act of Congress, may be discharged from imprisonment by the court on habeas corpus, although it has no appellate jurisdiction by writ of error over the judgment. The court is clearly of opinion that it is appellate in its character. It requires the court to revise an act of a circuit court in making the warrants of commitment upon the convictions referred to. This, according to all the decisions, is an exercise of appellate power.

Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview
Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Constitutional Law > Congressional Duties & Powers > General Overview
[HN2]That the court is authorized to exercise appellate jurisdiction by habeas corpus directly is a position sustained by abundant authority. It has general power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are, that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers and consuls, and cases in which a state is a party; but has appellate jurisdiction in all other cases of federal cognizance, with such exceptions and under such regulations as Congress shall make. Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction; and may issue it in the exercise of appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law except those in which it has original jurisdiction only.

Constitutional Law > The Judiciary > Jurisdiction > General Overview
Criminal Law & Procedure > Appeals > Remands & Remittiturs
Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > Sentences
[HN3]There are limitations of the court's jurisdiction arising from the nature and objects of the writ of habeas corpus itself, as defined by the common law, from which its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a habeas corpus, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where a court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, an appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error. But the general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by habeas corpus.

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > General Overview
Criminal Law & Procedure > Habeas Corpus > Procedure > Filing of Petition > Jurisdiction
[HN4]The only ground on which the court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

Criminal Law & Procedure > Sentencing > Appeals > Appealability
Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > General Overview
[HN5]Where a person has been committed under the judgment of another court of competent criminal jurisdiction, the court cannot review the sentence upon a return to a habeas corpus. In such cases, this court is not a court of appeal.

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > General Overview
[HN6]If a commitment be against law, as being made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court is to discharge. The latter part of this rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void.

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues > General Overview
Governments > Courts > General Overview
[HN7]An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it is not deemed so conclusive but that the question of the trial court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ.

Governments > Federal Government > Elections
Governments > Local Governments > Elections
[HN8]See U.S. Rev. Stat. § 2011.

Governments > Federal Government > Elections
Governments > Local Governments > Elections
[HN9]See U.S. Rev. Stat. § 2012.

Governments > Federal Government > Elections
[HN10]See U.S. Rev. Stat. § 2016.

Governments > Federal Government > Elections
[HN11]See U.S. Rev. Stat. § 2017.

Governments > Federal Government > Elections
[HN12]See U.S. Rev. Stat. § 2021.

Governments > Federal Government > Elections
[HN13]See U.S. Rev. Stat. § 2022.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview
Governments > Federal Government > Elections
Governments > Local Governments > Elections
[HN14]See U.S. Rev. Stat. § 5515.

Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > General Overview
Governments > Federal Government > Elections
[HN15]See U.S. Rev. Stat. § 5522.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview
Governments > Federal Government > Elections
[HN16]The court is unable to see why it necessarily follows that, if Congress makes any regulations on the subject of elections, it must assume exclusive control of the whole subject. The Constitution does not say so.

Constitutional Law > Congressional Duties & Powers > Elections > Time, Place & Manner
Governments > Federal Government > U.S. Congress
[HN17]The clause of the Constitution under which the power of Congress, as well as that of the state legislatures, to regulate the election of senators and representatives arises, is as follows: The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing senators.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview
Governments > Federal Government > U.S. Congress
[HN18]After first authorizing the states to prescribe the election regulations, it is added in the Constitution: The Congress may at any time, by law, make or alter such regulations. "Make or alter:" What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the state and national governments, the court should not have any difficulty in understanding them. There is no declaration that the regulations shall be made either wholly by the state legislatures or wholly by Congress. If Congress does not interfere, they may be made wholly by the state; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving the general organization of the polls to the state, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it. When exercised, the action of Congress, so far as it extends and conflicts with the regulations of the state, supersedes them. This is implied in the power to "make or alter."

Constitutional Law > Supremacy Clause > General Overview
Governments > Federal Government > U.S. Congress
International Trade Law > General Overview
[HN19]Where the subject-matter is one of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive. On the contrary, where neither of these circumstances exist, it has been held that state regulations are not unconstitutional. In the absence of congressional regulation, which would be of paramount authority when adopted, they are valid and binding.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview
[HN20]In the case of laws for regulating the elections of representatives to Congress, the state may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the state, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their form-

ing a harmonious system perfectly capable of being administered and carried out as such.

Business & Corporate Law > Agency Relationships > Terminations > General Overview
Civil Rights Law > Voting Rights > Voting Rights Act > Interference
Governments > Federal Government > U.S. Congress
[HN21]As to the supposed conflict that may arise between the officers appointed by the State and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same matters, must necessarily be paramount to those to be performed by the officers of the state. If both cannot be performed by the officers of the State, the latter are pro tanto superseded and cease to be duties. If the power of Congress over the subject is supervisory and paramount, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the state. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between the different officers appointed by the state, when the state alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of them.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview
Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause
Governments > Federal Government > U.S. Congress
[HN22]As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the state will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the state officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, State or national. Penalties for fraud and delinquency are part of the regulations belonging to the subject.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview
Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause
Governments > State & Territorial Governments > General Overview
[HN23]It is the duty of the states to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the state government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the state. A violation of duty is an offence against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a representative owes no duty to the national government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States.

Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause
Criminal Law & Procedure > Criminal Offenses > Miscellaneous Offenses > Resisting Arrest > General Overview
Governments > Federal Government > U.S. Congress
[HN24]It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by state laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such performance. The imposition of punishment implies a prohibition of the act punished. The state laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfillment. Content to leave the laws as they are, it is not content with the means provided for their

enforcement. It provides additional means for that purpose; and it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Double Jeopardy
[HN25]Each government punishes for violation of duty of itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview
Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause
[HN26]If the officers of election, in elections for representatives, own a duty to the United States, and are amenable to that government as well as to the State, -- as the court thinks they are, -- then there is no reason why each should not establish sanctions for the performance of the duty owed to itself, though referring to the same act.

Constitutional Law > The Judiciary > Jurisdiction > Concurrent Jurisdiction
Constitutional Law > Supremacy Clause > General Overview
Governments > State & Territorial Governments > General Overview
[HN27]The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every state owes obedience, whether in his individual or official capacity. There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the state and national sovereignties. Generally, the powers given by the Constitution to the government of the United States are given over distinct branches of sovereignty from which the state governments, either expressly or by necessary implication, are excluded. But a concurrent jurisdiction is contemplated, that of the state, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.

Constitutional Law > Congressional Duties & Powers > Elections > General Overview
[HN28]In exercising the power, the court is bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with state laws and regulations, with the duties of state officers, or with local prejudices. It could not act at all so as to accomplish any beneficial object in preventing frauds and violence, and securing the faithful performance of duty at the elections, without providing for the presence of officers and agents to carry its regulations into effect. It is also difficult to see how it could attain these objects without imposing proper sanctions and penalties against offenders.

Governments > Legislation > Interpretation
[HN29]If the court takes a plain view of the words of the Constitution, and gives to them a fair and obvious interpretation, the court cannot fail in most cases of coming to a clear understanding of its meaning. The court shall not have far to seek. The court shall find it on the surface, and not in the profound depths of speculation.

Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause
Constitutional Law > Supremacy Clause > General Overview
[HN30]The government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the state to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. This Constitution, and all laws which shall be made in pursuance thereof, shall be the supreme law of the land.

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview
Constitutional Law > The Judiciary > Jurisdiction > Concurrent Jurisdiction
Constitutional Law > Supremacy Clause > General Overview
[HN31]This concurrent jurisdiction which the national government necessarily possesses to exercise its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the Constitution, it is authorized to exercise over the District of Columbia, and over those places within a state which are purchased by consent of the legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. There its jurisdiction is absolutely exclusive of that of the state, unless,

as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired. Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified.

Constitutional Law > Supremacy Clause > General Overview
Governments > Federal Government > U.S. Congress
[HN32]Where the regulations of Congress conflict with those of the state, it is the latter which are void, and not the regulations of Congress; and that the laws of the state, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws.

Constitutional Law > Congressional Duties & Powers > General Overview
Constitutional Law > The Presidency > Appointment of Officials
[HN33]The Constitution declares that the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments. It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.

Constitutional Law > Congressional Duties & Powers > Necessary & Proper Clause
[HN34]Congress has the power to vest the appointment of the supervisors of elections in the circuit courts.

Constitutional Law > Supremacy Clause > General Overview
[HN35]Whilst the states are really sovereign as to all matters which have not been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter are the supreme law of the land; and, when they conflict with the laws of the states, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and existence of the States, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.

LAWYERS' EDITION HEADNOTES:

Habeas Corpus -- jurisdiction as to -- erroneous decision -- personal liberty -- constitutionality of law -- power of Congress -- Enforcement Act -- election law -- officers of election -- collision of jurisdiction -- paramount national authority -- marshals -- exclusive power -- state officers -- supervisors of election. --

Headnote:

Head notes by Mr. Justice Bradley.

1. The appellate jurisdiction of this court, exercisible by habeas corpus, extends to a case of imprisonment upon conviction and sentence in an inferior court of the United States, under and by virtue of an unconstitutional Act of Congress, whether this court has jurisdiction to review the judgment by writ of error or not.

2. The jurisdiction of this court by habeas corpus, when not restrained by some special law, extends, generally, to imprisonment by inferior tribunals of the United States which have no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional Act.

3. But when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error.

4. Where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having power to award the writ.

5. Certain Judges of Election in the City of Baltimore, appointed under state laws, were convicted in the Circuit Court of the United States, under sections 5515

and 5522 of the Revised Statutes of the United States, for interfering with and resisting the Supervisors of Election and Deputy-Marshals of the United States in the performance of their duty at an election of Representatives to Congress, under sections 2016, 2017, 2021, 2022, title XXVI., of the Revised Statutes. Held, that the question of the constitutionality of said laws is good ground for this court to issue a writ of habeas corpus to inquire into the legality of the imprisonment under such conviction; and if the laws are determined to be unconstitutional, the prisoner should be discharged.

6. Congress had power by the Constitution to pass the sections referred to, viz.: section 5515 of the Revised Statutes, which makes it a penal offense against the United States for any officer of election, at an election held for a Representative in Congress, to neglect to perform, or to violate, any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such law, with intent to affect such election, or to make a fraudulent certificate of the result, etc.; and section 5522, which makes it a penal offense for any officer or other person, with or without process, to obstruct, hinder, bribe or interfere with a Supervisor of Election or Marshal or Deputy-Marshal, in the performance of any duty required of them by any law of the United States, or to prevent their free attendance at the places of registration or election, etc.; also, sections 2011, 2012, 2016, 2017, 2021, 2022, title XXVI., of the Revised Statutes which authorize the circuit courts to appoint supervisors of such elections, and the marshal to appoint special deputies to aid and assist them, and which prescribe the duties of such Supervisors and Deputy-Marshals, these being the laws provided by Congress in the Enforcement Act of May 31, 1870, and the supplement thereto of February 28, 1871, for supervising the elections of Representatives, and for preventing frauds therein.

7. The circuit courts have jurisdiction of indictments under these laws, and a conviction and sentence in pursuance thereof is lawful cause of imprisonment, from which this court has no power to relieve on habeas corpus.

8. In making regulations for the election of Representatives, it is not necessary that Congress should assume entire and exclusive control thereof. By virtue of that clause of the Constitution which declares that "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing Senators," Congress has a supervisory power over the subject, and may either make entirely new regulations, or add to, alter or modify the regulations made by the State.

9. In the exercise of such supervisory power, Congress may impose new duties on the officers of election, or additional penalties for breach of duty or for the perpetration of fraud; or provide for the attendance of officers to prevent frauds and see that the elections are legally and fairly conducted.

10. The exercise of such power can properly cause no collision of regulations or jurisdiction, because the authority of Congress over the subject is paramount, and any regulations it may make necessarily supersede inconsistent regulations of the State. This is involved in the power to "make or alter."

11. There is nothing in the relation of the state and the national sovereignties to preclude the co-operation of both in the matter of elections of Representatives. If both were equal in authority over the subject, collisions of jurisdiction might ensue; but the authority of the National Government being paramount, collisions can only occur from unfounded jealousy of such authority.

12. Congress had power by the Constitution to vest in the circuit courts the appointment of Supervisors of Election. It is expressly declared that "Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." Whilst, as a question of propriety, the appointment of officers whose duties appertain to one department ought not to be lodged in another, the matter is, nevertheless, left to the discretion of Congress.

13. The provision which authorizes the Deputy-Marshals to keep the peace at the elections is not unconstitutional. The National Government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution.

14. The concurrent jurisdiction of the National Government with that of the States, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the Constitution in the District of Columbia, and in those places acquired for the erection of forts, magazines, arsenals, etc.

15. The provisions adopted for compelling the state officers of election to observe the state laws regulating elections of Representatives, not altered by Congress, are within the supervisory powers of Congress over such elections. The duties to be performed in this behalf are owed to the United States as well as to the State; and their violation is an offense against the United States which Congress may rightfully inhibit and punish. This, necessarily, follows from the direct interest which the National Government has in the due election of its Rep-

resentatives and from the power which the Constitution gives to Congress over this particular subject.

SYLLABUS

1. The appellate jurisdiction of this court, exercisible by the writ of habeas corpus, extends to a case of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional act of Congress, whether this court has jurisdiction to review the judgment of conviction by writ of error or not,

2. The jurisdiction of this court by habeas corpus, when not restrained by some special law, extends generally to imprisonment pursuant to the judgment of an inferior tribunal of the United States which has no jurisdiction of the cause, or whose proceedings are otherwise void and not merely erroneous; and such a case occurs when the proceedings are had under an unconstitutional act.

3. But when the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error; and, of course, cannot be reviewed at all if no writ of error lies.

4. Where personal liberty is concerned, the judgment of an inferior court [***2] affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having power to award the writ.

5. Certain judges of election in the city of Baltimore, appointed under State laws, were convicted in the Circuit Court of the United States, under sects. 5515 and 5522 of the Revised Statutes of the United States, for interfering with and resisting the supervisors of election and deputy marshals of the United States in the performance of their duty at an election of representatives to Congress, under sects. 2016, 2017, 2021, 2022, title xxvi., of the Revised Statutes. Held, that the question of the constitutionality of said laws is good ground for the issue by this court of a writ of habeas corpus to inquire into the legality of the imprisonment under such conviction; and if the laws are determined to be unconstitutional, the prisoner should be discharged.

6. Congress had power by the Constitution to enact sect. 5515 of the Revised Statutes, which makes it a penal offence against the United States for any officer of election, at an election held for a representative in Congress, [***3] to neglect to perform, or to violate, any duty in regard to such election, whether required by a law of the State or of the United States, or knowingly to do any act unauthorized by any such law, with intent to affect such election, or to make a fraudulent certificate of the result, &c.; and sect. 5522, which makes it a penal offence for any officer or other person, with or without process, to obstruct, hinder, bribe, or interfere with a supervisor of election, or marshal, or deputy marshal, in the performance of any duty required of them by any law of the United States, or to prevent their free attendance at the places of registration or election, &c.; also, sects. 2011, 2012, 2016, 2017, 2021, 2022, title xxvi., which authorize the circuit courts to appoint supervisors of such elections, and the marshal to appoint special deputies to aid and assist them, and which prescribe the duties of such supervisors and deputy marshals, -- these being the laws provided in the Enforcement Act of May 31, 1870, and the supplement thereto of Feb. 28 1871, for supervising the elections of representatives, and for preventing frauds therein.

7. The circuit courts have jurisdiction of indictments [***4] under these laws, and a sentence in pursuance of a verdict of condemnation is lawful cause of imprisonment, from which this court has no power to relieve on habeas corpus.

8. In making regulations for the election of representatives, it is not necessary that Congress should assume entire and exclusive control thereof. By virtue of that clause of the Constitution which declares that "the times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the place of choosing senators," Congress has a supervisory power over the subject, and may either make entirely new regulations, or add to, alter, or modify the regulations made by the State.

9. In the exercise of such supervisory power, Congress may impose new duties on the officers of election, or additional penalties for breach of duty, or for the perpetration of fraud; or provide for the attendance of officers to prevent frauds and see that the elections are legally and fairly conducted.

10. The exercise of such power can properly cause no collision of regulations [***5] or jurisdiction, because the authority of Congress over the subject is paramount, and any regulations it may make necessarily supersede inconsistent regulations of the State. This is involved in the power to "make or alter."

11. There is nothing in the relation of the State and the national sovereignties to preclude the co-operation of both in the matter of elections of representatives. If both were equal in authority over the subject, collisions of jurisdiction might ensue; but the authority of the national government being paramount, collisions can only occur from unfounded jealousy of such authority.

12. The provision which authorizes the deputy marshals to keep the peace at the elections is not unconstitutional. The national government has the right to use physical force in any part of the United States to compel obedience to its laws, and to carry into execution the powers conferred upon it by the Constitution.

13. The concurrent jurisdiction of the national government with that of the States, which it has in the exercise of its powers of sovereignty in every part of the United States, is distinct from that exclusive jurisdiction which it has by the Constitution in [***6] the District of Columbia, and in those places acquired for the erection of forts, magazines, arsenals, &c.

14. The provisions adopted for compelling the State officers of election to observe the State laws regulating elections of representatives, not altered by Congress, are within the supervisory powers of Congress over such elections. The duties to be performed in this behalf are owed to the United States as well as to the State; and their violation is an offence against the United States which Congress may rightfully inhibit and punish. This necessarily follows from the direct interest which the national government has in the due election of its representatives and from the power which the Constitution gives to Congress over this particular subject.

15. Congress had power by the Constitution to vest in the circuit courts the appointment of supervisors of election. It is expressly declared that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Whilst, as a question of propriety, the appointment of officers whose duties appertain to one department ought [***7] not to be lodged in another, the matter is nevertheless left to the discretion of Congress.

COUNSEL: Mr. Bradley T. Johnson for the petitioners.

The Attorney-General, contra.

OPINION BY: BRADLEY

OPINION

[*373] [**718] MR. JUSTICE BRADLEY delivered the opinion of the court.

The petitioners in this case, Albert Siebold, Walter Tucker, Martin C. Burns, Lewis Coleman, and Henry Bowers, were judges of election at different voting precincts in the city of Baltimore, at the election held in that city, and in the State of Maryland, on the fifth day of November, 1878, at which representatives to the Forty-sixth Congress were voted for.

At the November Term of the Circuit Court of the United States for the District of Maryland, an indictment against each of the petitioners was found in said court, for offences alleged to have been committed by them respectively at their respective precincts whilst being such judges of election; upon which indictments they were severally tried, convicted, and sentenced by said court to fine and imprisonment. They now apply to this court for a writ of habeas corpus to be relieved from imprisonment.

Before making this application, each petitioner, in the [***8] month of September last, presented a separate petition to the Chief Justice of this court (within whose circuit Baltimore is situated), at Lynn, in the State of Connecticut, where he then was, praying for a like habeas corpus to be relieved from the same imprisonment. The Chief Justice thereupon made on order that the said marshal and warden should show cause, before him, on the second Tuesday of October, in the city of Washington, why such writs should not issue. That being the first day of the present term of this court, at the instance of the Chief Justice the present application was made to the court by a new petition addressed thereto, and the petitions and papers which had been [*374] presented to the Chief Justice were by consent made a part of the case. The records of the several indictments and proceedings thereon were annexed to the respective original petitions, and are before us. These indictments were framed partly under sect. 5515 and partly under sect. 5522 of the Revised Statutes of the United States; and the principal questions raised by the application are, whether those sections, and certain sections of the title of the Revised Statutes relating to the elective [***9] franchise, which they are intended to enforce, are within the constitutional power of Congress to enact. If they are not, then it is contended that the Circuit Court has no jurisdiction of the cases, and that the convictions and sentences of imprisonment of the several petitioners were illegal and void.

The jurisdiction of this court to hear the case is the first point to be examined. [HN1]The question is whether a party imprisoned under a sentence of a United States court, upon conviction of a crime created by and indictable under an unconstitutional act of Congress, may be discharged from imprisonment by this court on habeas corpus, although it has no appellate jurisdiction by writ of error over the judgment. It is objected that the case is one of original and not appellate jurisdiction, and, therefore, not within the jurisdiction of this court. But we are clearly of opinion that it is appellate in ite character. It requires us to revise the act of the Circuit Court in making the warrants of commitment upon the convictions referred to. This, according to all the decisions, is an exercise of appellate power. Ex parte Bur-

ford, 3 Cranch, 448; Ex parte Bollman and Swartout, 4 id. [***10] 100, 101; Ex parte Yerger, 8 Wall. 98.

[HN2]That this court is authorized to exercise appellate jurisdiction by habeas corpus directly is a position sustained by abundant authority. It has general power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are, that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers and consuls, and cases in which a State is a party; but has appellate jurisdiction in all other cases of Federal cognizance, "with such exceptions and under such regulations as Congress shall make." Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction; and [*375] may issue it in the exercise of appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law except those in which it has original jurisdiction only. Ex parte Bollman and Swartwout, supra; Ex parte Watkins, 3 Pet. 202; 7 id. 568; Ex parte Wells, 18 How. 307, 328; Ableman v. Booth, 21 id. 506; Ex parte Yerger, 8 Wall. 85.

[HN3]There are other limitations of the jurisdiction, however, arising from the nature and [***11] objects of the writ itself, as defined by the common law, from which its name and incidents are derived. It cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a habeas corpus, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded.No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error. Bac. Abr., Hab. Corp., B. 13, Bethel's Case, Salk. 348; 5 Mod. 19. But the general rule is, that a conviction and sentence by a court of competent jurisdiction is lawful cause of imprisonment, and no relief can be given by habeas corpus.

[HN4]The only ground on which this court, or any court, without some [***12] special statute authorizing it, will give relief on habeas corpus to a prisoner [**719] under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void.

This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of Ex parte Lange (18 Wall. 163) and Ex parte Parks, 93 U.S. 18. In the former case, we held that the judgment was void, and released the petitioner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause; and we refused to interfere.

[*376] Chief Justice Abbot, in Rex v. Suddis (1 East, 306), said: "It is a general rule that, [HN5]where a person has been committed under the judgment of another court of competent criminal jurisdiction, this court [the King's Bench] cannot review the sentence upon a return to a habeas corpus. In such cases, this court is not a court of appeal."

It is stated, however, in Bacon's Abridgment, probably in the words of Chief Baron Gilbert, that, [HN6]"if the commitment be against law, as being [***13] made by one who had no jurisdiction of the cause, or for a matter for which by law no man ought to be punished, the court are to discharge." Bac. Abr., Hab. Corp., B. 10. The latter part of this rule, when applied to imprisonment under conviction and sentence, is confined to cases of clear and manifest want of criminality in the matter charged, such as in effect to render the proceedings void. The authority usually cited under this head is Bushel's Case, decided in 1670. There, twelve jurymen had been convicted in the oyer and terminer for rendering a verdict (against the charge of the court) acquitting William Penn and others, who were charged with meeting in conventicle. Being imprisoned for refusing to pay their fines, they applied to the Court of Common Pleas for a habeas corpus; and though the court, having no jurisdiction in criminal matters, hesitated to grant the writ, yet, having granted it, they discharged the prisoners, on the ground that their conviction was void, inasmuch as jurymen cannot be indicted for rendering any verdict they choose. The opinion of Chief Justice Vaughan in the case has rarely been excelled for judicial eloquence. T. Jones, 13; s.c. Vaughan, [***14] 135; s.c. 6 Howell's State Trials, 999.

Without attempting to decide how far this case may be regarded as law for the guidance of this court, we are clearly of opinion that the question raised in the cases before us is proper for consideration on habeas corpus. The validity of the judgments is assailed on the ground that the acts of Congress under which the indictments were found are unconstitutional. If this position is well taken, it affects the foundation of the whole proceedings. [HN7]An unconstitutional law is void, and is as no law. An offence created by it is not a crime. A conviction under it is not merely erroneous, but is illegal and void, [*377] and cannot be a legal cause of imprisonment. It is true, if no writ of error lies, the judgment may be final, in the sense that there may be no means of reversing it. But personal liberty is of so great moment in the eye of the law that the judgment of an inferior court affecting it

is not deemed so conclusive but that, as we have seen, the question of the court's authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having authority to award the writ. We are satisfied that [***15] the present is one of the cases in which this court is authorized to take such jurisdiction. We think so, because if, the laws are unconstitutional and void, the Circuit Court acquired no jurisdiction of the causes. Its authority to indict and try the petitioners arose solely upon these laws.

We proceed, therefore, to examine the cases on their merits.

The indictments commence with an introductory statement that, on the 5th of November, 1878, at the Fourth [or other] Congressional District of the State of Maryland, a lawful election was held, whereat a representative for that congressional district in the Forty-sixth Congress of the United States was voted for; that a certain person [naming him] was then and there a supervisor of election of the United States, duly appointed by the Circuit Court aforesaid, pursuant to sect. 2012 of the Revised Statutes, for the third [or other] voting precinct of the fifteenth [or other] ward of the city of Baltimore, in the said congressional district, for and in respect of the election aforesaid, thereat; that a certain person [naming him] was then and there a special deputy marshal of the United States, duly appointed by the United [***16] States marshal for the Maryland district, pursuant to sect. 2021 of the Revised Statutes, and assigned for such duty as is provided by that and the following section, to the said precinct of said ward of said city, at the congressional election aforesaid, thereat.Then come the various counts.

The petitioner, Bowers, was convicted on the second count of the indictment against him which was as follows: --

"That the said Henry Bowers, afterwards, to wit, on the day and year aforesaid, at the said voting precinct within the district aforesaid, unlawfully did obstruct, hinder, and, by the use [*378] of his power and authority as such judge as aforesaid (which judge he then and there was), interfere with and prevent the said supervisor of election in the performance of a certain duty in respect to said election required of him, and which he was then and there authorized to perform by the law of the United States, in such case made and provided, to wit. that of personally inspecting and scrutinizing, at the beginning of said day of election, and of the said election, the manner in which the voting was done at the said poll of election, by examining and seeing whether the ballot first [***17] voted at said poll of election was put and placed in a ballot-box containing no ballots whatever, contrary to sect. 5522 of said statutes, and against the peace, government, and dignity of the United States."

Tucker, who was indicted jointly with one Gude, was convicted upon the second and fifth counts of the indictment against them, which were as follows: --

"(2d.) That the said Justus J. Gude and the said Walter Tucker afterwards, to wit, on the day and year aforesaid, at the said voting precinct of said ward of said city, unlawfully and by exercise of their power and authority as such judges as aforesaid, did prevent and hinder the free attendance and presence of the said James [**720] N. Schofield (who was then and there such deputy marshal as aforesaid, in the due execution of his said office), at the poll of said election of and for the said voting precinct, and the full and free access of the same deputy marshal to the same poll of election, contrary to the said lastmentioned section of said statutes (sect. 5522), and against the peace, government, and dignity of the United States.

"(5th.) That the said Justus J. Gude and the said Walter Tucker, on the day and year [***18] aforesaid, at the precinct aforesaid, within the district aforesaid (they being then and there such officers of said election as aforesaid), knowingly and unlawfully at the said election did a certain act, not then and there authorized by any law of the State of Maryland, and not authorized then and there by any law of the United States, by then and there fraudulently and clandestinely putting and placing in the ballot-box of the said precinct twenty (and more) ballots (within the intent and meaning of sect. 5514 of said statutes), which had not been voted at said election in said precinct before the ballots, [*379] then and there lawfully deposited in the same ballot-box, had been counted, with intent thereby to affect said election and the result thereof, contrary to sect. 5515 of said statutes, and against the peace, government, and dignity of the United States."

This charge, it will be observed, is for the offence commonly known as "stuffing the ballot-box."

The counts on which the petitioners, Burns and Coleman, were convicted were similar to those above specified. Burns was charged with refusing to allow the supervisor of elections to inspect the ballot-box, or even [***19] to enter the room where the polls were held, and with violently resisting the deputy marshal who attempted to arrest him, as required by sect. 2022 of the Revised Statutes. The charges against Coleman were similar to those against Burns, with the addition of a charge for stuffing the ballot-box. Siebold was only convicted on one count of the indictment against him, which was likewise a charge of stuffing the ballot-box.

The sections of the law on which these indictments are founded, and the validity of which is sought to be impeached for unconstitutionality, are summed up by the counsel of the petitioners in their brief as follows (omitting the comments thereon): --

The counsel say: --

"These cases involve the question of the constitutionality of certain sections of title xxvi. of the Revised Statutes, entitled 'The Elective Franchise.'

"SECT. 2011. [HN8]The judge of the Circuit Court of the United States, wherein any city or town having upwards of twenty thousand inhabitants is situated, upon being informed by two citizens thereof, prior to any registration of voters for, or any election at which a representative or delegate in Congress is to be voted for, that it is their desire [***20] to have such registration or election guarded and scrutinized, shall open the Circuit Court at the most convenient point in the circuit.

"SECT. 2012. [HN9]The judge shall appoint two supervisors of election for every election district in such city or town.

"SECT. 2016. [HN10]The supervisors are authorized and required to attend all times and places fixed for registration of voters [*380] to challenge such as they deem proper; to cause such names to be registered as they may think proper to be so marked; to inspect and scrutinize such register of voters; and for purposes of identification to affix their signatures to each page of the original list.

"SECT. 2017. [HN11]The supervisors are required to attend the times and places for holding elections of representatives or delegates in Congress, and of counting the votes cast; to challenge any vote the legality of which they may doubt; to be present continually where the ballot-boxes are kept, until every vote cast has been counted, and the proper returns made, required under any law of the United States, or any State, territorial, or municipal law; and to personally inspect and scrutinize at any and all times, on the day of election, the [***21] manner in which the poll-books, registry lists, and tallies are kept; whether the same are required by any law of the United States, or any State, territorial, or municipal laws.

"SECT. 2021. [HN12]requires the marshal, whenever any election at which representatives or delegates in Congress are to be chosen, upon application by two citizens in cities or towns of more than twenty thousand inhabitants, to appoint special deputy marshals, whose duty it shall be to aid and assist the supervisors in the discharge of their duties, and attend with them at all registrations of voters or election at which representatives to Congress may be voted for.

"SECT. 2022. [HN13]requires the marshal, and his general and special deputies, to keep the peace and protect the supervisors in the discharge of their duties; preserve order at such place of registration and at such polls; prevent fraudulent registration and voting, or fraudulent conduct on the part of any officer of election, and immediately to arrest any person who commits, or attempts to commit, any of the offences prohibited herein, or any offence against the laws of the United States."

The counsel then refer to and summarize sects. 5514, 5515, and [***22] 5522 of the Revised Statutes. Sect. 5514 merely relates to a question of evidence, and need not be copied. Sects. 5515 and 5522, being those upon which the indictments are directly framed, are proper to be set out in full. They are as follows: --

[*381] "SECT. 5515. [HN14]Every officer of an election at which any representative or delegate in Congress is voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who neglects or refuses to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or who violates any duty so imposed; or who knowingly does any acts thereby unauthorized, with intent to affect any such election, or the result thereof; or who fraudulently makes any false certificate of the result of such election in regard to such representative or delegate; or who withholds, conceals, or destroys any certificate of record so required by law respecting the election of any such representative or delegate; or who neglects or refuses to make and return such [***23] certificate as required by law; or who aids, counsels, [**721] procures, or advises any voter, person, or officer to do any act by this or any of the preceding sections made a crime, or to omit to do any duty the ommission of which is by this or any of such sections made a crime, or attempts to do so, shall be punished as prescribed in sect. 5511."

"SECT. 5522. [HN15]Every person, whether with or without any authority, power, or process, or pretended authority, power, or process, of any State, Territory, or municipality, who obstructs, hinders, assaults, or by bribes, solicitation, or otherwise, interferes with or prevents the supervisors of election, or either of them, or the marshal or his general or special deputies, or either of them, in the performance of any duty required of them, or either of them, or which he or they, or either of them, may be authorized to perform by any law of the United States, in the execution of process or otherwise, or who, by any of the means before mentioned, hinders or prevents the free attendance and presence at such places of registration, or at such polls of election, or full and free access and egress to and from any such place of registra-

tion [***24] or poll of election, or in going to and from any such place of registration or poll of election, or to and from any room where any such registration or election or canvass of votes, or of making any returns or certificates thereof, may be had, or who molests, interferes with, removes, or ejects from any such place of registration or poll of election, or of canvassing votes cast thereat, or of making returns or certificates thereof, any supervisor of election, the marshal, or his general or special deputies, or either of them; or who threatens, or attempts, or offers so to do, or refuses or neglects to aid and assist any supervisor [*382] of election, or the marshal or his general or special deputies, or either of them, in the performance of his or their duties, when required by him or them, or either of them, to give such aid and assistance, shall be liable to instant arrest without process, and shall be punished by imprisonment not more than two years, or by a fine of not more than $3,000, or by both such fine and imprisonment, and shall pay the cost of the prosecution."

These portions of the Rivised Statutes are taken from the act commonly known as the Enforcement Act, approved [***25] May 31, 1870, and entitled "An Act to enforce the right of citizens of the United States to vote in the several States of this Union, and for other purposes;" and from the supplement of that act, approved Feb. 28, 1871. They relate to elections of members of the House of Representatives, and were an assertion, on the part of Congress, of a power to pass laws for regulating and superintending said elections, and for securing the purity thereof, and the rights of citizens to vote thereat peaceably and without molestation. It must be conceded to be a most important power, and of a fundamental character. In the light of recent history, and of the violence, fraud, corruption, and irregularity which have frequently prevailed at such elections, it may easily be conceived that the exertion of the power, if it exists, may be necessary to the stability of our frame of government.

The counsel for the petitioners, however, do not deny that Congress may, if it chooses, assume the entire regulation of the elections of representatives; but they contend that it has no constitutional power to make partial regulations intended to be carried out in conjunction with regulations made by the States.

[***26] The general positions contended for by the counsel of the petitioners are thus stated in their brief: --

"We shall attempt to eastablish these propositions: --

"1. That the power to make regulations as to the times, places, and manner of holding elections for representatives in Congress, granted to Congress by the Constitution, is an exclusive power when exercised by Congress.

"2. That this power, when so exercised, being exclusive of all interference therein by the States, must be so exercised as [*383] not to interfere with or come in collision with regulations presented in that behalf by the States, unless it provides for the complete control over the whole subject over which it is exercised.

"3. That when put in operation by Congress it must take the place of all State regulations of the subject regulated, which subject must be entirely and complety controlled and provided for by Congress."

[HN16]We are unable to see why it necessarily follows that, if Congress makes any regulations on the subject, it must assume exclusive control of the whole subject. The Constitution does not say so.

[HN17]The clause of the Constitution under which the power of Congress, as well as [***27] that of the State legislatures, to regulate the election of senators and representatives arises, is as follows: "The times, places, and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time, by law, make or alter such regulations, except as to the place of choosing Senators."

It seems to us that the natural sense of these words is the contrary of that assumed by the counsel of the petitioners. [HN18]After first authorizing the States to prescribe the regulations, it is added, "The Congress may at any time, by law, make or alter such regulations." "Make or alter:" What is the plain meaning of these words? If not under the prepossession of some abstract theory of the relations between the State and national governments, we should not have any difficulty in understanding them. There is no declaration that the regulations shall be made either wholly by the State legislatures or wholly by Congress. If Congress does not interfere, of course they may be made wholly by the State; but if it chooses to interfere, there is nothing in the words to prevent its doing so, either wholly or partially. [***28] On the contrary, their necessary implication is that it may do either. It may either make the regulations, or it may alter them. If it only alters, leaving, as manifest convenience requires, the general organization of the polls to the State, there results a necessary co-operation of the two governments in regulating the subject. But no repugnance [*384] in the system of regulations can arise thence; for the power of Congress over the subject is paramount. It may be exercised as and when Congress sees fit to exercise it.When exercised, the action of Congress, so far as it extends and conflicts with the regulations of [**722] the State, necessarily supersedes them.This is implied in the power to "make or alter."

Suppose the Constitution of a State should say, "The first legislature elected under this Constitution may by law regulate the election of members of the two Houses; but any subsequent legislature may make or alter such regulations," -- could not a subsequent legislature modify the regulations made by the first legislature without making an entirely new set? Would it be obliged to go over the whole subject anew? Manifestly not: it could alter or modify, add [***29] or subtract, in its discretion. The greater power, of making wholly new regulations, would include the lesser, of only altering or modifying the old. The new law, if contrary or repugnant to the old, would so far, and so far only, take its place. If consistent with it, both would stand. The objection, so often repeated, that such an application of congressional regulations to those previously made by a State would produce a clashing of jurisdictions and a conflict of rules, loses sight of the fact that the regulations made by Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative. No clashing can possibly arise. There is not the slightest difficulty in a harmonious combination into one system of the regulations made by the two sovereignties, any more than there is in the case of prior and subsequent enactments of the same legislature.

Congress has partially regulated the subject heretofore. In 1842, it passed a law for the election of representatives by separate districts; and, subsequently, other laws fixing the time of election, and directing that the elections shall [***30] be by ballot. No one will pretend, at least at the present day, that these laws were unconstitutional because they only partially covered the subject.

The peculiarity of the case consists in the concurrent authority of the two sovereignties, State and National, over the same [*385] subject-matter. This, however, is not entirely without a parallel. The regulation of foreign and inter-state commerce is conferred by the Constitution upon Congress. It is not expressly taken away from the States. But [HN19]where the subject-matter is one of a national character, or one that requires a uniform rule, it has been held that the power of Congress is exclusive. On the contrary, where neither of these circumstances exist, it has been held that State regulations are not unconstitutional. In the absence of congressional regulation, which would be of paramount authority when adopted, they are valid and binding. This subject was largely discussed in the case of Cooley v. Board of Wardens of Port of Philadelphia, 12 How. 299. That was a case of pilotage. In 1789, Congress had passed a law declaring that all pilots should continue to be regulated in conformity with the laws of the States respectively [***31] wherein they should be. Hence, each State continued to administer its own laws, or passed new laws for the regulation of pilots in its harbors. Pennsylvania passed the law then in question in 1803. Yet the Supreme Court held that this was clearly a regulation of commerce; and that the State laws could not be upheld without supposing that, in cases like that of pilotage, not requiring a national and uniform regulation, the power of the States to make regulations of commerce, in the absence of congressional regulation, still remained. The court held that the power did so remain, subject to those qualifications; and the State law was sustained under that view.

Here, then, is a case of concurrent authority of the State and national governments, in which that of the latter is paramount. In 1837, Congress interfered with the State regulations on the subject of pilotage, so far as to authorize the pilots of adjoining States, separated only by navigable waters, to pilot ships and vessels into the ports of either State located on such waters.It has since made various regulations respecting pilots taking charge of steam vessels, imposing upon them peculiar duties and requiring of them [***32] peculiar qualifications. It seems to us that there can be no doubt of the power of Congress to impose any regulations it sees fit upon pilots, and to subject them to such penalties for breach of duty as it may deem [*386] expedient. The States continue in the exercise of the power to regulate pilotage subject to the paramount right of the national government. If dissatisfied with congressional interference, should such interference at any time be imposed, any State might, if it chose, withdraw its regulations altogether, and leave the whole subject to be regulated by Congress. But so long as it continues its pilotage system, it must acquiesce in such additional regulations as Congress may see fit to make.

So [HN20]in the case of laws for regulating the elections of representatives to Congress. The State may make regulations on the subject; Congress may make regulations on the same subject, or may alter or add to those already made. The paramount character of those made by Congress has the effect to supersede those made by the State, so far as the two are inconsistent, and no farther. There is no such conflict between them as to prevent their forming a harmonious system perfectly [***33] capable of being administered and carried out as such.

[HN21]As to the supposed conflict that may arise between the officers appointed by the State and national governments for superintending the election, no more insuperable difficulty need arise than in the application of the regulations adopted by each respectively. The regulations of Congress being constitutionally paramount, the duties imposed thereby upon the officers of the United States, so far as they have respect to the same

matters, must necessarily be paramount to those to be performed by the officers of the State. If both cannot be performed by the officers of the State. If both cannot be performed, the latter are pro tanto superseded and cease to be duties. If the power of Congress over the subject is supervisory and paramount, as we have seen it to be, and if officers or agents are created for carrying out its regulations, it follows as a necessary consequence that such officers and agents must have the requisite authority to act without obstruction or interference from the officers of the State. No greater subordination, in kind or degree, exists in this case than in any other. It exists to the same extent between [***34] the different officers appointed by the State, when the State alone regulates the election. One officer cannot interfere with the duties of another, or obstruct or hinder him in the performance of them. Where there is a disposition to act harmoniously, there is no [*387] danger of [**723] disturbance between those who have different duties to perform. When the rightful authority of the general government is once conceded and acquiesced in, the apprehended difficulties will disappear. Let a spirit of national as well as local patriotism once prevail, let unfounded jealousies cease, and we shall hear no more about the impossibility of harmonious action between the national and State governments in a matter in which they have a mutual interest.

[HN22]As to the supposed incompatibility of independent sanctions and punishments imposed by the two governments, for the enforcement of the duties required of the officers of election, and for their protection in the performance of those duties, the same considerations apply. While the State will retain the power of enforcing such of its own regulations as are not superseded by those adopted by Congress, it cannot be disputed that if [***35] Congress has power to make regulations it must have the power to enforce them, not only by punishing the delinquency of officers appointed by the United States, but by restraining and punishing those who attempt to interfere with them in the performance of their duties; and if, as we have shown, Congress may revise existing regulations, and add to or alter the same as far as it deems expedient, there can be as little question that it may impose additional penalties for the prevention of frauds committed by the State officers in the elections, or for their violation of any duty relating thereto, whether arising from the common law or from any other law, State or national. Why not? Penalties for fraud and delinquency are part of the regulations belonging to the subject. If Congress, by its power to make or alter the regulations, has a general supervisory power over the whole subject, what is there to preclude it from imposing additional sanctions and penalities to prevent such fraud and delinquency?

It is objected that Congress has no power to enforce State laws or to punish State officers, and especially has no power to punish them for violating the laws of their own State. As [***36] a general proposition, this is undoubtedly true; but when, in the performance of their functions, State officers are called upon to fulfil duties which they owe to the United States as well as to the State, has the former no means of compelling such fulfillment? [*388] Yet that is the case here. [HN23]It is the duty of the States to elect representatives to Congress. The due and fair election of these representatives is of vital importance to the United States. The government of the United States is no less concerned in the transaction than the State government is. It certainly is not bound to stand by as a passive spectator, when duties are violated and outrageous frauds are committed. It is directly interested in the faithful performance, by the officers of election, of their respective duties. Those duties are owed as well to the United States as to the State. This necessarily follows from the mixed character of the transaction, -- State and national. A violation of duty is an offence against the United States, for which the offender is justly amenable to that government. No official position can shelter him from this responsibility. In view of the fact that Congress has [***37] plenary and paramount jurisdiction over the whole subject, it seems almost absurd to say that an officer who receives or has custody of the ballots given for a representative owes no duty to the national government which Congress can enforce; or that an officer who stuffs the ballot-box cannot be made amenable to the United States. If Congress has not, prior to the passage of the present laws, imposed any penalties to prevent and punish frauds and violations of duty committed by officers of election, it has been because the exigency has not been deemed sufficient to require it, and not because Congress had not the requisite power.

The objection that the laws and regulations, the violation of which is made punishable by the acts of Congress, are State laws and have not been adopted by Congress, is no sufficient answer to the power of Congress to impose punishment. [HN24]It is true that Congress has not deemed it necessary to interfere with the duties of the ordinary officers of election, but has been content to leave them as prescribed by State laws. It has only created additional sanctions for their performance, and provided means of supervision in order more effectually to secure such [***38] performance. The imposition of punishment implies a prohibition of the act punished.The State laws which Congress sees no occasion to alter, but which it allows to stand, are in effect adopted by Congress. It simply demands their fulfilment. [*389] Content to leave the laws as they are, it is not content with the means provided for their enforcement. It provides additional means for that purpose; and we

think it is entirely within its constitutional power to do so. It is simply the exercise of the power to make additional regulations.

That the duties devolved on the officers of election are duties which they owe to the United States as well as to the State, is further evinced by the fact that they have always been so regarded by the House of Representatives itself. In most cases of contested elections, the conduct of these officers is examined and scrutinized by that body as a matter of right; and their failure to perform their duties is often made the ground of decision. Their conduct is justly regarded as subject to the fullest exposure; and the right to examine them personally, and to inspect all their proceedings and papers, has always been maintained. This could [***39] not be done, if the officers were amenable only to the supervision of the State government which appointed them.

Another objection made is, that, if Congress can impose penalties for violation of State laws, the officer will be made liable to double punishment for delinquency, -- at the suit of the State, and at the suit of the United States. But the answer to this is, that [HN25]each government punishes for violation of duty of itself only. Where a person owes a duty to two sovereigns, he is amenable to both for its performance; and either may call him to account. Whether punishment inflicted by one can be pleaded in bar to a charge by the other for the same identical act, need not now be decided; although considerable discussion bearing upon the subject has taken place in this court, tending to the conclusion that such a plea cannot be sustained.

In reference to a conviction under a State law for passing conterfeit coin, which was sought to be reversed on the ground that Congress had jurisdiction over that subject, and might inflict punishment for the same offence, Mr. Justice [**724] Daniel, speaking for the court, said: "It is almost certain that, in the benignant spirit in [***40] which the institutions both of the State and Federal systems are administered, an offender who should have suffered the penalties denounced by the one would not be subjected [*390] a second time to punishment by the other for acts essentially the same, -- unless, indeed, this might occur in instances of peculiar enormity, or where the public safety demanded extraordinary rigor. But, were a contrary course of policy or action either probable or usual, this would by no means justify the conclusion that offences falling within the competency of different authorities to restrain or punish them would not properly be subjected to the consequences which those anthorities might ordain and affix to their perpetration." Fox v. The State of Ohio, 5 How. 410. The same judge, delivering the opinion of the court in the case of United States v. Marigold (9 How. 569), where a conviction was had under an act of Congress for bringing counterfeit coin into the country, said, in reference to Fox's Case: "With the view of avoiding conflict between the State and Federal jurisdictions, this court, in the case of Fox v. State of Ohio, have taken care to point out that the same act might, as to its character [***41] and tendencies, and the consequences it involved, constitute an offence against both the State and Federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each. We hold this distinction sound;" and the conviction was sustained. The subject came up again for discussion in the case of Moore v. State of Illinois (14 id. 13), in which the plaintiff in error had been convicted under a State law for harboring and secreting a negro slave, which was contended to be properly an offence against the United States under the fugitive-slave law of 1793, and not an offence against the State. The objection of double punishment was again raised. Mr. Justice Grier, for the court, said: "Every citizen of the United States is also a citizen of a State or Territory. He may be said to owe allegiance to two sovereigns, and may be liable to punishment for an infraction of the laws of either. The same act may be an offence or transgression of the laws of both." Substantially the same views are expressed in United States v. Cruikshank (92 U.S. 542), referring to these cases; and we do not well see how the doctrine they contain [***42] can be controverted. A variety of instances may be readily suggested, in which it would be necessary or proper to apply it. Suppose, for example, a State judge having power under the naturalization [*391] laws to admit aliens to citizenship should utter false certificates of naturalization, can it be doubted that he could be indicted under the act of Congress providing penalties for that offence, even though he might also, under the State laws, be indictable for forgery as well as liable to impeachment? So, if Congress, as it might, should pass a law fixing the standard of weights and measures, and imposing a penalty for sealing false weights and false measures, but leaving to the States the matter of inspecting and sealing those used by the people, would not an offender, filling the office of sealer under a State law, be amenable to the United States as well as to the State?

[HN26]If the officers of election, in elections for representatives, own a duty to the United States, and are amenable to that government as well as to the State, -- as we think they are, -- then, according to the cases just cited, there is no reason why each should not establish sanctions for the performance [***43] of the duty owed to itself, though referring to the same act.

To maintain the contrary proposition, the case of Commonwealth of Kentucky v. Dennison (24 How. 66) is confidently relied on by the petitioners' counsel. But there, Congress had imposed a duty upon the governor of

the State which it had no authority to impose. The enforcement of the clause in the Constitution requiring the delivery of fugitives from justice was held not to belong to the United States. It is a purely executive duty, and Congress had no authority to require the governor of a State to execute this duty.

We have thus gone over the principal reasons of a special character relied on by the petitioners for maintaining the general proposition for which they contend; namely, that in the regulation of elections for representatives the national and State governments cannot co-operate, but must act exclusively of each other; so that, if Congress assumes to regulate the subject at all, it must assume exclusive control of the whole subject. The more general reason assigned, to wit, that the nature of sovereignty is such as to preclude the joint co-operation of two sovereigns, even in a matter in which they are [***44] mutually concerned, is not, in our judgment, of sufficient force to prevent concurrent and harmonious action on the part of the national and State governments in the election of representatives. It is at most [*392] an argument ab inconveniente. There is nothing in the Constitution to forbid such co-operation in this case. On the contrary, as already said, we think it clear that the clause of the Constitution relating to the regulation of such elections contemplates such co-operation whenever Congress deems it expedient to interfere merely to alter or add to existing regulations of the State. If the two governments had an entire equality of jurisdiction, there might be an intrinsic difficulty in such co-operation. Then the adoption by the State government of a system of regulations might exclude the action of Congress. By first taking jurisdiction of the subject, the State would acquire exclusive jurisdiction in virtue of a well-known principle applicable to courts having co-ordinate jurisdiction over the same matter. But no such equality exists in the present case. The power of Congress, as we have seen, is paramount, and may be exercised at any time, and to any extent [***45] which it deems expedient; and so far as it is exercised, and no farther, the regulations effected supersede those of the State which are inconsistent therewith.

As a general rule, it is no doubt expedient and wise that the operations of the State and national governments should as far as practicable, be conducted separately, in order to avoid undue jealousies and jars and conflicts of jurisdiction and power.But there is no reason for laying this down as a rule of universal application. It should never be made to override the plain and manifest dictates of the Constitution itself. We cannot yield to such a transcendental [**725] view of state sovereignty. [HN27]The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity. There are very few subjects, it is true, in which our system of government, complicated as it is, requires or gives room for conjoint action between the State and national sovereignties.Generally, the powers given by the Constitution to the government of the United States are given over distinct branches of sovereignty from which the State [***46] governments, either expressly or by necessary implication, are excluded. But in this case, expressly, and in some others, by implication, as we have seen in the case of pilotage, a concurrent jurisdiction is contemplated, that of [*393] the State, however, being subordinate to that of the United States, whereby all question of precedency is eliminated.

In what we have said, it must be remembered that we are dealing only with the subject of elections of representatives to Congress. If for its own convenience a State sees fit to elect State and county officers at the same time and in conjunction with the election of representatives, Congress will not be thereby deprived of the right to make regulations in reference to the latter. We do not mean to say, however, that for any acts of the officers of election, having exclusive reference to the election of State or county officers, they will be amenable to Federal jurisdiction; nor do we understand that the enactments of Congress now under consideration have any application to such acts.

It must also be remembered that we are dealing with the question of power, not of the expediency of any regulations which Congress has made. [***47] That is not within the pale of our jurisdiction. [HN28]In exercising the power, however, we are bound to presume that Congress has done so in a judicious manner; that it has endeavored to guard as far as possible against any unnecessary interference with State laws and regulations, with the duties of State officers, or with local prejudices. It could not act at all so as to accomplish any beneficial object in preventing frauds and violence, and securing the faithful performance of duty at the elections, without providing for the presence of officers and agents to carry its regulations into effect.It is also difficult to see how it could attain these objects without imposing proper sanctions and penalties against offenders.

The views we have expressed seem to us to be founded on such plain and practical principles as herdly to need any labored argument in their support. We may mystify any thing. But [HN29]if we take a plain view of the words of the Constitution, and give to them a fair and obvious interpretation, we cannot fail in most cases of coming to a clear understanding of its meaning. We shall not have far to seek. We shall find it on the surface, and not in the profound depths [***48] of speculation.

The greatest difficulty in coming to a just conclusion arises from mistaken notions with regard to the relations which subsist [*394] between the State and national governments. It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised towards this government in reference to the preservation of our liberties, than is proper to be exercised towards the State governments. Its powers are limited in number, and clearly defined; and its action within the scope of those powers is restrained by a sufficiently rigid bill of [***49] rights for the protection of its citizens from oppression.The true interest of the people of this country requires that both the national and State governments should be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other.

Several other questions bearing upon the present controversy have been raised by the counsel of the petitioners. Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the State authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the [***50] States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is [*395] founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle, that [HN30]the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.

This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case, the words of the Constitution itself show which is to yield. "This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land."

[HN31]This concurrent jurisdiction which the national government necessarily possesses to exercise [***51] its powers of sovereignty in all parts of the United States is distinct from that exclusive power which, by the first article of the Constitution, it is authorized to exercise over the District [**726] of Columbia, and over those places within a State which are purchased by consent of the legislature thereof, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings. There its jurisdiction is absolutely exclusive of that of the State, unless, as is sometimes stipulated, power is given to the latter to serve the ordinary process of its courts in the precinct acquired.

Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified.

Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? must they rely on him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the [***52] parties and bystanders to allow the law to take its course? This is [*396] the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation.

The argument is based on a strained and impracticable view of the nature and powers of the national government. It must execute its powers, or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction. Without specifying other instances in which this power to preserve order and keep the peace

unquestionably exists, take the very case in hand. The counsel for the petitioners concede that Congress may, if it sees [***53] fit, assume the entire control and regulation of the election of representatives. This would necessarily involve the appointment of the places for holding the polls, the times of voting, and the officers for holding the election; it would require the regulation of the duties to be performed, the custody of the ballots, the mode of ascertaining the result, and every other matter relating to the subject. Is it possible that Congress could not, in that case, provide for keeping the peace at such elections, and for arresting and punishing those guilty of breaking it? If it could not, its power would be but a shadow and a name. But, if Congress can do this, where is the difference in principle in its making provision for securing the preservation of the peace, so as to give to every citizen his free right to vote without molestation or injury, when it assumes only to supervise the regulations made by the State, and not to supersede them entirely? In our judgment, there is no difference; and, if the power exists in the one case, it exists in the other.

The next point raised is, that the act of Congress proposes to operate on officers or persons authorized by State laws to perform [***54] certain duties under them, and to require them to disobey [*397] and disregard State laws when they come in conflict with the act of Congress; that it thereby of necessity produces collision, and is therefore void. This point has been already fully considered. We have shown, as we think, that, [HN32]where the regulations of Congress conflict with those of the State, it is the latter which are void, and not the regulations of Congress; and that the laws of the State, in so far as they are inconsistent with the laws of Congress on the same subject, cease to have effect as laws.

Finally, it is objected that the act of Congress imposes upon the Circuit Court duties not judicial, in requiring them to appoint the supervisors of election, whose duties, it is alleged, are entirely executive in their character. It is contended that no power can be conferred upon the courts of the United States to appoint officers whose duties are not connected with the judicial department of the government.

[HN33]The Constitution declares that "the Congress may, by law, vest the appointment of such inferior officers as they think proper, in the President alone, in the courts of law, or in the heads of departments." [***55] It is no doubt usual and proper to vest the appointment of inferior officers in that department of the government, executive or judicial, or in that particular executive department to which the duties of such officers appertain. But there is no absolute requirement to this effect in the Constitution; and, if there were, it would be difficult in many cases to determine to which department an office properly belonged. Take that of marshal, for instance. He is an executive officer, whose appointment, in ordinary cases, is left to the President and Senate. But if Congress should, as it might, vest the appointment elsewhere, it would be questionable whether it should be in the President alone, in the Department of Justice, or in the courts. The marshal is pre-eminently the officer of the courts; and, in case of a vacancy, Congress has in fact passed a law bestowing the temporary appointment of the marshal upon the justice of the circuit in which the district where the vacancy occurs is situated.

But as the Constitution stands, the selection of the appointing power, as between the functionaries named, is a matter [*398] resting in the discretion of Congress. And, looking at [***56] the subject in a practical light, it is perhaps better that it should rest there, than that the country should be harassed by the endless controversies to which a more specific direction on this subject might have given rise. The observation in the case of Hennen, to which reference is made (13 Pet. 258), that the appointing power in the clause referred to "was no doubt intended to be exercised by the department of the government to which the official to be appointed most appropriately belonged." was not intended to define the constitutional power of Congress in this regard, but rather to express the law or rule by which it should be governed. The cases in which the courts have declined to exercise certain duties imposed by Congress, stand upon a different consideration from that which applies in the present case. The law of 1792, which required the circuit to examine claims to revolutionary [**727] pensions, and the law of 1849, authorizing the district judge of Florida to examine and adjudicate upon claims for injuries suffered by the inhabitants of Florida from the American army in 1812, were rightfully held to impose upon the courts powers not judicial, and were, therefore, [***57] void. But the duty to appoint inferior officers, when required thereto by law, is a constitutional duty of the courts; and in the present case there is no such incongruity in the duty required as to excuse the courts from its performance, or to render their acts void. It cannot be affirmed that the appointment of the officers in question could, with any greater propriety, and certainly not with equal regard to convenience, have been assigned to any other depositary of official power capable of exercising it. Neither the President, nor any head of department, could have been equally competent to the task.

In our judgment, [HN34]Congress had the power to vest the appointment of the supervisors in question in the circuit courts.

The doctrine laid down at the close of counsel's brief, that the State and national governments are

co-ordinate and altogether equal, on which their whole argument, indeed, is based, is only partially true.

The true doctrine, as we conceive, is this, that [HN35]whilst the States are really sovereign as to all matters which have not [*399] been granted to the jurisdiction and control of the United States, the Constitution and constitutional laws of the latter [***58] are, as we have already said, the supreme law of the land; and, when they conflict with the laws of the States, they are of paramount authority and obligation. This is the fundamental principle on which the authority of the Constitution is based; and unless it be conceded in practice, as well as theory, the fabric of our institutions, as it was contemplated by its founders, cannot stand. The questions involved have respect not more to the autonomy and existence of the States, than to the continued existence of the United States as a government to which every American citizen may look for security and protection in every part of the land.

We think that the cause of commitment in these cases was lawful, and that the application for the writ of habeas corpus must be denied.

Application denied.

MR. JUSTICE CLIFFORD and MR. JUSTICE FIELD dissented.

See MR. JUSTICE FIELD's opinion infra, p. 404.

LEXSEE 408 U.S. 104

GRAYNED v. CITY OF ROCKFORD

No. 70-5106

SUPREME COURT OF THE UNITED STATES

408 U.S. 104; 92 S. Ct. 2294; 33 L. Ed. 2d 222; 1972 U.S. LEXIS 26

January 19, 1972, Argued
June 26, 1972, Decided

PRIOR HISTORY: APPEAL FROM THE SUPREME COURT OF ILLINOIS.

DISPOSITION: *46 Ill. 2d 492, 263 N. E. 2d 866*, affirmed in part and reversed in part.

SUMMARY:

A demonstrator in front of a Rockford, Illinois, high school was convicted in the Circuit Court of Winnebago County of violating the Rockford anti-picketing ordinance, which outlawed demonstrations near schools in session (except peaceful labor picketing), and the Rockford antinoise ordinance, which prohibited disturbing a school session by wilfully making a noise or diversion while on adjacent public or private grounds. The Supreme Court of Illinois affirmed (*46 Ill 2d 492, 263 NE2d 866*).

On appeal, the United States Supreme Court reversed with respect to the antipicketing ordinance, but affirmed with respect to the antinoise ordinance. In an opinion by Marshall, J., expressing the views of seven members of the court, it was held that (1) the antipicketing ordinance violated the *equal protection clause* because it made an impermissible distinction between labor picketing and other peaceful picketing; and (2) the antinoise ordinance was neither unconstitutionally vague nor unconstitutionally overbroad in restricting *First Amendment* freedoms.

Blackmun, J., joined in the court's opinion as to (1), and concurred in the result as to (2).

Douglas, J., joined in the court's opinion as to (1), but dissented as to (2) on the ground that the demonstrator could not constitutionally be convicted, because he was not noisy, boisterous, or rowdy at the demonstration.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

#) APPEAL AND ERROR §1084(2)

claims not presented --

Headnote:[1A][1B]

On an appeal in which the appellant's sole claim is that he was convicted under facially unconstitutional ordinances, there is no occasion for the court to evaluate either the police's selective arrests or the sufficiency of the evidence that the appellant himself actually engaged in conduct within the terms of the ordinances.

[***LEdHN2]

CONSTITUTIONAL LAW §501

equal protection -- offenses --

Headnote:[2]

A municipal disorderly conduct ordinance which prohibits picketing or demonstrating on a public way within 150 feet of any primary or secondary school building, from 30 minutes before school is in session until 30 minutes after school has been concluded, "provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute," is unconstitutional because it makes an impermissible distinction between labor picketing and other peaceful picketing.

[***LEdHN3]

APPEAL AND ERROR §1660

statutory amendment pending appeal --

Headnote:[3A][3B]

Notwithstanding the postconviction amendment of the ordinance under which an appellant was arrested and convicted, so as to delete unconstitutional language, the United States Supreme Court must consider the facial constitutionality of the ordinance in effect when the appellant was arrested and convicted.

[***LEdHN4]

STATUTES §17

vagueness --

Headnote:[4]

It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.

[***LEdHN5]

STATUTES §18

vagueness --

Headnote:[5A][5B][5C]

An antinoise ordinance, which forbids any person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, from wilfully making or assisting in the making of any noise or diversion which disturbs the peace or good order of such school session or class thereof, is not impermissibly vague.

[***LEdHN6]

APPEAL AND ERROR §709

construing state laws --

Headnote:[6]

The United States Supreme Court is without power to construe and narrow state laws.

[***LEdHN7]

CONSTITUTIONAL LAW §525

statutes -- overbreadth --

Headnote:[7]

A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct.

[***LEdHN8]

STATUTES §37

standing to challenge --

Headnote:[8]

One convicted under an ordinance has standing to challenge the ordinance as unconstitutionally overbroad.

[***LEdHN9]

CONSTITUTIONAL LAW §925

free speech -- public places --

Headnote:[9]

The right to use a public place for expressive activity may be restricted only for weighty reasons.

[***LEdHN10]

CONSTITUTIONAL LAW §925

free speech --

Headnote:[10]

The government has no power to restrict expressive activity because of its message.

[***LEdHN11]

CONSTITUTIONAL LAW §935.5

demonstrations --

Headnote:[11]

Reasonable "time, place and manner" regulations on expressive activity may be necessary to further significant governmental interests, and are permitted; but subject to such reasonable regulation, peaceful demonstrations in public places are protected by the *First Amendment*, although when they turn violent, demonstrations lose their protected quality as expression under the *First Amendment*.

[***LEdHN12]

CONSTITUTIONAL LAW §925

free speech -- regulation --

Headnote:[12]

The nature of a place and the pattern of its normal activities dictate the kinds of regulations of the time, place, and manner of expressive conduct that are reasonable; the crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time, weighing heavily the fact that communication is involved and that the regulation must be narrowly tailored to further the state's legitimate interest.

[***LEdHN13]

CONSTITUTIONAL LAW §925

,940 First Amendment rights -- public places --

Headnote:[13]

Access to the streets, sidewalks, parks, and other similar public places for the purpose of exercising *First Amendment* rights cannot constitutionally be denied broadly.

[***LEdHN14]

CONSTITUTIONAL LAW §925

free speech -- regulation --

Headnote:[14]

Free expression cannot be abridged or denied in the guise of regulation.

[***LEdHN15]

STATUTES §14

ordinance -- validity --

Headnote:[15A][15B]

An antinoise ordinance, which forbids any person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, from wilfully making or assisting in the making of any noise or diversion which disturbs the peace or good order of such school session or class thereof, is not an unconstitutionally overbroad regulation of expressive activity around a school.

[***LEdHN16]

CONSTITUTIONAL LAW §925.8

expression -- school regulation --

Headnote:[16]

School property may not be declared off-limits for expressive activity by students, and the public sidewalk adjacent to school grounds may not be declared off-limits for expressive activity by members of the public, but in each case, expressive activity may be prohibited if it materially disrupts classwork or involves substantial disorder or invasion of the rights of others.

[***LEdHN17]

CONSTITUTIONAL LAW §925

free speech -- place --

Headnote:[17]

One is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.

[***LEdHN18]

CONSTITUTIONAL LAW §925.8

demonstrations -- schools --

Headnote:[18]

Noisy demonstrations which disrupt or are incompatible with normal school activities may be prohibited next to a school when classes are in session.

SYLLABUS

1. Antipicketing ordinance, virtually identical with one invalidated as violative of equal protection in *Police Department of Chicago* v. *Mosley, ante*, p. 92, is likewise invalid. P. 107.

2. Antinoise ordinance prohibiting a person while on grounds adjacent to a building in which a school is in session from willfully making a noise or diversion that disturbs or tends to disturb the peace or good order of the school session is not unconstitutionally vague or overbroad. The ordinance is not vague since, with fair warning, it prohibits only actual or imminent, and willful, interference with normal school activity, and is not a broad invitation to discriminatory enforcement. *Cox v. Louisiana, 379 U.S. 536*; *Coates v. Cincinnati, 402 U.S. 611*, distinguished. The ordinance is not overbroad as unduly interfering with *First Amendment* rights since expressive activity is prohibited only if it "materially disrupts classwork." *Tinker v. Des Moines School District, 393 U.S. 503, 513.* Pp. 107-121.

COUNSEL: Sophia H. Hall argued the cause for appellant. With her on the briefs were William R. Ming, Jr., and Aldus S. Mitchell.

William E. Collins argued the cause for appellee. With him on the brief were A. Curtis Washburn and Charles F. Thomas.

JUDGES: Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Brennan, Stewart, White, Powell, and Rehnquist, JJ., joined. Blackmun, J., filed a statement joining in the judgment and in Part I of the Court's opinion and concurring in the result as to Part II of the opinion, post, p. 121. Douglas, J., filed an opinion dissenting in part and joining in Part I of the Court's opinion, post, p. 121.

OPINION BY: MARSHALL

OPINION

[*105] [***225] [**2297] MR. JUSTICE MARSHALL delivered the opinion of the Court.

Appellant Richard Grayned was convicted for his part in a demonstration in front of West Senior High School in Rockford, Illinois. Negro students at the school had first presented their grievances to school administrators. When the principal took no action on crucial complaints, a more public demonstration of protest was planned. On April 25, 1969, approximately 200 people -- students, their family members, and friends -- gathered next to the school grounds. Appellant, whose brother and twin sisters were attending the school, was part of this group. The demonstrators marched around on a sidewalk about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: "Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights, Negro counselors." Others, without placards, made the "power to the people" sign with their upraised and clenched fists.

[***226] In other respects, the evidence at appellant's trial was sharply contradictory. Government witnesses reported that the demonstrators repeatedly cheered, chanted, baited policemen, and made other noise that was audible in the school; that hundreds of students were distracted from their school activities and lined the classroom windows to watch the demonstration; that some demonstrators successfully yelled to their friends to leave the school building and join the demonstration; that uncontrolled latenesses after period changes in the school were far greater than usual, with late students admitting that they had been watching the demonstration; and that, in general, orderly school procedure was disrupted. Defense witnesses claimed that the demonstrators were at all times quiet and orderly; that they did not seek to violate the law, but only to "make [*106] a point"; that the only noise was made by policemen using loudspeakers; that almost no students were noticeable at the schoolhouse windows; and that orderly school procedure was not disrupted.

[***LEdHR1A] [1A]After warning the demonstrators, the police arrested 40 of them, including appellant. [1] For participating in the [**2298] demonstration, Grayned was tried and convicted of violating two Rockford ordinances, hereinafter referred to as the "antipicketing" ordinance and the "antinoise" ordinance. A $ 25 fine was imposed for each violation. Since Grayned challenged the constitutionality of each ordinance, he appealed directly to the Supreme Court of Illinois. Ill. Sup. Ct. Rule 302. He claimed that the ordinances were

invalid on their face, but did not urge that, as applied to him, the ordinances had punished constitutionally protected activity. The Supreme Court of Illinois held that both ordinances were constitutional on their face. *46 Ill. 2d 492, 263 N. E. 2d 866 (1970)*. We noted probable jurisdiction, *404 U. S. 820 (1971)*. We conclude that the antipicketing ordinance is unconstitutional, but affirm the court below with respect to the antinoise ordinance.

[***LEdHR1B] [1B]

1 Police officers testified that "there was no way of picking out any one in particular" while making arrests. Report of Proceedings in Circuit Court, 17th Judicial Circuit, Winnebago County 66. However, apparently only males were arrested. *Id.*, at 65, 135, 147. Since appellant's sole claim in this appeal is that he was convicted under facially unconstitutional ordinances, there is no occasion for us to evaluate either the propriety of these selective arrests or the sufficiency of evidence that appellant himself actually engaged in conduct within the terms of the ordinances. MR. JUSTICE DOUGLAS, in concluding that appellant's particular behavior was protected by the *First Amendment*, reaches a question not presented by the parties here or in the court below. See Tr. of Oral Arg. 16-17; Jurisdictional Statement 3; *City of Rockford v. Grayned, 46 Ill. 2d 492, 494, 263 N. E. 2d 866, 867 (1970)*.

[*107] I

[***LEdHR2] [2] [***LEdHR3A] [3A]At the time of appellant's arrest and conviction, Rockford's antipicketing ordinance provided that

"A person commits disorderly conduct when he knowingly:

. . . .

"(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection [***227] does not prohibit the peaceful picketing of any school involved in a labor dispute . . . ." Code of Ordinances, c. 28, § 18.1 (i).

This ordinance is identical to the Chicago disorderly conduct ordinance we have today considered in *Police Department of Chicago* v. *Mosley, ante*, p. 92. For the reasons given in *Mosley*, we agree with dissenting Justice Schaefer below, and hold that § 18.1 (i) violates the *Equal Protection Clause of the Fourteenth Amendment*. Appellant's conviction under this invalid ordinance must be reversed. [2]

[***LEdHR3B] [3B]

2 In November 1971, the antipicketing ordinance was amended to delete the labor picketing proviso. As Rockford notes, "This amendment and deletion has, of course, no effect on Appellant's personal situation." Brief 2. Necessarily, we must consider the facial constitutionality of the ordinance in effect when appellant was arrested and convicted.

II

The antinoise ordinance reads, in pertinent part, as follows:

"No person, while on public or private grounds adjacent to any building in which a school or any [*108] class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof. . . ." Code of Ordinances, c. 28, § 19.2 (a).

Appellant claims that, on its face, this ordinance is both vague and overbroad, and therefore unconstitutional. We conclude, however, that the ordinance suffers from neither of these related infirmities.

A. Vagueness

[***LEdHR4] [4]It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. 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 [**2299] to know what is prohi-

bited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. [3] Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. [4] A vague [***228] law impermissibly delegates [*109] 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 application. [5] Third, but related, where a vague statute "abut[s] upon sensitive areas of basic *First Amendment* freedoms," [6] it "operates to inhibit the exercise of [those] freedoms." [7] Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked." [8]

3 *E. g., Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972)*; *Cramp v. Board of Public Instruction, 368 U.S. 278, 287 (1961)*; *United States v. Harriss, 347 U.S. 612, 617 (1954)*; *Jordan v. De George, 341 U.S. 223, 230-232 (1951)*; *Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939)*; *Connally v. General Construction Co., 269 U.S. 385, 391 (1926)*; *United States v. Cohen Grocery Co., 255 U.S. 81, 89 (1921)*; *International Harvester Co.* v. *Kentucky, 234 U.S. 216, 223-224 (1914)*.

4 *E. g., Papachristou v. City of Jacksonville, supra; Coates v. Cincinnati, 402 U.S. 611, 614 (1971)*; *Gregory v. Chicago, 394 U.S. 111, 120 (1969)* (Black, J., concurring); *Interstate Circuit v. Dallas, 390 U.S. 676, 684-685 (1968)*; *Ashton v. Kentucky, 384 U.S. 195, 200 (1966)*; *Giaccio v. Pennsylvania, 382 U.S. 399 (1966)*; *Shuttlesworth v. Birmingham, 382 U.S. 87, 90-91 (1965)*; *Kunz v. New York, 340 U.S. 290 (1951)*; *Saia v. New York, 334 U.S. 558, 559-560 (1948)*; *Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)*; *Herndon v. Lowry, 301 U.S. 242, 261-264 (1937)*.

5 Where *First Amendment* interests are affected, a precise statute "evincing a legislative judgment that certain specific conduct be . . . proscribed," *Edwards v. South Carolina, 372 U.S. 229, 236 (1963)*, assures us that the legislature has focused on the *First Amendment* interests and determined that other governmental policies compel regulation. See Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1, 32; *Garner v. Louisiana, 368 U.S. 157, 200, 202 (1961)* (Harlan, J., concurring in judgment).

6 *Baggett v. Bullitt, 377 U.S. 360, 372 (1964)*.

7 *Cramp v. Board of Public Instruction, 368 U.S., at 287*.

8 *Baggett v. Bullitt, supra, at 372*, quoting *Speiser v. Randall, 357 U.S. 513, 526 (1958)*. See *Interstate Circuit v. Dallas, supra, at 684*; *Ashton v. Kentucky, supra, at 195, 200-201*; *Dombrowski v. Pfister, 380 U.S. 479, 486 (1965)*; *Smith v. California, 361 U.S. 147, 150-152 (1959)*; *Winters v. New York, 333 U.S. 507 (1948)*; *Stromberg v. California, 283 U.S. 359, 369 (1931)*.

[***LEdHR5A] [5A] [***LEdHR6] [6]Although the question is close, we conclude that the antinoise ordinance is not impermissibly vague. The court below rejected appellant's arguments "that proscribed conduct was not sufficiently specified and that police were given too broad a discretion in determining whether conduct was proscribed." *46 Ill. 2d, at 494, 263 N. E. 2d, at 867*. Although it referred to other, similar statutes it had recently construed and upheld, the court [*110] below [**2300] did not elaborate on the meaning of the antinoise ordinance. [9] In this situation, as Mr. Justice Frankfurter put it, we must "extrapolate its allowable meaning." [10] Here, we are "relegated . . . to the words of the ordinance itself," [11] to the interpretations the court below has given to analogous statutes, [12] and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it. [13] "Extrapolation," of course, is a delicate task, for it is not within our power to construe and narrow state laws. [14]

9 The trial magistrate simply charged the jury in the words of the ordinance. The complaint and verdict form used slightly different language. See n. 24, *infra*.

10 *Garner v. Louisiana, 368 U.S., at 174* (concurring in judgment).

11 *Coates v. Cincinnati, 402 U.S., at 614*.

12 *E. g., Gooding v. Wilson, 405 U.S. 518 (1972).*

13 *E. g., Lake Carriers Assn.* v. *MacMullan, 406 U.S. 498, 506-508 (1972)*; *Cole v. Richardson, 405 U.S. 676 (1972)*; *Ehlert v. United States, 402 U.S. 99, 105, 107 (1971)*; cf. *Poe v. Ullman, 367 U.S. 497 (1961).*

14 *United States v. 37 Photographs, 402 U.S. 363, 369 (1971).*

[***LEdHR5B] [5B]With that warning, we find no unconstitutional vagueness in the antinoise ordinance. Condemned to the use of words, we can never expect [***229] mathematical certainty from our language. [15] The words of the Rockford ordinance are marked by "flexibility and reasonable breadth, rather than meticulous specificity," *Esteban v. Central Missouri State College, 415 F.2d 1077, 1088 (CA8 1969)* (Blackmun, J.), cert. denied, *398 U.S. 965 (1970)*, but we think it is clear what the ordinance as a whole prohibits. Designed, according to its preamble, "for the protection of Schools," the ordinance forbids deliberately [*111] noisy or diversionary [16] activity that disrupts or is about to disrupt normal school activities. It forbids this willful activity at fixed times -- when school is in session -- and at a sufficiently fixed place -- "adjacent" to the school. [17] Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase "tends to disturb." [18] However, in *Chicago v. Meyer, 44 Ill. 2d 1, 4, 253 N. E. 2d 400, 402 (1969)*, and *Chicago v. Gregory, 39 Ill. 2d 47, 233 N. E. 2d 422 (1968)*, reversed on other grounds, *394 U.S. 111 (1969)*, the Supreme Court of Illinois construed a Chicago ordinance prohibiting, *inter alia*, a "diversion tending to disturb the peace," and held that it permitted conviction only where there was " [**2301] *imminent* threat of violence." (Emphasis supplied.) See *Gregory v. Chicago, 394 U.S. 111, 116-117, 121-122 (1969)* (Black, J., concurring). [19] Since *Meyer* was specifically cited in the opinion below, and it in turn drew heavily on *Gregory*, we think it proper to conclude that the Supreme Court of Illinois would interpret the Rockford ordinance to prohibit only actual [*112] or imminent interference with the "peace or good order" of the school. [20]

15 It will always be true that the fertile legal "imagination can conjure up hypothetical cases in which the meaning of [disputed] terms will be in nice question." *American Communications Assn.* v. *Douds, 339 U.S. 382, 412 (1950).*

16 "Diversion" is defined by *Webster's Third New International Dictionary* as "the act or an instance of diverting from one course or use to another . . . : the act or an instance of diverting (as the mind or attention) from some activity or concern . . . : a turning aside . . . : something that turns the mind from serious concerns or ordinary matters and relaxes or amuses."

17 Cf. *Cox v. Louisiana, 379 U.S. 559, 568-569 (1965)* ("near" the courthouse not impermissibly vague).

18 See *Gregory v. Chicago, 394 U.S., at 119-120* (Black, J., concurring); *Gooding v. Wilson, 405 U.S., at 525-527*; *Craig v. Harney, 331 U.S. 367, 372 (1947)*; cf. *Chaplinsky v. New Hampshire, 315 U.S. 568 (1942)* (statute punishing "fighting words," that have a "*direct* tendency to cause acts of violence," upheld); *Street v. New York, 394 U.S. 576, 592 (1969).*

19 Cf. *Chicago v. Terminiello, 400 Ill. 23, 79 N. E. 2d 39 (1948)*, reversed on other grounds, *337 U. S. 1, 6 (1949).*

20 Some intermediate appellate courts in Illinois appear to have interpreted the phrase "tending to" out of the Chicago ordinance entirely, at least in some contexts. *Chicago v. Hansen, 337 Ill. App. 663, 86 N. E. 2d 415 (1949)*; *Chicago v. Holmes, 339 Ill. App. 146, 88 N. E. 2d 744 (1949)*; *Chicago v. Nesbitt, 19 Ill. App. 2d 220, 153 N. E. 2d 259 (1958)*; but cf. *Chicago v. Williams, 45 Ill. App. 2d 327, 195 N. E. 2d 425 (1963).*

In its brief, the city of Rockford indicates that its sole concern is with *actual* disruption. "[A] court and jury [are] charged with the duty of determining whether or not . . . a school *has been disrupted* and that the defendant's conduct, [no matter what it was,] caused or contributed to cause the disruption." Brief for Appellee 16 (emphasis supplied). This was the theory on which the city tried appellant's case to the jury, Report,

supra, n. 1, at 12-13, although the jury was instructed in the words of the ordinance. As already noted, *supra*, n. 1, no challenge is made here to the Rockford ordinance as applied in this case.

Although [***230] the prohibited quantum of disturbance is not specified in the ordinance, it is apparent from the statute's announced purpose that the measure is whether normal school activity has been or is about to be disrupted. We do not have here a vague, general "breach of the peace" ordinance, but a statute written specifically for the school context, where the prohibited disturbances are easily measured by their impact on the normal activities of the school. Given this "particular context," the ordinance gives "fair notice to those to whom [it] is directed." [21] Although the Rockford ordinance may not be as precise as the statute we upheld in *Cameron v. Johnson, 390 U.S. 611 (1968)* -- which prohibited picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from" any courthouse -- we think that, as in *Cameron*, the ordinance here clearly "delineates its reach in words of common understanding." *Id., at 616.*

21 *American Communications Assn.* v. *Douds, 339 U.S., at 412.*

[*113] *Cox v. Louisiana, 379 U.S. 536 (1965)*, and *Coates v. Cincinnati, 402 U.S. 611 (1971)*, on which appellant particularly relies, presented completely different situations. In *Cox*, a general breach of the peace ordinance had been construed by state courts to mean "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." The Court correctly concluded that, as construed, the ordinance permitted persons to be punished for merely expressing unpopular views. [22] In *Coates*, the ordinance punished the sidewalk assembly of three or more persons who "conduct themselves in a manner annoying to [**2302] persons passing by . . ." We held, in part, that the ordinance was impermissibly vague because enforcement depended on the completely subjective standard of "annoyance."

22 Cf. *Edwards v. South Carolina, 372 U.S. 229 (1963)*; *Cantwell v. Connecticut, 310 U.S. 296, 308 (1940)*. Similarly, in numerous other cases, we have condemned broadly worded licensing ordinances which grant such standardless discretion to public officials that they are free to censor ideas and enforce their own personal preferences. *Shuttlesworth v. Birmingham, 394 U.S. 147 (1969)*; *Staub v. City of Baxley, 355 U.S. 313 (1958)*; *Saia v. New York, 334 U.S. 558 (1948)*; *Schneider v. State, 308 U.S. 147, 163-164 (1939)*; *Lovell v. Griffin, 303 U.S. 444 (1938)*; *Hague v. CIO, 307 U.S. 496 (1939)*.

[***LEdHR5C] [5C]In contrast, Rockford's antinoise ordinance does not permit punishment for the expression of an unpopular point of view, and it contains no broad invitation to subjective or discriminatory enforcement. Rockford does not claim the broad power to punish all "noises" and "diversions." [23] The vagueness of these terms, by themselves, is dispelled by the ordinance's requirements that (1) the "noise or diversion" be actually incompatible with normal school activity; (2) there be a demonstrated causality between the disruption that occurs and the "noise or diversion"; and (3) the acts be [*114] "willfully" done. [24] "Undesirables [***231] " or their "annoying" conduct may not be punished. The ordinance does not permit people to "stand on a public sidewalk . . . only at the whim of any police officer." [25] Rather, there must be demonstrated interference with school activities. As always, enforcement requires the exercise of some degree of police judgment, but, as confined, that degree of judgment here is permissible. The Rockford City Council has made the basic policy choices, and has given fair warning as to what is prohibited. "The ordinance defines boundaries sufficiently distinct" for citizens, policemen, juries, and appellate judges. [26] It is not impermissibly vague.

23 Cf. *Cox v. Louisiana, 379 U.S. 536, 546-550 (1965)*; *Edwards v. South Carolina, 372 U.S., at 234-237.*

24 Tracking the complaint, the jury verdict found Grayned guilty of "wilfully causing diversion of good order of public school in session, in that while on school grounds and while school was in session, did wilfully make and assist in the making of a diversion

which tended to disturb the peace and good order of the school session and class thereof."

25 *Shuttlesworth v. Birmingham, 382 U.S., at 90.*

26 *Chicago v. Fort, 46 Ill. 2d 12, 16, 262 N. E. 2d 473, 476 (1970)*, a case cited in the opinion below.

B. Overbreadth

[***LEdHR7] [7] [***LEdHR8] [8]A clear and precise enactment may nevertheless be "overbroad" if in its reach it prohibits constitutionally protected conduct. [27] Although appellant does not claim that, as applied to him, the antinoise ordinance has punished protected expressive activity, he claims that the ordinance is overbroad on its face. Because overbroad laws, like vague ones, deter privileged activity, our cases firmly establish appellant's standing to raise an overbreadth challenge. [28] The crucial question, then, is [*115] whether the ordinance sweeps within its prohibitions what may not be punished under the *First* and *Fourteenth Amendments*. Specifically, appellant contends that the Rockford ordinance unduly interferes with *First* and *Fourteenth Amendment* rights to picket on a public sidewalk near a school. We disagree.

27 See *Zwickler v. Koota, 389 U.S. 241, 249-250 (1967)*, and cases cited.

28 *E. g., Gooding v. Wilson, 405 U.S. 518 (1972)*; *Coates v. Cincinnati, 402 U.S., at 616*; *Dombrowski v. Pfister, 380 U.S., at 486*, and cases cited; *Kunz v. New York, 340 U.S. 290 (1951).*

"

[***LEdHR9] [9]In considering the right of a municipality to control the use of public streets for the expression of religious [or political] views, we start with the words of Mr. Justice Roberts that 'Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing [**2303] public questions.' *Hague v. CIO, 307 U.S. 496, 515 (1939)*." *Kunz v. New York, 340 U.S. 290, 293 (1951)*. See *Shuttlesworth v. Birmingham, 394 U.S. 147, 152 (1969)*.The right to use a public place for expressive activity may be restricted only for weighty reasons.

[***LEdHR10] [10] [***LEdHR11] [11]Clearly, government has no power to restrict such activity because of its message. [29] Our cases make equally clear, however, that reasonable "time, place and manner" regulations may be necessary to further significant governmental interests, [***232] and are permitted. [30] For example, two parades cannot march on the same street simultaneously, and government may allow only one. *Cox v. New Hampshire, 312 U.S. 569, 576 (1941)*. A demonstration or parade on a large street during rush hour [*116] might put an intolerable burden on the essential flow of traffic, and for that reason could be prohibited. *Cox v. Louisiana, 379 U.S., at 554*. If overamplified loudspeakers assault the citizenry, government may turn them down. *Kovacs v. Cooper, 336 U.S. 77 (1949)*; *Saia v. New York, 334 U.S. 558, 562 (1948)*. Subject to such reasonable regulation, however, peaceful demonstrations in public places are protected by the *First Amendment*. [31] Of course, where demonstrations turn violent, they lose their protected quality as expression under the *First Amendment*. [32]

29 *Police Department of Chicago* v. *Mosley, ante*, p. 92.

30 *Cox v. New Hampshire, 312 U.S. 569, 575-576 (1941)*; *Kunz v. New York, 340 U.S., at 293-294*; *Poulos v. New Hampshire, 345 U.S. 395, 398 (1953)*; *Cox v. Louisiana, 379 U.S., at 554-555*; *Cox v. Louisiana, 379 U.S. 559 (1965)*; *Adderley v. Florida, 385 U.S. 39, 46-48 (1966)*; *Food Employees v. Logan Valley Plaza, 391 U.S. 308, 320-321 (1968)*; *Shuttlesworth v. Birmingham, 394 U.S. 147 (1969).*

31 *Police Department of Chicago* v. *Mosley, ante*, at 95-96, and cases cited.

32 See generally T. Emerson, The System of Freedom of Expression 328-345 (1970).

[***LEdHR12] [12] [***LEdHR13] [13] [***LEdHR14] [14]The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are rea-

sonable." [33] Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana, 383 U.S. 131 (1966)*, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time. Our cases make clear that in assessing the reasonableness of a regulation, we must weigh heavily the fact that communication is involved; [34] the regulation must be narrowly [*117] tailored [**2304] to further the State's legitimate interest. [35] Access [***233] to the "streets, sidewalks, parks, and other similar public places . . . for the purpose of exercising [*First Amendment* rights] cannot constitutionally be denied broadly . . . ." [36] Free expression "must not, in the guise of regulation, be abridged or denied." [37]

33 Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027, 1042 (1969). Cf. *Cox v. Louisiana, 379 U.S. 559 (1965)*; *Adderley v. Florida, 385 U.S. 39 (1966)*; *Food Employees v. Logan Valley Plaza, 391 U.S. 308 (1968)*; *Tinker v. Des Moines School District, 393 U.S. 503 (1969)*.

34 *E. g., Schneider v. State, 308 U.S. 147 (1939)*; *Talley v. California, 362 U.S. 60 (1960)*; *Saia v. New York, 334 U.S., at 562*; *Cox v. New Hampshire, 312 U.S., at 574*; *Hague v. CIO, 307 U.S., at 516*. See generally Kalven, The Concept of the Public Forum: Cox v. Louisiana, 1965 Sup. Ct. Rev. 1.

35 *De Jonge v. Oregon, 299 U.S. 353, 364-365 (1937)*; *Lovell v. Griffin, 303 U.S., at 451*; *Schneider v. State, 308 U.S., at 164*; *Cantwell v. Connecticut, 310 U.S., at 307*; *Cox v. Louisiana, 379 U.S., at 562-564*; *Davis v. Francois, 395 F.2d 730 (CA5 1968)*. Cf. *Shelton v. Tucker, 364 U.S. 479, 488 (1960)*; *NAACP v. Button, 371 U.S. 415, 438 (1963)*.

36 *Food Employees v. Logan Valley Plaza, 391 U.S., at 315*.

37 *Hague v. CIO, 307 U.S., at 516*.

[***LEdHR15A] [15A]In light of these general principles, we do not think that Rockford's ordinance is an unconstitutional regulation of activity around a school. Our touchstone is *Tinker v. Des Moines School District, 393 U.S. 503 (1969)*, in which we considered the question of how to accommodate *First Amendment* rights with the "special characteristics of the school environment." *Id., at 506. Tinker* held that the Des Moines School District could not punish students for wearing black armbands to school in protest of the Vietnam war. Recognizing that "'wide exposure to . . . robust exchange of ideas'" is an "important part of the educational process" and should be nurtured, *id., at 512*, we concluded that free expression could not be barred from the school campus. We made clear that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," *id., at 508*, [38] and that particular expressive activity could not be prohibited because of a "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," *id., at 509*. But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use [*118] all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted, but only if the forbidden conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id., at 513*. The wearing of armbands was protected in *Tinker* because the students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder." *Id., at 514*. Compare *Burnside v. Byars, 363 F.2d 744 (CA5 1966)*, and *Butts v. Dallas Ind. School District, 436 F.2d 728 (CA5 1971)*, with *Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (CA5 1966)*.

38 Cf. *Hague v. CIO, supra, at 516*.

[***LEdHR16] [16]Just as *Tinker* made clear that school property may not be declared off limits for expressive activity by students, we think it clear that the public sidewalk adjacent to school grounds may not be declared off limits for expressive activity by members of the public. But in each case, expressive activity may be prohibited if it "materially disrupts classwork or involves substantial

disorder or invasion of the rights of others." *Tinker v. Des Moines School District, 393 U.S., at 513.*[39]

39 In *Tinker* we recognized that the principle of that case was not limited to expressive activity within the school building itself. *Id., at 512 n. 6, 513-514.* See *Esteban v. Central Missouri State College, 415 F.2d 1077 (CA8 1969)* (Blackmun, J.), cert. denied, *398 U.S. 965 (1970)*; *Jones v. Board of Regents, 436 F.2d 618 (CA9 1970)*; *Hammond v. South Carolina State College, 272 F.Supp. 947 (SC 1967)*, cited in *Tinker.*

[***LEdHR17] [17]We [***234] would be ignoring reality if we did not recognize that the public schools in a community are important institutions, and are often the focus of [**2305] significant grievances. [40] Without interfering with normal school activities, [*119] daytime picketing and handbilling on public grounds near a school can effectively publicize those grievances to pedestrians, school visitors, and deliverymen, as well as to teachers, administrators, and students. Some picketing to that end will be quiet and peaceful, and will in no way disturb the normal functioning of the school. For example, it would be highly unusual if the classic expressive gesture of the solitary picket disrupts anything related to the school, at least on a public sidewalk open to pedestrians. [41] On the other hand, schools could hardly tolerate boisterous demonstrators who drown out classroom conversation, make studying impossible, block entrances, or incite children to leave the schoolhouse. [42]

40 Cf. *Thornhill v. Alabama, 310 U.S., at 102.* It goes without saying that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State, 308 U.S., at 163.*

41 Cf. *Jones v. Board of Regents, supra.*

42 Cf. *Barker v. Hardway, 283 F.Supp. 228* (SD W. Va.), aff'd, *399 F.2d 638 (CA4 1968)*, cert. denied, *394 U.S. 905 (1969)* (Fortas, J., concurring).

Rockford's antinoise ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools. It is narrowly tailored to further Rockford's compelling interest in having an undisrupted school session conducive to the students' learning, and does not unnecessarily interfere with *First Amendment* rights. Far from having an impermissibly broad prophylactic ordinance, [43] Rockford punishes only conduct which disrupts or is about to disrupt normal school activities. That decision is made, as it should be, on an individualized basis, given the particular fact situation. Peaceful picketing which does not interfere with the ordinary functioning of the school is permitted. [*120] And the ordinance gives no license to punish anyone because of what he is saying. [44]

43 See *Jones v. Board of Regents, supra; Hammond v. South Carolina State College, supra.*

44 Compare *Scoville v. Board of Education, 425 F.2d 10* (CA7), cert. denied, *400 U.S. 826 (1970)*; *Dickey v. Alabama State Board of Education, 273 F.Supp. 613 (MD Ala. 1967)* (cited in *Tinker*).

[***LEdHR18] [18]We recognize that the ordinance prohibits some picketing that is neither violent nor physically obstructive. Noisy demonstrations that disrupt or are incompatible with normal school activities are obviously within the ordinance's reach. Such expressive conduct may be constitutionally protected at other places or other times, cf. *Edwards v. South Carolina, 372 U.S. 229 (1963)*;*Cox v. Louisiana, 379 U.S. 536 (1965)*, but next to a school, while classes are in session, it may be prohibited. [45] The [***235] antinoise ordinance imposes no such restriction on expressive activity before or after the school session, while the student/faculty "audience" enters and leaves the school.

45 Different considerations, of course, apply in different circumstances. For example, restrictions appropriate to a single-building high school during class hours would be inappropriate in many open areas on a college campus, just as an assembly that is permitted outside a dormitory would be inappropriate in the middle of a mathematics class.

[**2306] [***LEdHR15B] [15B]In *Cox v. Louisiana, 379 U.S. 559 (1965)*, this Court indicated that, because of the special nature of the place, [46] persons could be constitutionally prohibited from picketing "in or near" a courthouse "with the intent of interfering with, obstructing, or impeding the administration of justice." Likewise, in *Cameron v. Johnson, 390 U.S. 611 (1968)*, we upheld a statute prohibiting [*121] picketing "in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses." [47] As in those two cases, Rockford's modest restriction on some peaceful picketing represents a considered and specific legislative judgment that some kinds of expressive activity should be restricted at a particular time and place, here in order to protect the schools. [48] Such a reasonable regulation is not inconsistent with the *First* and *Fourteenth Amendments*. [49] The antinoise ordinance is not invalid on its face. [50]

46 Noting the need "to assure that the administration of justice at all stages is free from outside control and influence," we emphasized that "[a] State may protect against the possibility of a conclusion by the public . . . [that a] judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process." *379 U.S., at 562, 565.*

47 Quoting *Schneider v. State, 308 U.S., at 161*, we noted that "'such activity bears no necessary relationship to the freedom to . . . distribute information or opinion.'" *390 U.S., at 617.*

48 Cf. *Garner v. Louisiana, 368 U.S., at 202-203* (Harlan, J., concurring in judgment).

49 Cf. *Adderley v. Florida, 385 U.S. 39 (1966)*. In *Adderley*, the Court held that demonstrators could be barred from jailhouse grounds not ordinarily open to the public, at least where the demonstration obstructed the jail driveway and interfered with the functioning of the jail. In *Tinker* we noted that "a school is not like a hospital or a jail enclosure." *393 U.S., at 512 n. 6.*

50 It is possible, of course, that there will be unconstitutional applications; but that is not a matter which presently concerns us. See *Shuttlesworth v. Birmingham, 382 U.S., at 91*, and n. 1, *supra*.

The judgment is

Affirmed in part and reversed in part.

MR. JUSTICE BLACKMUN joins in the judgment and in Part I of the opinion of the Court. He concurs in the result as to Part II of the opinion.

DISSENT BY: DOUGLAS (In Part)

DISSENT

[***236] MR. JUSTICE DOUGLAS, dissenting in part.

While I join Part I of the Court's opinion, I would also reverse the appellant's conviction under the antinoise ordinance.

[*122] The municipal ordinance on which this case turns is c. 28, § 19.2 (a) which provides in relevant part:

"That no person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof."

Appellant was one of 200 people picketing a school and carrying signs promoting a black cause -- "Black cheerleaders to cheer too," "Black history with black teachers," "We want our rights," and the like. Appellant, however, did not himself carry a picket sign. There was no evidence that he yelled or made any noise whatsoever. Indeed, the evidence reveals that appellant simply marched quietly and on one occasion raised his arm in the "power to the people" salute.

The pickets were mostly students; but they included former students, parents of students, and concerned citizens. They had made proposals to the school board on their demands and were turned down. Hence the picketing. The picketing [**2307] was mostly by black students who were counseled and advised by a faculty member of the school. The school contained 1,800 students.

Those counseling the students advised they must be quiet, walk hand in hand, no whispering, no talking.

Twenty-five policemen were stationed nearby. There was noise but most of it was produced by the police who used loudspeakers to explain the local ordinance and to announce that arrests might be made. The picketing did not stop, and some 40 demonstrators, including appellant, were arrested.

The picketing lasted 20 to 30 minutes and some students went to the windows of the classrooms to observe it. It is not clear how many there were. The picketing [*123] was, however, orderly or, as one officer testified, "very orderly." There was no violence. And appellant made no noise whatever.

What Mr. Justice Roberts said in *Hague v. CIO, 307 U.S. 496, 515-516*, has never been questioned:

"Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied."

[***237] We held in *Cox v. Louisiana, 379 U.S. 536, 544-545*, that a State could not infringe the right of free speech and free assembly by convicting demonsrators under a "disturbing the peace" ordinance where all that the students in that case did was to protest segregation and discrimination against blacks by peaceably assembling and marching to the courthouse where they sang, prayed, and listened to a speech, but where there was no violence, no rioting, no boisterous conduct.

The school where the present picketing occurred was the center of a racial conflict. Most of the pickets were indeed students in the school. The dispute doubtless disturbed the school; and the blaring of the loudspeakers of the police was certainly a "noise or diversion" in the [*124] meaning of the ordinance. But there was no evidence that appellant was noisy or boisterous or rowdy. He walked quietly and in an orderly manner. As I read this record, the disruptive force loosed at this school was an issue dealing with race -- an issue that is preeminently one for solution by *First Amendment* means. * That is all that was done here; and the entire picketing, including appellant's part in it, was done in the best *First Amendment* tradition.

* The majority asserts that "appellant's sole claim . . . is that he was convicted under facially unconstitutional ordinances" and that there is, therefore, no occasion to consider whether his activities were protected by the *First Amendment. Ante*, at 106 n. 1. Appellant argues, however, that the ordinance is overly broad in that it punishes constitutionally protected activity. A statute may withstand an overbreadth attack "only if, as authoritatively construed . . . , it is not susceptible of application to speech . . . that is protected by the *First* and *Fourteenth Amendments*." *Gooding v. Wilson, 405 U.S. 518, 520 (1972)*. If the ordinance applies to appellant's activities and if appellant's activities are constitutionally protected, then the ordinance is overly broad and, thus, unconstitutional. There is no merit, therefore, to the Court's suggestion that the question whether "appellant's particular behavior was protected by the *First Amendment*," *ante*, at 106 n. 1, is not presented.

REFERENCES

16 Am Jur 2d, Constitutional Law 346, 500

US L Ed Digest, Constitutional Law 501; Statutes 14, 17

ALR Digests, Constitutional Law 430; Statutes 26, 44

L Ed Index to Anno (Rev ed), Equal Protection of the Laws; Freedom of Speech, Press, Religion, and Assembly

ALR Quick Index, Equal Protection of Law; Freedom of Speech and Press; Picketing

Federal Quick Index, Equal Protection of the Laws; Freedom of Speech and Press; Picketing

Annotation References:

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. *96 L Ed 374, 16 L Ed 2d 1231.*

The Supreme Court and the right of free speech and press. *93 L Ed 1151 ,2 L Ed 2d 1706, 11 L Ed 2d 1116, 16 L Ed 2d 1053, 21 L Ed 2d 976.*

Participation of student in demonstration on or near campus as warranting imposition of criminal liability for breach of peace, disorderly conduct, trespass, unlawful assembly, or similar offense. *32 ALR3d 551.*

Nonlabor picketing or boycott. *93 ALR2d 1284.*

Validity of statute or ordinance against picketing. 35 ALR 1200, 108 ALR 1119, 122 ALR 1043, 125 ALR 963, 130 ALR 1303.

In re Thomas G. Kelly III and Pauline A. Kelly, Debtor; Robert W. and Carolyn B. Zolg and Tucson Realty & Trust Company, Appellants, and United States of America, Intervenor, v. Thomas G. Kelly III and Pauline A. Kelly, Appellees, and Alan Solot, Trustee in Bankruptcy

No. 87-1560

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

841 F.2d 908; 1988 U.S. App. LEXIS 2529; Bankr. L. Rep. (CCH) P72,218; 18 Collier Bankr. Cas. 2d (MB) 560; 17 Bankr. Ct. Dec. 611

August 13, 1987, Argued and Submitted
March 2, 1988, Filed

PRIOR HISTORY: [**1] Appeal from the Bankruptcy Appellate Panel for the Ninth Circuit, BAP Nos. AZ 86-1080 EMeAS, AZ 86-1117 EMeAS, Elliott, Meyers and Ashland, Bankruptcy Judges, Presiding.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant judgment creditors challenged an order of the Bankruptcy Appellate Panel for the Ninth Circuit, which reversed a judgment of the bankruptcy court that dismissed appellee debtors' Chapter 7 bankruptcy petition for substantial abuse.

OVERVIEW: The debtors filed a petition for relief under Chapter 7 of the Bankruptcy Code. Thereafter, the bankruptcy judge held a hearing to determine whether their petition should be dismissed under 11 U.S.C.S. § 707(b). Finding that the debtors owed primarily consumer debts, the bankruptcy court ruled that granting the debtors' petition would be a substantial abuse of the Bankruptcy Code and dismissed the petition. The bankruptcy appellate panel reversed, holding that the debtors did not have primarily consumer debt because most of their debt was secured by real estate mortgages. The judgment creditors, who sought satisfaction of their judgment against the debtors, appealed. The court ruled that 11 U.S.C.S. §707(b) clearly provided that consumer debt included debt secured by real property. Because the debtors were clearly able to repay their debts, the bankruptcy court was justified in dismissing their petition under 11 U.S.C.S. § 707(b) as a substantial abuse of Chapter 7.

OUTCOME: Finding that consumer debt included debt secured by real property and that appellees were able to repay their debts, the court reversed the order of the bankruptcy appellate panel since appellees' petition constituted a substantial abuse.

CORE TERMS: consumer debts, real property, notice, repay, attorney's fees, legislative history, debt secured, ability to pay, line of credit, granting relief, committee reports, vagueness, mortgage debts, repayment, qualify, home equity, unsecured debts, consumer credit, statutory language, household purpose, criminal contempt, sua sponte, reconsideration, resolving, ambiguous, frivolous, threshold, mortgage, consumer, contempt

LexisNexis(R) Headnotes

Bankruptcy Law > Practice & Proceedings > Appeals > Jurisdiction
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN1]The court's jurisdiction over appeals from the Bankruptcy Appellant Panel (BAP) is limited to appeals from all final decisions, judgments, orders, and decrees, pursuant to 28 U.S.C.S. § 158(d). In determining whether a decision is final, the court looks, first, to see whether

the order of the bankruptcy court was final, and second, to whether the decision of the BAP is final. Both decisions must be final.

Bankruptcy Law > Practice & Proceedings > Appeals > General Overview
Civil Procedure > Appeals > Appellate Jurisdiction > Final Judgment Rule
[HN2]A decision affirming or reversing a final order of a bankruptcy court is also deemed final for purposes of appealability. However, where the Bankruptcy Appellant Panel remands for further factual findings on "a central issue," the decision is not appealable, because review of such decisions would violate the traditional policy disfavoring piecemeal appeals.

Bankruptcy Law > Conversion & Dismissal > Liquidations
[HN3]See 11 U.S.C.S. § 707(b).

Governments > Legislation > Interpretation
[HN4]Legislative history by traditional canons of interpretation is irrelevant to an unambiguous statute.

Bankruptcy Law > Claims > Types > Definitions
Bankruptcy Law > Individuals With Regular Income > Eligibility > Regular Income
[HN5]11 U.S.C.S. § 101(7) defines "consumer debt" as debt incurred by an individual primarily for a personal, family, or household purpose. "Debt" means "liability on a claim," under 11 U.S.C.S. § 101(11) and "claim," in turn, is broadly defined as any right to payment, whether or not such right is secured, or unsecured, pursuant to 11 U.S.C.S. § 101(4)(A).

Bankruptcy Law > Claims > Types > Definitions
Bankruptcy Law > Debtor Benefits & Duties > Debtor Duties
[HN6]A literal reading of the Bankruptcy Code's simple language leads inexorably to the conclusion that consumer debt includes secured debt. Indeed, 11 U.S.C.S. § 521(2) makes special provision for consumer debts which are secured by property of the estate, an unambiguous indication that Congress intended that the "secured or unsecured" language of the definition apply to consumer debts.

Bankruptcy Law > Discharge & Dischargeability > Effects of Discharge > Hearings & Reaffirmation
Real Property Law > Bankruptcy > Secured Claims
[HN7]11 U.S.C.S. § 524 explicitly recognizes that consumer debt may be secured by real property, making different provisions for the reaffirmation of consumer debt depending on whether or not it is consumer debt secured by real property. The statutory scheme so clearly contemplates that consumer debt include debt secured by real property that there is no room left for any other conclusion.

Bankruptcy Law > Conversion & Dismissal > Lack of Good Faith
[HN8]The existence of substantial consumer debt does not, in itself, result in dismissal. The court may dismiss the petition only if granting relief would be a "substantial abuse."

Bankruptcy Law > Conversion & Dismissal > Lack of Good Faith
Bankruptcy Law > Conversion & Dismissal > Liquidations
[HN9]The second prerequisite to dismissal under 11 U.S.C.S. § 707(b) is a finding that granting the debtor's petition would be a "substantial abuse" of Chapter 7. The unanimous conclusion of bankruptcy courts has been that the principal factor to be considered in determining substantial abuse is the debtor's ability to repay the debts for which a discharge is sought.

Bankruptcy Law > Conversion & Dismissal > Lack of Good Faith
[HN10]The debtor's ability to pay his debts when due, as determined by his ability to fund a Chapter 13 plan, is the primary factor to be considered in determining whether granting relief would be a substantial abuse.

Bankruptcy Law > Conversion & Dismissal > Lack of Good Faith
[HN11]A finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

Governments > Legislation > Interpretation
[HN12]Laws that regulate economic activity not involving constitutionally protected conduct are subject to a quite lenient test for constitutional sufficiency. The Bankruptcy Code is such a law.

Bankruptcy Law > Conversion & Dismissal > Liquidations
Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection
[HN13]The due process clause requires only such notice as is reasonably calculated to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. 11 U.S.C.S. § 707(b) provides that the court may dismiss a petition under its provisions "after notice and a hearing," a phrase defined as such notice and such opportunity for a hearing as is appropriate in the particular circumstances.

COUNSEL: Michael McGrath, Stompoly & Stroud, for the Appellants.

Thomas G. Kelly III, Blaser, Kelly & Don, for the Appellees.

Scott A. Harbottle, Civil Division, Department of Justice, for Intervenor.

JUDGES: Mary M. Schroeder, Cecil F. Poole and Alex Kozinski, Circuit Judges.

OPINION BY: KOZINSKI

OPINION

[*910] KOZINSKI, Circuit Judge:

We consider whether the bankruptcy appellate panel erred in reversing the bankruptcy court's dismissal of appellees' chapter 7 bankruptcy petition as a "substantial abuse" of the Bankruptcy Code.

Background

Robert and Carolyn Zolg sold their home to the Kellys; Tucson Realty acted as the real estate agent for this transaction. Subsequently, the Kellys sued the Zolgs and Tucson Realty, charging fraud and breach of contract and seeking damages for loss of the benefit of their bargain, repairs to the house, punitive damages and attorney's fees. On September 6, 1983, the Arizona Superior Court found for the defendants on all counts and awarded them attorney's fees and costs [**2] in the amount of $16,369.90, plus interest from the date of judgment.

The Kellys appealed. In lieu of a supersedeas bond, as called for by Arizona law, they posted security in the form of a $17,056.90 irrevocable reserve against their home equity credit line with the Valley National Bank (VNB). The Arizona Superior Court stayed execution on the judgment until December 31, 1984, when the line of credit was scheduled to expire, but the court's order provided that the stay would remain in effect thereafter if the credit agreement was extended. Clerk's Record (CR) 15 exh. C. VNB promised to extend the agreement for an additional year if the Kellys' credit remained satisfactory, and the line of credit was in fact so extended. CR 15 para. 6 & exh. B.

The Arizona Court of Appeals affirmed the judgment against the Kellys on February 8, 1985, and awarded defendants an additional $5,610.73 in attorney's fees and costs. Not long thereafter, without notifying defendants or seeking permission from the court, Kelly instructed VNB to cease holding the reserve for the Zolgs and Tucson Realty. Excerpt of Record (ER) at 61-62, 79.

The Arizona Supreme Court denied the Kellys' petition for review [**3] on June 12, 1985. Having exhausted all recourse in the state courts, the Kellys turned to the federal courts, filing a petition for relief under chapter 7 of the Bankruptcy Code. In their petition the Kellys listed $181,350 in assets, $147,000 in debt secured by mortgages against their home, and $25,000 in unsecured debt owed to the Zolgs, Tucson Realty, and the other defendants in the original state court action. Before filing for bankruptcy, the Kellys paid off all their other [*911] unsecured creditors, consolidating some of this debt into their secured line of credit with VNB. ER at 67a, 69-70; CR 18 at 38-46. Shortly after filing this petition, Kelly sold back his one-third interest in his law firm, Blaser, Kelly & Don, P.C., for the nominal sum of $ 100.

On August 30, 1985, Kelly was examined pursuant to Bankruptcy Rule 2004. Thereafter, on October 16, 1985, the bankruptcy judge on his own motion held a hearing to determine whether the Kellys' petition should be dismissed under 11 U.S.C. § 707(b). The court found that the Kellys owed "primarily consumer debts" and that granting their petition would be a "substantial abuse" of the Code because they [**4] could easily pay all of their debts. Accordingly, the bankruptcy court dismissed the petition. The Kellys moved for reconsideration, and after a second hearing on January 13, 1986, the court reaffirmed the dismissal. *In re Kelly*, 57 B.R. 536 (Bankr. D. Ariz. 1986) (Scanland, J.).

The Kellys appealed, arguing (1) that section 707(b) is unconstitutional; (2) that they did not have "primarily consumer debts" because most of their debts were secured by real estate mortgages; and (3) that their ability to repay all their unsecured debts was irrelevant to the question of whether granting their petition would be a "substantial abuse." The BAP agreed with the second contention and reversed. *Kelly v. Solot (In re Kelly)*, 70 B.R. 109 (Bankr. 9th Cir. 1986). The Zolgs and Tucson Realty in turn appealed to this court, and the United States intervened to defend the constitutionality of section 707(b).

I. Jurisdiction

[HN1]Our jurisdiction over appeals from the BAP is limited to "appeals from all final decisions, judgments, orders and decrees." 28 U.S.C. § 158 [**5] (d) (Supp. III 1985). In determining whether a decision is final, "we look, first, to see whether the order of the bankruptcy court was final, and second, to whether the decision of the BAP is final. Both decisions must be final." *King v. Stanton (In re Stanton)*, 766 F.2d 1283, 1285 (9th Cir. 1985) (citations and footnote omitted). Turning first to the bankruptcy court's order, it is obvious that a dismissal of a debtor's bankruptcy petition is final, terminating, as it does, all litigation in the case. The more difficult question is whether the BAP's reversal of that dismissal is also final.

[HN2]A decision affirming or reversing a final order of a bankruptcy court is also deemed final for purposes of appealability. *In re Stanton*, 766 F.2d at 1287. However, where the BAP remands for further factual findings on "a central issue," the decision is not appealable, because review of such decisions would violate the traditional "policy disfavoring piecemeal appeals." *Id.*

Here, the BAP reversed a final order of the bankruptcy court and remanded for "a determination [**6] of the nature of the unsecured debt" and for reconsideration of the proper test for substantial abuse. 70 B.R. at 112, 113. The latter question is clearly one of law. As for the former, the only matter left unresolved was whether appellants' judgment for attorney's fees qualifies as a "consumer debt" under 11 U.S.C. § 101(7). Since the underlying facts are not disputed, [1] the question is one in which legal issues predominate and is thus subject to de novo review. *United States v. McConney*, 728 F.2d 1195, 1199-1204 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 83 L. Ed. 2d 46, 105 S. Ct. 101 (1984). The policies of judicial efficiency and finality are best served by our resolving the question now.

> 1 Although the bankruptcy court record does not contain a full exegesis of the factual setting giving rise to the litigation which resulted in the award of attorney's fees, we take judicial notice of the Arizona Court of Appeals' memorandum opinion setting forth the facts and issues in that case. Fed. R. Evid. 201.

[**7] II. Section 707(b) Dismissal

Title III of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 355 (the 1984 Act) added the so-called consumer credit amendments to the Bankruptcy Code as it had been originally enacted by the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (the 1978 Act). Included in these amendments was new subsection 707(b), which provided:

> [HN3]After notice and a hearing, the court, on its own motion and not at the request or suggestion of any party in interest, may dismiss a case filed by an individual debtor [*912] under this chapter whose debts are primarily consumer debts if it finds that the granting of relief would be a substantial abuse of the provisions of this chapter [7]. There shall be a presumption in favor of granting the relief requested by the debtor.

11 U.S.C. § 707(b) (Supp. III 1985). [2] The Kellys dispute the applicability of this provision to their case.

> 2 Section 707(b) was later amended by the Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, title II, § 219(b), 100 Stat. 3101 (1986 Act), to permit the United States Trustee to request a dismissal hearing.

[**8] A. *Primarily Consumer Debts*

1. The first question we must address is whether some or all of the Kellys' debts constitute "consumer debts" within the meaning of the Code. As an initial matter, the Kellys argue that debts secured by real property are never consumer debts, relying on floor statements made in the House and Senate prior to the enactment of the 1978 Act. *See* 124 Cong. Rec. S17,406 (daily ed. Oct. 6, 1978) (statement of Sen. DeConcini) ("[a] consumer debt does not include a debt to any extent the debt is secured by real property"); 124 Cong. Rec. 32,393 (1978) (statement of Rep. Edwards) (same). Since approximately 85 percent of the Kellys' debt is secured by real property (their home), they contend that they cannot have "primarily consumer debts" and thus are exempt from dismissal under section 707(b).

This argument stands the process of statutory interpretation on its head, resorting to legislative history without first considering the language of the statute. As the Supreme Court has noted, [HN4]"legislative history, . . . by traditional canons of interpretation[, [**9]] is irrelevant to an unambiguous statute." *United Air Lines, Inc. v. McMann*, 434 U.S. 192, 199, 54 L. Ed. 2d 402, 98 S. Ct. 444 (1977); *accord Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1391 (9th Cir. 1986). Here, resort to legislative history is not appropriate because the statutory language is clear and precisely addresses this situation.

[HN5]The Code defines "consumer debt" as "debt incurred by an individual primarily for a personal, family, or household purpose." 11 U.S.C. § 101(7) (1982). "Debt" means "liability on a claim," 11 U.S.C. § 101(11) (1982), and "claim," in turn, is broadly defined as any "right to payment, whether or not such right is . . . *secured, or unsecured.*" 11 U.S.C. § 101(4)(A) (1982) (emphasis added). [HN6]A literal reading of the Code's simple language leads inexorably to the conclusion that consumer debt includes secured debt. Indeed, section 521(2) of the Code, also [**10] added by the 1984 Act, makes special provision for "consumer debts which are secured by property of the estate," an unambiguous indication that Congress intended that the "secured or unsecured" language of the definition apply to consumer debts.

Nor is there any indication that debts secured by real property are to be treated differently. To the contrary, section 524 of the Code [HN7]explicitly recognizes that consumer debt may be secured by real property, making different provisions for the reaffirmation of consumer debt depending on whether or not it is "consumer debt secured by real property." 11 U.S.C. §§ 524(c)(6)(B), (d)(2) (Supp. III 1985). The statutory scheme so clearly contemplates that consumer debt include debt secured by real property that there is no room left for any other conclusion. *See* 4 *Collier on Bankruptcy* para. 707.06, at 707-16 (15th ed. 1987) (*Collier*). [3]

> 3 Even if the statutory language were ambiguous, we would find the Kellys' analysis of the legislative history unconvincing. To the extent that legislative history may be considered, it is the official committee reports that provide the authoritative expression of legislative intent. *Garcia v. United States*, 469 U.S. 70, 76, 83 L. Ed. 2d 472, 105 S. Ct. 479 (1984); *Zuber v. Allen*, 396 U.S. 168, 186, 24 L. Ed. 2d 345, 90 S. Ct. 314 (1969). The committee reports on the 1978 Act make no reference to the supposed exclusion of debt secured by real property from the definition of consumer debt. *See* S. Rep. No. 989, 95th Cong., 2d Sess. 22 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5808; H.R. Rep. No. 595, 95th Cong., 1st Sess. 309 (1977), *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6266. Stray comments by individual legislators, not otherwise supported by statutory language or committee reports, cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely.

[**11] [*913] The Kellys argue that this interpretation would render petitions of most consumer debtors subject to dismissal, because most consumers have the largest portion of their debt secured by real property. Such policy arguments are, of course, beside the point once Congress has spoken. In any event, the argument is spurious. [HN8]The existence of substantial consumer debt does not, in itself, result in dismissal. The court may dismiss the petition only if granting relief would be a "substantial abuse." Those debtors who are, for no fraudulent or improper reasons, truly in need of a "fresh start" will not be subject to 707(b) dismissal. This is precisely what Congress had in mind. *See* pp. slip op. 2561-2564 *infra*. [4]

> 4 In fact, it is the interpretation urged by the Kellys that would frustrate congressional intent. Since many debtors do have large mortgage debts, a blanket rule excluding such debt from the category of consumer debt would completely insulate a very substantial number of debtors from section 707(b) dismissal.
>
> The BAP attempted to avoid this problem by excluding mortgage debt from the section 707(b) calculus altogether, and instead considering only the ratio of unsecured consumer debt to unsecured non-consumer debt. Nothing in the statute provides the slightest support for this approach. Bankruptcy judges have no more power than any others to ignore the plain language of a statute in order to reach a result more in keeping with their notions of equity. *In re Shoreline Concrete Co.*, 831 F.2d 903, 905 (9th Cir. 1987).

[**12] 2. While secured debt is not automatically excluded from consumer debt, it is not automatically included either. We must look to the purpose of the debt in determining whether it falls within the statutory definition. Of the Kellys' mortgage debts, $ 95,000 consists of a lien they assumed in purchasing their home and $ 32,000 represents a home equity line of credit incurred for home improvements and the repayment of credit card debts. ER at 102; CR 18 at 38-43. All these fit comfortably within the Code's definition of consumer debt. [5] It is difficult to conceive of any expenditure that serves a "family . . . or household purpose" more directly than does the purchase of a home and the making of improvements thereon.

> 5 The Kellys argue that the $ 95,000 first mortgage is not to be counted in determining their total debt load because it is non-recourse. This contention is frivolous. The title to the Kellys' home is subject to this lien, and they make monthly payments on the debt. ER at 15, 64-65. Were they to default on such payments, the lienholder could sell their home in a foreclosure or trustee's sale to collect the $ 95,000. This clearly

qualifies as a consumer debt within the meaning of 11 U.S.C. §§ 101(4), (11).

[**13] The Kellys also claim to have a second home equity line of credit on which they owe approximately $ 20,000. The sole evidence concerning the nature of this debt is Kelly's affidavit which describes it as securing a loan from VNB to his professional corporation. Debt incurred for business ventures or other profit-seeking activities is plainly not consumer debt for purposes of section 707(b). *In re Bell*, 65 B.R. 575, 577 (Bankr. E.D. Mich. 1986).

The Kellys' only remaining debt is the $ 25,000 they owe to the Zolgs and Tucson Realty for attorney's fees incurred in the state court litigation. That lawsuit was commenced by the Kellys for the purpose of recovering money allegedly overpaid in purchasing their home. The litigation thus served primarily a "family" or "household" purpose within the meaning of section 101(7). A debt for attorney's fees incurred in attempting to further this purpose, like any other debt so incurred, qualifies as a consumer debt.

The ultimate question we must decide under section 707(b) is, of course, whether debtors have "*primarily* consumer debts." "Primarily" means "for the most part." *Webster's Ninth New Collegiate Dictionary* [**14] 934 (1984). Thus, when "the most part" -- i.e., more than half -- of the dollar amount owed is consumer debt, the statutory threshold is passed. Here that standard is easily met. Of the Kellys' $ 172,000 indebtedness, $ 152,000 (approximately 88 percent) is consumer debt. They have primarily consumer debts within the meaning of section 707(b).

B. *Substantial Abuse*

1. [HN9]The second prerequisite to dismissal under section 707(b) is a finding that granting the debtor's petition would be a "substantial abuse" of chapter 7. With the [*914] singular exception of the BAP below, the unanimous conclusion of bankruptcy courts has been that the principal factor to be considered in determining substantial abuse is the debtor's ability to repay the debts for which a discharge is sought. *See, e.g., In re Walton*, 69 B.R. 150, 154 (E.D. Mo. 1986); *In re Cord*, 68 B.R. 5, 7 (Bankr. W.D. Mo. 1986); *In re Gaukler*, 63 B.R. 224, 225 (Bankr. D.N.D. 1986); *In re Kress*, 57 B.R. 874, 878 (Bankr. D.N.D. 1985); *In re Hudson*, 56 B.R. 415, 419 (Bankr. N.D. Ohio 1985); [**15] *In re Grant*, 51 B.R. 385, 391 (Bankr. N.D. Ohio 1985); *In re Edwards*, 50 B.R. 933, 936-37 (Bankr. S.D.N.Y. 1985); *In re White*, 49 B.R. 869, 874 (Bankr. W.D.N.C. 1985); *see also In re Bryant*, 47 B.R. 21, 24-26 (Bankr. W.D.N.C. 1984) (dismissing petition where debtor was able to pay debts and had not truthfully reported his financial condition); 4 *Collier* para. 707.07 (primary factor is ability to repay debts; other factors include failure to fully disclose financial condition and indication that debtor has not suffered any calamity but merely desires to avoid paying debts); 3 *Collier* para. 521.06[4], at 521-26. In determining ability to pay, courts have looked to the debtor's ability to fund a chapter 13 plan. *See, e.g., Walton*, 69 B.R. at 154; *Hudson*, 56 B.R. at 420; *Grant*, 51 B.R. at 391.

The Kellys point to the legislative history of the statute which they claim demonstrates that ability to pay is not a relevant consideration in determining substantial abuse. *See* 130 Cong. Rec. S7624 (daily ed. June 19, 1984) ("under [**16] [the 1984 Act], the availability of bankruptcy relief would not be limited by a future earnings standard") (statement of Sen. Metzenbaum); 130 Cong. Rec. H7489 (daily ed. June 29, 1984) ("the Consumer Credit amendments . . . contain no threshold or future income test") (statement of Rep. Rodino). [6] Even if such floor statements were indicative of legislative intent, *but see* p. 912 n.3 *supra*, the Kellys misinterpret these statements and the intent of Congress in passing the 1984 Act.

6 As usual, the Congressional Record contains ample support on both sides of the issue. *See, e.g.*, 130 Cong. Rec. H7499 (daily ed. June 29, 1984) (substantial abuse occurs if "the debtor is found capable of fulfilling the terms of a chapter 13 repayment agreement") (statement of Rep. Anderson); 130 Cong. Rec. S6090 (daily ed. May 21, 1984) (statement of Sen. Hatch); *id.* at S6087 (statement of Sen. Heflin); 130 Cong. Rec. H1808 (daily ed. March 21, 1984) (statement of Rep. Roukema); *see also* 4 *Collier* para. 707.04, at 707-12 n.4.

[**17] The consumer credit amendments approved by Congress in 1984 were adapted from provisions first proposed in an earlier Senate bill, S. 445. As originally introduced in February 1983, S. 445 contained a formula for determining the precise point where a debtor's ability to pay some debts would preclude chapter 7 relief. As a result of efforts by Senator Metzenbaum and others, however, this formula was eliminated by the Senate Judiciary Committee in favor of the substantial abuse formulation which was ultimately adopted and codified by the 1984 Act as section 707(b). The statements cited by the Kellys referred to the fact that the bill no longer contained a threshold formula; they do not suggest that a debtor's ability to repay his debts is no longer the primary consideration in determining whether there is abuse. Indeed, the committee report on the final version of S. 445 [7] states clearly that dismissal for substantial abuse is intended to "uphold[] creditors' interests in obtaining repayment where such repayment would not be a burden," and that "if a debtor can meet his debts

without difficulty as they come due, use of Chapter 7 would represent a substantial abuse." S. Rep. No. 65, 98th [**18] Cong., 1st Sess. 53, 54 (1983). Accordingly, we hold that [HN10]the debtor's ability to pay his debts when due, as determined by his ability to fund a chapter 13 plan, is the primary factor to be considered in determining whether granting relief would be a substantial abuse.

7 There were no committee reports on the 1984 Act. Therefore, the report on S. 445 is the best available evidence of Congress' intent in enacting section 707(b).

2. The rule adopted by the overwhelming majority of the courts considering the issue appears to be that a debtor's ability to pay his debts will, standing alone, justify a section 707(b) dismissal. *See Cord*, 68 B.R. at 7 (debtors who are able to pay their debts neither need nor deserve protection of chapter 7); *Hudson*, 56 B.R. at 419 (substantial abuse occurs whenever debtor has ability to repay substantial portion of his debts under chapter 13); *Edwards*, 50 B.R. at 937 [**19] (ability to pay principal amount of debts in three years is per se [*915] substantial abuse). [8] We find this approach fully in keeping with Congress's intent in enacting section 707(b), and accordingly adopt it. This is not to say that inability to pay will shield a debtor from section 707(b) dismissal where bad faith is otherwise shown. But [HN11]a finding that a debtor is able to pay his debts, standing alone, supports a conclusion of substantial abuse.

8 *But see In re Deaton*, 65 B.R. 663, 664-65 (Bankr. S.D. Ohio 1986) ("the mere ability to fund a Chapter 13 plan is not sufficient to constitute 'substantial abuse'").

The Kellys are clearly able to repay their debts. They admitted to an excess of income over expenses in the amount of some $ 440 per month, and the bankruptcy judge found that half of their claimed $ 500-per-month expenditure for "recreation" was excessive. 57 B.R. at 540. [**20] [9] Combining these two figures, the court found that the Kellys could repay, out of disposable income, approximately 99 percent of their unsecured debt in only three years. *Id.* The bankruptcy court was amply justified in dismissing the petition under section 707(b) as a substantial abuse of chapter 7.

9 The bankruptcy judge was, if anything, unduly generous in this regard. The sole support for the $ 500 figure was Kelly's explanation that this was for "going out to dinner, entertaining people[,] . . . buying toys for the kids or going to the movies, that sort of thing." ER at 82. None of these items qualify as "reasonably necessary . . . for the maintenance or support of the debtor or a dependent of the debtor," 11 U.S.C. § 1325(b)(2)(A) (Supp. III 1985), and thus permitting a debtor to retain this income would be grounds for rejection of a chapter 13 plan. 11 U.S.C. § 1325(b). The same test is appropriate in determining which of the expenses claimed by the debtor could in reality be devoted to debt servicing for purposes of determining the debtor's ability to repay his debts under section 707(b).

[**21] III. Constitutionality of Section 707(b)

The Kellys raise various constitutional challenges to section 707(b). Although the BAP found it unnecessary to address these claims, it nonetheless opined that "[the Kellys'] due process arguments are troublesome." 70 B.R. at 110. We do not find them so.

A. *Vagueness*

The Kellys first raise a volley of arguments to the effect that section 707(b) is void for vagueness. But [HN12]laws that regulate economic activity not involving constitutionally protected conduct are subject to a quite lenient test for constitutional sufficiency. *See Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 497, 71 L. Ed. 2d 362, 102 S. Ct. 1186 (1982); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162, 31 L. Ed. 2d 110, 92 S. Ct. 839 (1972). The Bankruptcy Code is such a law. *In re Talmadge*, 832 F.2d 1120, 1125 (9th Cir. 1987). Considering the Kellys' contentions in this light, we find them to be lacking in merit.

1. The Kellys first argue that section 707(b) [**22] is constitutionally inadequate because it fails to require notice to the debtors that fully informs them of all the matters to be considered at the hearing and of the facts on which the court will rely in resolving them. This contention is frivolous. [HN13]The due process clause requires only such notice as is "reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 94 L. Ed. 865, 70 S. Ct. 652 (1950). Section 707(b) provides that the court may dismiss a petition under its provisions "after notice and a hearing," a phrase defined as "such notice . . . and such opportunity for a hearing as is appropriate in the particular circumstances." 11 U.S.C. § 102(1)(A) (1982). In conformity with these statutory and constitutional strictures, the bankruptcy judge gave the Kellys more than a month's notice, informing them of the hearing and the nature of the issue to be considered, and instructing them to "appear [**23] . . . to show cause, if any they have, why such proceedings should not be dismissed." ER at 39.

The Code provides for, and the Kellys received, constitutionally adequate notice.

The Kellys argue, however, that they were unable to ascertain what facts would be considered at the hearing. This contention is untenable. Section 707(b) permits dismissal only after the court finds that the debtor had "primarily consumer debts" and [*916] engaged in "substantial abuse." Both of these terms are defined by the Code, legislative history and case law; debtors are therefore on reasonable notice of the facts relevant to these determinations. Even if the Kellys had for some reason been unaware of the relevant considerations at their first hearing, they could not have remained in the dark by the time of the second hearing, held by the court in response to their motion for reconsideration. The Kellys had by then read the judge's original order dismissing their petition and therefore knew exactly the facts and law the court deemed relevant. The bankruptcy judge generously allowed them to present additional evidence at this hearing, but they chose to rely solely on previously submitted evidence [**24] and Kelly's affidavit. [10] Their argument that they were "placed . . . in the untenable position of not knowing what evidence to present at the hearing ordered by the Court," Appellees' Answering Brief at 12, is quite simply disingenuous.

> 10 At this hearing, the following exchange took place:
>
> > THE COURT: . . . I would be willing to take any evidence you would want to give.
> >
> > MR. BREEN [attorney for Kellys]: Well, as far as the facts, Your Honor, we were satisfied with the affidavit of the Kellys explaining how the debt structure was, which was attached to the motion, and then the legal arguments about respective income.
>
> CR 38 at 4.

2. The Kellys also claim that section 707(b) is unconstitutionally vague because it fails to specify the procedures for the presentation of evidence and rebuttal of the statutory presumption in favor of granting relief. With respect to the presentation of evidence, the Bankruptcy Rules incorporate the Federal Rules of Evidence, as well as Federal Rules of Civil [**25] Procedure 43 and 44 governing precisely this issue. Bankr. R. 9017. As for the presumption, we are unable to discern any constitutional infirmity in leaving its application to the discretion of the trial court. The Kellys' claim to the contrary is entirely without merit.

3. The Kellys' final vagueness objection to section 707(b) is that the terms "primarily consumer debt" and "substantial abuse" are not adequately defined. Although they admit that "consumer debt" is defined in 11 U.S.C. § 101(7), they argue that the definition is ambiguous because it fails to indicate whether mortgage debts are consumer debts. As discussed above, however, the statute addresses this point directly. *See* slip op. at pp. 6-9 *supra*.

The term "primarily consumer debts" is not separately defined in the Code. But the Code does define "consumer debt," and the modifier "primarily" is not a word that is ambiguous or difficult to understand. The Constitution does not require the legislature to incorporate *Webster's* into every statute in order to insulate it from vagueness challenges.

The Code also contains no definition of "substantial abuse." As the United States points [**26] out in its brief as intervenor, however, the Supreme Court has upheld statutes that contain equally undefined standards of decision. *See, e.g.*, *Nash v. United States*, 229 U.S. 373, 376-78, 57 L. Ed. 1232, 33 S. Ct. 780 (1913) ("unreasonable" restraints of trade). The legislative history of the statute clearly indicates that ability to repay debts is the primary factor to be considered in applying this phrase, and the bankruptcy courts have had no difficulty in fashioning a relatively uniform approach to resolving this question. *See Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 593, 105 S. Ct. 3325, 87 L. Ed. 2d 409 (1985) (statutory "term that appears vague on its face 'may derive much meaningful content from the purpose of the Act, its factual background, and the statutory context'") (quoting *American Power & Light Co. v. SEC*, 329 U.S. 90, 104, 91 L. Ed. 103, 67 S. Ct. 133 (1946)). As Kelly, an experienced lawyer, should well have known, section 707(b) is simply not void for vagueness.

B. *Due Process*

The Kellys also object to the fact that, at the time their petition was filed, section 707(b) granted the bankruptcy [**27] judge sole discretion to institute dismissal proceedings. [11] They claim that this placed the court in an adversarial position, particularly because the presumption in favor of [*917] granting relief supposedly requires the court to come forward with evidence justifying dismissal. They rely on *In re Murchison*, 349 U.S. 133, 99 L. Ed. 942, 75 S. Ct. 623 (1955), which held that a judge could not try witnesses, who had appeared before him while he sat as a one-man grand jury, for criminal contempt based on the judge's own investigations, because "having been part of [the accusatory] process a

judge cannot be, in the very nature of things, wholly disinterested in the conviction or acquittal of those accused." *Id.* at 137.

11 The Code was amended in 1986 to authorize United States Trustees to initiate such proceedings as well. *See* 912 n.2 *supra*.

The result in *Murchison* was based in part on the criminal nature of the proceedings, *id.*, and in part on the [**28] fear that the extensive and often one-sided evidence presented in the secret grand jury proceedings could "weigh far more heavily with [the judge] than any testimony given in the open hearings," *id.* at 138. Neither of these considerations is present in the bankruptcy context. Indeed, the authority granted the bankruptcy judge under section 707(b) is no different from that granted federal judges in a number of similar situations, none of which raises any due process concerns. *See, e.g., Sacher v. United States*, 343 U.S. 1, 9, 96 L. Ed. 717, 72 S. Ct. 451 (1952) (upholding district court's imposition of criminal contempt sanctions, without hearing, on parties who committed disruptive conduct during trial before sanctioning judge); *Clark v. Paul Gray, Inc.*, 306 U.S. 583, 588, 83 L. Ed. 1001, 59 S. Ct. 744 (1939) (issue of subject matter jurisdiction raised sua sponte); Fed. R. Civ. P. 11 (court on its own motion may impose sanctions for frivolous pleadings); Fed. R. Civ. P. 12(h)(3) (court must sua sponte dismiss actions whenever it appears that subject matter jurisdiction is lacking); Fed. R. Civ. P. 16(f) (court on its own motion [**29] may impose sanctions for failure to comply with discovery orders); Fed. R. Crim. P. 42 (criminal contempt may be punished summarily at instance of judge; judge may preside at contempt hearing unless contempt charged "involves disrespect to or criticism of" that judge).

There is simply no basis for the Kellys' novel contention that a judge's power to order a hearing on the issue of dismissal denies debtors a neutral and impartial arbiter. As with sua sponte orders concerning jurisdiction, contempt and sanctions, the court acquires no stake in the litigation merely by ordering a hearing.

Our conclusion is not affected by the fact that the statute gives debtors the benefit of a presumption in favor of granting relief. This presumption does not place on the judge the burden of producing evidence. Rather, when the issue of section 707(b) dismissal is raised, the debtor and, if appropriate, other parties as well are free to present evidence on the relevant issues. The court remains at all times above the level of advocacy. Seen in this light, the presumption is in reality a caution and a reminder to the bankruptcy court that the Code and Congress favor the granting of bankruptcy relief, [**30] and that accordingly "the court should give the benefit of any doubt to the debtor and dismiss a case only when a substantial abuse is clearly present." 4 *Collier* § 707.08, at 707-19.

It is ironic that the Kellys should be raising a constitutional objection to this provision. Congress carefully reserved to the court the power to institute such proceedings precisely to protect debtors from possible harassment by creditors. *See* 4 *Collier* para. 707.05. Congress violated no constitutional protections in adopting this approach. Section 707(b) is constitutional on its face and as applied to the Kellys in this case.

IV. Attorney's Fees

The Zolgs and Tucson Realty seek an award of attorney's fees against the Kellys for their bad faith in litigating this appeal. Because the Zolgs and Tucson Realty are appellants before us, we cannot award them fees under 28 U.S.C. § 1912 (1982) (damages and costs may be allowed to prevailing *appellees*), or Federal Rule of Appellate Procedure 38 (fees may be awarded to prevailing *appellees*). We decline to make such an award under 28 U.S.C. § 1927 (1982) or our inherent [**31] equitable powers. We express no opinion, however, as to whether appellants may be entitled to an award of attorney's fees in the courts below.

Conclusion

The judgment of the BAP is REVERSED and the case is REMANDED to the bankruptcy court for further proceedings in accordance with this opinion.

LEXSEE 461 U.S. 352

KOLENDER, CHIEF OF POLICE OF SAN DIEGO, ET AL. v. LAWSON

No. 81-1320

SUPREME COURT OF THE UNITED STATES

461 U.S. 352; *103 S. Ct. 1855*; *75 L. Ed. 2d 903*; *1983 U.S. LEXIS 159*; *51 U.S.L.W. 4532*

November 8, 1982, Argued
May 2, 1983, Decided

PRIOR HISTORY: APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *658 F.2d 1362*, affirmed and remanded.

DECISION:

California loitering statute requiring "credible and reliable" identification at police request held unconstitutionally vague.

SUMMARY:

An individual who had been detained or arrested on approximately 15 occasions under a California statute, which required 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 valid stop, brought a civil action seeking a declaratory judgment that the statute was unconstitutional, a mandatory injunction seeking to restrain enforcement of the statute, and compensatory and punitive damages against the various officers who detained him. The United States District Court for the Southern District of California held that the statute was overbroad and enjoined enforcement of the statute but held that damages were not recoverable. The United States Court of Appeals for the Ninth Circuit affirmed the District Court determination as to the statute's unconstitutionality (*658 F2d 1362*).

On appeal, the United States Supreme Court affirmed and remanded. In an opinion by O'Connor, J., joined by Burger, Ch. J., and Brennan, Marshall, Blackmun, Powell, and Stevens, JJ., it was held that the statute was unconstitutionally vague on its face within the meaning of the *due process clause of the Fourteenth Amendment* because it encouraged arbitrary enforcement by failing to clarify what is contemplated by the requirement that a suspect provide a credible and reliable identification.

White, J., joined by Rehnquist, J., dissented, expressing the view that the statute was not unconstitutionally vague since a criminal statute is not unconstitutionally vague on its face unless it is impermissibly vague in all of its possible applications.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

STATUTES §18.9

loitering statute -- vagueness --

Headnote:[1A][1B][1C]

A state 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 valid stop is unconstitutionally vague on its face within the meaning of the *due process clause of the Fourteenth Amendment* because it encourages arbitrary enforcement by failing to clarify what is contemplated by the requirement that a suspect provide a credible and reliable identification. (White and Rehnquist, JJ., dissented from this holding.)

[***LEdHN2]

COURTS §810

facial challenge -- state law -- state court construction --

Headnote:[2]

In 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.

[***LEdHN3]

COURTS §805.3

vagueness of state statute -- interpretation by state court --

Headnote:[3A][3B]

For the purpose of determining whether a state statute is too vague and indefinite to constitute valid legislation the United States Supreme Court must take the statute as though it read precisely as the highest court of the state has interpreted it.

[***LEdHN4]

COURTS §790.3

construction of state statute by state intermediate appellate court --

Headnote:[4A][4B]

An opinion by a state intermediate appellate court is authoritative for purposes of defining a state statute where the opinion has construed the statute, where the state's highest court has refused review, and where the opinion has been the law of the state for 9 years.

[***LEdHN5]

ARREST §2

objective facts --

Headnote:[5A][5B]

Fourth Amendment concerns are implicated where a state statute permits investigative detentions in situations where the police officers lack a reasonable suspicion of criminal activity based on objective facts.

[***LEdHN6]

STATUTES §17

limitation on individual freedoms --

Headnote:[6]

Statutory limitations on constitutional individual freedoms are examined for substantive authority and content as well as for definiteness or certainty of expression.

[***LEdHN7]

STATUTES §18

void-for-vagueness doctrine -- penal statute --

Headnote:[7]

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.

[***LEdHN8]

STATUTES §18

void-for-vagueness doctrine -- arbitrary enforcement --

Headnote:[8]

Although the void-for-vagueness doctrine focuses both on actual notice to citizens and arbitrary enforcement, the more important aspect of vagueness doctrine is not actual notice, but the other principal element of the doctrine, which is the requirement that a legislature establish minimal guidelines to govern law enforcement.

[***LEdHN9]

STATUTES §18

facial challenge -- penal statute --

Headnote:[9A][9B]

The United States Supreme Court permits a facial void-for-vagueness challenge to a statute if a law reaches a substantial amount of constitutionally protected conduct; where a statute imposes criminal penalties, the standard of certainty is higher (White and Rehnquist, JJ., dissented from this holding.)

[***LEdHN10]

WITNESSES §72

questioning of citizens -- compulsion --

Headnote:[10A][10B]

While police have the right to request citizens to answer voluntarily questions concerning unsolved crimes they have no right to compel them to answer.

[***LEdHN11]

SEIZURE §11

detention -- level of suspicion sufficient to justify stop --

Headnote:[11]

In providing that a detention under a state statute may occur only where there is the level of suspicion sufficient to justify a constitutional stop, a state insures the existence of neutral limitations on the conduct of individual officers.

[***LEdHN12]

STATUTES §18

definiteness and clarity -- penal statute --

Headnote:[12]

The concern with curbing criminal activity cannot justify legislation that would otherwise fail to meet constitutional standards for definiteness and clarity.

[***LEdHN13]

ERROR §1339

constitutional questions -- review --

Headnote:[13A][13B]

On appeal from a United States Court of Appeals judgment affirming a United States District Court's judgment holding a state statute unconstitutional, the United States Supreme Court, in affirming the judgment on the ground of the statute's unconstitutionality as void for vagueness, would not decide other questions raised by the parties where its resolution of the other issues would decide constitutional questions in advance of the necessity of doing so.

SYLLABUS

A California statute requires persons who loiter or wander on the streets to identify themselves 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 "credible and reliable" 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*. 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.

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. 355-361.

COUNSEL: 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. Kre-

mer, 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.

JUDGES: O'CONNOR, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, MARSHALL, BLACKMUN, POWELL, and STEVENS, JJ., joined. BRENNAN, J., filed a concurring opinion, post, p. 362. WHITE, J., filed a dissenting opinion, in which REHNQUIST, J., joined, post, p. 369.

OPINION BY: O'CONNOR

OPINION

[*353] [***906] [**1856] JUSTICE O'CONNOR delivered the opinion of the Court.

[***LEdHR1A] [1A]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 (1968)*. [1] 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. [***907] Accordingly, we affirm the judgment of the court below.

1 -

California Penal Code Ann. § 647(e) (West 1970) 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 so to do, 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 Ann. § 647(e)* (West 1970). [2] Lawson was prosecuted only twice, and was convicted once. The second charge was dismissed.

2 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. *Id.*, at 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 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 overboard because "a person who is stopped on less than probable cause cannot be punished for failing to identify himself." App. to Juris. Statement 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). 658 F.2d 1362 (1981)*. 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 (1982)*.

II

[***LEdHR2] [2] [***LEdHR3A] [3A] [***LEdHR4A] [4A] [***LEdHR5A] [5A]In the courts below, Lawson mounted an attack on the [***908] facial validity of *§ 647(e)*. [3] "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." *Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494, n. 5 (1982)*. As construed by the California Court of Appeal, [4] *§ 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. [5] *People v. Solomon, 33 Cal. App. 3d 429,* [**1858] *108 Cal. Rptr. 867* [*357] *(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., at 873*. In addition, a suspect may be required to "*account for his presence . . .* to the extent that it assists in producing credible and reliable identification . . . ." *Id., at 438, 108 Cal. Rptr., at 872*. Under the [***909] terms of the statute, failure of the individual to provide "credible and reliable" identification permits the arrest. [6]

3 The appellants have apparently never challenged the propriety of declaratory and injunctive relief in this case. See *Steffel v. Thompson, 415 U.S. 452 (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 (1975)*.

[***LEdHR3B] [3B] [***LEdHR4B] [4B]

4 In *Wainwright v. Stone, 414 U.S. 21, 22-23 (1973)*, we held that "[for] 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 (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)*.

[***LEdHR5B] [5B]

5 The *Solomon* court apparently read *Terry v. Ohio, 392 U.S. 1 (1968)*, 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*. The Ninth Circuit then held that although what *Solomon* articulated as the *Terry* standard differed from what *Terry* actually held, "[we] believe that the *Solomon* court meant to incorporate in principle the standards enunciated in *Terry*." *658 F.2d, at 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 (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 870-871*. 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.

6 In *People v. Caylor, 6 Cal. App. 3d 51, 56, 85 Cal. Rptr. 497, 501 (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

[***LEdHR6] [6]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).

[***LEdHR7] [7] [***LEdHR8] [8]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. *Hoffman Estates v. Flipside, Hoffman Estates, Inc., supra; Smith v. Goguen, 415 U.S. 566 (1974)*; *Grayned v. City of Rockford, 408 U.S. 104 (1972)*; *Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)*; *Connally v. General Construction Co., 269 U.S. 385 (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 the 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, 415 U.S., at 574*. 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*. [7]

> 7 Our concern for minimal guidelines finds its roots as far back as our decision in *United States v. Reese, 92 U.S. 214, 221 (1876)*:
>
> "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."

[***LEdHR9A] [9A]*Section 647(e)*, as presently drafted and as 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). Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90* [**1859] *(1965).* [***910] Our concern here is based upon the "potential for arbitrarily suppressing *First Amendment* liberties. . . ." *Id., at 91*. In addition, *§ 647(e)* implicates consideration of the constitutional right to freedom of movement. See *Kent v. Dulles, 357 U.S. 116, 126 (1958); Aptheker v. Secretary of State, 378 U.S. 500, 505-506 (1964).* [8]

[***LEdHR9B] [9B]

8 In his dissent, JUSTICE WHITE claims that "[the] 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 370. 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, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982)*. Second, where a statute imposes criminal penalties, the standard of certainty is higher. See *Winters v. New York, 333 U.S. 507, 515 (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 (1979); Lanzetta v. New Jersey, 306 U.S. 451 (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 371. 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." *Post*, at 370. 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 (1967); NAACP v. Button, 371 U.S. 415, 433 (1963)*. See also Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. 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 (1974)*, but in that case we deliberately applied a less stringent vagueness analysis "[because] of the factors differentiating military society from civilian society." *Id., at 756. 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*, 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.*

[*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, 33 Cal. App. 3d, at 438, 108 Cal. Rptr., at 872-873.* In addition, the suspect may also have to account for his presence "to the extent it assists in producing [*360] credible and reliable identification." *Id., at 438, 108 Cal. Rptr., at 872.*

[***LEdHR10A] [10A]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, [9] or could satisfy the identification requirement [***911] simply by reciting his name and address. See *Id., at 6-10.*

[***LEdHR10B] [10B]

9 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 the 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 (1969).*

[***LEdHR1B] [1B] [***LEdHR11] [11]It is clear that the full discretion accorded to the police to determine whether the suspect has provided a "credible and reliable" identification necessarily "[entrusts] [**1860] lawmaking 'to the moment-to-moment judgment of the policeman on his beat.'" *Smith, supra, at 575* (quoting *Gregory v. Chicago, 394 U.S. 111, 120 (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, 405 U.S., at 170* (quoting *Thornhill v. Alabama, 310 U.S. 88, 97-98 (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 (1974)* (POWELL, J., concurring in result). 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." *Brown v. Texas, 443* [*361] *U.S., at 51.*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.

[***LEdHR12] [12]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 (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 (1947)*, this is not a case where further precision in the statutory language is either impossible or impractical.

IV

[***LEdHR1C] [1C] [***LEdHR13A] [13A]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. [10] Accordingly, the judgment of [*362] the Court of Appeals is affirmed, [***912] and the case is remanded for further proceedings consistent with this opinion.

[***LEdHR13B] [13B]

10 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 (1905)*; *Liverpool, N. Y. & P. S.S. Co.* v. *Commissioners of Emigration, 113 U.S. 33, 39 (1885)*. See also *Ashwander v. TVA, 297 U.S. 288, 346-347 (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 (1979)*.

It is so ordered.

CONCUR BY: BRENNAN

CONCUR

JUSTICE BRENNAN, concurring.

I join the Court's opinion; it demonstrates convincingly that the California statute at issue in this case, *Cal. Penal Code Ann. § 647(e)* (West 1970), 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*. [1] 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.

1 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 (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, ante*, at 105-109; *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 (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 (1968)*, holding that a police of-

ficer with reasonable suspicion of criminal activity, based on articulable facts, may detain a suspect [***913] 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 (1975)*; *Adams v. Williams, 407 U.S. 143, 145-146 (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 (1979)*. [2]

2 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., at 212-216* (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 (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 (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, 460 U.S. 491, 500 (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, supra, at 19, n. 16*; see *Florida v. Royer, 460 U.S. 491, 498-499 (1983)* (opinion of WHITE, J.); *United States v. Mendenhall, 446 U.S. 544, 554 (1980)* (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, pp. 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. 40, 45 (1968)*; *Florida v. Royer, supra, at 493-495*.

The price of that effectiveness, [***914] 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*. 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.

"[The] 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* (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 501* (opinion of WHITE, J.); *id., at 509-511* (BRENNAN, J., concurring in result); *Dunaway v. New York, supra, at 216.*

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 (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*. 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).

[***915] 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. [3] 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. [4]

3 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.*, ALI Model Code of Pre-Arraignment Procedure § 110.2(1)(b) (Proposed Official Draft 1975).

4 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 which 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, supra, at 884* (federal interest in immigration control permits stops at the border itself without reasonable suspicion), and *California v. Byers, 402 U.S. 424, 456-458 (1971)* (Harlan, J., concurring in 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 [***916] *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, 443 U.S. 47 (1979)*, 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. [5] 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 354. 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)*, *ante*, at 356, 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*; *United States v. Brignoni-Ponce, 422 U.S., at 884-885*. 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, firsthand knowledge of local jail conditions, a "search incident to arrest," and the expense of defending against a possible prosecution. [6] 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. [7]

5 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*.

6 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 (1966)*. In fact, if he indicates a desire to remain silent, the police should cease questioning him altogether. *Id., at 473-474*.

7 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.

[***917] 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.

DISSENT BY: WHITE

DISSENT

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 (1975)*; *United States v. Powell, 423 U.S. 87, 92-93 (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 (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, Hoffman Estates, Inc., 455 U.S. 489, 497 (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, at 756*; a "greater degree of specificity" is demanded than in other contexts. *Smith v. Goguen, 415 U.S. 566, 573 (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, 417 U.S., at 756*. 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 [***918] 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 358-359, 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.*

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 lawbreaker 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, supra, at 504*. 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." *Hoffman Estates v. Flipside,* [*372] *supra, at 495.* * But the [***919] 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.

"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., at 584* (WHITE, J., concurring in judgment).

See *id., at 590* (BLACKMUN, J., joined by BURGER, C. J., agreeing with WHITE, J., 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 attempts to underplay the conflict between its decision today and the decision last Term in *Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 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.*

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' identification." *Ante*, at 358. 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 (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.'" *Id., at 156-157, n. 1.*

In *Lewis v. City of New Orleans, 415 U.S. 130, 132 (1974)*, [***920] 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 is never mentioned. *Shuttlesworth v. City of Birmingham, 382 U.S. 87 (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 any police officer to move on,'" *id., at 90*, 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 (1938)*, and *Schneider v. State, 308 U.S. 147 (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.

REFERENCES

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine

21 Am Jur 2d, Criminal Law 15-17; *39 Am Jur 2d, Highways, Streets, and Bridges 250*

7 Am Jur Pl & Pr Forms (Rev), Constitutional Law, Forms 21, 38

USCS, *Constitution, 14th Amendment*

US L Ed Digest, Statutes 18, 18.9

L Ed Index to Annos, Certainty and Definiteness; Criminal Law; Due Process of Law

ALR Quick Index, Certainty and Definiteness; Criminal Law; Due Process of Law; Loitering

Federal Quick Index, Certainty and Definiteness; Criminal Law; Due Process of Law; Loitering

Annotation References:

Supreme Court's views regarding validity of criminal disorderly conduct statutes under void-for-vagueness doctrine. *75 L Ed 2d 1049.*

Indefiniteness of language as affecting validity of criminal legislation or judicial definition of common-law crime. *96 L Ed 374, 16 L Ed 2d 1231.*

Validity of loitering statutes and ordinances. 25 ALR3d 836.

Validity of vagrancy statutes and ordinances. 25 ALR3d 792.

MONTEREY MECHANICAL CO., Plaintiff-Appellant, v. PETE WILSON; GRAY DAVIS; CURT PRINGLE; DELAINE EASTON; BARRY MUNITZ; ROLAND E. ARNALL; MARIAN BAGDASARIAN; WILLIAM D. CAMPBELL; RONALD L. CEDILLOS; JIM CONSIDINE; MARTHA C. FALLGATTER; BERNARD GOLDSTEIN, JR.; JAMES H. GRAY; WILLIAM HAUCK; JOAN OTOMO-CORGEL, DR.; RALPH R. PESQUEIRA; ALI C. RAZI; TED J. SAENGER; MICHAEL D. STENNIS; ANTHONY M. VITTI; STANLEY T. WANG; FRANK Y. WADA, Individually and as Trustee of the California State University; SWINERTON AND WALBERG CO., a California Corporation, Defendants-Appellees.

No. 96-16729

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

125 F.3d 702*; *1997 U.S. App. LEXIS 23099*; *97 Cal. Daily Op. Service 7099*; *97 Daily Journal DAR 11464

February 10, 1997, Argued, Submitted, San Francisco, California
September 3, 1997, Filed

SUBSEQUENT HISTORY: [**1] Sua Sponte Request for Rehearing En Banc Denied March 9, 1998, Reported at: *1998 U.S. App. LEXIS 4151*.

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of California. D.C. No. CV-96-01279-EJG. Edward J. Garcia, District Judge, Presiding.

DISPOSITION: REVERSED AND REMANDED.

COUNSEL: Marcia L. Augsburger, McDonough, Holland & Allen, Sacramento, California, for the plaintiffs-appellants.

Karen L. Robinson, California State University, Legal Division, Long Beach, California, for the defendants-appellees. Dana M. Rudnick and Barbara Gadbois Gibbs, Giden, Locher & Acret, Los Angeles, California, for the defendants-appellees. Anthony T. Caso, Pacific Legal Foundation, Sacramento, California, for the defendant-appellee.

JUDGES: Before: Diarmuid F. O'Scannlain, Edward Leavy and Andrew J. Kleinfeld, Circuit Judges. Opinion by Judge Kleinfeld.

OPINION BY: Andrew J. KLEINFELD

OPINION

[*703] OPINION

KLEINFELD, Circuit Judge:

We review denial of a preliminary injunction, regarding a state program setting goals for ethnic and sex characteristics of construction subcontractors.

[*704] *FACTS*

California Polytechnic State University, San Luis Obispo (the University) solicited bids for a utilities upgrade. This construction project, expected to take almost two years, will connect all buildings to a central [**2] heating and air conditioning plant and install a new electrical distribution system. Monterey Mechanical, the plaintiff-appellant, submitted the low bid, $ 21,698,000.00, but did not get the job. The second lowest bidder, Swinerton and Walberg, won the contract, with a bid $ 318,000 higher than Monterey Mechanical's.

Monterey Mechanical's bid was disqualified because the company did not comply with a state statute. The statute requires general contractors to subcontract percentages of the work to minority, women, and disabled veteran owned subcontractors, or demonstrate good faith efforts to do so. The required "goals" are "not less than" 15% for minority business enterprises, 5% women, 3% disabled veteran. *Cal. Public Contract Code § 10115(c)*. To count towards fulfilling the goal, a subcontractor must be at least 51% owned and controlled by members of those classes. *Cal. Public Contract Code § 10115.1(e)*.

There were two ways Monterey Mechanical might have complied with the statute. It could have used minority, women and disabled veteran business enterprises for the designated 23% (15% plus 5% plus 3%) "of the contract dollar amount." Its bid was $ 21,698,000, so compliance by [**3] this means would require subcontracting $ 4,990,540 to subcontractors of the designated classes.

Alternatively, Monterey Mechanical could comply by demonstrating "good faith effort" to meet the "goals." The statute requires a bidder using "good faith" as its means of qualifying to contact government agencies and organizations to identify potential subcontractors in the designated classes, advertise in papers "focusing on M/W/DVBEs," [1] and solicit bids from "potential M/W/DVBE subcontractors and suppliers." The contractor must document its efforts within two days following the opening of the bids, so as a practical matter the solicitation must be fully accomplished prior to bidding. Dates, times, organizations contacted, contact names, and phone numbers are "needed to corroborate the information."

1 "M/W/DVBEs" is the designation on the University's forms for "Minority/Woman/Disabled Veteran Business Enterprises."

Monterey Mechanical did not fully comply with the statute by either method. Its President acknowledges [**4] that "Monterey is not eligible for classification as an MBE or a WBE." It did not subcontract out the required 23% of the contract amount. [2] Nor did Monterey Mechanical fully comply with the "good faith" requirement. Monterey Mechanical contacted state and federal agencies and minority and women organizations, advertised to minority and women owned firms, and invited and considered bids from them. But it did not document contact with the University physical planning and development office to identify minority, women, and disabled veteran business enterprises.

2 Monterey Mechanical put in 13 times as much money for black subcontractors as Swinerton and Walberg, and a slightly higher amount for women subcontractors, though the total percentages were not very high for either of them. Neither company proposed to subcontract anything to disabled veteran subcontractors. Swinerton and Walberg had a higher total for total minority participation because of a $ 3,000,000 item for "Pacific Asian" minority participation.

[**5] Swinerton and Walberg, which won the contract, did not subcontract out at least 23% of the work to firms in the designated classes (and does not claim to be a minority, women, or disabled veteran enterprise). It differed materially from Monterey Mechanical only in that it fully complied with the "good faith" requirement. Unlike Monterey Mechanical, it provided documentation of its contact with the University physical planning and development office to identify minority, women, and disabled veteran business enterprises.

When the University rejected Monterey Mechanical's bid as non-responsive, Monterey Mechanical requested whatever disparity study California State University had used to justify the goals for the designated classes. The University replied that there was no such study. It took the position that because [*705] the "goal requirements" of the scheme "do not involve racial or gender quotas,

set-asides or preferences," the University needed no such disparity documentation.

Monterey Mechanical protested the contract award, then sued the University's trustees and Swinerton and Walberg for a declaratory judgment, injunction, and damages. The theory of the lawsuit is that the statute [**6] that caused Monterey Mechanical to lose the contract violates the *Equal Protection Clause of the United States Constitution.*

The district judge denied the preliminary injunction. Monterey Mechanical has appealed. The denial was based on a legal conclusion that Monterey Mechanical had a low probability of success on the merits. [3] No findings of fact were made, nor were any necessary, because there was no dispute as to any of the facts. The facts recited above, from the documents submitted by the parties, are uncontested.

3 Here is the relevant portion of the district court decision:

> The motion for preliminary injunction will be denied. I find that plaintiff has little likelihood of success on the merits on the equal protection claim as pled. The *Fourteenth Amendment's equal protection clause* requires the State to justify the differential treatment of similarly situated individuals.
>
> . . . .
>
> On its motion plaintiff argues that California has not made sufficient findings of past discrimination to support Minority Women Enterprise participation goal requirements. In so arguing plaintiff immediately focuses on strict scrutiny analysis without considering what I believe a necessary first step.
>
> By that I mean that plaintiff apparently assume without analysis that California's Minority and Women Enterprise participation goals treat general contractors differently on the basis of race and gender. I'm not satisfied that this is the case. In fact, it's plain that the participation goals require all general contractors, regardless of race or gender, to either submit bids with a set percentage of Minority Women Enterprise participation or to actively seek out and solicit bids from Minority Women Enterprise subcontractors.
>
> Thus the statute does not appear to treat general contractors differently. It might be argued that the statute does treat non-minority women enterprise general contractors differently in one respect. A minority business enterprises that will perform 15% of the contract with its own labor and equipment is under no obligation to seek out minority business enterprises subcontractors since it already meets the minority business participation goal.
>
> The same is true of women business enterprises general contractors who intend to perform five percent of the contract themselves. However, this possible difference in treatment appears to me to be de minimis. In fact, the extra step of soliciting bids from minority business enterprises where a minority business enterprise general contractor might not have to seems hardly worth mentioning.
>
> This is especially so, given that the minority business enterprise would still be required to solicit bids from women business enterprises, nor is there any showing that this possible extra step which might have to be performed by non-minority women enterprises makes it more likely that a minority women business enterprise will be awarded a contract over a non-minority women business enterprise. More importantly, however, even if it is conceded that this possible difference in treatment among general contractors is sufficient to confer standing upon plaintiff to challenge the constitutionality of California's minority women business enterprise participation goal requirements, that possible difference in treatment would not entitle plaintiff to the relief he seeks here.
>
> . . .
>
> The record shows that the state let the contract to a non-minority women business

enterprise general contractor who solicited bids from minority women business enterprise contractors, but did not meet the participation goals. Accordingly, there is no causal relationship between the manner in which the statute might treat general contractors differently and plaintiff's failure to win the contract. Here in fact, the statute treated plaintiff and defendant Swinerton exactly the same.

[**7] ANALYSIS

We have jurisdiction to review "interlocutory orders . . . refusing . . . injunctions" under *28 U.S.C. § 1292(a)(1)*. While we review its decision not to enter a preliminary injunction for an abuse of discretion, the district court is deemed to abuse its discretion when it "bases its decision on an erroneous legal standard." *American-Arab Anti-Discrimination Comm. v. Reno, 70 F.3d 1045, 1062 (9th Cir. 1995)*. Thus an abuse of discretion is established if the district court applied the incorrect substantive law. *International Molders' and Allied Workers' Local Union No. 164 v. Nelson, 799 F.2d 547, 551 (9th Cir. 1986)*. [4]

4 California's Proposition 209, *see Coalition for Economic Equity v. Wilson, 122 F.3d 692, 1997 WL 160667 (9th Cir. 1997)*, was passed after Monterey Mechanical was disqualified and the contract was awarded to Swinerton and Walberg, and after the district court denied Monterey Mechanical a preliminary injunction. The parties have not argued that the subsequent change in state law affects this case. They have not made any arguments regarding Proposition 209. We therefore do not consider what effect if any Proposition 209 or *Coalition for Economic Equity* might have on this case.

[**8] [*706] *A. Standing.*

The district court concluded that Monterey Mechanical lacked standing. Because Swinerton and Walberg was not a women or minority business enterprise, [5] and all general contractors, not just non-minority non-women contractors, were bound by the same requirements, the district court concluded that unconstitutional discrimination, even if it existed, did not cause Monterey Mechanical to lose the contract. The idea is that if the government does not discriminate against A, but requires that A discriminate against B, B has standing but A does not. Appellees [6] do not argue that Monterey Mechanical lacked standing. We nevertheless consider standing sua sponte, because it goes to jurisdiction. "Standing is a question of law reviewed de novo." *Snake River Farmers' Assn. v. Department of Labor, 9 F.3d 792, 795 (9th Cir. 1993)*.

5 None of the parties have presented any arguments regarding the statutory provision relating to disabled veterans, *Cal. Public Contract Code § 10115 et. seq.*, so we disregard it in our discussion. Monterey Mechanical does not challenge its constitutionality, and the University does not make any arguments relating to it. Accordingly, we do not consider the disabled veterans provisions of the statute, and our decision has no bearing on the provisions of the statute regarding disabled veterans.

[**9]

6 Governor Pete Wilson was nominally a defendant in the case, and as such prevailed in district court. He has accordingly filed an appellee's brief rather than an appellant's brief. But his position is the same as appellant's, that the statute is unconstitutional. Though nominally an appellee, Governor Wilson is in substance an appellant. Our references to appellees arguments do not include the arguments made by Governor Wilson.

The issue of standing is controlled by *Northeastern Florida Contractors v. Jacksonville, 508 U.S. 656, 113 S. Ct. 2297, 124 L. Ed. 2d 586 (1993)*. That was another contracting set-aside case. The plaintiff made no showing that it or any of its members would have received particular contracts but for the challenged set-aside ordinance. The Court held that to establish standing in challenges to set-aside laws, a bidder need only demonstrate that a discriminatory policy prevents it from competing on an equal footing, not that the discrimination caused its failure to win a contract:

> When the government erects a barrier that makes it more difficult for members of one group to obtain a

> benefit [**10] than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit. . . . And in the context of a challenge to a set-aside program, the "injury in fact" is the inability to compete on an equal footing in the bidding process, not the loss of a contract. . . . To establish standing, therefore, a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy prevents it from doing so on an equal basis. [7]

113 S. Ct. at 2303.

> 7 It follows from our definition of "injury in fact" that petitioner has sufficiently alleged both that the city's ordinance is the "cause" of its injury and that a judicial decree directing the city to discontinue its program would "redress" the injury.

[**11] Monterey Mechanical was prevented by the statute from competing on an equal footing with general contractors in the designated classes. Had it been a minority or women business enterprise (or both), and proposed to keep those classes' work rather than subcontract it out, it would have been excused to that extent from both the subcontracting and "good faith" requirements. *See Cal. Public Contract Code §§ 10115(c), 10115.2.*

[*707] We construed *Northeastern Florida Contractors* in *Bras v. California Public Utilities Commission, 59 F.3d 869 (9th Cir. 1995).* We held that in a challenge to an affirmative action program, "plaintiffs did not have to prove that they would lose any bids or identifiable contracts in order to sustain actual injury." *Id. at 873.* "An injury results not only when [the bidder] actually loses a bid, but every time the company simply places a bid." *Id. at 873*, quoting *Coral Construction Company v. King County, 941 F.2d 910 (9th Cir 1991).* Our analysis of standing in *Coral Construction* was approved of by the Court in *Northeastern Florida Contractors, 113 S. Ct. at 2300.* A bidder need not establish that the discriminatory policy caused it [**12] to lose the contract. To establish standing bidders "need only show that they are forced to compete on an unequal basis." *Bras, 59 F.3d at 873.* Being forced to compete on an unequal basis because of race (or sex) is an injury under the *Equal Protection Clause. See Northeastern Florida Contractors, 113 S. Ct. at 2303.*

The Tenth Circuit applied *Northeastern Florida Contractors* to standing under an ordinance substantially similar to the statute before us in *Concrete Works of Colorado, Inc. v. City and County of Denver, 36 F.3d 1513 (10th Cir. 1994). Concrete Works* held that because minority and women business enterprises could use their own work to satisfy goals for their classes while firms not in these classes would have to subcontract the work out or show "good faith," a non-minority and non-women bidder satisfied all elements of the standing requirement. The injury in fact was that "the extra requirements imposed costs and burdens on non-minority firms that preclude them from competing with MBEs and WBEs on an equal basis." *Id. at 1518, 1519.* The case at bar is indistinguishable from *Concrete Works,* and there is no justification for creating an intercircuit [**13] split of authority on this point.

Monterey Mechanical established injury in fact traceable to the challenged statute, and established redressability, for several reasons. One is that a minority-owned or women-owned bidder could keep the work for its class (and a firm owned and controlled by women who were minorities could keep the work for both classes). Keeping the work would avoid the loss of profits to subcontractors, and the time and expense of complying with the "good faith" requirements. Though Swinerton and Walberg subsequently won the contract, Monterey Mechanical did not know that when it submitted its bid. The time of bidding was the relevant time for determining whether Monterey Mechanical was unable "to compete on an equal footing in the bid-

ding process." *Northeastern Florida Contractors, 113 S. Ct. at 2303.* When it prepared and submitted its bid, Monterey Mechanical had to do so in the face of a statute conferring advantages on whatever competing bidders might be in groups identified by ethnicity and sex. The burden of bidding in a discriminatory context established by statute is, under *Northeastern Florida Contractors,* injury in fact caused by the challenged [**14] statute.

Standing is also established in this case independently of whether minority or female competitors, if there were any, would have competed against Monterey Mechanical on a privileged basis. Standing doctrine "requires us to ask . . . 'Was this person hurt by the claimed wrongs?'" *Snake River Farms' Assn. v. Department of Labor, 9 F.3d 792, 798 (9th Cir. 1993).* Even if a general contractor suffers no discrimination itself, it is hurt by a law requiring it to discriminate, or try to discriminate, against others on the basis of their ethnicity or sex. A person required by the government to discriminate by ethnicity or sex against others has standing to challenge the validity of the requirement, even though the government does not discriminate against him.

A person suffers injury in fact if the government requires or encourages as a condition of granting him a benefit that he discriminate against others based on their race or sex. Americans view ethnic or sex discrimination as "odious," *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097, 2106, 132 L. Ed. 2d 158 (1995).* The principle that ethnic discrimination is wrong is what makes discrimination against groups of which we are not members [**15] wrong, and by that principle, discrimination is wrong [*708] even if the beneficiaries are members of groups whose fortunes we would like to advance. The person required by government to engage in discrimination suffers injury in fact, albeit of a different kind, as does the person suffering the discrimination. A "law compelling persons to discriminate against other persons because of race" is a "palpable violation of the *Fourteenth Amendment,*" regardless of whether the persons required to discriminate would have acted the same way regardless of the law. *Peterson v. City of Greenville, 373 U.S. 244, 248, 10 L. Ed. 2d 323, 83 S. Ct. 1119 (1963).*

The contractor required to discriminate also suffers injury in fact because the statute exposes him to risk of liability for the discrimination. A private actor may be subject to section 1983 liability for discriminating against persons based on their ethnicity or sex pursuant to a state law requiring it. *Adickes v. S.H. Kress and Company, 398 U.S. 144, 148, 152, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970).* For example, the plaintiff in *Bras v. California Public Utilities Commission, 59 F.3d 869 (9th Cir. 1995),* brought a section 1983 claim for damages against Pacific Bell for discriminating against the plaintiff [**16] in the course of complying with a state statutory scheme to increase minority and women owned businesses shares of utility contracting.

The contractor required to discriminate also suffers injury in fact because of the increased expense and difficulty of performing the contract. A construction contract is not completed when the winning bid is announced. The work must be done. A general contractor often uses the same specialty subcontractors on many jobs, because of successful past experience with them, so it would be a waste of time and money to solicit bids from strangers, and risky to accept them. The statute allows a women- and minority-owned contractor to subcontract out a fifth of the work to whomever it chooses, or keep the work itself, but denies this flexibility to contractors not in those groups.

Appellees have not argued absence of redressability. But for the minority and women enterprise goals and "good faith" requirements, Monterey Mechanical would have won the contract. The statute imposed injury in fact on Monterey Mechanical. Monterey Mechanical has standing to challenge the statute pursuant to which its bid was rejected.

B. Classification.

Appellees argue [**17] that Monterey Mechanical's equal protection challenge has to fail, because the statute treats all general contractors bidding on state jobs alike. They argue that because general contractors are treated alike, there is no unequal treatment to which any scrutiny need be applied, that is, no classification. There are two aspects to this argument. One is that all general contractors are treated alike. To the extent that minority or women contractors could avoid the subcontract-

ing and good faith requirements for their groups, the argument goes, the difference is de minimis. The second is that the scheme has enough flexibility, because a contractor can avoid the percentages by "good faith" efforts, so that its ethnicity and sex aspects cannot violate the *Equal Protection Clause*. The district court adopted the first of these arguments. Appellees' argument that the statute does not classify general contractors by ethnicity or sex is in some respects the standing argument in a slightly different form. Because it is made separately, and addresses the *Equal Protection Clause* rather than the case or controversy requirement in Article III, we discuss classification independently of standing.

[**18] *1. Different treatment.*

The argument that all general contractors are treated alike, regardless of sex or ethnicity, is mistaken. They are not. The statute requires that state contracts have "participation goals" of at least 15% minority, 5% women, and 3% disabled veteran enterprises:

> Contracts awarded by any state agency, department, officer, or other state governmental entity for construction, professional services . . ., materials, supplies, equipment, alteration, repair, or improvement shall have statewide participation goals of not less than 15 percent for minority business enterprises, not less than 5 percent for women business enterprises and 3 percent [*709] for disabled veteran business enterprises. These goals apply to the overall dollar amount expended each year by the awarding department . . . .

Cal. Public Contract Code § 10115(c). A state agency making a contract award is required to award the contract to the low bidder "meeting or making good faith efforts to meet these goals":

> (a) In awarding contracts to the lowest responsible bidder, the awarding department shall consider the efforts of a bidder to meet minority business enterprise, women [**19] business enterprise, and disabled veteran business enterprise goals set forth in this article. The awarding department shall award the contract to the lowest responsible bidder meeting or making good faith efforts to meet these goals.
>
> (b) A bidder shall be deemed to have made good faith efforts upon submittal, within time limits specified by the awarding department, of documentary evidence that all of the following actions were taken:
>
> (1) Contact was made with the awarding department to identify minority, women, and disabled veteran business enterprises.
>
> (2) Contact was made with other state and federal agencies, and with local minority, women, and disabled veteran business enterprise organizations to identify minority, women, and disabled veteran business enterprises.
>
> (3) Advertising was published in trade papers and papers focusing on minority, women, and disabled veteran business enterprises, unless time limits imposed by the awarding department do not permit that advertising.
>
> (4) Invitations to bid were submitted to potential minority, women, and disabled veteran business enterprise contractors.

(5) Available minority, women, and disabled veteran business enterprises [**20] were considered.

Cal. Public Contract Code § 10115.2(a).

The statute allows a minority or women business enterprise to satisfy the goals by allocating the percentage of work for its group to itself. The statute requires the state to award the contract to the "bidder meeting . . . the goals," *Cal. Public Contract Code § 10115.2(a)*. It does not say that the "bidder" should meet the goals by subcontracting the work to someone else instead of keeping it for itself. It would be nonsensical to disqualify, for example, a minority enterprise's bid for not meeting the 15% minority goal, when the minority bidder proposed to do at least 15% of the work itself. The university bid documents accordingly say that one way to meet the goals is that, "the bidder is an MBE and committed to performing not less that 15% of the contract dollar amount with its own forces or in combination with those of other MBEs and is committed to using WBEs for not less than five (5) percent of the contract dollar amount, and DVBEs for not less than three (3) percent of the contract dollar amount." Supplementary General Conditions § 1(b) (emphasis added). Likewise for women and disabled veteran bidders.

[**21] Under these provisions, a bidder not in any of the designated groups must subcontract out at least 23% of the job, or make good faith efforts to do so, to subcontractors in the designated groups. But a minority or female bidder can avoid that requirement by keeping that group's work for itself. Thus not all general contractors bidding on state projects are treated the same way. An enterprise in all the designated categories can, by keeping at least 23% of the work for itself, avoid any of the requirements of the statute.

The district court considered this difference, but concluded that it was *de minimis*. *De minimis non curat lex* means that the law does not concern itself with trifles. *Black's Law Dictionary* 482 (4th ed. 1957); *Ballentine's Law Dict.* 330 (3d ed. 1969). On this $ 21,698,000 job, it would be worth $ 3,254,700 of the gross to be a minority as compared with a non-minority bidder, if the bidder were to keep as much as possible of the work for itself. A bidder in all three categories could keep $ 4,990,540 that a bidder in none would have to subcontract out or demonstrate a good faith effort to do so. There is nothing *de minimis* about that kind of money.

[**22] [*710] *2. Good faith efforts.*

Appellees argue that the classifications the statute makes are not subject to heightened levels of scrutiny, because they require only good faith attempts to satisfy goals, and do not impose rigid quotas. Thus a bidder may satisfy the goals without being in one of the designated classes, and without subcontracting 23% of the work to businesses in the designated classes, so long as it shows good faith.

Analysis of this argument requires that a distinction be drawn between whether the classifications themselves are permissible, considered in section D, and whether a softer system of discrimination avoids the *Equal Protection Clause*. For now, we are discussing only the latter proposition, whether there is a classification at all, not the former, whether the classification is permissible.

Appellees are correct in their argument that the statute does not impose rigid quotas. A bidder in none of the designated classes can get a contract even though it subcontracts none of the work whatsoever to anyone in the designated classes. Indeed, the University's analysis says that Swinerton and Walberg's winning bid had this breakdown, well under 23%:

[SEE TABLE IN [**23] ORIGINAL]

Minority Participation		MWDVBE Breakdown	
African American:	$ 19,980	MBE:	13.92%
Pacific Asian:	$ 3,000,000	WBE:	1.25%
Anglo:	$ 18,678,000	DVBE:	0.00%

Total Contract Amount: $ 21,698,000 [8]

8 Here are the University's categories and numbers for Monterey Mechanical:

Minority Participation	MWDVBE Breakdown	
African American	$ 262,000 MBE:	3.49%
Hispanic	$ 306,700 WBE:	1.29%
Native American	$ 15,788 DVBE:	0.0%
Asian Indian	$ 162,000	
"Anglo"	$ 20,633,512	
Total Contract Amount	$ 21,380,000	

But the statute still has firm requirements, enforced by rejection of low bids like Monterey Mechanical's, unless all the requirements are met. State agencies "shall award the contract to the lowest responsible bidder meeting or making good faith efforts to meet" the percentage "goals." *Cal. Public Contract Code § 10115.2(a)*. That means that the state will not award a contract to a bidder which [**24] does neither. The "good faith efforts" have specific content. They require documented efforts to identify, focus advertising on, and solicit and consider bids from, firms in the designated classes:

> (b) A bidder shall be deemed to have made good faith efforts upon submittal within time limits specified by the awarding department of documentary evidence that all of the following actions were taken:
>
> (1) Contact was made with the awarding department to identify minority, women, and disabled veteran business enterprises.
>
> (2) Contact was made with other state and federal agencies, and with local minority, women, and disabled veteran business enterprise organizations to identify minority, women, and disabled veteran business enterprises.
>
> (3) Advertising was published in trade papers and papers focusing on minority, women, and disabled veteran business enterprises, unless time limits imposed by the awarding department do not permit that advertising.
>
> (4) Invitations to bid were submitted to potential minority, women, and disabled veteran business enterprise contractors.
>
> (5) Available minority, women, and disabled veteran business enterprises were considered.

Cal. Public [**25] *Contract Code § 10115.2(b)*. Adherence is monitored, *Calif. Public Contract Code § 10115.3(a)*. Though the requirements allow for awards to bidders who do not meet the percentage goals, they are rigid in requiring precisely described and monitored efforts to attain those goals.

The question whether a non-rigid system of goals and good faith efforts, as opposed to rigid quotas, is treated as a classification under the *Equal Protection Clause*, is settled by existing precedent. *Bras v. California Public Utilities Commission, 59 F.3d 869 (9th Cir. 1995)*, dealt with a similar law, providing for "goals" and "methods for encouraging" minority and women subcontracts, and expressly abjuring "quotas." Cal. Pub. [*711] Util. Code § 8283(b). The state argued that a challenger lacked standing because of the absence of rigid requirements. We held that the provisions were not "immunized from scrutiny because they purport to establish goals rather than quotas." *Bras, 59 F.3d at 874*. We construed *Northeastern Florida Contractors* to mean that "the relevant question is not

whether a statue requires the use of such measures, but whether it authorizes or encourages them." *Bras, 59 F.3d at 875.* [**26]

Bras controls. In the case at bar, the statute does not require set-asides, but it encourages them. A bidder can avoid disqualification by seeing to it that 23% of the work goes to the designated classes, or showing that it tried to bring about that result. The Tenth Circuit has reached the same conclusion in an indistinguishable case, *Concrete Works of Colorado v. Denver, 36 F.3d 1513 (10th Cir 1994).* The Denver ordinance at issue in that case was almost identical in material respects to the statute at issue here. It provided only for "goals" and "good faith" efforts to meet them, not quotas or rigid set-asides. Appellees do not cite any cases going the other way. We have no basis for setting up an intercircuit conflict on this settled issue.

It is much easier to imagine that good faith compliance, as opposed to meeting the goals by subcontracting out 23% of the work, might be *de minimis*. Good faith compliance does not cost millions of dollars. It does not seem much to ask of a bidder that it get the names of firms in the designated classes, advertise to them, and consider their bids. There is much appeal to enlarging the participation of minority-owned and women-owned [**27] firms by assuring that they as well as others receive full information on opportunities to bid.

But the question we are considering in this section of our opinion is whether the statute classifies, that is, whether it treats people differently by ethnicity or sex, not whether the purpose of the classification is attractive. The statute treats contractors differently according to their ethnicity and sex, with respect to the "good faith" requirement. It does not say that all contractors must assure that the opportunity to bid is advertised to all prospective subcontractors, including minority-owned and women-owned firms. Only those firms not minority or women owned must advertise to those respective groups, and only minority and women owned firms are entitled to receive the bid solicitation. A firm which is both minority and women owned, and keeps at least a fifth of the work, does not have to solicit any bids from firms identified by ethnicity or sex. If a minority and women owned firm does solicit bids from subcontractors, the firm is free under the statute before us to exclude non-minority, non-women owned firms from the solicitation.

We are not faced with a non-discriminatory outreach [**28] program, requiring that advertisements for bids be distributed in such a manner as to assure that all persons, including women-owned and minority-owned firms, have a fair opportunity to bid. The *Equal Protection Clause* as construed in *Adarand* applies only when the government subjects a "person to unequal treatment." There might be a non-discriminatory outreach program which did not subject anyone to unequal treatment. But this statute is not of that type.

Though worded in terms of goals and good faith, the statute imposes mandatory requirements with concreteness. The scheme requires the bid solicitation in the context of requiring "good faith efforts to meet [percentage] goals." *Cal. Public Contract Code § 10115.2(a).* It requires distribution of information only to members of designated groups, without any requirement or condition that persons in other groups receive the same information. Thus the statute may be satisfied by distribution of information exclusively to persons in the designated groups. Bidders in the designated groups are relieved, to the extent they keep the required percentages of work, of the obligation to advertise to people in their groups. The outreach [**29] the statute requires is not from all equally, or to all equally.

It is heuristically useful, in sorting out the question of whether a classification is made from the question whether the classification is permissible, to hypothesize the same provision in favor of white male firms. That way we can separate the question of whether the [*712] discrimination is permissible, which it would not be for white male firms, from the question whether there is discrimination at all. If the statute required solicitation of subcontract bids only to white male-owned firms, and did not require that white-male-owned firms make any solicitation if they kept the work, a court might well find that the scheme "discriminated against MBEs and WBEs and continued to operate under 'the old boy network' in awarding contracts." *Associated General Contractors v. Coalition for Economic Equity, 950 F.2d 1401, 1414 (9th Cir. 1991).* We would certainly conclude that the statute classified by ethnicity and sex.

The statutory classification also imposes higher compliance expenses on some firms than others, according to ethnicity and sex. To demonstrate "good faith," the bidder must contact the awarding department, state [**30] agencies, federal agencies, and minority and women organizations, to identify prospective subcontractors, locate and prepare advertisements for advertisements in papers focusing on those groups, and distribute invitations to bid to potential minority and women subcontractors. *Cal. Public Contract Code § 10115.2(b).* These efforts require time, which must be paid for, effort, and expense - they do not happen by themselves. The expenses - perhaps a few hundred or a few thousand dollars for wages and salaries, communications, and advertisements - are avoidable for firms in the designated classes to the extent they keep the required percentages of work for themselves.

More important, we can find no authority, and appellees have cited none, for a *de minimis* exception to the *Equal Protection Clause.* The Supreme Court has held that, "*any* person, of whatever race, has the right to demand that *any* governmental actor subject to the Constitution justify *any* racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand, 115 S. Ct. at 2111* (emphasis added). We conclude that there is no *de minimis* exception to the *Equal* [**31] *Protection Clause.* Race discrimination is never a "trifle."

C. Heightened Scrutiny.

We have concluded so far that Monterey Mechanical had standing to challenge the constitutionality of the statute, and that the statute makes a classification subject to Equal Protection analysis. That does not end the inquiry into probability of success on the merits. The next question is whether the classification is permissible.

The *Equal Protection Clause* protects "persons, not groups, so group classifications are in most circumstances prohibited, and are subjected to detailed judicial inquiry to insure that the personal right to equal protection of the laws has not been infringed." *Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 115 S. Ct. 2097, 2112-13, 132 L. Ed. 2d 158 (1995).* Likewise, "parties who seek to defend gender based government action must demonstrate an exceedingly persuasive justification for that action." *United States v. Virginia, 135 L. Ed. 2d 735, 116 S. Ct. 2264, 2274 (1996).*

The Constitution entitles "any person" to equal protection of the laws. *U.S. Const. Amend. 14, § 1.* It draws no distinction by ethnicity or sex. The scrutiny applied to racial classifications "is not dependent on the race of those [**32] burdened or benefitted." *Adarand, 115 S. Ct. at 2110.* An "exceedingly persuasive justification" must be presented for a sex classification, even if it "discriminates against males rather than against females." *Mississippi University for Women v. Hogan, 458 U.S. 718, 723-24, 73 L. Ed. 2d 1090, 102 S. Ct. 3331 (1982).*

Racial classifications are subject to "strict scrutiny," and "are Constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand, 515 U.S. 200, 115 S. Ct. at 2113, 132 L. Ed. 2d 158.* Classifications based on sex must be justified by an "exceedingly persuasive justification," serve "important governmental objectives" and the means must be "substantially related to the achievement of those objectives." *United States v. Virginia, 135 L. Ed. 2d 735, 116 S. Ct. 2264, 2274, 2275 (1996).*

The statute benefits bidders and subcontractors who fit the classification "minority [*713] business enterprise" and "women business enterprise." *Cal. Public Contract Code § 10115.2(a).* A "women business enterprise" must be "at least 51% owned by one or more women," "whose management and daily operations are controlled by one or more women who own the business." *Cal. Public Contract Code § 10115.1(f).* A "minority business [**33] enterprise" must meet the same criteria with respect to the designated minorities. *Cal. Public Contract Code § 10115.1(e).*

For a racial classification to survive strict scrutiny in the context before us, it must be a narrowly tailored remedy for past discrimination, active or passive, by the governmental entity making the classification. *City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 716, 720, 102 L. Ed. 2d 854 (1989).* "Findings of societal discrimination will not suffice; the findings must concern prior discrimination by the government unit involved." *109 S. Ct. at 716, 717; and see Associated General*

Contractors v. City and County of San Francisco, 813 F.2d 922, 930 (9th Cir. 1987).

The burden of justifying different treatment by ethnicity or sex is always on the government. "Any person of whatever race has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand, 115 S. Ct. at 2111.* For laws that classify by sex, "The burden of justification is demanding and it rests entirely on the State." *United States v. Virginia, 116 S. Ct. at 2275.* [**34]

In the case before us, the University offered no evidence whatsoever to justify the race and sex discrimination. When asked by Monterey Mechanical for statistics, the University said there were none. In their opposition papers to Monterey Mechanical's motion for preliminary injunction, the University and Swinerton & Walberg offered no evidence whatsoever that the University or the state had previously discriminated, actively or passively, against the groups benefitted by the statute. They never proposed to offer evidence of past discrimination in any form at any time. There are legislative findings, but they do not say that California State University, or the California state government, has in the past actively or passively discriminated against the benefitted groups. *Cal. Public Contract Code § 10115(a).* There are no legislative findings, and no fact findings by the district court, of past discrimination against the benefitted groups by the state or the University.

Instead, the legislative findings say that markets, prices and personal opportunities will be advanced by "the policy of the state to aid the interests of minority, women and disabled veteran business enterprises." [**35] *Id.* Phrases in the legislative findings say and imply that these enterprises have an "economically disadvantaged position." *Cal. Public Contract Code § 10115(a)(4).* But the legislative findings do not say whether the "economically disadvantaged position" has to do with past active or passive discrimination by the State, other entities, general societal discrimination, or factors other than discrimination.

Because the state made absolutely no attempt to justify the ethnic and sex discrimination it imposed, we do not reach the questions of how much proof, or what kinds of legislative findings, suffice. Unlike *Associated General Contractors v. Coalition for Economic Equity, 950 F.2d 1401, 1414 (9th Cir. 1991)*, there were no "detailed findings of prior discrimination" and no extensive evidence of discrimination submitted. Because appellees offered no evidence or argument justifying discrimination, we do not reach the question whether a more tolerant constitutional regime for sex discrimination would permit the part of the statute favoring women owned businesses to survive constitutional analysis if the part favoring minority businesses does not. *See United States v. Virginia,* [**36] *135 L. Ed. 2d 735, 116 S. Ct. 2264*; *Associated General Contractors v. City and County of San Francisco, 813 F.2d 922, 940-41 (9th Cir. 1987).* Even sex discrimination against males requires the state to bear the burden of justification. Likewise, because no justification has been offered for the group classifications at issue, [*714] we do not reach the question whether group discrimination *ipso facto* violates individuals' rights to equal protection of the laws. *See Adarand, 115 S. Ct. at 2118, 2119* (Scalia, concurring, and Thomas, concurring).

Even if the purpose of a discriminatory scheme is legitimate, the scheme can survive strict scrutiny only if it is "narrowly tailored" to serve a compelling governmental interest. *Wygant v. Jackson Board of Education, 476 U.S. 267, 283, 90 L. Ed. 2d 260, 106 S. Ct. 1842 (1986)*; *Adarand, 115 S. Ct. at 2117.* The statute at issue is not "narrowly tailored." That it is not is shown by the same overbreadth in its definition of "minority" that the Supreme Court has noted for years in similar statutes. *Wygant, 476 U.S. at 284 n. 13*; *City of Richmond v. J.A. Croson, Co., 109 S. Ct. at 728*:

(d) "Minority," for purposes of this section, means a citizen or lawful permanent resident [**37] of the United States is an ethnic person of color and who is: Black (a person having origins in any of the Black racial groups of Africa); Hispanic (a person of Mexican, Puerto Rican, Cuban, Central or South American, or other Spanish or Portuguese culture or origin, regardless of race); Native American (an American Indian, Eskimo, Aleut, or Native Hawaiian); Pacific-Asian (a person whose origins are from Japan, China, Taiwan, Korea, Vietnam, Laos, Cambodia, the Philippines, Samoa, Guam, or the United States Trust Territories of the Pacific in-

cluding the Northern Marianas); Asian-Indian (a person whose origins are from India, Pakistan, or Bangladesh); or any other group of natural persons identified as minorities in the respective project specifications of an awarding department or participating local agency.

Cal. Public Contract Code § 10115.1(d).

In *Croson, 109 S. Ct. at 728*, the Court was struck by the inclusion of Aleuts and Eskimos in a Richmond, Virginia, ordinance. Likewise, in *Wygant* the court said that the inclusion of groups highly unlikely to have been the victims of past discrimination by the school board "illustrate[] the undifferentiated nature of the [**38] plan." *Wygant, 476 U.S. at 284 n. 13*. The statute before us also lists groups highly unlikely to have been discriminated against in the California construction industry. The Aleuts, for example, a distinct people native to the western part of the Alaska peninsula and the Aleutian Islands, have suffered brutal oppression repeatedly in their history. But it would be frivolous to suggest that California State Polytechnic University at San Luis Obispo, or the State of California, have actively or passively discriminated against Aleuts in the award of construction contracts. In *Croson,* the Court observed in reference to Aleuts and Eskimos that "the gross overinclusiveness of Richmond's racial preference strongly impugns the city's claim of remedial motivation." *109 S. Ct. at 728*. Likewise here, some of the groups designated are, in the context of a California construction industry statute, red flags signalling that the statute is not, as the *Equal Protection Clause* requires, narrowly tailored.

The list in the statute before us might be explained by a laudable desire to improve the social position of various groups perceived to be less well off. Or conceivably those who drafted the [**39] statute for the legislature copied from a model form and neglected to strike its inapplicable portions. One explanation which is not plausible is the one needed as a justification, that the list is narrowly tailored to remedy past discrimination, active or passive, by the State of California. Appellees submitted no evidence and offer no argument to the contrary. "A broad program that sweeps in all minorities with a remedy that is in no way related to past harms cannot survive constitutional scrutiny." *Hopwood v. State of Texas, 78 F.3d 932, 951 (5th Cir. 1996).*

We are compelled by firmly established law to conclude that the statute violates the *Equal Protection Clause*. The state has not even attempted to show that the statute is narrowly tailored to remedy past discrimination. The laudable legislative goal, that "the actual and potential capacity of minority, women, and disabled veteran business enterprises [be] encouraged and developed," *Calif. Public Contract Code § 10115(a)(1)*, cannot [*715] be achieved by ethnic and sex discrimination against individuals excluded by ethnicity or sex from these groups, in the absence of Constitutionally required justification.

D. Irreparable [**40] *Harm.*

The district court concluded that Monterey Mechanical's probable success on the merits was low, so gave very limited consideration to whether it would suffer irreparable harm if interlocutory equitable relief were denied, and whether granting a preliminary injunction would impose hardship on the University and Swinerton and Walberg. See Stanley v. University of Southern *California, 13 F.3d 1313 (9th Cir. 1994)*; *Martin v. International Olympic Committee, 740 F.2d 670, 674-75 (9th Cir. 1984)*. The district court found that the balance of hardships did not tip "sufficiently" in favor of Monterey Mechanical, "especially in view of the possibility of loss of funding if the construction contract is not completed speedily."

The University argues that Monterey Mechanical was properly denied a preliminary injunction, even if its probability of success on the merits was high, because Monterey Mechanical demonstrated no irreparable harm, and the balance of hardships tipped in the University's favor. The University's evidence of hardship was that if a preliminary injunction stopped the project from proceeding while the litigation was pending, completion would probably be delayed [**41] until past the date when unencumbered funding would revert to a state bond reserve. Further, the University filed evidence that faculty and staff would be delayed in obtaining the benefits of the project, and the University would be delayed in enjoying the benefits of saving money on electricity because of the project. Monterey Mechanical showed two kinds of harm: (1) loss of the

contract, and (2) unconstitutional discrimination in the bidding process based on race and sex. While money damages might remedy the first harm, it is not apparent to us how they would remedy the second.

"We have stated that an alleged constitutional infringement will often alone constitute irreparable harm. *Associated General Contractors v. Coalition For Economic Equity, 950 F.2d 1401, 1412 (9th Cir. 1991)*. We have been compelled to conclude that the statute, insofar as it classifies by ethnicity and sex, is unconstitutional. That makes Monterey's probability of success much higher than it was when preliminary injunctive relief was considered in district court. We therefore remand so that the district court may reconsider preliminary equitable relief in light of our determination of unconstitutionality.

[**42] *CONCLUSION*

All persons, of either sex and any ethnicity, are entitled to equal protection of the law. That principle, and only that principle, guarantees individuals that their ethnicity or sex will not turn into legal disadvantages as the political power of one or another group waxes or wanes. The statute at issue in this case violates the *Equal Protection Clause*, so the plaintiff's probability of success on the merits in their challenge to the ethnic and sex provisions of the statute is high. The district court must therefore reconsider the motion for preliminary injunction in light of the unconstitutionality of the statute.

REVERSED AND REMANDED.

ROBERT M. NELSON; WILLIAM BRUCE BRANERDT; JULIA BELL; JOSETTE BELLAN; DENNIS V. BYRNES; GEORGE CARLISLE; KENT ROBERT CROSSIN; LARRY R. D'ADDARIO; RILEY M. DUREN; PETER R. EISENHARDT; SUSAN D.J. FOSTER; MATTHEW P. GOLOMBEK; VAROUJAN GORJIAN; ZAREH GORJIAN; ROBERT J. HAW; JAMES KULLECK; SHARLON L. LAUBACH; CHRISTIAN A. LINDENSMITH; AMANDA MAINZER; SCOTT MAXWELL; TIMOTHY P. MCELRATH; SUSAN PARADISE; KONSTANTIN PENANEN; CELESTE M. SATTER; PETER M. B. SHAMES; AMY SNYDER HALE; WILLIAM JOHN WALKER; PAUL R. WEISSMAN, Plaintiffs-Appellants, v. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, an Agency of the United States; MICHAEL GRIFFIN, Director of NASA, in his official capacity only; UNITED STATES DEPARTMENT OF COMMERCE; CARLOS M. GUTIERREZ, Secretary of Commerce, in his official capacity only; CALIFORNIA INSTITUTE OF TECHNOLOGY, Defendants-Appellees.

No. 07-56424

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

530 F.3d 865; 2008 U.S. App. LEXIS 13205; 27 I.E.R. Cas. (BNA) 1397

December 5, 2007, Argued and Submitted, Pasadena, California
June 20, 2008, Filed

SUBSEQUENT HISTORY: Rehearing, en banc, denied by, Concurring Opinion at, Dissenting Opinion at Nelson v. NASA, 568 F.3d 1028, 2009 U.S. App. LEXIS 12073 (9th Cir. Cal., 2009)
US Supreme Court certiorari granted by Nasa v. Nelson, 2010 U.S. LEXIS 2298 (U.S., Mar. 8, 2010)

PRIOR HISTORY: [**1]
Appeal from the United States District Court for the Central District of California. D.C. No. CV-07-05669-ODW. Otis D. Wright, District Judge, Presiding.
Nelson v. NASA, 512 F.3d 1134, 2008 U.S. App. LEXIS 498 (9th Cir. Cal., 2008)

DISPOSITION: REVERSED and REMANDED.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellants, scientists, engineers, and administrative support personnel (personnel), challenged the decision entered by the United States District Court for the Central District of California that denied their request for preliminary injunction in their action against appellees that challenged one appellee's recently adopted requirement that low risk contract employees like themselves submit to in-depth background investigations.

OVERVIEW: The personnel were not government employees but instead were employees of a private organization. They conducted research for one appellee, a federal agency, pursuant to a contract between the organization and the agency. The personnel were designated by the government as low risk contract employees because they did not work with classified material. The agency required these individuals to submit to a broad background investigations as a condition of retaining access to the organization's facilities. The district court rejected the personnel's Fourth Amendment argument, holding that a background investigation was not a search within the meaning of the Fourth Amendment. On appeal, the appellate court granted a temporary injunction pending a

merits determination of the denial of the preliminary injunction. The appellate court found that the personnel had raised serious questions as to the merits of their informational privacy claim and the balance of hardships tipped sharply in their favor, who risked losing their jobs pending appeal. The information sought in some of the questionnaires raised serious privacy issues.

OUTCOME: The appellate court reversed the district court's denial of the preliminary injunction, and remanded with instructions to fashion preliminary injunctive relief consistent with the court's opinion.

CORE TERMS: privacy, informational, disclosure, questionnaire, personnel, contractor, constitutional right, personal information, suitability, safeguards, succeed, national security, illegal drugs, narrowly tailored, questioning, implicate, sentence, balance of hardships, privacy claim, legitimate interest, legitimate state interest, authorization, tips, Space Act, preliminary injunction, government's interest, injunctive relief, irreparable, ripeness, sharply

LexisNexis(R) Headnotes

Civil Procedure > Remedies > Injunctions > Elements > General Overview
Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions
[HN1]To obtain preliminary injunctive relief, appellants must demonstrate either (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor. The two prongs are not separate tests but rather extremes of a single continuum, so the greater the relative hardship to the party seeking the preliminary injunction, the less probability of success must be shown.

Constitutional Law > The Judiciary > Case or Controversy > Standing > Elements
[HN2]To enforce U.S. Const. art. III's limitation of federal jurisdiction to cases and controversies, plaintiffs must demonstrate both standing and ripeness. To demonstrate standing, a plaintiff must have suffered an injury in fact--an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.

Constitutional Law > The Judiciary > Case or Controversy > Ripeness
[HN3]The ripeness doctrine serves to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies and requires assessing both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.

Administrative Law > Agency Rulemaking > Formal Rulemaking
Transportation Law > Space Transportation
[HN4]See 42 U.S.C.S. § 2455(a).

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
[HN5]An action to uncover information is generally considered a search if the target of the search has a reasonable expectation of privacy in the information being sought, a term of art meaning a subjective expectation of privacy that society is prepared to recognize as reasonable. One does not have a reasonable expectation of privacy in one's information for Fourth Amendment purposes merely because that information is of a private nature; instead, Fourth Amendment protection can evaporate in any of several ways.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
[HN6]What a person knowingly exposes to the public is not a subject of Fourth Amendment protection; however, information does not lose Fourth Amendment protection simply because it is conveyed to another party.

Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Scope of Protection
Criminal Law & Procedure > Search & Seizure > Expectation of Privacy
[HN7]Requiring an individual to answer questions may lead to the forced disclosure of information that he or she reasonably expects to keep private. Historically, however, when the objective is to obtain testimonial rather than physical evidence, the relevant constitutional amendment is not the Fourth but the Fifth.

Constitutional Law > Substantive Due Process > Privacy > Personal Information
[HN8]The Constitution protects an individual interest in avoiding disclosure of personal matters. This interest covers a wide range of personal matters, including sexual

activity, medical information, and financial matters. If the government's actions compel disclosure of private information, it has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest. The court must balance the government's interest in having or using the information against the individual's interest in denying access, weighing, among other things: the type of information requested, the potential for harm in any subsequent nonconsensual disclosure, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access.

Civil Procedure > Remedies > Injunctions > Elements > Balance of Hardship

[HN9]Monetary injury is not normally considered irreparable.

Constitutional Law > Substantive Due Process > Privacy > General Overview

[HN10]There exists a presumption that private conduct does not constitute government action. This presumption is rebutted, however, when a sufficient nexus makes it fair to attribute liability to the private entity as a governmental actor. Typically, the nexus consists of some willful participation in a joint activity by the private entity and the government.

COUNSEL: Dan Stormer and Virginia Keeny, Law Offices of Hadsell & Stormer, Inc., Pasadena, California, for the plaintiffs-appellants.

Mark B. Stern and Dana Martin, U.S. Department of Justice, Appellate Staff Civil Division, Washington, D.C., and Mark Holscher, R. Alexander Pilmer, and Mark T. Cramer, Kirkland & Ellis LLP, Los Angeles, California, for the defendants-appellees.

JUDGES: Before: David R. Thompson and Kim McLane Wardlaw, Circuit Judges, and Edward C. Reed, Jr.,* District Judge. Opinion by Judge Wardlaw.

* The Honorable Edward C. Reed, Jr., Senior United States District Judge for the District of Nevada, sitting by designation.

OPINION BY: Kim McLane Wardlaw

OPINION

[*870] ORDER AND OPINION

Our prior opinion filed on January 11, 2008, and reported at 512 F.3d 1134 is vacated concurrent with the filing of a new opinion today.

The petition for panel rehearing and the petition for rehearing en banc are denied as moot. The parties may file new petitions for rehearing and rehearing en banc in accordance with the Federal Rules of Appellate Procedure.

IT [**2] IS SO ORDERED.

WARDLAW, Circuit Judge:

The named appellants in this action ("Appellants") are scientists, engineers, and administrative support personnel at the Jet Propulsion Laboratory ("JPL"), a research laboratory run jointly by the National Aeronautics and Space Administration ("NASA") and the California Institute of Technology ("Caltech"). Appellants sued NASA, Caltech, and the Department of Commerce (collectively "Appellees"), challenging NASA's recently adopted requirement that "low risk" contract employees like themselves submit to in-depth background investigations. The district court denied Appellants' request for a preliminary injunction, finding they were unlikely to succeed on the merits and unable to demonstrate irreparable harm. Because Appellants raise serious legal and constitutional questions and because the balance of hardships tips sharply in their favor, we reverse and remand.

I

JPL is located on federally owned land, but operated entirely by Caltech pursuant to a contract with NASA. Like all JPL personnel, Appellants are employed by Caltech, not the government. Appellants are designated by the government as "low risk" contract employees. They do not work with classified [**3] material.

Appellants contest NASA's newly instated procedures requiring "low risk" JPL personnel to yield to broad background investigations as a condition of retaining access to JPL's facilities. NASA's new policy requires that every JPL employee undergo a National Agency Check with Inquiries (NACI), the same background investigation required of government civil service employees, before he or she can obtain an identification badge needed for access to JPL's facilities. The NACI investigation requires the applicant to complete and submit Standard Form 85 (SF 85), which asks for (1) background information, [*871] including residential, educational, employment, and military histories; (2) the names of three references that "know you well;" and (3) disclosure of any illegal drug use, possession, supply, or manufacture within the past year, along with the nature and circumstances of any such activities and any treatment or counseling received. This information is then

checked against four government databases: (1) Security/Suitability Investigations Index; (2) the Defense Clearance and Investigation Index; (3) the FBI Name Check; and (4) the FBI National Criminal History Fingerprint Check. Finally, [**4] SF 85 requires the applicant to sign an "Authorization for Release of Information" that authorizes the government to collect "any information relating to [his or her] activities from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information." The information sought "may include, but is not limited to, [the applicant's] academic, residential, achievement, performance, attendance, disciplinary, employment history, and criminal history record information." [1] The record is vague as to the exact extent to and manner in which the government will seek this information, but it is undisputed that each of the applicants' references, employers, and landlords will be sent an "Investigative Request for Personal Information" (Form 42), which asks whether the recipient has "any reason to question [the applicant's] honesty or trustworthiness" or has "any adverse information about [the applicant's] employment, residence, or activities" concerning "violations of law," "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," or "other matters." The recipient [**5] is asked to explain any adverse information noted on the form. Once the information has been collected, NASA and the federal Office of Personnel Management determine whether the employee is "suitable" for continued access to NASA's facilities, though the exact mechanics of this suitability determination are in dispute. [2]

1 The form also notes that "for some information, a separate specific release will be needed," but does not explain what types of information will require a separate release.

2 Appellants claim that the factors used in the suitability determination were set forth in a document, temporarily posted on JPL's internal website, labeled the "Issue Characterization Chart." The document identifies within categories designated "A" through "D" "[i]nfrequent, irregular, but deliberate delinquency in meeting financial obligations," "[p]attern of irresponsibility as reflected in . . . credit history," "carnal knowledge," "sodomy," "incest," "abusive language," "unlawful assembly," "attitude," "homosexuality . . . when indications are present of possible susceptibility to coercion or blackmail," "physical health issues," "mental, emotional, psychological, or psychiatric issues," "issues [**6] . . . that relate to an associate of the person under investigation," and "issues . . . that relate to a relative of the person under investigation." NASA neither concedes nor denies that these factors are considered as part of its suitability analysis; instead, it suggests that Appellants have not sufficiently proved that such factors will play a role in any individual case.

Since it was first created in 1958, NASA, like all other federal agencies, has conducted NACI investigations of its civil servant employees but not of its contract employees. Around the year 2000, however, NASA "determined that the incomplete screening of contractor employees posed a security vulnerability for the agency" and began to consider requiring NACI investigations for contract employees as well. In November 2005, revisions to NASA's Security Program Procedural Requirements imposed the same baseline NACI investigation for all employees, civil servant or contractor. These changes were not made [*872] applicable to JPL employees until January 29, 2007, when NASA modified its contract with Caltech to include the requirement. Caltech vigorously opposed the change, but NASA invoked its contractual right to unilaterally [**7] modify the contract and directed Caltech to comply immediately with the modifications. Caltech subsequently adopted a policy--not required by NASA--that all JPL employees who did not successfully complete the NACI process so as to receive a federal identification badge would be deemed to have voluntarily resigned their Caltech employment.

On August 30, 2007, Appellants filed suit alleging, both individually and on behalf of the class of JPL employees in non-sensitive or "low risk" positions, that NASA's newly imposed background investigations are unlawful. Appellants bring three primary claims: (1) NASA and the Department of Commerce (collectively "Federal Appellees") violated the Administrative Procedure Act ("APA") by acting without statutory authority in imposing the investigations on contract employees; (2) the investigations constitute unreasonable searches prohibited by the Fourth Amendment; and (3) the investigations violate their constitutional right to informational privacy.

On September 24, 2007, Appellants moved for a preliminary injunction against the new policy on the basis that any JPL worker who failed to submit an SF 85 questionnaire by October 5, 2007, would be summarily [**8] terminated. The district court denied Appellants' request. It divided Appellants' claims into two categories--those challenging the SF 85 questionnaire itself and those challenging the grounds upon which an employee might be deemed unsuitable--and found that the challenges to the suitability determination were highly speculative and unripe for judicial review. The court rejected Appellants' APA claim, finding statutory support for the investigations in the National Aeronautics and

Space Act of 1958 (the "Space Act"), 42 U.S.C. § 2455(a). The court rejected Appellants' Fourth Amendment argument, holding that a background investigation was not a "search" within the meaning of the Fourth Amendment. Finally, the court found that the SF 85 questionnaire implicated the constitutional right to informational privacy but was narrowly tailored to further the government's legitimate security interest. After concluding that Appellants had little chance of success on the merits, the district court also found that they could not demonstrate irreparable injury because any unlawful denial of access to JPL's facilities could be remedied post hoc through compensatory relief.

On appeal, a motions panel [**9] of our court granted a temporary injunction pending a merits determination of the denial of the preliminary injunction. *Nelson v. NASA*, 506 F.3d 713 (9th Cir. 2007). The panel concluded that the information sought by SF 85 and its waiver requirement raised serious privacy issues and questioned whether it was narrowly tailored to meet the government's legitimate interest in ascertaining the identity of its low-risk employees. *Id.* at 716. The panel further found that "[t]he balance of hardships tips sharply in favor of [A]ppellants," who risk losing their jobs pending appeal, whereas there was no exigent reason for performing the NACI investigations during the few months pending appeal given that "it has been more than three years since the Presidential Directive [upon which the government relies] was issued." *Id.* at 716.

II

[HN1]To obtain preliminary injunctive relief, Appellants must demonstrate either "(1) a likelihood of success on the merits [*873] and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in its favor." *Walczak v. EPL Prolong, Inc.*, 198 F.3d 725, 731 (9th Cir. 1999). The two prongs are not [**10] separate tests but rather "extremes of a single continuum," so "the greater the relative hardship to [the party seeking the preliminary injunction], the less probability of success must be shown." *Id.* (internal quotation marks omitted).

Upon review of the merits of the district court's denial of preliminary injunctive relief, we find ourselves in agreement with the motions panel. Appellants have demonstrated serious questions as to their informational privacy claim, and the balance of hardships tips sharply in their favor. We therefore conclude that the district court abused its discretion in denying Appellants' motion for a preliminary injunction, and we reverse and remand.

A. *Standing and Ripeness*

The district court found that the justiciability doctrines of ripeness and standing precluded consideration of Appellants' claims, except as they concerned the SF 85 questionnaire and associated waiver. We agree with the district court that Appellants' claims concerning the suitability determination are unripe and unfit for judicial review; however, the district court misconstrued Appellants' informational privacy claim, viewing it as limited to the SF 85 questionnaire alone.

[HN2]To enforce Article [**11] III's limitation of federal jurisdiction to "cases and controversies," plaintiffs must demonstrate both standing and ripeness. To demonstrate standing, a plaintiff "must have suffered an 'injury in fact'--an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal citations and quotation marks omitted). [HN3]The ripeness doctrine similarly serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies" and requires assessing "'both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.'" *Ass'n of Am. Med. Colls. v. United States*, 217 F.3d 770, 779-80 (9th Cir. 2000) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967)).

In analyzing justiciability, the district court distilled Appellants' claims into two basic arguments: (1) "that SF 85 is overly broad and intrusive considering the 'low-risk' nature of [appellants'] jobs at JPL" and (2) "that JPL's internal policy, which [**12] lists various grounds upon which an employee can be determined unsuitable for employment, is unconstitutional." We agree that challenges to the suitability determination are unripe because the record does not sufficiently establish how the government intends to determine "suitability"--accordingly, any claims are "strictly speculative." We also agree that Appellants have standing to challenge the SF 85 questionnaire, and because "it is undisputed that if [Appellants] do not sign the SF 85 waiver by October 5, 2007," they will "be deemed to have voluntarily resigned," there exists a "concrete injury that is imminent and not hypothetical" and thus ripe for review.

However, the district court overlooked Appellants' challenges to the government *investigation* that will result from the SF 85 requirement that the applicant sign an "authorization for release of information." On its face, this waiver [*874] authorizes the government to collect "*any* information . . . from schools, residential management agents, employers, criminal justice agencies, retail business establishments, or other sources of information" "includ[ing], but . . . not limited to, . . . academ-

ic, residential, performance, attendance, [**13] disciplinary, employment history, and criminal history record information." (emphasis added). It is uncontested that as a result of this authorization, the government Office of Personnel Management will send out "Investigative Request[s] for Personal Information," Form 42, to references, employers, and landlords. This form seeks highly personal information using an open-ended questioning technique, including asking for "any adverse information" at all or any "additional information which . . . may have a bearing on this person's suitability for government employment." Any harm that results from Form 42's dissemination and the information consequently provided to the government will be concrete and immediate.

Because Federal Appellees freely admit that Form 42 will be used in NASA's background investigations, Appellants have standing to challenge Form 42's distribution and solicitation of private information, and the issues raised in these challenges are ripe for review. The district court erred by excluding Form 42 claims from its analysis of Appellants' likelihood of success on the merits.

B. *APA Claim*

Appellants first claim that Federal Appellees violated the APA by imposing background [**14] investigations on contract employees without any basis in executive order or statute. The district court found that Congress gave NASA the authority to conduct such investigations in the Space Act of 1958, which provides:

> [HN4]The [NASA] Administrator shall establish such security requirements, restrictions, and safeguards as he deems necessary in the interest of the national security. The Administrator may arrange with the Director of the Office of Personnel Management for the conduct of such security or other personnel investigations of the Administration's officers, employees, and consultants, and its contractors and subcontractors and their officers and employees, actual or prospective, as he deems appropriate . . . .

42 U.S.C. § 2455(a).

Appellants argue that the "security or other personnel investigations" described in the second sentence of § 2455(a) are examples of the "security requirements, restrictions, and safeguards" described in the first sentence and therefore may only be established "as . . . deem[ed] necessary in the interest of the national security." They then argue that this limiting clause must be read in light of *Cole v. Young*, 351 U.S. 536, 76 S. Ct. 861, 100 L. Ed. 1396 (1956), where the Supreme [**15] Court interpreted a statute giving certain government officials the power to summarily dismiss employees "when deemed necessary in the interest of the national security." *Id.* at 538 (internal quotation marks omitted). In *Cole*, the Court found it clear "that 'national security' was not used in the Act in an all-inclusive sense, but was intended to refer only to the protection of 'sensitive' activities" and therefore held that "an employee can be dismissed 'in the interest of the national security' under the Act only if he occupies a 'sensitive' position." *Id.* at 551. Appellants claim that, by using identical limiting language in the Space Act so soon after *Cole*, Congress intended to authorize personnel investigations only of contractors in "sensitive" positions and not of the "low risk" contractors at issue in this case.

We need not resolve whether the reference to the "interest of the national security" [*875] in § 2455(a) should be interpreted in light of *Cole*, because we read this limiting language to apply only to the "security requirements, restrictions, and safeguards" described in the first sentence and not to the "personnel investigations" described in the second sentence. The second [**16] sentence could plausibly be read as an example of the "security requirements, restrictions, and safeguards" described in the first sentence, but the statute's legislative history strongly suggests that it was instead meant to be a separate and distinct authorization of power. The Conference Report describes the two sentences separately and notes that the Senate version of the bill contained the second sentence but not the first. Conf. Rep. No. 2166 (1958), *as reprinted in* 1958 U.S.C.C.A.N. 3160, 3190, 3197-98. This suggests that § 2455(a) provides two distinct authorizations, the latter of which allows the NASA Administrator to arrange for "security and other personnel investigations" of contractors "as he deems appropriate," regardless of whether these investigations are "necessary in the interest of the national security." Because the Space Act appears to grant NASA the statutory authority to require the investigations here at issue, we agree with the district court that Appellants are unlikely to succeed on the merits of their APA claim. [3]

> 3 To the extent that NASA has authority to require drug tests for current contractors, that authority is spelled out in the Civil Space Employee [**17] Testing Act, codified at 42 U.S.C. § 2473c. Congress enacted the Testing Act as part of the National Aeronautics & Space Administration Authorization Act, Fiscal Year 1992, and not as part of the Space Act of 1958. With the Testing Act, Congress gave NASA the power to administer a drug testing program for those employees or contractors responsible for "safety

> sensitive, security, or national security functions." *Id.* § 2473c(c)(1)-(2). The "program shall provide for preemployment, reasonable suspicion, random, and post-accident testing for use . . . of alcohol or a controlled substance." *Id.* Moreover, the statute provides that any drug test "shall . . . provide for the confidentiality of test results and medical information of employees." *Id.* § 2473c(f)(7).

C. *Fourth Amendment Claim*

We also agree with the district court's conclusion that Appellants are unlikely to succeed on their Fourth Amendment claims, because the government's actions are not likely to be deemed "searches" within the meaning of the Amendment. [HN5]An action to uncover information is generally considered a "search" if the target of the search has a "reasonable expectation of privacy" in the information being sought, a term [**18] of art meaning a "subjective expectation of privacy . . . that society is prepared to recognize as reasonable." *United States v. Diaz-Castaneda*, 494 F.3d 1146, 1151 (9th Cir. 2007) (citing *Katz v. United States*, 389 U.S. 347, 361, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (Harlan, J., concurring)). One does not have a "reasonable expectation of privacy" in one's information for Fourth Amendment purposes merely because that information is of a "private" nature; instead, Fourth Amendment protection can evaporate in any of several ways. *See, e.g.*, *United States v. Miller*, 425 U.S. 435, 443, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) (holding that there is no reasonable expectation of privacy in bank records in part because the information was voluntarily disclosed to the bank). To succeed on their Fourth Amendment claim, therefore, Appellants must demonstrate that either the Form 42 inquiries sent to third parties or the SF 85 questionnaire itself violates a "reasonable expectation of privacy" so as to be considered a "search" within the meaning of the Amendment.

1. Form 42 Inquiries

[HN6]"What a person knowingly exposes to the public . . . is not a subject of [*876] Fourth Amendment protection," *Katz v. United States*, 389 U.S. 347, 351, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967); however, information does [**19] not lose Fourth Amendment protection simply because it is conveyed to another party. For example, in *Katz*, FBI agents attached an electronic listening device to the outside of a public telephone booth and recorded the defendant transmitting illegal betting information over the telephone. *Id.* at 348. Even though the booth's occupant had voluntarily conveyed the information in the conversation to the party on the other end of the line, the Court found that he was "surely entitled to assume that the words he utters into the mouthpiece w[ould] not be broadcast to the world," so the covert surveillance was considered a search within the meaning of the Amendment. *Id.* at 352-53.

On the other hand, in *United States v. White*, the Supreme Court held that the electronic surveillance of a conversation between a defendant and a government informant did *not* constitute a "search" for Fourth Amendment purposes. 401 U.S. 745, 754, 91 S. Ct. 1122, 28 L. Ed. 2d 453 (1971) (plurality). The Court acknowledged that, as in *Katz*, the speaker likely expected the content of the conversations to be kept private; however, it held as a bright-line rule that the Fourth Amendment "affords no protection to 'a wrongdoer's misplaced belief that a person [**20] to whom he voluntarily confides his wrongdoing will not reveal it.'" *Id.* at 749 (quoting *Hoffa v. United States*, 385 U.S. 293, 302, 87 S. Ct. 408, 17 L. Ed. 2d 374 (1966)). In *United States v. Miller*, 425 U.S. 435, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976), holding that the government could subpoena private bank records without implicating the Fourth Amendment, the Court extended the bright-line rule to all information knowingly revealed to the government by third parties:

> [T]he Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed.

Id. at 443.

In the challenged background investigations, the government will send written Form 42 inquiries to the applicant's acquaintances. Through these inquiries, the third parties may disclose highly personal information about the applicant. As in *White* and *Miller*, the applicant presumably revealed this information to the third party with the understandable expectation that this information would be kept confidential. Nonetheless, these written inquiries appear to fit squarely [**21] under *Miller*'s bright-line rule and therefore cannot be considered "searches" under the Fourth Amendment. [4]

> 4 This analysis presupposes that the applicant voluntarily revealed the information to the third party. For example, the Fourth Amendment could still apply if the government actively used third parties to uncover private information. *See United States. v. Walther*, 652 F.2d 788, 791 (9th Cir. 1981) (noting that the Fourth Amendment is implicated when "a private party acts as an

'instrument or agent' of the state in effecting a search or seizure.").

2. SF 85 Questionnaire

The SF 85 questionnaire required of the applicant is also unlikely to be considered a Fourth Amendment "search." [HN7]Requiring an individual to answer questions may lead to the forced disclosure of information that he or she reasonably expects to keep private. Historically, however, when "the objective is to obtain testimonial [*877] rather than physical evidence, the relevant constitutional amendment is not the Fourth but the Fifth." *Greenawalt v. Ind. Dep't of Corr.*, 397 F.3d 587, 591 (7th Cir. 2005) (holding that a psychological examination required for continued government employment was not a search under the Fourth Amendment).

As [**22] Judge Posner notes in *Greenawalt*, direct questioning can potentially lead to a far greater invasion of privacy than many of the physical examinations that have in the past been considered Fourth Amendment "searches." *Id.* at 589-90. Nonetheless, applying the Fourth Amendment to such questioning would force the courts to analyze a wide range of novel contexts (e.g., courtroom testimony, police witness interviews, credit checks, and, as here, background checks) under a complex doctrine, with its cumbersome warrant and probable cause requirements and their myriad exceptions, that was designed with completely different circumstances in mind. *Id.* at 590-91. Moreover, declining to extend the Fourth Amendment to direct questioning will by no means leave individuals unprotected, as such contexts will remain governed by traditional Fifth and Sixth Amendment interrogation rights, and the right to informational privacy described below. *See id.* at 591-92.

Because neither the written inquiries directed at third parties nor the SF 85 questionnaire directed at the applicants will likely be deemed "searches," Appellants are unlikely to succeed on their Fourth Amendment claims.

D. *Informational Privacy* [23] *Claim***

Although the district court correctly found that Appellants were unlikely to succeed on their APA and Fourth Amendment claims, it significantly underestimated the likelihood that Appellants would succeed on their informational privacy claim. These constitutional errors stem in large part from the court's erroneous ripeness ruling; by limiting its analysis to the SF 85 questionnaire, the court failed to consider the most problematic aspect of the government's investigation--the open-ended Form 42 inquiries.

We have repeatedly acknowledged that [HN8]the Constitution protects an "individual interest in avoiding disclosure of personal matters." *In re Crawford*, 194 F.3d 954, 958 (9th Cir. 1999). This interest covers a wide range of personal matters, including sexual activity, *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983) (holding that questioning police applicant about her prior sexual activity violated her right to informational privacy), medical information, *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) ("The constitutionally protected privacy interest in avoiding disclosure of personal matters clearly encompasses medical information and its [**24] confidentiality."), and financial matters, *Crawford*, 194 F.3d at 958 (agreeing that public disclosure of social security numbers may implicate the right to informational privacy in "an era of rampant identity theft"). If the government's actions compel disclosure of private information, it "has the burden of showing that its use of the information would advance a legitimate state interest and that its actions are narrowly tailored to meet the legitimate interest." *Crawford*, 194 F.3d at 959 (internal quotation marks omitted). We must "balance the government's interest in having or using the information against the individual's interest in denying access," *Doe v. Att'y Gen.*, 941 F.2d 780, 796 (9th Cir. 1991), weighing, among other things:

> "the type of [information] requested, . . . the potential for harm in any subsequent nonconsensual disclosure, . . . the adequacy of safeguards to prevent unauthorized [*878] disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating towards access."

Id. (quoting *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980)) (alteration [**25] in original).

Both the SF 85 questionnaire and the Form 42 written inquiries require the disclosure of personal information and each presents a ripe controversy. Therefore, whereas the district court limited its analysis to the SF 85 questionnaire, we consider the constitutionality of both aspects of the investigation in turn.

1. SF 85 Questionnaire

Appellants concede that most of the questions on the SF 85 form are unproblematic and do not implicate the constitutional right to informational privacy. They do however challenge the constitutionality of one group of questions concerning illegal drugs. The questionnaire asks the applicant:

> In the last year, have you used, possessed, supplied, or manufactured illegal drugs? . . . . If you answered "Yes," provide information relating to the types of substance(s), the nature of the activity, and any other details relating to your involvement with illegal drugs. Include any treatment or counseling received.

The form indicates that "[n]either your truthful response nor information derived from your response will be used as evidence against you in any subsequent criminal proceeding." The district court concluded that the requested information implicated [**26] the right to informational privacy, but found that there were "adequate safeguards in place [to deal with these] sensitive questions."

Other courts have been skeptical that questions concerning illegal drug use--much less possession, supply, or manufacture--would even implicate the right to informational privacy. For example, in *Mangels v. Pena*, 789 F.2d 836 (10th Cir. 1986), the Tenth Circuit held that the disclosure of firefighters' past illegal drug use did not violate their informational privacy rights. *Id.* at 839-40. The Court held that "[t]he possession of contraband drugs does not implicate any aspect of personal identity which, under prevailing precedent, is entitled to constitutional protection. . . . Validly enacted drug laws put citizens on notice that this realm is not a private one." *Id.* at 839 (internal citations omitted). In *National Treasury Employees' Union v. U.S. Department of Treasury*, 25 F.3d 237 (5th Cir. 1994), the Fifth Circuit considered a similar form to the SF 85 questionnaire, with almost identical questions concerning illegal drugs, and rejected the applicants' informational privacy claims. The Court raised similar concerns to the Tenth Circuit:

> Today's [**27] society has made the bold and unequivocal statement that illegal substance abuse will not be tolerated. The government declared an all-out war on illegal drugs more than a decade ago. . . . Surely anyone who works for the government has a diminished expectation that his drug and alcohol abuse history can be kept secret, given that he works for the very government that has declared war on substance abuse.

Id. at 243. The Court also noted that the plaintiffs in that case were all federal employees in either "High" or "Moderate" risk "public trust" positions, and were thus acutely "aware of [their] employer's elevated expectations in [their] integrity and performance." *Id.* at 244.

Like the Tenth and Fifth Circuits, we are sensitive to the government's interest in uncovering and addressing illegal substance abuse among its employees and [*879] contractors, given the public stance it has taken against such abuse. This government interest is undoubtedly relevant to the constitutional balancing inquiry: whether the forced disclosure "would advance a legitimate state interest and [is] narrowly tailored to meet the legitimate interest." *Crawford*, 194 F.3d at 959. We are less convinced, however, that [**28] the government's interest should inform the threshold question of whether requested information is sufficiently personal to invoke the constitutional right to privacy. We doubt that the government can strip personal information of constitutional protection simply by criminalizing the underlying conduct--instead, to force disclosure of personal information, the government must at least demonstrate that the disclosure furthers a legitimate state interest. Drug dependance and abuse carries an enormous stigma in our society and "is not generally disclosed by individuals to the public." *Id.* at 958. If we had to reach the issue, therefore, we would be inclined to agree with the district court that SF 85's drug questions reach sensitive issues that implicate the constitutional right to informational privacy.

We do not need to decide this issue, however, because even if the question requiring disclosure of prior drug use, possession, supply, and manufacture does implicate the privacy right, it is narrowly tailored to achieve the government's legitimate interest. As our sister circuits have lucidly explained, the federal government has taken a strong stance in its war on illegal drugs, and this [**29] stance would be significantly undermined if its own employees and contractors freely ignored its laws. By requiring applicants to disclose whether they have "used, possessed, supplied, or manufactured illegal drugs" within the past year, and, if so, to explain the "nature of the activity" and "any other details relating to [the applicant's] involvement with illegal drugs, "the government has crafted a narrow inquiry designed to limit the disclosure of personal information to that which is necessary to further the government's legitimate interest.

The same cannot be said, however, for requiring applicants to disclose "any treatment or counseling received" for their drug problems. Information relating to medical treatment and psychological counseling fall squarely within the domain protected by the constitutional right to informational privacy. *See Norman-Bloodsaw*, 135 F.3d at 1269; *Doe*, 941 F.2d at 796. The government has not suggested any legitimate interest in requiring the disclosure of such information; indeed,

any treatment or counseling received for illegal drug use would presumably *lessen* the government's concerns regarding the underlying activity. Because SF 85 appears to *compel* [**30] disclosure of personal medical information for which the government has failed to demonstrate a legitimate state interest, Appellants are likely to succeed on this--albeit narrow portion of their informational privacy challenge to SF 85.

2. Form 42 Inquiries

The Form 42 written inquiries--omitted from the district court's analysis as a result of its erroneous ripeness holding--are much more problematic. Form 42 solicits "any adverse information" concerning "financial integrity," "abuse of alcohol and/or drugs," "mental or emotional stability," "general behavior or conduct," and "other matters." These open-ended questions are designed to elicit a wide range of adverse, private information that "is not generally disclosed by individuals to the public" and therefore seemingly implicate the right to informational privacy. [*880] *Crawford*, 194 F.3d at 958. [5] The government suggests that even if the information disclosed in the investigation implicates the right to informational privacy, the scheme must be upheld because the government has taken measures to keep the information from being disclosed to the general public. Although the risk of public disclosure is undoubtedly an important consideration [**31] in our analysis, *see Planned Parenthood of S. Ariz. v. Lawall*, 307 F.3d 783, 790 (9th Cir. 2002), it is only one of many factors that we should consider, *id.* at 789-90 ("[T]he right to 'informational privacy' . . . applies both when an individual chooses not to disclose highly sensitive information to the government and when an individual seeks assurance that such information will not be made public."); *Norman-Bloodsaw*, 135 F.3d at 1269 (noting that a government action can violate the right to privacy without disclosure to third parties); *Doe*, 941 F.2d at 796 (listing, as two factors among many, "'the potential for harm in any subsequent nonconsensual disclosure [and] the adequacy of safeguards to prevent authorized disclosure.'" (quoting *Westinghouse Elec. Corp.*, 638 F.2d at 578). Therefore, although safeguards exist to help prevent disclosure of the applicants' highly sensitive information, Federal Appellees must still demonstrate that the background investigations are justified by legitimate state interests and that Form 42's questions are "narrowly tailored to meet those legitimate interests." *Thorne*, 726 F.2d at 469.

> 5 The constitutional right to informational privacy is concerned [**32] with "the individual interest in avoiding disclosure of personal matters." In determining whether the right applies, our cases have emphasized the *nature* of the information sought--in particular, whether it is sufficiently "personal" to merit protection, *see Crawford*, 194 F.3d at 958; *Doe*, 941 F.2d at 796--rather than on the manner in which the information is sought. The highly personal information that the government seeks to uncover through the Form 42 inquiries is protected by the right to privacy, whether it is obtained from third parties or from the applicant directly.
>
> In this respect, the right to informational privacy differs from the Fourth Amendment, which, as a bright-line rule, "does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities." *Miller*, 425 U.S. at 443. This principle has occasionally been rephrased as a general holding "that a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." *Smith v. Maryland*, 442 U.S. 735, 743-44, 99 S. Ct. 2577, 61 L. Ed. 2d 220 (1979). We think it is clear, however, that the "legitimate expectation of privacy" described in this context is a term of art used [**33] only to define a "search" under the Fourth Amendment, and *Miller* and *Smith* do not preclude an *informational privacy* challenge to government questioning of third parties about highly personal matters. If the constitutional right to informational privacy were limited to cases that involved a Fourth Amendment "search," the two rights would be entirely redundant. Indeed, although the two doctrines often overlap, *see Norman-Bloodsaw*, 135 F.3d at 1269, we have repeatedly found the right to informational privacy implicated in contexts that did not involve a Fourth Amendment "search," *see, e.g.*, *Thorne*, 726 F.2d at 468.

We agree with the government that it has several legitimate reasons for investigating its contractors. NASA has an interest in verifying its contractors' identities to make sure that they are who they say they are, and it has an interest in ensuring the security of the JPL facility so as not to jeopardize the costly investments housed therein. Appellants concede, as they must, that these are legitimate government interests.

The government has failed to demonstrate, however, that Form 42's questions are "narrowly tailored" to meet these legitimate interests. Initially, we note [**34] that although NASA has a general interest in keeping the JPL facility secure, there is no [*881] specific evidence in the record to suggest that any of the "low risk" JPL personnel pose such a security risk; indeed, NASA appears to designate as "moderate risk" any individual who has the "opportunity to cause damage to a significant NASA asset or influence the design or implementation [of] a

security mechanism designed to protect a significant NASA asset." More importantly, Form 42's broad, open-ended questions appear to range far beyond the scope of the legitimate state interests that the government has proposed. Asking for "*any* adverse information about this person's employment, residence, or activities" may solicit some information relevant to the applicant's identity or security risk, but there are no safeguards in place to limit the disclosures to information relevant to these interests. Instead, the form invites the recipient to reveal *any* negative information of which he or she is aware. It is difficult to see how the vague solicitation of derogatory information concerning the applicant's "general behavior or conduct" and "other matters" could be narrowly tailored to meet *any* legitimate [**35] need, much less the specific interests that Federal Appellees have offered to justify the new requirement.

Finally, the context in which the written inquiries are posed further supports Appellants' claim. In *Thorne v. City of El Segundo*, 726 F.2d 459 (9th Cir. 1983), we focused not only on the private nature of questions asked, but also on the lack of standards governing the inquiry. We held that questioning a female police applicant about her past sexual relations with another officer in the department violated her constitutional right to informational privacy, *id.* at 468, finding that many of the questions posed went beyond any relevant lines of questioning, *id.* at 469-70. More importantly, we noted that the city had not set any *standards* for inquiring about the private information. *Id.* at 470. "When the state's questions directly intrude on the core of a person's constitutionally protected privacy and associational interests. . ., an unbounded, standardless inquiry, even if founded upon a legitimate state interest, cannot withstand the heightened scrutiny with which we must view the state's action." *Id.* In this case, the government's questions stem from SF 85's extremely broad authorization, [**36] allowing it "to obtain *any* information" from any source, subject to other releases being necessary only in some vague and unspecified contexts. Federal Appellees have steadfastly refused to provide any standards narrowly tailoring the investigations to the legitimate interests they offer as justification. Given that Form 42's open-ended and highly private questions are authorized by this broad, standardless waiver and do not appear narrowly tailored to any legitimate government interest, the district court erred in finding that Appellants were unlikely to succeed on their informational privacy claim.

E. *Balance of Hardships*

The balance of hardships tips sharply toward Appellants, who face a stark choice-either violation of their constitutional rights or loss of their jobs. The district court erroneously concluded that Appellants will not suffer any irreparable harm because they could be retroactively compensated for any temporary denial of employment. It is true that [HN9]"monetary injury is not normally considered irreparable," *L.A. Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir. 1980), and the JPL employees who choose to give up their jobs may later be made [**37] whole financially if the policy is struck down. However, in the meantime, there is a substantial risk that a number of employees will not be able to finance such a principled [*882] position and so will be coerced into submitting to the allegedly unconstitutional NACI investigation. Unlike monetary injuries, constitutional violations cannot be adequately remedied through damages and therefore generally constitute irreparable harm. *See Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Morever, the loss of one's job does not carry merely monetary consequences; it carries emotional damages and stress, which cannot be compensated by mere back payment of wages.

On the other side of the balance, NASA has not demonstrated any specific harm that it will face if it is enjoined for the pendency of the adjudication from applying its broad investigatory scheme to "low risk" JPL contract employees, many of whom have worked at the laboratory for decades. As Caltech argues, JPL has successfully functioned without any background investigations since the first contract between NASA and JPL in 1958, so granting injunctive relief would make NASA no worse off than it has ever been. Moreover, an [**38] injunction in this case would not affect NASA's ability to investigate JPL personnel in "high risk" or "moderate risk" positions, significantly undercutting any lingering security fears. Finally, we note that NASA has taken years to implement NACI at JPL, a fact we construe as weakening any urgency in imposing the investigations before Appellants' claims are fully adjudicated on their merits.

III

Caltech separately argues that any injunctive relief should not encompass it because, as a private actor, it cannot be held liable for constitutional violations that arise from the government-imposed background investigations. Caltech is correct that [HN10]there exists a "presumption that private conduct does not constitute government action." *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 835 (9th Cir. 1999). This presumption is rebutted, however, when a sufficient nexus "make[s] it fair to attribute liability to the private entity as a governmental actor. Typically, the nexus consists of some *willful participation in a joint activity* by the private entity and the government." *Id.* at 843 (emphasis added).

Caltech notes that it initially opposed the new background investigations, which are [**39] conducted entirely by NASA and other government agencies; therefore, it claims that the investigations are not "joint activities" and Caltech is not a "willful participant." We have some sympathy for this argument, and if Caltech had done nothing more than abide by the contract terms unilaterally imposed by NASA, we might agree with its position. Here, however, the record is clear that Caltech did do more--it established, on its own initiative, a policy that JPL employees who failed to obtain federal identification badges would not simply be denied access to JPL, they would be terminated entirely from Caltech's employment. This decision does not necessarily render Caltech liable as a governmental actor, but it raises serious questions as to whether the university has in fact now become a willful and joint participant in NASA's investigation program, even though it was not so initially. Caltech's threat to terminate non-compliant employees is central to the harm Appellants face and creates the coercive environment in which they must choose between their jobs or their constitutional rights. Moreover, with the government enjoined, Caltech faces no independent harm to itself, so the balance [**40] of hardships tips overwhelmingly in Appellants' favor. Therefore, we hold that preliminary injunctive relief should apply both to Caltech and to Federal Appellees.

[*883] **IV**

Appellants have raised serious questions as to the merits of their informational privacy claim and the balance of hardships tips sharply in their favor. The district court's denial of the preliminary injunction was based on errors of law and hence was an abuse of discretion. Accordingly, we reverse and remand with instructions to fashion preliminary injunctive relief consistent with this opinion.

REVERSED and REMANDED.

Analysis
As of: Aug 16, 2010

Erik E. SCHRADER v. STATE of Maryland

No. 240, September Term, 1986

Court of Special Appeals of Maryland

69 Md. App. 377; 517 A.2d 1139; 1986 Md. App. LEXIS 430

December 4, 1986

PRIOR HISTORY: [***1] Appeal From The Circuit Court for Montgomery County, Irma S. Raker, Judge.

DISPOSITION: JUDGMENT AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant was found guilty of conspiracy in connection with a pyramid scheme. The Circuit Court for Montgomery County (Maryland) sentenced him after a bench trial, to one year imprisonment, which was suspended, five years of supervised probation, and a fine. Defendant appealed.

OVERVIEW: The police department received a complaint concerning a business that was owned and operated by defendant. The police department initiated an investigation that included making a telephone call to a number that was on a business flyer. There was a recorded message that indicated that, with a small investment, the return could be from $ 300 to $ 700 per month in approximately three months and that no selling was involved. The officer then attended a couple of meetings that described the scheme. Defendant was charged with conspiracy with the person that conducted the meetings. The person that conducted the meetings was not charged criminally. On appeal, defendant argued that the statute that prohibited pyramids was vague. The court held that the word "primarily" in the statute possessed a common and generally accepted meaning and that there was nothing ambiguous about the term.

OUTCOME: The court affirmed the lower court's judgment and ordered defendant to pay costs.

CORE TERMS: pyramid, promotional, recruitment, vagueness, downline, recruit, flyer, phases, sale of goods, food, pyramid schemes, judgment of acquittal, unconstitutionally vague, triers of fact, recruiting, selling, seized, recruited, silver, penal statute, fair notice, vague, earn, join, ordinary intelligence, reasonable opportunity, judicial officers, void-for-vagueness, intelligence, anti-pyramid

LexisNexis(R) Headnotes

Criminal Law & Procedure > Criminal Offenses > Fraud > False Pretenses > General Overview

[HN1]A pyramid promotional scheme is defined as any plan or operation by which a participant gives consideration for the opportunity to receive compensation to be derived primarily from any person's introduction of other persons into participation in the plan or operation rather than from the sale of goods, services, or other intangible property by the participant or other persons introduced into the plan or operation.

Criminal Law & Procedure > Criminal Offenses > Fraud > False Pretenses > General Overview
Criminal Law & Procedure > Sentencing > Fines

[HN2]A person may not establish, operate, advertise, or promote a pyramid promotional scheme. Violation of that prohibition renders a person guilty of a misdemeanor punishable by fine and/or imprisonment.

Governments > Legislation > Interpretation
[HN3]Legislative acts creating crimes must be clear and certain. Such laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Where a statute imposes criminal penalties, the standard of certainty is higher than the standard applicable to statutes imposing only civil penalties.

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > General Overview
Governments > Legislation > Interpretation
Governments > Legislation > Types of Statutes
[HN4]A penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties. 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. The Fifth and Fourteenth Amendments guarantee that 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.

Governments > Legislation > Overbreadth
[HN5]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 application.

Governments > Legislation > Overbreadth
Governments > Legislation > Vagueness
[HN6]The constitutionality of a statutory provision under attack on void-for-vagueness grounds must be determined strictly on the basis of the statute's application to the particular facts at hand. Thus, it will usually be immaterial that the statute is of questionable applicability in foreseeable marginal situations, if a contested provision clearly applies to the conduct of the defendant in a specific case.

Evidence > Testimony > Experts > Admissibility
[HN7]The admissibility of expert testimony is a matter largely within the discretion of the trial court. The weight to be accorded it is left to the trier of fact.

Criminal Law & Procedure > Appeals > Standards of Review > General Overview
[HN8]The standard for reviewing sufficiency of the evidence in criminal cases is whether after viewing the evidence in the light most favorable to the prosecution any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > General Overview
[HN9]Criminal conspiracy requires a combination of two or more persons, who by some concerted action seek to accomplish some criminal act or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

Criminal Law & Procedure > Criminal Offenses > Inchoate Crimes > Conspiracy > General Overview
[HN10]No formal agreement need be shown to make out a conspiracy; the State must present only so much evidence as would allow the fact finder to infer that the parties tacitly agreed to commit an unlawful act.

COUNSEL: Bernard P. Horn (John V. Long and Long & Long, P.A. on the brief), Bethesda, for appellant.

John S. Bainbridge, Jr., Assistant Attorney General (Stephen H. Sachs, Attorney General, Baltimore, Andrew L. Sonner, State's Attorney for Montgomery County and Constance A. Junghans, Assistant State's Attorney for Montgomery County on the brief, Rockville), for appellee.

JUDGES: Garrity, Bloom, and Karwacki, JJ.

OPINION BY: KARWACKI

OPINION

[*380] [**1141] Erik E. Schrader, the appellant, was convicted at a bench trial in the Circuit Court for Montgomery County (Irma S. Raker, J.) of conspiracy to establish an illegal pyramid promotional scheme in violation of Md.Code (1957, 1982 Repl.Vol., 1985 Supp.), Article 27, § 233D. He was sentenced to a one year term of imprisonment, which was suspended, five years of supervised probation, and a fine of $ 10,000 to be paid within 60 days.

The General Assembly enacted Article 27, § 233D by Chapter 507 of the Acts of 1984, which took effect on July 1, 1984. Section 233D(a)(4) defines a "pyramid promotional [***2] scheme" as

> [HN1]any plan or operation by which a participant gives consideration for the opportunity to receive compensation to be derived primarily from any person's introduction of other persons into participation in the plan or operation rather than from the sale of goods, services, or other intangible property by the participant or other persons introduced into the plan or operation.

Subsection (b) states that "[[HN2]a] person may not establish, operate, advertise, or promote a pyramid promotional scheme." Violation of that prohibition renders a person guilty of a misdemeanor punishable by fine and/or imprisonment. Article 27, § 233D(c).

Pyramiding is a type of multi-level marketing operation which theoretically serves as a method of distributing a company's products to the public. Annot., 54 A.L.R.3d 217, 219 (1973). Participants in the operation are spread out over various distribution levels through which products are resold until they reach the consumer. *Id.* However, because "one profits merely by being a link in the product distribution chain, the emphasis is on recruiting more investor-distributors rather than on retailing products." Note, [*381] [***3] *Pyramid Schemes: Dare to be Regulated,* 61 Georgetown L.J. 1257, 1259 (1973).

A participant's recruitment of others into the pyramid operation results in creation of that participant's "downline," consisting of those persons recruited by the participant himself and by the participant's recruits. The downline is created by recruiting a preestablished number of individuals into the first level of the operation, each of whom then recruits an equal number of additional persons. The original participant moves up to the next level of the operation each time the bottom level of recruits in his downline is completed, with the process ideally continuing until the original participant's downline reaches a maximum figure determined by the number of levels in the pyramid. A participant may earn commissions from the sale of products to the distributors within his downline, but commissions are also received from entry fees paid by new recruits into one's downline.

The type of pyramid operation with which § 233D is concerned is one in which a participant's compensation is "derived primarily" from the participant's recruitment of others into the operation rather than from the sale of goods [***4] or services. With that consideration in mind, we now review the evidence in this case.

On February 4, 1985, the Montgomery County Police Department received a complaint concerning C.I. Systems ("CIS"), which was owned and operated by the appellant. Initiating an investigation into the company, Montgomery County Vice and Intelligence Officer John Sheridan called a telephone number obtained from a CIS flyer and heard a recorded message to the effect that "C.I. Systems would act as a consultant for a person that became involved. One could earn $ 300 to $ 700 a month in approximately three months. [**1142] This amount could double every six to nine months." The recording further advised that "[n]o selling was involved, and four to six hours per week is all that it would be necessary to work." Two additional telephone [*382] numbers, one in Virginia and the other in Maryland, were then provided. Officer Sheridan called the Maryland number and heard another recording, this one giving directions to CIS meetings at an office located in Bethesda, Maryland and requesting that callers leave their names and the date of the meeting they would attend. Officer Sheridan gave an undercover [***5] name and stated that he would attend the meeting on February 6, 1985.

On February 6, Officer Sheridan attended a meeting at the address indicated in the second recorded message. Conducting the meeting was one Robert Schaffer, who identified himself as a member of CIS's board of directors. [1] Mr. Schaffer informed those gathered at the meeting that an initial payment of $ 45 could result in earnings of $ 300 to $ 700 a month within 3-6 months and of $ 2,000 a month within 6-12 months, without any selling required. He also advised that Erik Schrader was the founder and head of CIS.

> 1. Mr. Schaffer was named as an unindicted co-conspirator in the charging document ultimately filed against the appellant.

Eight days later, on February 14, 1985, Officer Sheridan attended a second meeting at the same location. The meeting was again conducted by Robert Schaffer, who this time explained the various recruiting methods used by CIS. Among the methods discussed were flyers, tear-off slips, advertisements in newspapers [***6] and magazines, and the wearing of buttons to prompt inquiries from others. Mr. Schaffer stated that a $ 65 fee was required to join CIS, at which time flyers could be purchased at a special initial rate of $ 25 per 1,000. He then explained in further detail the overall nature of the operation, which involved the recruitment of others into the enterprise at different "levels." [2] According to Officer Sheridan's testimony at the appellant's [*383] trial, recruitment was emphasized as the focus of the operation; selling and the product line were incidental. To the extent products were involved, participants in the programs were generally buyers rather than sellers. [3]

2. These "levels" were the companies or programs which made up the components of the CIS operation. The programs were identified as: the Flyer Program, Morn'n Sun, Success Synergistics, the Silver Letter Program, Yurika Foods, and the VIP Program.

3. Depending on the program, participants were entitled to purchase or, in certain programs, required to purchase such items as cosmetics, silver bars, food products, and diamonds.

[***7] On March 23, 1985, Officer Sheridan attended a third meeting, this one at the CIS home office in Springfield, Virginia. The appellant was introduced at this meeting as the president of CIS. He spoke about a new plan he was introducing that would allow someone, for a payment of $ 475, to go directly into the VIP Program without progressing through the other programs. Again, the explanation of the program indicated that recruitment of others was the primary means by which participants could earn money.

Based on Officer Sheridan's investigation, search warrants were obtained for the CIS offices in Maryland and Virginia. [4] The ensuing searches resulted in the seizure of various records and documents from those offices.

4. The Virginia search warrant was applied for and executed by the police department of Fairfax County, Virginia.

William L. Holmes, a special agent with the Federal Bureau of Investigation, testified for the State at the appellant's trial as "an expert on the examination and interpretation [***8] of records for pyramid schemes." Based on his review of the materials seized from the CIS offices, Agent Holmes gave extensive testimony over two days, outlining the way in which CIS and its connected programs worked. He concluded that the various programs promoted by CIS -- the [**1143] Flyer Program, Morn'n Sun, Success Synergistics, the Silver Letter Program, Yurika Foods, and the VIP Program -- were interrelated parts of the same system.

At the trial judge's request, Agent Holmes presented an overview of the CIS operation. Agent Holmes testified that an individual had to join the Flyer Program in order to [*384] qualify for Morn'n Sun. Once qualified for Morn'n Sun, the participant was to recruit other individuals to participate in that program. In Phase One of Morn'n Sun, a participant recruited three individuals, each of whom then recruited three additional persons, for a total of nine. In the third level of Phase One, those nine individuals each recruited three more persons, who became part of the original participant's downline. This completed Phase One for the original participant, who then advanced to Phase Two of Morn'n Sun, which involved similar multi-level [***9] recruitment. The participant would continue to build his downline by bringing people into successive levels of Phase Two, followed by the same process in Phase Three. The participant received commissions based upon his recruitment of others into certain levels, but Agent Holmes explained that it was necessary to bring over seven million people into the organization in order to gain full commission benefits. With respect to payment of commissions, the trial judge had the following exchange with Agent Holmes:

THE COURT: So, in your view, the only thing a participant has to do to get money or commissions is to keep bringing people in.

THE WITNESS: That's correct.

THE COURT: He gets more people, he gets more people, and he gets more.

THE WITNESS: That's correct.

Agent Holmes further testified that a participant was required to join Success Synergistics and the Silver Letter Program within six months after entry into the Flyer Program. In return for an initial payment, Success Synergistics and Silver Letter distributed training aids, such as a newsletter and an instructional cassette, which enabled an individual to continue operating in Morn'n Sun. The next [***10] stage of the CIS operation was Yurika Foods, which, according to Agent Holmes, was distinguishable from the other CIS programs in that advancement was based on the volume of food sales rather than on the number of individuals recruited. The final CIS program was the VIP Program, [*385] which was another recruitment operation similar to Morn'n Sun except that VIP involved five phases rather than three and a greater investment by participants.

Agent Holmes, when asked whether his review of the records seized from the CIS offices revealed any evidence that the programs involved the sale of products to anyone other than participants in the program, responded, "No, ma'am, I did not." On the ultimate issue of whether the CIS operation constituted a pyramid promotional scheme, the following colloquy took place:

[PROSECUTOR]: Agent Holmes, if a pyramid promotional scheme is defined as an operation to which a participant gives consideration or money for the opportunity to receive money or compensation

> which is derived primarily from introducing other people into the same program, rather than from the sale of goods -- based on that definition, what would your opinion of CI [***11] Systems be?
>
> [AGENT HOLMES]: That all of the designated programs would fit within that category except Yurika Foods.

Moreover, Agent Holmes testified that, in his opinion, even if the various programs were separately owned and operated, CIS would still be a pyramid operation because it was "using those companies to facilitate the down liner system or programs."

In addition to Agent Holmes and Officer Sheridan, the State called one other witness, Richard Retta, who testified about his personal experience as a member of CIS. According to Mr. Retta, the only time a participant received products was when he [**1144] first joined and paid the initial fee of $ 45. [5] Mr. Retta received commissions for getting new recruits to join the company. He was not required to sell [*386] any products. For a fee of $ 50, CIS kept track of Mr. Retta's "down line" of recruits.

> 5. In Mr. Retta's case, he received two seven or eight ounce vials of shampoo. He received no additional products except a magazine subscription when he later joined Success Synergistics. Even that magazine was not really a product so much as a training manual for persons who joined Success Synergistics.

[***12] After the State rested its case, the appellant moved for judgment of acquittal. In conjunction with that motion, he filed what he titled a "Motion to Declare Maryland Code, Article 27 Sections [sic] 233(D) Unconstitutionally Vague as Applied to this Defendant." The trial court treated the latter motion as a motion to dismiss and denied it. After the motion for judgment of acquittal was also denied, the appellant chose to rest his case without offering any evidence. Following closing arguments, the trial court found the appellant guilty of conspiring with Robert Schaffer to establish an illegal pyramid promotional scheme.

The appellant's contentions on appeal can be reduced to the following:

> I. The trial court erred in denying the appellant's motion seeking to have Article 27, § 233D declared unconstitutionally vague as applied to him.
>
> II. The trial court erred in according the testimony of the State's expert witness any evidentiary value because that testimony was based on documents which were not admitted into evidence for their truth.
>
> III. The evidence was insufficient to support the appellant's conviction.

I.

At the conclusion of the State's case, [***13] the appellant moved for judgment of acquittal and also filed a "Motion to Declare Maryland Code Article 27 Sections [sic] 233(D) Unconstitutionally Vague as Applied to this Defendant." The latter motion was supported by a memorandum of authorities. The trial judge treated the latter motion as one to dismiss the prosecution and excused its untimeliness under Rule 4-252 over the objection of the prosecutor. After considering the written and oral arguments of counsel, the motion was denied. Under these circumstances, we believe the issue has been preserved for our review. *Cf.* [*387] *Vuitch v. State*, 10 Md.App. 389, 393-401, 271 A.2d 371 (1970), *cert. denied*, 261 Md. 729, *cert. denied*, 404 U.S. 868, 92 S.Ct. 44, 30 L.Ed.2d 112 (1971), where this Court declined to consider a constitutional attack upon a penal statute where there had been no pretrial motion to dismiss filed pursuant to former Rule 725 b. There the issue was raised for the first time in a motion for judgment of acquittal at the conclusion of the State's case, and the record failed to indicate that the trial judge had considered the constitutional issue in denying the defendant's motion for judgment [***14] of acquittal.

The appellant correctly asserts that [HN3]legislative acts creating crimes must be clear and certain. [6] As stated by the Supreme Court, such laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298-99, 33 L.Ed.2d 222, 227 (1972). Furthermore, "where a statute imposes criminal penalties, the standard of certainty is higher" than the standard applicable to statutes imposing only civil penalties. *Kolender v. Lawson*, 461 U.S. 352, 359 n. 8, 103 S.Ct. 1855, 1859, n. 8, 75 L.Ed.2d 903, 910 (1983).

> 6. The requirement of precision in penal statutes is an element of the constitutional guarantee of due process of law found in the Fourteenth Amendment of the United States Constitution and

in Article 24 of the Maryland Declaration of Rights.

A comprehensive discussion of the void-for-vagueness doctrine is found in *Bowers* [**1145] *v. State,* 283 [***15] Md. 115, 389 A.2d 341 (1978). The Court of Appeals there stated:

> The cardinal requirement is that [HN4]a penal statute "be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *Connally v. General Const. Co.,* 269 U.S. 385, 391, 46 S.Ct. 126, 70 L.Ed. 322 (1926). "[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 [*388] application, violates the first essential of due process of law." *Id.* The Fifth and Fourteenth Amendments guarantee that "[n]o 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." *Lanzetta v. New Jersey,* 306 U.S. 451, 453, 59 S.Ct. 618 [619], 83 L.Ed. 888 (1939). *Accord, Hynes v. Mayor of Oradell,* 425 U.S. 610, 620, 96 S.Ct. 1755 [1760], 48 L.Ed.2d 243 (1976); *United States v. Mazurie,* 419 U.S. 544, 553, 95 S.Ct. 710 [715], 42 L.Ed.2d 706 (1975); *Smith v. Goguen,* 415 U.S. 566, 572 n. 8, 94 S.Ct. 1242 [***16] [1247 n. 8], 39 L.Ed.2d 605 (1974); *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294 [2298], 33 L.Ed.2d 222 (1972); *Bouie v. City of Columbia,* 378 U.S. 347, 350-51, 84 S.Ct. 1697 [1700-01], 12 L.Ed.2d 894 (1964); *United States v. Harriss,* 347 U.S. 612, 617, 74 S.Ct. 808 [811], 98 L.Ed. 989 (1954); *Winters v. New York,* 333 U.S. 507, 515-16 [670-71], 68 S.Ct. 665, 92 L.Ed. 840 (1948). *See generally* Note, *The Void-For-Vagueness Doctrine in the Supreme Court,* 109 U.Pa.L.Rev. 67 (1960).
>
> In assessing the constitutionality of a statute assailed as overly uncertain either in respect of the acts it purports to prohibit or the persons to whom it applies, courts typically consider two basic criteria. The first of these may be described as the fair notice principle and is grounded on the assumption that one should be free to choose between lawful and unlawful conduct. Due process commands that persons of ordinary intelligence and experience be afforded a reasonable opportunity to know what is prohibited, so that they may govern their behavior accordingly.
>
> . . . . .
>
> A statute may also be stricken for vagueness if it fails to provide legally fixed [***17] standards and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, apply and administer the penal laws.
>
> > [*389] "[HN5]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 application." *Grayned v. City of Rockford,* 408 U.S. at 108-109 [92 S.Ct. at 2299]; *accord, Papachristou v. City of Jacksonville,* 405 U.S. 156, 170, 92 S.Ct. 839 [847], 31 L.Ed.2d 110 (1972).
>
> This is not to say, of course, that a criminal statute is void merely because it allows for the exercise of some discretion on the part of law enforcement and judicial officials. It is only where a statute is so broad as to be susceptible to irrational and selective patterns of enforcement that it will be held unconstitutional under this second arm of the vagueness principle. *See Giaccio v. Pennsylvania,* 382 U.S. 399, 402-403, 86 S.Ct. 518 [520-521], 15 L.Ed.2d 447 (1966).
>
> As a general rule, [HN6]the constitutionality of a statutory provision under attack on void-for-vagueness grounds must [***18] be determined strictly on the basis of the statute's application to the

> particular facts at hand. *United States v. Powell*, 423 U.S. 87, 92, 96 S.Ct. 316 [319], 46 L.Ed.2d 228 (1975); *United States v. Mazurie*, 419 U.S. at 550 [95 S.Ct. at 714]; *United States v. National Dairy Corp.*, 372 U.S. 29, 32-33, 83 S.Ct. 594 [597-598], 9 L.Ed.2d 561 (1963). Thus, it will usually be immaterial that the statute is of questionable [**1146] applicability in foreseeable marginal situations, if a contested provision clearly applies to the conduct of the defendant in a specific case. *United States v. Petrillo*, 332 U.S. 1, 7, 67 S.Ct. 1538 [1541], 91 L.Ed. 1877 (1947).

Id. at 120-22, 389 A.2d 341.

The appellant's contention that Article 27, § 233D is unconstitutionally vague as applied to him centers around the definition of "pyramid promotional scheme" in subsection (a)(4). The major thrust of the appellant's vagueness argument seems to be that § 233D(a)(4) is impermissibly vague because "it fails to provide legally fixed standards [*390] and adequate guidelines for police, judicial officers, triers of fact and others whose obligation it is to enforce, [***19] apply and administer" the statute. *Bowers v. State, supra*, 283 Md. at 121, 389 A.2d 341. Nevertheless, because the appellant also expresses concern about the clarity with which the statute defines "pyramid promotional scheme," we first examine whether it affords "fair notice" of what type of operation is prohibited.

A. Fair Notice

As defined in § 233D(a)(4), a pyramid promotional scheme is an operation in which a participant's compensation is "to be derived primarily from" recruitment of other participants into the operation rather than from the sale of goods or services. The word at issue in the statute is "primarily." The Court of Appeals in *Bowers* explained that "[a] statute is not vague when the meaning of the words in controversy can be fairly ascertained by reference to judicial determinations, the common law, dictionaries, treatises or even the words themselves, if they possess a common and generally accepted meaning." *Id.* at 125, 389 A.2d 341. We believe the word "primarily," as used in § 233D(a)(4), possesses a common and generally accepted meaning. Webster's New World Dictionary (2d College ed. 1982) defines "primarily" as "mainly; principally." [***20] In quantifiable terms, "primarily" is commonly understood to suggest a figure representing more than 50 percent. Thus, the definition of "pyramid promotional scheme" in § 233D(a)(4) imposes a standard requiring that participants in a pyramid operation derive more than 50 percent of their compensation from recruitment for the operation to fall within the definition. We find nothing ambiguous about the term "primarily" as used in that definition.

An Illinois anti-pyramid statute using the word "primarily" survived a similar attack based on vagueness grounds. The Illinois statute defined a "pyramid sales scheme" to include

> any plan or operation whereby a person in exchange for money or other thing of value acquires the opportunity to [*391] receive a benefit or thing of value, which is *primarily* based upon the inducement of additional persons, by himself or others, regardless of number, to participate in the same plan or operation and is not *primarily* contingent on the volume or quantity of goods, services, or other property sold or distributed or to be sold or distributed to persons for purposes of resale to consumers.

Ill.Rev.Stat. (1983), Ch. 121 [***21] 1/2, Par. 261(g) (emphasis added). In *People ex rel. Hartigan v. Dynasty System Corp.*, 128 Ill.App.3d 874, 83 Ill.Dec. 937, 471 N.E.2d 236 (1984), that statute was challenged as void for vagueness on grounds that "the word 'primarily' does not inform a person of reasonable intelligence of what conduct is prohibited by the Act." *Id.* 83 Ill.Dec. at 942, 471 N.E.2d at 241. Rejecting that argument, the Illinois court reasoned that "'[p]rimarily' means 'pre-eminently' or 'fundamentally'" and that the term "is certainly less broad than other terms contained in the Act which have withstood void for vagueness challenges." *Id.* The Court held that "the term 'primarily' provides fair notice to those who are subject to the act of the schemes and ventures which are prohibited." *Id.* 83 Ill.Dec. at 943, 471 N.E.2d at 242.

In 1983, the Utah legislature, apparently in an effort to cure potential vagueness [**1147] problems in that state's 1973 anti-pyramid law, *added* the word "primarily" to the definition of a pyramid scheme. Utah Code (1953, 1983 Supp.), § 76-6a-2(4).

> . . . [T]he Act attempts to cure potential problems of constitutional vagueness by defining [***22] a pyramid scheme as "any sales device or plan" in which a person provides consideration "for compensation or the right to receive compensation which is derived *primarily* from the

> introduction of other persons into the sales device or plan rather than from the sale of goods, services or other property." Thus, even if a multilevel plan involves a product that profitably may be sold to the consumer, it is still an illegal pyramid if the promised profits are derived [*392] primarily from recruitment. That definition does not appear to be unconstitutionally vague because it distinguishes more clearly than the 1973 law between genuine multilevel marketing plans and pyramid schemes by requiring that compensation be derived *primarily* from introduction of others into the scheme, rather than including organizations that pay *any* compensation derived from introduction of others into the scheme.

Utah Legislative Survey, 1984 Utah L.Rev. 115, 215-16 (footnotes omitted) (emphasis in original).

The word "primarily," as used in the definition of "pyramid promotional scheme" in § 233D(a)(4), has a sufficiently definite meaning to afford a person of ordinary intelligence [***23] and experience a reasonable opportunity to know what is prohibited by the statute. We therefore hold that § 233D provides adequate notice of the type of pyramid operations which are prohibited.

B. *Adequate Guidelines*

The appellant also argues that the statute fails to set forth any objective standards for police, judicial officers, triers of fact and others who must enforce it. Rather, he asserts, the statute requires the use of subjective standards for the purpose of ascertaining whether the compensation of participants in an allegedly illegal pyramid promotional scheme is derived primarily from recruitment rather than from sales of goods or services. We disagree.

The question of the source of the primary compensation of participants in a multi-level marketing operation is a matter of sufficiency of the evidence offered to prove guilt under § 233D. "Primarily" is an adequate benchmark for enforcement of the statute and evaluation of prosecutions brought for its violations.

II.

The appellant posits that the testimony of Agent Holmes, who was the State's first witness, totally lacked evidentiary value because he premised his expert opinions upon the [*393] documents [***24] seized from the CIS offices in Maryland and Virginia. Because, in the appellant's view, these documents were not admitted into evidence for their truth, Agent Holmes' testimony based upon them should not have been accorded any evidentiary weight. The appellant cites in particular the expert's reliance on "the hypothetical truth of a plan contained on a document called the 'downliner.'" According to the appellant, neither of the State's other witnesses (Officer Sheridan and Mr. Retta) who testified from personal knowledge authenticated this document, nor did they describe the CIS operation in a manner consistent with the operation outlined in the document.

The short answer to the appellant's argument is that the documents at issue were admitted into evidence without limitation. The appellant contends that the documents were admitted into evidence subject to a stipulation that they were not to be considered for the truth of what they contained, but only for the purpose of showing they were found at the CIS offices. The record belies his contention:

> THE COURT: Have they been received in evidence? Is there a stipulation that all these documents --
>
> [**1148] MS. JUNGHANS [***25] [PROSECUTOR]: Yes, that they all --
>
> THE COURT: (continuing) -- are admissible into evidence?
>
> MS. JUNGHANS: (continuing) -- the contents of the boxes; that is what the stipulation was, yes.
>
> MR. HORN [DEFENSE]: Yes, we stipulated that the --
>
> THE COURT: All exhibits A through E will be received in evidence?
>
> MR. HORN: For the purpose of showing that they were located at those offices.
>
> THE COURT: Well, is there any objection on relevancy grounds?
>
> MR. HORN: No.
>
> THE COURT: Let me understand the stipulation. The stipulation is that they were all seized from the two offices and that they are admissible into evidence.
>
> MR. HORN: For the limited purpose of saying that they were there. That is all we are --

> [*394] THE COURT: You do not object to them being received in evidence?
>
> MR. HORN: No, Your Honor.
>
> THE COURT: They will be received.

Based on that exchange, we could easily conclude that no objection to the evidence was registered and that its admissibility is thus not before this Court. Rule 1085; *Standifur v. State*, 64 Md.App. 570, 578, 497 A.2d 1164 (1985), *cert. granted*, 305 Md. 175, 501 A.2d 1323 (1986). [***26]

Moreover, we note that the appellant's argument actually concerns the weight to be accorded the expert testimony of Agent Holmes. The appellant did not challenge the credentials of Agent Holmes as an expert, nor did he object to Agent Holmes' expression of the opinion that CIS constituted a pyramid promotional scheme. [HN7]The admissibility of expert testimony is a matter largely within the discretion of the trial court. *Johnson v. State*, 303 Md. 487, 515, 495 A.2d 1 (1985); *Waltermeyer v. State*, 60 Md.App. 69, 79, 480 A.2d 831, *cert. denied*, 302 Md. 8, 485 A.2d 249 (1984). The weight to be accorded it is left to the trier of fact. *Fitzwater v. State*, 57 Md.App. 274, 281-82, 469 A.2d 909 (1984). We perceive no error in allowing Agent Holmes, once qualified as an expert in interpreting records of pyramid operations, to testify as to his opinion regarding the CIS operation. *Cf. Spriggs v. State*, 226 Md. 50, 52, 171 A.2d 715 (1961).

III.

Finally, we review the sufficiency of the evidence to support the appellant's conviction. [HN8]The standard for reviewing sufficiency of the evidence in criminal cases is "whether after viewing the evidence in the light most favorable [***27] to the prosecution *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Bloodsworth v. State*, 307 Md. 164, 167, 512 A.2d 1056 (1986).

> [HN9]Criminal conspiracy requires a combination of two or more persons, who by some concerted action seek to [*395] accomplish some criminal act or unlawful purpose; or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means.

Rhoades v. State, 56 Md.App. 601, 612, 468 A.2d 650 (1983), *cert. granted*, 299 Md. 492, 474 A.2d 917, *cert. dismissed*, 300 Md. 792, 481 A.2d 238 (1984). [HN10]No formal agreement need be shown to make out a conspiracy; the State must present only so much evidence as would "allow the fact finder to infer that the parties tacitly agreed to commit an unlawful act." *Id.* We believe the testimony of Officer Sheridan served as sufficient evidence that the appellant and Robert Schaffer worked together in furtherance of the objectives of CIS. The only question remaining is whether the evidence established that those objectives were in violation of the anti-pyramid law.

We believe the evidence was sufficient. The [***28] boxes of documentary evidence seized from the CIS offices in Maryland and Virginia demonstrate that the business was essentially nothing more than a recruitment scheme. The testimony of both Officer Sheridan and Mr. Retta indicated [**1149] that participants were told they did not have to concern themselves with selling anything; rather, they could earn money by recruiting others into the operation. In the opinion of the State's expert witness, the appellant's operation was one primarily for recruiting people into the pyramid and not for selling products. According to the expert, the individual programs promoted by CIS, even if separate business entities, were used by CIS "to facilitate the down liner system or programs." We conclude that there was ample evidence to support the finding of the trial judge that the appellant was guilty of conspiring to violate Article 27, § 233D.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY THE APPELLANT.

Analysis
As of: Aug 16, 2010

State of Kansas, ex rel. Donald E. Martin, County Attorney of Wyandotte County, Kansas, Plaintiff, v. The City of Kansas City, Kansas, a Municipal Corporation; Paul F. Mitchum, Mayor-Commissioner; Earl B. Swarner, Commissioner of Finance, Health and Public Property; Joseph P. Regan, Commissioner of Boulevards, Parks and Streets; and Quindaro Township, Wyandotte County, Kansas, a body politic and corporate, Defendants

No. 40,292

Supreme Court of Kansas

181 Kan. 870; 317 P.2d 806; 1957 Kan. LEXIS 443

November 9, 1957, Opinion Filed

PRIOR HISTORY: [***1] Original proceeding in quo warranto.

DISPOSITION: Judgment for plaintiff.

CASE SUMMARY:

PROCEDURAL POSTURE: In an original proceeding in quo warranto, plaintiff county attorney filed suit alleging that defendant city's ordinance seeking to annex property was invalid under Kan. Gen. Stat. § 13-1602a.

OVERVIEW: The city sought to annex certain property. However, its ordinance was challenged as being invalid. The matter was referred to a commissioner who found that the ordinance was invalid because the annexed tract of land was not "mainly" within the city limits. The court agreed. The court held that physical connection was the test of what was "within or mainly within" a city. The term "within" was defined as being inside the limits, and the term "mainly" meant that a common perimeter of 50 percent was present. In the instant case, only 40 per cent of the annexed property's total perimeter adjoined the city boundary. The requirements of § 13-1602a were to be strictly met. The court noted that the language of the statute could not be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purposes for which the statute was enacted. The policy of a legislative enactment was for the legislature to decide, not for the courts.

OUTCOME: The court found the city ordinance annexing certain property invalid.

CORE TERMS: block, mainly, industrial, ordinance, plat, annexation, annexed, street, unplatted land, majority opinion, perimeter, annex, acres, subdivided, tract, surrounded, river, circumscribed, unplatted, territory, platted, common boundary, rectangular, warranto, adjacent, enclosed, conform, quo, adjoining, touching

LexisNexis(R) Headnotes

Governments > Local Governments > Boundaries
[HN1]See Kan. Gen. Stat. § 13-1602a (1955).

Civil Procedure > Appeals > Standards of Review > General Overview
Governments > Legislation > General Overview
Governments > Local Governments > Boundaries
[HN2]The advisability of enlarging the territorial limits of the city is a legislative function which cannot be delegated to the court and if an ordinance annexing territory is attacked, the court's duty is only to determine whether

under the facts the city has statutory authority to enact the ordinance.

Governments > Local Governments > Boundaries
Governments > Local Governments > Duties & Powers
[HN3]Cities are creations of the legislature and can exercise only the powers conferred by law; they take no power by implication and the only powers they acquire in addition to those expressly granted are those necessary to make effective the power expressly conferred.

Governments > Local Governments > Boundaries
[HN4]The court has interpreted the word "block" to mean a space in a city usually rectangular in shape, enclosed by streets and used or intended to be used for building purposes. While blocks do not have to be any particular size or shape, there are certain standards to which a lot or block must in some measure conform. It cannot be said that the tracts of the size, shape and area disclosed on the purported plat could be construed as "blocks." Courts apply to words the definitions already given them by common usage. According to all dictionaries and the popular understanding everywhere, a "block" is a portion of a city surrounded by streets. In common practice, city plats are made to conform with this understanding and the legislature had in mind blocks so constituted and not tracts arbitrarily designated as such by the donor of a plat.

Governments > Local Governments > Boundaries
[HN5]The word "within" has been defined as "being inside the limits of." The word "mainly" has been defined as "principally," "chiefly," "in the main." If "within" means surrounded, "mainly within" a city would mean that a common perimeter of more than 50 per cent was present. To impute any other meaning would obliterate any distinction between the test for annexing platted and unplatted lands.

Governments > Legislation > Interpretation
[HN6]A court is not justified in adding additional words and, as a consequence, giving a new meaning to a statute. A court would be usurping legislative functions if it allowed an exception to be carved out of a statute because of a peculiarity involved in a particular case.

Governments > Local Governments > Boundaries
Real Property Law > Adjoining Landowners > General Overview
[HN7]Kan. Gen. Stat. § 12-501 (1949) provides a method for annexation of adjacent land by city petition to the board of county commissioners which may grant the petition if it finds that annexation is advisable. It is clear that in determining advisability, factors of economic interaction and mutual benefit must be considered.

Governments > Local Governments > Boundaries
[HN8]A city of the first class with a commission form of government may annex under either Kan. Gen. Stat. §§ 13-1602a or 12-501, et seq. Kan. Gen. Stat. § 13-1602a does not supersede Kan. Gen. Stat. § 12-501, et seq. and, in effect, provides different and alternative requirements.

Governments > Legislation > Interpretation
[HN9]The language of a statute cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purposes for which the statute was enacted. The policy of legislative enactment is for the legislature and not for the courts.

Civil Procedure > Remedies > Writs > Common Law Writs > Quo Warranto
[HN10]It is true the court has a measure of discretion in quo warranto proceedings. This is a judicial discretion. It is not to be used without reason and does not authorize a court to ignore a valid applicable statute which has been promptly invoked.

SYLLABUS

SYLLABUS BY THE COURT

1. Municipal Corporations -- *Annexation -- Functions of Court and Legislature.* The advisability of enlarging the territorial limits of a city is a legislative function which cannot be delegated to a court, and if an ordinance annexing territory is attacked, the court's duty is only to determine whether under the facts the city has statutory authority to enact the ordinance.

2. Municipal Corporations -- *Extent of Granted Powers.* Cities are creations of the legislature and can exercise only the power conferred by law; they take no power by implication and the only power they acquire in addition to that expressly granted is that necessary to make effective the power expressly conferred.

3. Municipal Corporations -- *"Platted Land."* "Platted land," as the term is used in G. S. 1955 Supp., 13-1602a, is land subdivided into lots and blocks.

4. Municipal Corporations -- *"Block."* The word "block," as used in 13-1602a, ordinarily refers to a space

rectangular in shape, enclosed by streets and used or intended to be used for building purposes.

5. Words and [***2] Phrases -- *"Words Defined."* As used in 13-1602a, the word "within" is usually defined as being "inside the limits of," and the word "mainly" is defined as "principally," "chiefly," or "in the main."

6. Municipal Corporation -- *Annexation of Unplatted Land -- Requirements.* Where annexation of unplatted land is attempted under 13-1602a, more than one-half of the perimeter of the unplatted land sought to be annexed must have a common boundary with the city.

7. Municipal Corporation -- *Annexation of Unplatted Land -- Nature of Requirement.* 13-1602a imposes a geographical requirement, rather than an economic and sociological one.

8. Courts -- *Judicial Legislation.* Courts should not judicially legislate so as to broaden the plain letter of the statute.

COUNSEL: *Arthur J. Stanley, Jr.,* of Kansas City, argued the cause, and *Donald E. Martin,* of Kansas City, county attorney, and *Newell George,* of Kansas City, assistant county attorney, and *Leonard O. Thomas,* of Kansas City, were with him on the briefs for the plaintiff.

J. W. Mahoney, of Kansas City, argued the cause, and *Charles W. Brenneisen, David W. Carson, Joseph T. Carey* and *Francis* [***3] *J. Donnelly,* all of Kansas City, appeared with him on the briefs for defendant city of Kansas City.

JUDGES: The opinion of the court was delivered by Wertz, J. Robb, J. dissenting. Fatzer, J., concurs in the foregoing dissenting opinion. Hall, J., dissenting. Fatzer, J., concurs in the foregoing dissent.

OPINION BY: WERTZ

OPINION

[*871] [**808] This is a proceeding in the nature of quo warranto brought in the name of the state [**809] of Kansas on relation of the county attorney of Wyandotte county against the city of Kansas City, a municipal corporation, and the mayor and city commissioners thereof, to question the validity of city ordinance No. 40,220, whereby the citysought to annex a tract of land within Quindaro township. This tract consists of approximately 2300 acres adjacent to the city and is generally referred to as Fairfax Industrial District.

This court appointed Mr. Milton Zacharias of Wichita as commissioner to hear the evidence. The commissioner, in his advisory capacity (*State, ex rel., v. Zale Jewelry Co.,* 179 Kan. 628, 298 P. 2d 283), made findings of fact and conclusions of law and declared that the ordinance in question was invalid and that defendants [***4] (hereinafter referred to as the city or defendant city) should be ousted of all authority in the Fairfax area.

[*872] The facts, as found by the commissioner, are largely undisputed. Kansas City is a city of the first class with a population of less than 165,000. The Fairfax Industrial District sought to be annexed consists of approximately 2300 acres of land in Wyandotte county, situated between the northeast boundary line of the city and the Missouri river. Of the district's total perimeter of 40,790 feet, 16,040 feet form a common boundary with Kansas City. A small portion of the boundary adjoins Quindaro township in Wyandotte county, while the remainder of the perimeter is formed by the Missouri river which bends around the district. To visualize the situation more clearly, reference is made to a drawing of the entire district in relation to the city, found in *State, ex rel., v. City of Kansas City,* 169 Kan. 702, 222 P. 2d 714.

The district is an urban area with restrictive provisions in the warranty deeds granted by its developers limiting use of the land to manufacturing plants, warehouses and other types of businesses requiring railroad facilities. All but a [***5] hundred acres of the district has been sold to industrial firms and developed. Many of the employees of the industries located in Fairfax live in Kansas City. Streets in the district are constructed and connect generally to the public streets of Kansas City, with the exception of a connection across the Fairfax bridge to Platte county, Missouri. Kansas City has constructed various approaches to the district's roads. The district has its own sewers and dikes, and municipally owned utilities in Kansas City sell electricity and water to the Fairfax industries. Quindaro township and the industries within the district provide fire protection, although the Kansas City fire department has supplemented this service.

On these facts the commissioner concluded that there were substantial economic and sociological ties between the Fairfax area and Kansas City, and that "The existence of the district and the recognition thereof by the city have been mutually advantageous to both."

On June 2, 1925, a purported plat of the Fairfax Drainage District, signed by representatives of the Kansas City Industrial Land Company, early developers of the industrial district, was filed with the office of [***6] the register of deeds of Wyandotte county. The plat, expressly filed for record "for taxation purposes," embraced 1282 acres of the 2300 acres of the industrial district. It indicated the ownership of various parcels of land but did not describe the property [*873] by

blocks and lots. Conveyances within the industrial district, both before and after filing of this plat, were by metes and bounds and the land was carried on the county clerk's books by tract numbers, not by block and lot numbers. Ordinance No. 40,220, here in question, sought to incorporate the area by reference to metes and bounds, rather than by description of a subdivision platted into blocks and lots.

The city's attempt to annex a portion of the industrial district in ordinance No. 35,841, enacted April 4, 1949, was struck down by this court in *State, ex rel., v. City of Kansas City,* supra.

The statutory authority here invoked is found in G. S. 1949, 13-1602 and 13-1602a, and G. S. 1955 Supp., 13-1602a. The provisions of these statutes applicable here are [**810] identical and, in effect, set forth requirements which must be met by a city for four types of annexation. G. S. 1955 Supp., 13-1602a [***7] provides:

[HN1][1] "Whenever any land adjoining or touching the limits of any city has been subdivided into blocks and lots, or [2] whenever any unplatted piece of land lies within (or mainly within) any city, or [3] any tract not exceeding twenty acres is so situated that two-thirds of any line or boundary thereof lies upon or touches the boundary line of such city, said lands, platted or unplatted, may be added to, taken into and made a part of such city by ordinance duly passed . . . [4] In adding territory to any city, if it shall become necessary for the purpose of making the boundary line straight or harmonious, a portion of a piece of land may be taken into such city, so long as such portion of the piece taken in does not exceed twenty acres . . ."

The commissioner concluded that the statute contained four limited grants of authority and that the city failed to meet the requirements of any of them. He found that the purported plat, discussed *supra,* was not a subdivision into blocks and lots for purposes of applying the first section of the statute. He concluded that the area sought to be annexed was not within or mainly within Kansas City within the meaning of the [***8] statute and that the statutory requirements were in geographical terms and precluded consideration of economic and sociological factors. He noted that neither of the last two sections quoted, *supra,* was applicable, inasmuch as the area sought to be annexed was larger than twenty acres and was not sought for the purpose of making the city's boundary straight or harmonious. Finally, he concluded that the denial of the writ of quo warranto on grounds of hardship and inequity was not justified.

Following the announcement of the commissioner's report, plaintiff filed motions to confirm these findings and for judgment of [*874] ouster. Defendant city filed its motion to modify certain findings of fact and conclusions of law and for additional findings, as well as a motion for a new trial. The commissioner, upon hearing the motions, sustained plaintiff's motion for judgment and overruled defendant's motions, filing his report, together with transcript of the evidence and the exhibits, with this court. The case was regularly set for argument and was heard upon the briefs and oral arguments of the parties.

In this appeal, we are confronted with the construction and interpretation [***9] of the following two provisions of G. S. 1955 Supp., 13-1602a: [1] "Whenever any land adjoining or touching the limits of any city has been subdivided into blocks and lots, or [2] whenever any unplatted piece of land lies within (or mainly within) any city, . . . said lands . . . may be . . . taken into . . . such city by ordinance duly passed."

At the outset, with relation to contentions later considered, it may be stated that [HN2]the advisability of enlarging the territorial limits of the city is a legislative function which cannot be delegated to the court and if an ordinance annexing territory is attacked, the court's duty is only to determine whether under the facts the city has statutory authority to enact the ordinance. (*Ruland v. City of Augusta,* 120 Kan. 42, 242 Pac. 456; *State, ex rel., v. City of Topeka,* 175 Kan. 488, 264 P. 2d 901; *State, ex rel., v. Kansas City,* 122 Kan. 311, 252 Pac. 714.)

[HN3]Cities are creations of the legislature and can exercise only the powers conferred by law; they take no power by implication and the only powers they acquire in addition to those expressly granted are those necessary to make effective the power expressly conferred. ([***10] *State, ex rel., v. City of Topeka,* supra; *State, ex rel., v. City of Topeka,* 176 Kan. 240, 270 P. 2d 270; *Kansas Power & Light Co. v. City of Great Bend,* 172 Kan. 126, 238 P. 2d 544.)

[**811] Defendant city contends that a part of the territory sought to be annexed was subdivided into blocks and lots within the meaning of the statute. Plaintiff contends that the purported plat did not meet the statutory qualifications.

It is noted that the statute appears to define platted lands as land subdivided into "blocks and lots." Whether the Fairfax Industrial District or any part was so subdivided is a crucial question when determining the validity of this plat. The facts reveal that the proffered plat is not a complete representation of the industrial [*875] district but covers only some 1282 acres of the Fairfax Drainage District. The plat was never used for conveyance purposes. The ordinance did not attempt to annex the property as a subdivision. Transfers of property were always made by metes and bounds description. The plat was filed in 1925 and its use was specifically

limited to facilitating description of acreage for taxation purposes. It discloses four [***11] roads within the entire district. The plat does not show blocks, streets and alleys which conform to those of adjoining Kansas City. It was not filed without reservation. It shows that the Kansas City Industrial Land Company did not dedicate for public use any streets, alleys or public highways, except as indicated thereon. Other forms of way were private property and were held by the company for its own use. It cannot be said that the plat complies with the provisions of G. S. 1949, 13-1413 in relation to platting and subdividing a tract of land. It further appears from the plat that there were embraced therein some fifteen tracts of land of assorted shapes which ranged in size from one to 161.38 acres and some of which were not bound by any road or street. The plat discloses no lots or blocks but only tracts by number.

[HN4]We have interpreted the word "block" to mean a space in a city usually rectangular in shape, enclosed by streets and used or intended to be used for building purposes. While blocks do not have to be any particular size or shape, there are certain standards to which a lot or block must in some measure conform. It cannot be said that the tracts of the size, [***12] shape and area disclosed on the purported plat could be construed as "blocks." Courts apply to words the definitions already given them by common usage. According to all dictionaries and the popular understanding everywhere, a "block" is a portion of a city surrounded by streets. In common practice, city plats are made to conform with this understanding and the legislature had in mind blocks so constituted and not tracts arbitrarily designated as such by the donor of a plat. (*Bowlus v. Iola,* 82 Kan. 774, 109 Pac. 405; *McGrew v. Kansas City,* 64 Kan. 61, 67 Pac. 438.) For a compilation of cases on this subject, see *Berndt v. City of Ottawa,* 179 Kan. 749, 298 P. 2d 262.

We agree with our commissioner that the area sought to be annexed had not been subdivided into lots and blocks within the meaning of the statute in question.

Next, it must be decided if this unplatted land is "within or mainly within" the city so as to be annexable. There has been [*876] little litigation on this point, but the context of the statute indicates that "within" must be equivalent to "surrounded by" the city. It would be natural, for example, to provide for annexation where the city [***13] has grown around unannexed unplatted lands.

[HN5]The word "within" has been defined as "being inside the limits of." (Ballentine's Law Dictionary, 2nd Ed., p. 1367; 97 C. J. S. Within, p. 330.) The word "mainly" has been defined as "principally," "chiefly," "in the main." (38 C. J. Mainly, p. 334; 54 C. J. S. Mainly, p. 897.) If "within" means surrounded, "mainly within" a city would mean that a common perimeter of more than fifty per cent was present. To impute any other meaning would obliterate any distinction between the test for annexing platted (such as adjoining or touching) and unplatted lands. Unquestionably, the legislature intended a distinction.

As we have discussed the statute, physical connection is the test of what is [**812] "within or mainly within" a city. In the instant case, only forty per cent of Fairfax's total perimeter adjoins defendant city's boundary. Since the city cannot grow into the Missouri river and surround the district any farther, it contends (1) that the Missouri river should be counted as city boundary, or at least (2) that the city has surrounded Fairfax Industrial District as much as possible and thus Fairfax is "within or mainly within" the [***14] city. We cannot agree with either contention. It must be presumed that the legislature was completely aware of this situation and chose to make no exceptions to the plain terms of the statute. [HN6]This court is not justified in adding additional words and, as a consequence, giving a new meaning to the statute. Since the legislature imposed a requirement which must read in strictly mathematical terms and since it made no exceptions, this court would be usurping legislative functions if it allowed an exception to be carved out of the statute because of the peculiar geographical situation involved in this case.

Our cases dealing with unplatted lands assume that more than one-half of the perimeter of the unplatted land sought to be annexed must have a common boundary with the city. (See *State, ex rel., v. City of Atchison,* 92 Kan. 431, 140 Pac. 873; *State, ex rel., v. City of Hutchinson,* 109 Kan. 484, 207 Pac. 440; *State, ex rel., v. Kansas City,* 122 Kan. 311, 252 Pac. 714.)

Several arguments may be made to show that the statute imposes a geographical requirement, rather than an economic and sociological [*877] one. G. S. 1949, 12-501, *et seq.* [HN7]provides a method [***15] for annexation of adjacent land by city petition to the board of county commissioners which may grant the petition if it finds that annexation is advisable. It is clear that in determining advisability, factors of economic interaction and mutual benefit must be considered. Where the legislature intended such factors to be considered, it declared this intention specifically. In 13-1602a, it indicated no such purpose. Also, the holding of this court in *State, ex rel., v. City of Topeka,* 172 Kan. 745, 243 P. 2d 218, that [HN8]a city of the first class with a commission form of government may annex under *either* 13-1602a *or* 12-501, *et seq.* indicates that 13-1602a does not supersede 12-501, *et seq.* and in effect provides different and alternative requirements.

Furthermore, use of an economic and sociological test would bring the court into the realm of deciding questions of the advisability or prudence of the extension of a city's boundaries, a function which this court has expressly declared to be legislative in nature. (*Ruland v. City of Augusta,* supra.) The terms of 13-1602a are clear and definite. They should not and cannot be enlarged or extended by this court [***16] with the aid of inferences, implication and strained interpretations. [HN9]The language of the statute cannot be enlarged beyond the ordinary meaning of its terms in order to carry into effect the general purposes for which the statute was enacted. The policy of legislative enactment is for the legislature and not for the courts. (*State v. One Bally Coney Island No. 21011 Gaming Table,* 174 Kan. 757, 760, 258 P. 2d 225.)

We agree with our commissioner that the area sought to be annexed does not lie "within or mainly within" the city as contemplated by 13-1602a.

It is further urged by the city that the court should deny in its discretion the writ of quo warranto on the ground that it is inequitable and unjust, that a failure to so deny would work a hardship on the city. This same contention was made in the case of *State, ex rel., v. City of Kansas City,* 169 Kan. 702, 717, 222 P. 2d 714, wherein we said:

[HN10]"It is true the court has a measure of discretion in quo warranto proceedings. (*See, State, ex rel., v. Allen County Comm'rs,* 143 Kan. 898, 57 P. 2d 450, syl. 3, and the cases collected at page 902; also, *Gas Service Co. v. Consolidated Gas Utilities Corp.,* 145 Kan. [***17] 423, 65 P. 2d 584; *State, ex rel.,* [**813] *v. Grenola Rural High School Dist.,* 157 Kan. 614, 142 P. 2d 695, and cases collected in the American Digest System, Quo Warranto, Key No. 6.) This is a judicial discretion. [*878] It is not to be used without reason and does not authorize a court to ignore a valid applicable statute which has been promptly invoked."

In the instant case timely action was taken to question the validity of the ordinance and it would be inequitable to deny the writ under the circumstances of this case. From an examination of the entire record, we are of the opinion that the defendant city had no authority under the statute (G. S. 1955 Supp., 13-1602a) to enact the ordinance. As a result, judgment must be rendered for plaintiff, holding the ordinance in question to be invalid.

It is so ordered.

DISSENT BY: ROBB; HALL

DISSENT

Robb, J. (dissenting):

I cannot agree with the majority opinion on the proposition that this court would have to resort to *legislating* in order to rule otherwise than it is doing in this case. I think the legislature was trying to refrain from being too specific and it desired to leave the courts some discretion in determining [***18] the equities of a particular situation. When this court adopts a standard of any kind in an effort to interpret legislative intent, it is, in truth, *legislating* -- under the rule of the majority opinion herein. In view of this theory, I am unable to see how the court can adopt so arbitrary a standard of computation as to say, in effect, that the words *"within (or mainly within)"* mean that the common boundary of a city and the boundary of the land to be added must constitute more than half the perimeter of the land sought to be annexed. That, in my opinion, is *legislating* just as much as any other interpretation of the legislative intent could be.

Keeping in mind what I think is meant by the legislative intent, I approach the question by considering the previous statutes on this subject.

In G. S. 1889, Volume 1, Chapter 18, Article 2, (552) Extend limits, § 8, we find the following:

"No unplatted territory of over five acres shall be taken into said city against the protest of the owner thereof, unless the same is *circumscribed* by platted territory that is taken into said city." (p. 199.) (My emphasis.)

In 1903 the legislature passed the following (G. S. 1905, [***19] Chapter 18, Article 2, § 741, Extending limits, § 9):

". . . or whenever any unplatted piece of land lies *within, or mainly within,* any city . . . said lands . . . may be added to, taken into and made a part of such city by ordinance duly passed." (p. 163.) (My emphasis.)

[*879] Then the 1907 legislature passed the following (G. S. 1909, Chapter 17, Article 21, § 1220, Annexing territory, § 353):

". . . or whenever any unplatted piece of land lies *within (or mainly within)* any city . . . said lands . . . may be added to, taken into and made a part of such city by ordinance duly passed." (p. 288.) (My emphasis.)

The above provision of the statute remains the same to this day (G. S. 1955 Supp. 13-1602a), as quoted in the majority opinion.

The term "circumscribed," as used in the old law, had and continues to have a definite meaning which is accepted and understood by everyone. When something is "circumscribed," it is entirely surrounded. The legislature did not continue the use of that word, which had such a connotation of definiteness, but instead substituted the word "within" whereby it must have intended

something with more flexibility in its meaning than the [***20] word "circumscribed" had. The lawmakers did not stop there but also added "(*or mainly within*)" to be sure that the terminology of the statute had enough flexibility to leave something to the discretion of a court which might be called upon to determine what the legislature intended by this part of the statute. It is apparent the legislature did [**814] not intend to use "circumscribed" nor convey that meaning to the statute and to my way of interpreting the majority opinion, it says "within" means "circumscribed" and "mainly within" means "over 50% circumscribed."

I have not overlooked the use of *commas* instead of parentheses before and after the term "or mainly within" in the intervening statute (G. S. 1905, *supra*) but that does not affect my opinion in the matter. The legislature, it seems to me, intended and expected the courts to exercise great discretion in determining the applicability of this statute and it must be remembered that *all the elements* of this statute, as well as other pertinent statutes, are to be considered in arriving at that determination.

Cities are creatures of the legislature and can grow only by legislative fiat, as interpreted by [***21] the courts. For authorities and a more thorough discussion of the powers of courts to interpret legislation and to determine the legislative intent, see 5 Hatcher's Kansas Digest, rev. ed., Statutes, §§ 70, 71, 72, 73, 74, 76, 77, 89; 9 West's Kansas Digest, Statutes, §§ 174, 176, 179, 181, 183, 184, 185, 187, 190, 199, 205, 206, 212.

[*880] I can only conclude from the above authorities and my own interpretation of the statute that the majority opinion places too strict an interpretation on the statue in question. The Fairfax Industrial District is "*mainly within*" the city of Kansas City, Kansas, and the city had the power, under G. S. 1955 Supp 13-1602a to pass the ordinance that it did and I would enter judgment in favor of defendants for costs.

Hall, J., (dissenting):

I am unable to concur in the opinion of the majority that the Fairfax Industrial District does not lie "within or mainly within" the city of Kansas City. I believe that it does and that ordinance 40,220 is valid as a proper exercise of the city's authority to annex under G. S. 1955 Supp., 13-1602a.

I agree with paragraphs 1, 2, and 8 of the Syllabus of the opinion that the advisability of enlarging [***22] the territorial limits of the city, and providing therefor, is a legislative function which cannot be delegated to a court; that cities are creatures of the legislature and can exercise only the power conferred by law; and that courts should not judicially legislate so as to broaden the plain letter of a statute.

I disagree with the result of the majority opinion because its interpretations of the annexation statute in the case at bar (13-1602a) are not a proper application of these rules of law.

In determining whether or not the Fairfax Industrial District had been subdivided into "blocks and lots" so as to come within the statute, the majority opinion applies the test stated in Syllabus 4 that the word "block" as used in 13-1602a ordinarily refers to a space rectangular in shape, enclosed by streets and used or intended to be used for building purposes, citing in support thereof *Bowlus v. Iola*, 82 Kan. 774, 109 Pac. 405; *McGrew v. Kansas City*, 64 Kan. 61, 67 Pac. 438; *Berndt v. City of Ottawa*, 179 Kan. 749, 298 P. 2d 262.

These cases are all interpretations of G. S. 1949, Sections 12-601 and 12-602, otherwise known as the general paving law. These sections provide [***23] that assessments for pavement shall be made on the property to the middle of the "block." In the early interpretations of the word "block" under this statute nothing was said about them being rectangular or used or intended to be used for building. In the Bowlus case, Justice Burch said:

[*881] ". . . According to all the dictionaries and the popular understanding everywhere a block is a portion of a city surrounded by streets. In common practice city plats are made to conform to this understanding, and the legislature had in mind blocks so constituted, and not tracts arbitrarily designated as blocks by the donor of a plat. . . ." (p. 776.)

[**815] In the later cases, particularly *Berndt v. City of Ottawa*, supra, the court defined the word "block" as follows:

"Ordinarily the word 'block' as used in G. S. 1949, 12-601 and 12-602, refers to a space in a city, usually rectangular, enclosed by streets and used or intended for buildings (following *Wilson v. City of Topeka*, 168 Kan. 236, 212 P. 2d 218)."

Syllabus 4 here follows the definition in the Berndt case.

These decisions are neither persuasive nor *stare decisis* of the definition of "lots and blocks" as [***24] the term is used in the annexation statute G. S. 1955 Supp., 13-1602a.

The annexation statute simply provides that whenever any land adjoining or touching the limits of any city has been subdivided into "blocks and lots" it may be annexed. The standards of the above cases are impractical of application to the statute here. The Bowlus case de-

scribes a "block" as a portion of a city surrounded by streets. This is a fair test under the paving assessment law but can hardly apply under the annexation law where the "block" to be annexed is not yet a portion of the city. Likewise, the same impractical result follows under the Berndt definition. The annexation statute says nothing about "blocks" being "rectangular in shape, enclosed by streets and used or intended to be used for building purposes." It is understandable that this kind of a definition may be helpful in the application of the paving law but it is totally beyond the scope and requirements of the annexation statute. Contrary to the position of the majority opinion there is nothing in the statute which requires certain arbitrary standards of common usage to which a "block or lot" must in some measure conform. There is also [***25] no basis whatsoever to place the annexation statute in *pari materia* with the tax statutes G. S. 1949, 79-405, 79-406 and 79-407, under which this plat was allegedly filed, the platting statute G. S. 1949, 13-1413, or for that matter any other statute.

As a matter of fact in these times land is being platted on more esthetic lines than ever before. "Blocks and lots" may be of all sizes, shapes and descriptions. Many "blocks" may be dedicated for parks or recreational areas and may lie in between rows of [*882] houses and not be enclosed by streets or alleys. Are they not to be considered "blocks and lots" within the statute because they fail to comply with an arbitrary standard of common usage?

Section 13-1602a provides in clear and unambiguous language that land adjacent or touching the limits of any city which has been subdivided into "lots and blocks" may be annexed. We should not judicially change the plain words of the statute by adding descriptive adjectives of limitation such as we have done here.

In the instant case it is doubtful even under more liberal interpretation that the Fairfax Industrial District has been subdivided into "blocks and lots" to come within [***26] the purview of the statute but the law of this case goes far beyond the determination of this fact and as stated in Syllabus 4 is a serious limitation to annexation not intended by the legislature.

In determining whether or not the Fairfax Industrial District is "within or mainly within" the city of Kansas City the majority opinion first defines the meaning of the words "within and mainly within."

The court then states that:

"Our cases dealing with unplatted lands assume that more than one-half of the perimeter of the unplatted land sought to be annexed must have a common boundary with the city. . . ."

citing in support thereof, *State, ex rel., v. City of Atchison,* 92 Kan. 431, 140 Pac. 873; *State, ex rel., v. City of Hutchinson,* 109 Kan. 484, 207 Pac. 440; *State, ex rel., v. Kansas City,* 122 Kan. 311, 252 Pac. 714.

This rule is then applied and inasmuch as less than one-half of the total perimeter of the Fairfax Industrial District lies adjacent to the city the opinion concludes [**816] that the area is not "within or mainly within" the city.

Under the cases cited the assumption that more than one-half of the perimeter of unplatted land must have a common boundary [***27] with the city is unwarranted. These cases turn on other points. In fact the precise question of the meaning of "within or mainly within" has never been decided in this state. This is a case of first impression.

It will be noted that the definitions of the words "mainly" and "within" in the majority opinion are based upon the general references of Ballentine's Law Dictionary, Corpus Juris, and Corpus Juris Secundum. Surprising as it may seem the words really have not been defined in relation to annexation statutes. They are defined in *McGill v. Baumgart,* 233 Wis. 86, 288 N. W. 799, but this [*883] definition adds nothing additional to the definitions in the general reference books.

The point is that in determining the interpretation and application of the words "within and mainly within" this court is not bound by any precedent and has the freedom of decision such a situation implies. The question was raised in *State, ex rel., v. City of Kansas City,* 169 Kan. 702, 222 P. 2d 714, but the court did not decide it.

"Defendant next argues that Fairfax Industrial District is a proper subject of annexation and that it lies within or mostly within the city. The contention [***28] is not important here. The ordinance in question did not attempt to annex Fairfax Industrial District to the city. It attempted to annex only a part of Fairfax Industrial District, the part specifically described in the ordinance. While there was much evidence received by our commissioner pertaining to the Fairfax Industrial District as a whole its only purpose was to show the general situation and the history of the development of the district. These are the only purposes for which such evidence can be considered here. We must necessarily limit our decision to the authority of the city to annex the particular property described in the ordinance, in view of our statute (G. S. 1935, 13-1602) under which the city acted." (p. 717.)

Here again Section 13-1602a provides in clear and unambiguous language that unplatted land lying "within or mainly within" a city may be annexed. We should not

judicially substitute the fixed mathematical requirement of "more than one-half the perimeter" for the words "within or mainly within." This too is a limitation on annexation not intended by the legislature.

There is nothing difficult in either the definition or application of the words "within [***29] and mainly within." Under the definitions of the commonly accepted reference books set out in the majority opinion the application must necessarily depend upon the facts and circumstances of the given case. It should not depend alone on a mathematical calculation. Following the rules of law laid down in paragraphs 1, 2, and 8 of the Syllabus this court has a duty to inquire as to the authority of the city to act. Beyond that we should not substitute our judgment on the facts and circumstances for that of the city in the application of the words "within and mainly within" in the absence of a clear abuse of discretion.

We certainly should not require more of cities under this statute than we require in others. The test of "arbitrary, capricious and unreasonable" is an almost universal one in the review of acts of public bodies.

In the instant case the city certainly had authority to act under the statute.

[*884] The Fairfax Industrial District is bounded by the Missouri River which winds around the district on the north and east, by a small portion of Quindaro Township to the west, and the balance by the city.

[**817] Under a total perimeter test as applied by the majority, [***30] the city, of course, does not occupy fifty percent of the total boundary, but there are other facts and circumstances which the city considered in enacting the ordinance. Most important of all is the fact that the city has reached *its greatest possible surroundment* of the area. The Fairfax Industrial District cannot grow into the river nor can it extend itself into Missouri. The river which forms the state boundary presents a natural and jurisdictional barrier both to the district and to the city. The city actually occupies 24,040 feet of the possible 24,590 feet of non-river boundary. This comes to ninety-six percent. For this and other reasons the city decided the district is "mainly within" the city. Can we say such a judgment is unreasonable and a clear abuse of discretion? I think not.

There is no basis to presume the legislature was aware of this situation and intended that special statutes would be necessary to achieve annexation. The same problem will arise whenever any city attempts to annex land which is contiguous to it and which borders to a state boundary. There is no reasonable ground for presuming that the legislature intended to exclude *any* case involving [***31] unplatted lands from the purview of the statute, or that it intended specifically to exclude a case involving a state boundary.

The situation differs from the one in which the legislature did make special provision for annexation of areas across a county line from a city. There, statutory authority was provided to allow a city to go *beyond* a county boundary and annex land in an adjacent county. Where state boundaries are concerned, the city can never do more than annex *up to* the boundary. No statutory provision could effect a contrary result.

It is more reasonable to presume that the legislature intended the statute to provide for every case involving unplatted lands. Whether or not the legislature contemplated the instant case or cases like it, it is within the accepted scope of the judicial function to apply a general statute to a specific case. In doing so, the court does not legislate.

PROOF OF SERVICE

STATE OF CALIFORNIA

COUNTY OF FRESNO

I, Valerie Pomella, 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 September 7, 2010, I served the foregoing document(s) described as

NOTICE OF LODGING OTHER AUTHORITIES IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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:

Edmund G. Brown, Jr., Attorney General of California
Zackery P. Morazzini, Supervising Deputy Attorney General
Peter A. Krause, Deputy Attorney General (185098)
1300 I Street, Suite 125
P.O. Box 944255
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 September 7, 2010, at Long Beach, California.

_X_ (PERSONAL SERVICE) I caused such envelope to delivered by hand to the offices of the addressee.
Executed on September 7, 2010, at Long Beach, California.

___ (VIA FACSIMILE TRANSMISSION) As follows: The facsimile machine I used complies with California Rules of Court, Rule 2003, and no error was reported by the machine. Pursuant to Rules of Court, Rule 2006(d), I caused the machine to print a transmission record of the transmission, copies of which is attached to this declaration.
Executed on September 7, 2010, California.

_X_ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

VALERIE POMELLA