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Case Notes

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CIVIL RIGHTS—Employment Testing in Public Sector Must Demonstrate Reasonable Relationship to Particular Job in Order to Comply with Requirements of Equal Protection Clause. Chance v. Board of Examiners, 458 F.2d 1167 (2d Cir. 1972).

The City of New York, pursuant to the New York State Education Law,[1] required all candidates seeking permanent positions as principals and assistant principals in the city school system to pass an examination prepared and administered by the Board of Examiners. Plaintiffs, black and Puerto Rican candidates, initiated a class action alleging the examination to be discriminatory against minority group candidates.[2] Plaintiffs Chance and Mercado are state certified principals appointed by their local school boards on a temporary basis, pending successful completion of the examination. Chance failed the examination and Mercado has refused to take it because of its alleged irrelevancy.[3] Relying on statistical data prepared cooperatively by both sides and after hearing extensive expert testimony, the district court found a sufficient showing of discrimination.[4] The court examined whether the test in fact measured the knowledge and skills required by the positions in question.[5] It found

1. N.Y. Educ. Law §§ 2573(10), 2590-j(3)(a)(1) (McKinney 1971).

2. Chance v. Bd. of Examiners, 458 F.2d 1167 (2d Cir. 1972), aff'g 330 F. Supp. 203 (S.D.N.Y. 1971).

3. 330 F. Supp. at 208.

4. Id. at 209. The district court received in evidence a lengthy statistical study prepared cooperatively by both sides which attempted to delineate a pattern of test results involving substantial differences between minority group applicants and other applicants. The court stated that "the Survey reveals that out of 6,201 candidates taking most of the supervisory examinations given in the last seven (7) years, including all such examinations within the last three (3) years, 5,910 were identified by race. Of the 5,910 thus identified, 818 were Black or Puerto Rican and 5,092 were Caucasian. Analysis of the aggregate pass-fail statistics for the entire group reveals that only 31.4% of the 818 Black and Puerto Rican candidates passed as compared with 44.3% of the 5,092 white candidates." Id. at 210. On the basis of these and other similar statistics, the court found discrimination. The court, however, rejected the plaintiffs' contention that discrimination is shown by the disparity in proportions between the black and Puerto Rican student population of the schools and the disproportionately low number of black and Puerto Rican principals and assistant principals. Id. at 213.

5. Id. at 214. "[T]he evidence establishes to our satisfaction that the examinations prepared and administered by the Board for licensing of supervisory personnel in New York City schools do have the de facto effect of discriminating

no rational relationship between the test criteria and the job requirements and granted a preliminary injunction against the Board of Examiners' further use of the examination. The United States Court of Appeals for the Second Circuit, in affirming the district court decision,[6] noted that, unless a reasonable relationship between the test and the jobs could be demonstrated by the employer, the classifications created by the examination were violative of the equal protection clause of the fourteenth amendment.[7]

In striking down the tests as unconstitutional, the court of appeals holding has two significant aspects. First, it imposes the requirement of job relatedness to examinations given by the Board of Examiners to persons seeking supervisory positions in the city school system. Second, in determining the requirements of the equal protection clause, the court applied the standards developed for determining the acceptability of tests administered by private employers under Title VII of the Civil Rights Act of 1964,[8] to the requirements of the equal protection clause in this area.

Since 1965 when Title VII became effective[9] the courts have devel-

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significantly and substantially against qualified Black and Puerto Rican applicants. However, the existence of such discrimination, standing alone, would not entitle the plaintiffs to relief. . . . The goal of the examination procedures should be to provide the best qualified supervisors, regardless of their race, and if the examinations appear reasonably constructive to measure knowledge, skills and abilities essential to a particular position, they should not be nullified because of a de facto discriminatory impact." Id.

6. 458 F.2d 1167 (2d Cir. 1972).

7. Id. at 1175.

8. 42 U.S.C. § 2000e (1970). Title VII standards are more fully explained in the text. Briefly, the Title requires that all tests given as a condition to employment, as a method of determining job placement, as a criterion to promotion, or as a condition to retention, as well as for other purposes, be job related. Thus, the test must have a reasonable relationship to the job requirements for which it is given and the test must be in some way validated. Validation, despite contrary language contained in the EEOC guidelines, has come to mean job related as determined by some professional group or by the courts. See note 22 infra.

9. Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e (1970). The purpose of the Act is "to achieve a peaceful and voluntary settlement of the persistent problem of racial and religious discrimination or segregation by establishments doing business with the general public, and by labor unions and professional, business, and trade associations." U.S. Code Cong. and Adm. News, 88th Cong., 2d Sess., 2401 (1964) The purpose of Title VII is "to eliminate . . . discrimination in employment based on race, color, religion, or national origin." In broad terms, the title defines what shall be considered an unlawfully discrimina-

oped criteria for judging the acceptability of tests when administered by private employers to persons attempting to find employment, or seeking transfer or promotion within their establishments. Title VII has been successfully used to strike down discriminatory testing in the private sector,[10] as well as other discriminatory employment practices of labor unions and private employers.[11]

Although it was specifically inapplicable to the states and their instrumentalities,[12] the courts have applied the requirements of Title VII, through the vehicle of the equal protection clause, in striking down discriminatory testing in the public sector.

While the *Chance* case is not directly concerned with Title VII it will

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tory employment practice and establishes the Equal Employment Opportunity Commission, charged with enforcing Title VII of the Civil Rights Act.

10. See note 12 infra and accompanying text.

11. United States v. Jacksonville Terminal Co. 451 F.2d 418 (5th Cir. 1971) (seniority, transfer and promotion practices); United States v. National Lead Co., 438 F.2d 935 (8th Cir. 1971) (seniority systems); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971) (sex discrimination); Schultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir. 1970) (sex discrimination in pay); Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969) (referral systems); United States v. Sheet Metal Workers, 416 F.2d 123 (8th Cir.), cert. denied, 399 U.S. 919 (1969) (seniority systems).

12. "[B]ut such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof . . . ." Civil Rights Act of 1964 § 701(b), 42 U.S.C. § 2000e(b) (1970). On March 24, 1972 the above quoted section was amended making Title VII applicable to the states and their subdivisions. Equal Employment Opportunity Act of 1972, Pub. L. 92-261, 86 Stat. 103 (1972). The impact of this amendment should be marked. Discriminatory hiring practices by states and their subdivisions will be brought within the purview of the EEOC and will be subject to the Commission's cease and desist orders. The significance of the change will probably be more procedural than substantive. Substantively, the requirements of Title VII have been made binding on the states through the equal protection clause. Procedurally, the process of enforcing these requirements has been judicial—the amendment would make this process administrative. For the legislative history of the Equal Employment Opportunity Act of 1972, see U.S. Code Cong. & Adm. News, 92d Cong., 2d Sess., 1005 (1972). The Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000e(2)(a) (1970) provides: "It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." Id. For the legislative history of this portion of the Civil Rights Act of 1964, see U.S. Code Cong. & Adm. News, 88th Cong., 2d Sess., 2401 (1964).

be useful to examine these standards since the requirements of the equal protection clause in its application to the public sector have been greatly influenced, if not controlled, by the standards developed for Title VII.[13]

In the area of testing, the primary requirement that the courts have imposed on private employers is that of job relatedness.[14] Employment testing has become widespread in the United States.[15] Studies have shown, however, that minority groups, when considered statistically as a group, do not score as well as whites on many of these tests.[16] There are many factors that account for this disparity of performance:

> [C]rucial factors in a person's score are the quality and extent of his past schooling and training and the degree of correlation between his cultural milieu and that which serves as the test's point of reference. . .
>
> The general patterns of racial discrimination, lesser educational and cultural opportunities for black people, and cultural separatism that have marked our society for generations have impeded blacks in attaining the background necessary for success on existing standardized tests.[17]

The problem confronting the courts in this area presents an interesting dichotomy. On the one hand, Congress has created Title VII as a vehicle for ending discriminatory employment practices.[18] On the other hand, that title specifically provides for the continuation of employer testing:

> [N]or shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.[19]

The crucial words of the above quoted section were "professionally

13. There are a plethora of articles concerning Title VII. For a comprehensive overview of the title, see Hill, The New Judicial Perception of Employment Discrimination—Litigation Under Title VII of the Civil Rights Act, 43 U. Col. L. Rev. 243 (1972); Affeldt, Title VII in the Federal Courts—Private or Public Law—Part I, 14 Vill. L. Rev. 664 (1969).

14. 330 F. Supp. 203 (S.D.N.Y. 1971).

15. While there are no actual figures compiled, the extent of such testing is vividly demonstrated in Note, Legal Implications of the Use of Standardized Ability Tests in Employment and Education, 68 Colum. L. Rev. 691 (1968).

16. Id. This article contains a thorough review of various tests and a detailed analysis of the differences in the scores of various racial groups.

17. Cooper & Sobol, Seniority and Testing Under Fair Employment Laws: A General Approach to Ojective Criteria of Hiring and Promotion, 82 Harv. L. Rev. 1598, 1639, 1640 (1969). This study has been cited often by the courts in decisions related to employment and labor practices.

18. See notes 11 and 15 supra.

19. Civil Rights Act § 703, 42 U.S.C. § 2000e-2(h) (1970).

developed" and a determination of their meaning was central. The Equal Employment Opportunity Commission [hereinafter EEOC], established with the enactment of Title VII[20] and charged with enforcement of the Act,[21] interpreted the words in the following manner:

> The Commission accordingly interprets "professionally developed ability test" to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII.[22]

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20. Id. §§ 705-06, 42 U.S.C. § 2000e-4 (1970).

21. Id., 42 U.S.C. § 2000e-5 (1970). § 705 establishes the Equal Employment Opportunity Commission and enumerates its powers. § 706 outlines the methods of enforcement available. Such methods range from informal, strictly off the record attempts at persuasion to court action when such attempts fail.

22. Cooper & Sobol, supra note 17, at 1653-54 (1969), quoting CCH Empl. Prac. Guide ¶ 16,904, at 7319. For the complete guideline of the EEOC in the testing area see 29 C.F.R. § 1607.1 to .14 (1972). For present purposes, however, two of the most important sections are § 1607.1(a) and § 1607.4(c). § 1607.1(a) provides: "The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally." § 1607.4(c) provides: "Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated." These guidelines have been criticized as being unrealistically strict. Comment, Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 Harv. L. Rev. 1109 (1971). Much has been said in the literature as to whether other guidelines require that the test be predictive of future job performance in order to be valid, or whether the guidelines merely require that the tests are reasonably relevant to the job performance needs of the employer. However, as made clear in the above cited article: "If theoretically objectionable, the Guidelines have apparently not been rigorously applied in practice. They do speak of 'feasibility,' and this notion has influenced the Commission's interpretation of the validation and alternative showing requirements. Many tests have been approved which do not satisfy the standards of 'classical validation.' Where such validation would not be feasible, the Commission has often settled for concurrent validation, which can be carried out with present employees and without having to hire a group of applicants who have not passed the test, or

The EEOC's guidlines have been given great weight by the courts, as will become apparent from a review of the cases. In *Hicks v. Crown Zellerbach Corp.*,[23] the district court was presented with a situation in which the defendant employer, beginning in 1963, required all applicants for production or maintenance positions to achieve certain minimum scores on several standardized tests. This requirement was later extended to all employees seeking transfer to these positions from less desirable parts of the plant. The disparity in the results achieved by those tested was evident to the court.[24] In granting the injunction against further testing the court held that:

> [Where] an employer adheres to a practice which significantly prefers Whites over Negroes, that practice must fall before Title VII unless the employer can show business necessity for it.[25]

Before a practice which substantially prefers whites over blacks will be upheld, the employer must demonstrate business necessity, *i.e.*, the skills measured by the test are relevant to the employer's job performance needs.[26]

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synthetic studies. In addition, it has allowed the use of 'rational' validation techniques like 'content validity' . . . ." 84 Harv. L. Rev. at 1131. As shall become clear from the cases reviewed in this note, the courts have accepted the rational relationship criteria as opposed to the requirement of predictiveness.

23. 319 F. Supp. 314 (E. D. La. 1970) See also Paperworkers v. United States, 416 F.2d 980 (5th Cir.), cert. denied 397 U.S. 919 (1969); Hicks v. Crown Zellerbach Corp., 321 F. Supp. 1241 (E.D. La. 1971).

24. 319 F. Supp. at 318. In tests given by the employer, of the whites tested, 37.3% passed, while 9.8% of the blacks tested passed. Id. at 318. The court also noted: "There was no claim that defendants had adopted the tests for the express purpose of capitalizing on these differential passing rates, nor was evidence adduced to support such a claim. Rather, it was the effect of the tests in opening jobs to a high percentage of whites while excluding all but a small percentage of Negroes which plaintiffs challenged." Id. at 318.

25. Id.

26. Id. at 319. As the court later noted: "No reason appears why Crown Zellerbach's use of tests should not also be governed by the rule that business necessity must be shown to justify a practice which substantially prefers whites over Negroes. . . . [T]his simply means that the skills measured by the tests must be shown to be relevant to the employer's job performance needs." Id. See also U.S. v. Hayes Int'l Corp., 415 F.2d 1038, 1043 (5th Cir. 1969). The test in question was instituted on the recommendation of Crown's personnel department without professional study. All of the expert witnesses who testified agreed that these tests had no relevance to the lower and middle level jobs in the plant. A permanent injunction against the use of the test, and the requirement of a high school diploma, was granted in Hicks v. Crown Zellerbach Corp., 321 F. Supp. 1241 (E.D. La. 1971).

Undoubtedly, the most significant decision in the area of testing is the recent Supreme Court decision in *Griggs v. Duke Power Co.*[27] Prior to the enactment of the Civil Rights Act of 1964 the defendant company had practiced a policy of open discrimination at its Dan River plant. Following the passage of the Act the company required a high school diploma of all employees holding positions other than laborers, positions traditionally held by blacks.[28] Subsequently, the company instituted a testing program and required either a high school diploma or certain minimum scores on the tests for employment in, or transfer to, positions other than laborers' positions.[29] In deciding the case the Court looked to the intent of Congress in enacting Title VII:

> [T]he objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[30]

Thus, the Court interpreted Congress' action as mandating the removal of arbitrary and unnecessary barriers to employment when such barriers operate to invidiously discriminate on the basis of racial or other im-

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In other cases employers have tried to circumvent the requirements of Title VII by offering equal pay for racially segregated jobs. The courts have been quick to strike down such attempts. The court in United States v. Hayes Int'l Corp., 415 F.2d 1038 (5th Cir. 1969) made it clear that: "[T]his Court will not be misled by the 'equal pay' or 'substantial pay' tests as indication of the absence of a violation of Title VII, for Title VII of the 1964 Civil Rights Act is not an equal pay provision but an equal opportunity to the full enjoyment of employment rights."

27. 401 U.S. 424 (1971), noted in 40 Fordham L. Rev. 350 (1972).

28. 401 U.S. at 427.

29. In determining the efficacy of employment tests, it is necessary to keep in mind the point made by Cooper & Sobol, supra note 17: "It is sometimes argued that standardized intelligence tests are inherently related to business needs on the ground that every employer is entitled to prefer more intelligent employees. Similarly, mechanical comprehension tests are sometimes thought of as related to business needs in any industrial situation where machinery is used. This notion misconceives the function of tests. Industrial employers need people who can do industrial jobs better; to the extent that requires a certain mental capacity, the employer can be said to need a more 'intelligent' employee or one with certain kinds of comprehension. But a paper and pencil test asking general questions does not necessarily measure the relevant mental capacity." Id. at 1643.

30. 401 U.S. at 429, 430.

permissible grounds.[31] When employment practices create such a discriminatory effect they must be justified on the basis of business necessity.[32] Additionally, practices which have such an effect must have a manifest relationship to the employer's job performance needs.[33]

On the basis of the decision in *Griggs*, the requirements of Title VII are somewhat clarified. Before a private employer may use a test which, in its operative effect, appears to discriminate on the basis of race it must be demonstrated to be business related, *i.e.*, to have a demonstrable business necessity. The fact that the test has been professionally prepared is not in itself sufficient—the test must meet the criteria of business necessity.

Discriminatory Practices by States and Municipalities

Prior to the most recent amendment, Title VII was inapplicable to the states and their instrumentalities.[34] To circumvent this problem the equal protection clause has been used as a vehicle for striking down such discriminatory hiring practices by states and municipalities.[35] In short, the standards which were outlined above for Title VII in the private sector have become equal protection standards in the area of state and municipal hiring. *Arrington v. Massachusetts Bay Transportation Authority*[36] illustrates the application of the equal protection standard in the area of municipal testing. In that case a class action was brought against the Transportation Authority under the equal protection clause charging discriminatory employment practices. The Authority required all job applicants to take a standardized test. Persons tested were then ranked according to their scores with jobs being offered to persons on the list according to their rank.[37] Noting the disparity in the scores of black and white applicants, the court went on to comment on the efficacy of such classifications:

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31. Id. at 431.

32. Id. "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation.

33. Id. at 432. A lower court case, with facts similar to Griggs, is United States v. Virginia Elec. and Power Co., 327 F. Supp. 1034 (E.D. Va. 1971).

34. See note 11 supra.

35. See notes 36, 40, 41, 44 and 46 infra.

36. 306 F. Supp. 1355 (D. Mass. 1969).

37. Id. at 1357. Of 1,533 persons tested, with 300 being black, only 60 blacks were in the first 1,000 on the list. As a result, the majority of blacks tested would be excluded from employment. Id. at 1357-58.

Whenever state action is creative of a classification among its citizens such that burdens or benefits flow unequally, that classification is constitutionally suspect. The legitimacy of the objectives producing the classification must be adequately justified and of sufficient importance to overcome the evils of the inequality engendered.[38]

Further, the practice need not have been implemented with any discriminatory intent. When the effect of a state's actions is to deny to some of the state's citizens rights that should be available to all, there must be a compelling justification.[39]

Interestingly, however, the "compelling interest" test was not applied. Rather, the court simply required the examination to be job related only:

A hiring practice related to ability to perform is not itself unfair even if it means that disadvantaged minorities are in fact adversely affected.

However, if there is no demonstrated correlation between scores on an aptitude test and ability to perform well on a particular job, the use of the test in determining who or when one gets hired makes little business sense. When its effect is to discriminate against disadvantaged minorities, in fact denying them an equal opportunity for public employment, then it becomes unconstitutionally unreasonable and arbitrary.[40]

Western Addition Community Organization v. Alioto,[41] another case involving municipal testing with a discriminatory impact, also demonstrates the use of the equal protection clause in the area of municipal testing. Here an action was brought against the Mayor of San Francisco

38. Id. at 1358.

39. Id. See also note 58 infra.

40. Id. The court found no relation between the test and the job requirements but denied delief because there was no irreparable injury. Id. at 1359-60. Another Massachusetts case, Castro v. Beecher, 334 F. Supp. 930 (D. Mass. 1971) mod. 459 F.2d 725 (1st Cir. 1972), concerned alleged discriminatory hiring practices of the Boston police department. The police department, pursuant to a study on the improvement of the police force, instituted certain requirements as a precondition to employment: holding a high school diploma and the attainment of a minimum score on a written examination. The court upheld the high school diploma requirement as being job related because of the prior study but struck down the written test because it had not been validated as being job-related. In explaining the requirements of the equal protection clause in this area the court said: "If a job requirement has in fact a significant relation to successful or improved job performance and is adopted bona fide by an employer exclusively on that account, and not as a mere device intended covertly or openly to discriminate against some racial or like minority group, the Constitutional guarantee of equal protection is met." 334 F. Supp. at 939. For another case involving hiring practices by police departments see Penn. v. Stumpf, 308 F. Supp. 1238 (N.D. Ala. 1970).

41. 330 F. Supp. 536 (N.D. Cal. 1971).

to enjoin the city from administering qualifying examinations to prospective volunteer firemen. Plaintiffs contended that as a result of this test requirement, *de facto* discrimination was apparent in the personnel selection of the city's firemen.[42] The court found a sufficient showing of discrimination and determined that it would grant the injunction unless the city justified the selection method by showing a reasonably necessary connection between the qualities tested in the examination and the actual requirements of the job to be performed.[43] It is interesting to note that in this case the court felt "obliged" to follow the standards used in Title VII cases.[44] Other courts have also equated the equal protection standard with the requirements of Title VII in this area:

> Because defendants are a public agency and its officers, their actions are governed not by Section 703 of the Civil Rights Act of 1964,[45] but by the Fourteenth Amendment to the Constitution. The Fourteenth Amendment imposes upon defendants prohibitions against race discrimination that are at least as great as those levied upon private employers in Section 703.[46]

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42. Id. at 537. Of the city's 1,800 firemen only 4 were black. Id.

43. Id. at 539. Further, the court makes clear that the constitutional test to be applied is that of job-relatedness: "[W]here the hiring practice of a public agency (even though it does not intend to discriminate against minority groups) has the effect of producing a de facto pattern of racial discrimination, such a discriminatory effect, although it does not necessarily render the method of selection constitutionally defective, does render the method of selection sufficiently suspect to make a prima facie case of unconstitutionality.

Under such circumstances the burden shifts to the public agency to justify the use of such generalized hiring tests by showing some rational connection between the qualities tested by the written examination and the actual requirements of the job to be performed." Id.

44. Id. Another case involving the hiring of firemen, Carter v. Gallagher, 452 F.2d 315 (8th Cir. 1971), wherein the City of Minneapolis had imposed the requirement of a high school diploma and the attainment of a certain minimum score on a standardized test. The district court had overturned both requirements, the former because it was not job-related and the latter because it had not been validated as being job-related. In Allen v. City of Mobile, 331 F. Supp. 1134 (S.D. Ala. 1971) a standardized test given by the police department as a precondition to promotion was upheld as being job-related.

45. 42 U.S.C. § 2000e (1970).

46. Baker v. Municipal Separate School System, 329 F. Supp. 706, 721 (N.D. Miss. 1971). Here, a local board of education instituted a requirement that all teachers seeking employment or retention in the school system which was about to be desegregated obtain a minimum score of 1000 in the national teachers' examination. In enacting the requirement, the board was aware that this requirement would have racially discriminatory results. The court decided the case on

The decision of the second circuit in *Chance*[47] is similarly illustrative of this equal protection approach and of the relationship between the standards of Title VII in the private sector and the requirements of equal protection in the public sector. Initially, the court concedes that the actions of the Board of Examiners involve neither intentional racial discrimination nor racially neutral practices applied discriminatorily.[48] However, these two possibilities do not exhaust the protection against racial discrimination afforded by the fourteenth amendment:[49]

> As already indicated, the district court found that the Board's examinations have a significant and substantial discriminatory impact on [B]lack and Puerto Rican applicants. That harsh racial impact, even if unintended, amounts to an invidious de facto classification that cannot be ignored or answered with a shrug. At the very least, the Constitution requires that state action spawning such classifications be justified by legitimate state considerations.[50]

After reviewing the evidence presented in the district court, the second circuit agreed that a *prima facie* case of invidious discrimination had been demonstrated.[51] Once having found such a classification, the burden of ultimate persuasion was shifted to the defendant to justify, at least on the basis of job relatedness, the classification that it had created.[52] Since such a showing was not made, both the district court and the court of appeals found that there was no error in granting an injunction against the continued use of the test.[53]

Although the second circuit affirmed the district court's decision as to discrimination, the court firmly rejected the use of the compelling state interest test in this case:

> According to the Board, the district court "clearly erred" in applying the compelling interest standard rather than the rational relationship test customarily applied in equal protection cases.
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> Although state action invidiously discriminating on the basis of race has long called for the "most rigid scrutiny" [citations omitted], the Supreme Court has yet to apply that stringent test to a case such as this, in which the allegedly unconstitutional action unintentionally resulted in discriminatory effects. . . . The [district] court did not reach the issue whether—or even suggest that—if the

equal protection grounds and struck down the requirement as not being job-related.

47. 458 F.2d 1167 (2d Cir. 1972).
48. Id. at 1175.
49. Id.
50. Id. at 1175-76 (citation omitted).
51. Id. at 1176.
52. Id.
53. Id. at 1178.

written examination were job-related the Board would still be required to demonstrate that no less discriminatory means of obtaining its supervisory personnel were available [citations omitted]. Had the [district] court done that, the bite of the "compelling interest" test would apply.[54]

The equal protection approach of *Chance* is perhaps the most interesting aspect of the decision and is fertile ground for rather extensive inquiry. One small facet of the problem, however, and the one which most directly affects the *Chance* decision is the question of when the equal protection clause requires the application of the compelling interest test.

In *Shapiro v. Thompson*,[55] one of the major cases in the equal protection area, the Court dealt with a residency requirement for welfare recipients. The Court struck down the residency requirement as an infringement on the right to travel interstate:

But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional.[56]

In *Shapiro* a compelling state interest was required because the right restricted, *i.e.* the right to travel, was held to be fundamental.[57] *Eisenstadt*

54. Id. at 1177.

55. 394 U.S. 618 (1969).

56. Id. at 634.

57. Id. at 630-31. In Shapiro, the Court was confronted with statutes from the states of Connecticut, Pennsylvania and from the District of Columbia which created a one-year residency requirement for persons seeking to receive welfare benefits. The Court rejected the defendants' contention that the statute sought to exclude persons seeking higher benefits, as well as the argument that the waiting period helps the defendant-state in preparing the budget. Rather, the Court found that the statute sought to deter the migration of indigents and was therefore, unconstitutional: "[T]he purpose of deterring the in-migration of indigents cannot serve as justification for the classification created by the one-year waiting period, since that purpose is constitutionally impermissible. If a law has 'no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is] patently unconstitutional.' [citations omitted]." Id. at 631. Here, obviously, the Court looked to the intent of the statute and found that it created a classification which was intended to restrict the enjoyment of the fundamental right to travel. Id. at 638. Harper v. Bd. of Elections, 383 U.S. 663 (1966), demonstrates another facet of the problem. Here, the Court was concerned with the constitutionality of a poll tax. After reaffirming the concept enunciated in Reynolds v. Sims, 377 U.S. 533 (1964), that the right to vote was fundamental, the Court struck down the poll tax as a violation of the equal protection clause. In so doing the Court said: "We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection

v. Baird,[58] a recent Supreme Court decision in the equal protection area and one relied on by the court of appeals in *Chance*, seemingly moves in a different direction. Here, the Court was faced with a conviction under a Massachusetts statute for distributing a contraceptive to an unmarried woman during a birth control lecture.[59] The Supreme Court affirmed the granting of the habeas corpus petition, holding that the statute violated the rights of single persons to obtain contraceptives under the equal protection clause.[60] In discussing the requirements of equal protection the Court said:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to the States the power to treat different classes of persons in different ways [citations omitted]. The Equal Protection Clause of that Amendment does, however, deny to the States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objectives of that statute. A classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.[61]

From this brief discussion of these two cases it might fairly be concluded that where the state is creating a classification outside of the area of fundamental individual rights the equal protection clause does not require that a compelling state interest be demonstrated. It is sufficient that the classification meet the less rigid standards of the *Eisenstadt* decision.

A further query remains as to intended racial classifications. In *Chance*, the plaintiffs alleged that the examination was *intended* to create a racial classification. Both the district court and the court of appeals rejected this contention:

> The goal of the examination procedures should be to provide the best qualified supervisors, regardless of their race, and if the examinations appear reasonably constructive to measure knowledge, skills and abilities essential to a particular position, they should not be nullified because of a de facto discriminatory impact.[62]

Clause, classifications which might invade or restrain them must be closely scrutinied and carefully confined." Id. at 670 (citations omitted).

58. 405 U.S. 438 (1972).

59. Id. at 440.

60. Id. at 443.

61. Id. at 446-47 (citations omitted).

62. 330 F. Supp. at 214. A question that should be asked is whether or not freedom from racial discrimination is a fundamental right. Brown v. Board of Educ., 347 U.S. 483 (1954) is a sound basis for the exploration of this question.

Nonetheless, on the facts of the case, the tests were shown to have a definite racial impact:

> Despite the splendidly motivated genesis of the Board of Examiners, its examinations . . . have led to unintentional racial discrimination.[63]

The intent of the examination was allegedly to secure the best qualified supervisory personnel, but its impact was found to be discriminatory, and it was this impact which shifted the burden to the Board of Examiners to justify the examination as job-related. Although a discriminatory classification was the net effect of the examination, the court determined that the test could be justified under the equal protection clause if it was shown to be job related—that is, if a rational basis could be demonstrated. Thus, while the racial impact was sufficient to compel a shifting of the burden of ultimate persuasion from the plaintiffs to the Board of Examiners, the non-discriminatory intent of the Board of Examiners prevented the application of the compelling state interest test.

The Equal Employment Opportunity Act of 1972, amending Title VII to include states and their sub-divisions has probably made cases of this

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In overruling the doctrine of "separate but equal" the Court found separate educational facilities to be inherently unequal. Bolling v. Sharpe, 347 U.S. 497 (1954), a case involving segregation by the federal government in the schools of Washington, D.C., clarifies the Brown view of racial classifications. In negating such classifications the Court offered this view of their character: "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect." Id. at 499. Hunter v. Erickson, 393 U.S. 385 (1969) demonstrates the application of these concepts in another area. This case involved an Akron, Ohio, municipal ordinance which required a majority vote by Akron's residents before an open housing ordinance could be enacted. The Court held that the ordinance, "[d]iscriminates against minorities, and constitutes a real, substantial, and invidious denial of equal protection of the laws." Id. at 393. The ordinance created a racial classification because the impact fell on the minorities' right to be free from discrimination. Id. at 391. In holding such discrimination to be violative of the equal protection clause, the Court said, "Because the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race, racial classifications are 'constitutionally suspect,' . . . and subject to the 'most rigid scrutiny'. . . . They 'bear a far heavier burden of justification' than other classifications." Id. at 391, 392 (citations omitted). In light of this judicial history it might be interesting to consider what the Court would do in a situation where an employer used a test which had demonstrable business necessity, but also produced discriminatory classifications, if the employer had selected this test primarily for its discriminatory impact.

63. 458 F.2d at 1170.

sort merely interesting bits of history. Undoubtedly, however, the rationale of the court and the application of the rational basis test to discriminatory hiring practices will continue under the revised Title VII as administered by the EEOC.

CONSTITUTIONAL LAW—Candidate Filing Fees—Excessive Filing Fees with No Alternative Means of Ballot Access Held Violative of Equal Protection Clause. Bullock v. Carter, 405 U.S. 134 (1972).

Three potential candidates for local office brought suit to have their names placed on the ballot in the Texas Democratic primary elections.[1] Their suit was joined by a number of voters who wished to vote for them.[2] Two of the candidates met all of the qualifications for candidacy in the primary except for their inability to pay the filing fees required under Texas statutes.[3]

Plaintiffs contended that the fees were unconstitutional denials of due process and equal protection which deprived them of their right to run for office and to vote for the candidates of their choice.[4] A three judge district court was convened and ordered that two of the candidates be placed on the ballot without payment of the fees.[5] A hearing on the merits was subsequently granted in which the court held the Texas statutes to be unconstitutional violations of the first and fourteenth amendments.[6] On direct appeal, the Supreme Court unanimously declared the Texas statutes unconstitutional under the equal protection clause of the fourteenth amendment.[7] The first amendment and due process issues were not discussed.

The right to vote has been recognized as one of the most important

1. Carter v. Dies, 321 F. Supp. 1358 (N.D. Tex. 1970), aff'd sub nom. Bullock v. Carter, 405 U.S. 134 (1972).

2. 321 F. Supp. at 1360.

3. Id. The challenged statutes were Tex. Election Code Ann. arts. 13.07a, 13.08, 13.08a, 13.15, and 13.16 (1967). These statutes established filing fees in primary elections for federal, state, local and political party offices.

4. 321 F. Supp. at 1360.

5. Id. The third candidate failed to notarize his application and submit a loyalty oath. He was denied relief.

6. Id. at 1363.

7. 405 U.S. at 149.

political rights.[8] In *Reynolds v. Sims*,[9] the Supreme Court considered the right to vote freely for the candidate of one's choice "the essence of a democratic society."[10] Restrictions on the right to vote "strike at the heart of representative government."[11] Infringement of this right in state elections is subject to judicial review under the equal protection clause of the fourteenth amendment.[12] Because of the key role primary elections play in the electoral process, statutes regulating them are considered to be "state action" and therefore also subject to judicial review under the equal protection clause.[13]

Although the right to vote is fundamental, there is no question that states have the power to set reasonable qualifications on the franchise. The right of suffrage "is subject to the imposition of state standards which are not discriminatory and which do not contravene any restriction that Congress, acting pursuant to its constitutional powers, has imposed."[14] Thus the state may establish age, residence, and even literacy requirements for the right to vote.[15] However, the payment of any fee or tax as a condition upon the right of the franchise was held to be "invidious discrimination" in violation of the equal protection clause in *Harper v. Virginia Bd. of Elections*.[16] In delivering the opinion of the Court, Mr. Justice Douglas declared that "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."[17]

The right to vote for the candidate of one's choice is not necessarily the same as the right to appear on the ballot as a candidate. It was not until *Williams v. Rhodes*[18] that the Supreme Court recognized the power of judicial review in right to candidacy cases.[19] In *Williams* the

8. "[I]t is regarded as a fundamental political right, because [it is] preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

9. 377 U.S. 533 (1964).

10. Id. at 555.

11. Id.

12. Id. at 566.

13. Gray v. Sanders, 372 U.S. 368, 374-75, 379 (1963); Nixon v. Herndon, 273 U.S. 536, 540-41 (1927). See also Smith v. Allwright, 321 U.S. 649 (1944); United States v. Classic, 313 U.S. 299 (1941).

14. Lassiter v. Northampton Bd. of Elections, 360 U.S. 45, 51 (1959).

15. Id. See also Carrington v. Rash, 380 U.S. 89 (1965).

16. 383 U.S. 663, 666 (1966).

17. Id. at 668.

18. 393 U.S. 23 (1968).

19. Id. at 28.

Court invalidated the "highly restrictive provisions"[20] of the state of Ohio which made it virtually impossible for a slate of presidential electors pledged to George Wallace to get on the Ohio ballot.[21] In the opinion of the Court the burdens placed on access to the ballot by the Ohio laws violated two different rights. First was "the right of individuals to associate for the advancement of political beliefs. . . ."[22] This first amendment freedom is protected against state infringement under the fourteenth amendment.[23] Second was "the right of qualified voters, regardless of their political persuasion, to cast their votes effectively."[24] The Court found that the state failed to show any "compelling interest" to justify the burdens on the right to vote and associate.[25]

Once the door was opened to judicial review of the right to candidacy, it was inevitable that burdens on that right such as requirements of property ownership, nominating petitions, and filing fees would be challenged. In *Turner v. Fouche*,[26] the Court held that the privilege of holding public office may not be denied on the basis of classifications that violate federal constitutional guarantees of equal protection.[27] In this case, the requirement that one be an owner of real estate before he may be appointed to the county board of education was held to be "invidious discrimination" because there was no substantial interest that the requirement served.[28]

In *Jenness v. Fortson*,[29] the Supreme Court upheld a Georgia statute requiring, as a condition of getting on the ballot, either a party primary victory or submission of a nominating petition signed by at least five per cent of the voters registered in the last general election.[30] In distinguishing this case from *Williams*, Mr. Justice Stewart noted the "open quality"[31]

20. Id. at 33.

21. Id. at 24-26. For a summary of the legal obstacles, see id. at 25, n.1.

22. Id. at 30.

23. Id. at 30-31 (citing New York Times Co. v. Sullivan, 376 U.S. 254 (1964)).

24. Id. at 30.

25. Id. at 31. See notes 51-59 infra, and accompanying text.

26. 396 U.S. 346 (1970).

27. Id. at 362-63.

28. Id. at 363-64.

29. 403 U.S. 431 (1971).

30. Id. at 433. It should be noted that the district court granted an injunction against enforcement of a filing fee requirement of five per cent of the annual salary of the office being sought on the grounds that it was a denial of equal protection. Socialist Workers Party v. Fortson, 315 F. Supp. 1035 (N.D. Ga. 1970), aff'd on other grounds sub nom. Jenness v. Fortson, 403 U.S. 431 (1971). No appeal was taken against the injunction. 403 U.S. at 432.

31. 403 U.S. at 439.

of the Georgia system and the absence of any procedural or substantive limitations on write-in votes.[32] The Court recognized a legitimate state interest in demanding "some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot—the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election."[33]

Soon after *Williams*, a number of federal courts were confronted with the question of the constitutionality of candidate filing fees as a prerequisite for having one's name printed on the ballot.[34] Two basically irreconcilable positions emerged.[35] The first decision on the subject was *Jenness v. Little*[36] where a three judge district court ruled that the denial of ballot access for the inability to post a filing fee was "illegal and unconstitutional"[37] where there was no other way to get on the ballot.[38] Even though write-in ballots were allowed, the fees were impermissible because "to force a candidate to seek election in this fashion is to throw too many hurdles in his path solely because he is without funds to qualify."[39] The contrary position was taken in *Wetherington v. Adams*,[40]

32. Id. at 434.

33. Id. at 442.

34. A number of prior challenges to candidate filing fees were made in state courts on state constitutional grounds and the fees were generally upheld. See Annot., 89 A.L.R.2d 864 (1963).

35. Wong v. Mihaly, 332 F. Supp. 165, 167 (N.D. Cal. 1971).

36. 306 F. Supp. 925 (N.D. Ga. 1969), appeal dismissed as moot sub nom., Matthews v. Little, 397 U.S. 94 (1970). Cases generally following the reasoning of this case are: Wong v. Mihaly, 332 F. Supp. 165 (N.D. Cal. 1971); Duncantell v. City of Houston, 333 F. Supp. 973 (S.D. Tex. 1971); Socialist Workers Party v. Welch, 334 F. Supp. 179 (S.D. Tex. 1971); Thomas v. Mims, 317 F. Supp. 179 (S.D. Ala. 1970); Socialist Workers Party v. Fortson, 315 F. Supp. 1035 (N.D. Ga. 1970), aff'd on other grounds sub nom. Jenness v. Fortson, 403 U.S. 431 (1971).

37. 306 F. Supp. at 929. The court did not precisely state the constitutional grounds for its decision, although it appears to have relied on Harper. See notes 16-17 supra, and accompanying text.

38. Id.

39. Id.

40. 309 F. Supp. 318 (N.D. Fla. 1970). Cases generally following Wetherington are: Spillers v. Slaughter, 325 F. Supp. 550 (M.D. Fla.), motion for leave to file petition for writ of mandamus denied, 402 U.S. 971 (1971), judgment vacated sub nom. Pope v. Haimowitz, 404 U.S. 806 (1971); Fowler v. Adams, 315 F. Supp. 592 (M.D. Fla.), injunction granted, 400 U.S. 1205 (1970), appeal dismissed for want of jurisdiction, 400 U.S. 986 (1971).

where the constitutionality of filing fees was upheld. The three judge district court noted that it was legitimate for the state to impose a three or even a five per cent of annual salary filing fee in order to limit the ballot to "serious, good-faith candidates."[41] The court found that "[a] serious candidate for public office has traditionally attracted money for his candidacy. The inability to pay a reasonable filing fee might indicate a lack of potential political support for a person's candidacy."[42] Furthermore, the inability to pay the fee was not a complete denial of candidacy as the office-seeker could run as a write-in candidate.[43] The court in *Wetherington* distinguished the case from *Jenness v. Little* on the basis of unspecified factual differences.[44]

In *Bullock v. Carter*,[45] the Supreme Court was faced with a number of factual problems which were peculiar to the Texas statutes under challenge. The most significant of these was that the fees were strikingly high. The fee for one of the plaintiffs amounted to $6,300 or 32 per cent of the annual salary of the office sought.[46] In the past, the filing fees had run as high as $8,900 for some offices.[47] This situation was, as the Court pointed out, a natural consequence of placing the burden of paying the administrative expenses of primary elections on the candidate rather than on the governmental unit.[48] The other distinguishing feature of the Texas system was that although the filing fee had to be paid to get on the primary ballot, and write-in votes for all offices except county and precinct party chairman were not permitted,[49] a candidate might be placed on the general election ballot if he filed a nominating petition.[50]

In reaching its decision the Court had to determine the proper standard of review in cases involving a restriction on ballot access. Over the years the Court has developed two standards of review in equal protection cases.[51] One is the standard of restrained review which tests the rea-

41. 309 F. Supp. at 321.
42. Id.
43. Id. at 320.
44. Id. at 322.
45. 405 U.S. at 134.
46. Id. at 138 n.10.
47. Id. at n.11.
48. Id. at 138-39. The Court also noted that filing fees fixed by statute for statewide offices ranged from $50 to $1000. See Tex. Election Code Ann. arts. 1308, 13.08a, 13.16 (Supp. 1972).
49. Tex. Election Code Ann. art. 13.09(b) (Supp. 1972).
50. Id. art. 13.50 (1967).
51. For a thorough discussion of the standards used in equal protection cases,

sonableness and rationality of a state imposed classification.[52] Under this test the constitutionality of the state statute is presumed and it will be upheld so long as the classification reasonably relates to a legitimate purpose.[53] Failure to meet this standard is held to be "invidious discrimination."[54] The other more stringent standard of review is adopted where suspect classifications are involved or where burdens are imposed on the fundamental rights of citizens.[55] When this occurs, the classification becomes subject to close scrutiny[56] and the presumption of constitutionality is eliminated.[57] The burden of proof is placed on the state to demonstrate that the classification is well-tailored to serve a "compelling" state interest.[58] If the burden is met the Court will then balance the compelling state interests with the fundamental individual interests.[59]

Chief Justice Burger, in delivering the opinion of the Court, determined that the stricter standard of review should apply. Noting that the right to vote was given fundamental status, he found that "the rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters."[60] Furthermore, the barriers erected by the state gave the Texas system a "patently exclusionary character."[61] Not only did it exclude from candidacy those lacking personal wealth or affluent backers, but it was likely to have a differential impact on voters because the limitations would be likely to "fall more heavily on the less affluent segment of the community, whose favorites may be unable to pay the large costs required by the Texas system."[62] It appears then that the more stringent standard of review for voting rights cases adopted in

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see Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969) (hereinafter cited as Developments).

52. E.g., McGowan v. Maryland, 366 U.S. 420, 425-27 (1961).

53. Id.

54. E.g., Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

55. Developments, note 51 supra, at 1088. Suspect classifications include those based on race, lineage, alienage, and in some instances wealth. Id. at 1124.

56. Korematsu v. United States, 323 U.S. 214, 216 (1944).

57. Developments, supra note 51, at 1101. See, e.g., Harper v. Board of Elections, 383 U.S. 663, 670 (1966).

58. Developments, note 51 supra, at 1122. See Shapiro v. Thompson, 394 U.S. 618, 658-60 (1969) (Harlan, J., dissenting).

59. Developments, note 51 supra, at 1122-23.

60. 405 U.S. at 143.

61. Id.

62. Id. at 144.

Harper[63] was invoked because of the Texas statutes' burdens on the fundamental right to vote and its unequal impact on the voters depending on their wealth or economic status.[64]

Under this standard of review the state must show that it has compelling interests in making its classifications. The Court recognized the state's contention that it has a legitimate interest in regulating the number of candidates on the ballot[65] and "an interest, if not a duty, to protect the integrity of its political processes from frivolous or fraudulent candidacies."[66] Nevertheless, it found that filing fees of up to $8,900 were "extraordinarily ill-fitted"[67] to serve these goals because they tended to exclude legitimate as well as frivolous candidates.[68] In rejecting the state's argument that it did not use the filing fees to exclude serious candidates because they could be placed on the general election ballot by petition, the Court took notice of the fact that, in Texas, selection of the Democratic party candidate is commonly tantamount to election;[69] moreover, it was unreasonable to require "candidates and voters to abandon their party affiliations in order to avoid the burdens of the filing fees."[70]

The Court flatly rejected the contention that there is a necessary state interest in apportioning the cost of primary elections among the candidates for office.[71] It pointed out that the cost of general elections is spread among all of the voters and that "it is far too late to make out a case that the party primary is such a lesser part of the democratic process that its cost must be shifted away from the taxpayers generally."[72]

Thus the Court determined that the state failed to justify its filing fee system and held that the system resulted in a denial of equal protection of the laws.[73] The Court emphasized that the features of the Texas system which led to this result were: (1) the lack of reasonable alternative means of ballot access; and (2) the denial to voters of the oppor-

63. See notes 16-17 supra, and accompanying text.
64. 405 U.S. at 144.
65. Id. at 145.
66. Id.
67. Id. at 146.
68. Id.
69. Id. and n.26.
70. Id. at 147.
71. Id. at 147-48.
72. Id. at 148.
73. Id. at 149.

tunity to vote for candidates who were not on the primary ballot because of their inability to pay.[74]

The immediate result of *Bullock* is the extension of the strict standard of review to state legislation which restricts access to the ballot by potential candidates. This extension is based on the rights and interests of voters rather than on any rights that the candidates themselves might have. In short, the Court in *Bullock* was unwilling to rule that political candidacy is a fundamental right. This is consistent with other access to ballot cases that have come before the Court.[75]

It seems clear, however, that the real significance of *Bullock* will be the presentation to the Court of even more challenges to filing fees in the near future. Rather than rule directly on the issue of the constitutionality of filing fees,[76] the Court merely held that the Texas system was "patently exclusionary" and in violation of fourteenth amendment rights of equal protection. The Court cautioned that "nothing herein is intended to cast doubt on the validity of reasonable candidate filing fees or licensing fees in other contexts."[77] No hint was given as to how to determine the reasonableness of a filing fee system.

Without explanation, the Court completely ignored the first amendment arguments that figured so prominently in *Williams*[78] and in the decision of the lower court in *Bullock*.[79] Notable also was the Court's unfortunate distinction between the *inability* and *unwillingness* to pay the filing fees.[80] With only passing reference to a dissent in *Harper*,[81] the Court indicated that "[t]here may well be some rational relationship between a candidate's willingness to pay a filing fee and the seriousness

74. Id.

75. Jenness v. Fortson, 403 U.S. 431, 440 (1971); Williams v. Rhodes, 393 U.S. 23, 30 (1968). See notes 18-25, 29-33 supra, and accompanying text.

76. A decision declaring them unconstitutional has been urged by some commentators. See Comment, The Emerging Right to Candidacy in State and Local Elections: Constitutional Protection of the Voter, the Candidate, and the Political Group, 17 Wayne L. Rev. 1543 (1971); Note, The Constitutionality of Candidate Filing Fees, 70 Mich. L. Rev. 558 (1972).

77. 405 U.S. at 149.

78. See notes 18-25 supra, and accompanying text.

79. See notes 1-6 supra, and accompanying text.

80. 405 U.S. at 146.

81. "[I]t is certainly a rational argument that payment of some minimal poll tax promotes civic responsibility, weeding out those who do not care enough about public affairs to pay $1.50 or thereabouts a year for the exercise of the franchise." 383 U.S. at 684-85 (Harlan, J., dissenting). For a discussion of the majority opinion see notes 16-17 supra, and accompanying text.

with which he takes his candidacy. . . ."[82] This contention that the willingness to pay filing fees may be a rational way to weed out frivolous candidates surely cannot withstand rigorous analysis. Even allowing for the ability to pay, it can be argued that the sacrifice made by a relatively poor candidate paying a "reasonable" filing fee may significantly exceed the sacrifice made by his wealthier opponent. While the Court may well rule that such differential burdens are tolerable, it would be a mistake to assume that they are in any way a measure of seriousness.[83]

It is likely then that in the very near future the Court will be called upon to expand and explain its limited holding in *Bullock*.[84]

CONSTITUTIONAL LAW—Equal Protection—Durational Residence Requirements for Voting in State Elections Violate the Equal Protection Clause of the Fourteenth Amendment. Dunn v. Blumstein, 405 U.S. 330 (1972).

Respondent moved to Tennessee on June 12, 1970, to begin employment as an assistant professor of law at Vanderbilt University. In order to vote in the August and November elections he attempted to register with the county registrar. Under Tennessee law,[1] only those persons who

82. 405 U.S. at 145-46.

83. "Is a 'serious' candidate one who is able to expend a good deal of money on his campaign? If so, this is unacceptable as a standard. The wealth of the individual candidate is too cynical a test to be applied to the legitimacy of his effort. A poor man may be as 'serious' in his campaign as a wealthy one, and he has the right to seek office with or without a capital outlay." Thomas v. Mims, 317 F. Supp. 179, 182 (S.D. Ala. 1970). See also Lindsey v. Normet, 405 U.S. 56 (1972), which was decided only the day prior to Bullock. There the Court was unpersuaded by the argument that a double-bond requirement would screen out frivolous appeals because "it not only bars nonfrivolous appeals by those who are unable to post the bond but also allows meritless appeals by others who can afford the bond." Id. at 78. For a discussion of some of the other arguments concerning this issue, see Note, The Constitutionality of Candidate Filing Fees, 70 Mich. L. Rev. 558, 579-80 (1972).

84. In fact, the Supreme Court has been asked to hear another challenge to a candidate filing fee. See Brown v. Chote, cert. granted, 41 U.S.L.W. 3198 (U.S. Oct. 17, 1972) (No. 71-1583).

1. Article IV § 1 of the Tennessee Constitution provides: "Right to vote—Election precincts—Military duty.—Every person of the age of twenty-one years, being a citizen of the United States, and a resident of this State for twelve months, and of the county wherein such person may offer to vote for three months, next

have been residents of the State for a year and residents of the county for three months are allowed to vote in state elections. As a result, respondent was not allowed to register.

After he exhausted administrative remedies, respondent brought suit. A three judge federal court held that Tennessee's durational residence requirements were unconstitutional since they interfered with the right to vote and created a "suspect" classification penalizing some Tennessee residents because of recent interstate movements.[2]

The United States Supreme Court in a 6-1 decision[3] affirmed the decision of the lower court concluding that Tennessee did not offer an adequate justification for its durational residence laws.[4]

Ever since the decision in *Yick Wo v. Hopkins*,[5] the Supreme Court has recognized that the right to vote is a fundamental political right "because [it is] preservative of all rights."[6] In 1964, the Court in *Reynolds v.*

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preceding the day of election, shall be entitled to vote for electors for President and Vice-President of the United States, members of the General Assembly and other civil officers for the county or district in which such person resides; and there shall be no other qualification attached to the right of suffrage.

The General Assembly shall have power to enact laws requiring voters to vote in the election precincts in which they may reside, and laws to secure the freedom of elections and the purity of the ballot box. . . ." Section 2-201 of the Tenn. Code Ann. provides: "Qualification of voters.—Every person of the age of twenty-one (21) years, being a citizen of the United States and a resident of this state for twelve (12) months, and of the county wherein he may offer his vote for three (3) months next preceding the day of election, shall be entitled to vote for members of the general assembly and other civil officers for the county or district in which he may reside." Section 2-304 of the Tenn. Code Ann. provides: "Persons entitled to permanently register—Required time for registration to be in effect prior to election.—All persons qualified to vote under existing laws at the date of application for registration . . . who will have lived in the state for twelve (12) months and in the county for which they applied for registration for three (3) months by the date of the next succeeding election shall be entitled to permanently register as voters under the provisions of this chapter provided, however, that registration or reregistration shall not be permitted within thirty (30) days of any primary or general election provided for by statute. . . ." Both of these statutory sections are slated for repeal, effective Jan. 15, 1973.

2. Blumstein v. Ellington, 337 F. Supp. 323 (M.D. Tenn. 1970), aff'd sub nom., Dunn v. Blumstein, 405 U.S. 330 (1972).

3. 405 U.S. 330 (1972). Mr. Chief Justice Burger dissented; Mr. Justice Powell and Mr. Justice Rhenquist took no part in the decision.

4. Id. at 360.

5. 118 U.S. 356 (1886).

6. Id. at 370.

Sims[7] reaffirmed that the right to vote is fundamental. In the instant case the Court specifically found that durational residence requirements deny a certain class of the population the right to vote,[8] raising the constitutional question of whether the equal protection clause of the fourteenth amendment permits a state to discriminate in this way among its citizens.[9]

Traditionally, laws challenged under the equal protection clause had to meet a test of "reasonableness."[10] In *Dunn*, the State of Tennessee based its argument on the decision in *Drueding v. Devlin*[11] which was decided under that traditional equal protection standard.[12] In *Drueding*, plaintiffs challenged sections of the Maryland Constitution which established residence requirements for voting in elections for the President and Vice-President of the United States. The district court concluded

7. 377 U.S. 533 (1964). "Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society." Id. at 561-62.

8. "Durational residence laws penalize those persons who have traveled from one place to another to establish a new residence during the qualifying period. Such laws divide residents into two classes, old residents and new residents, and discriminate against the latter to the extent of totally denying them the opportunity to vote." 405 U.S. at 334-35 (footnote omitted).

9. Id. This type of discrimination, based on durational residence requirements, has disenfranchised millions of voters. See Cocanower & Rich, Residency Requirements for Voting, 12 Ariz. L. Rev. 477 (1970) [hereinafter cited as Cocanower]; Macleod & Wilberding, State Voting Residency Requirements and Civil Rights, 38 Geo. Wash. L. Rev. 93 (1969); Note, Residence Requirements for Voting in Presidential Elections, 37 U. Chi. L. Rev. 359 (1970).

10. In Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61 (1911), the Court established certain rules which clarified the "reasonableness" standard. "The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." Id. at 78-79 (citations omitted). See also Allied Stores v. Bowers, 358 U.S. 522 (1959); Morey v. Doud, 354 U.S. 457 (1957); Williamson v. Lee Optical Co., 348 U.S. 483 (1955).

11. 234 F. Supp. 721 (D. Md. 1964), aff'd per curiam, 380 U.S. 125 (1965).

12. 234 F. Supp. at 725.

that the statutes in question did not amount to any irrational or unreasonable discrimination.[13] However, the Supreme Court in *Dunn* was quick to point out that the test used in *Drueding* can no longer be applied when considering any statute which places a condition on the exercise of the right to vote.[14] Having rejected the "reasonableness" test of *Drueding*, the Court concluded that the state must show a "substantial and compelling reason for imposing durational residence requirements."[15]

The "compelling state interest" test had been used in a number of cases relating to the right to vote.[16] Essentially, the test is applied to state statutes in two different categories, those which are "inherently suspect"[17] and those which involve rights that are considered fundamental.[18] In *Kramer v. Union Free School District No. 15*,[19] the Supreme Court rejected the old standard of reasonableness.[20] Kramer, a bachelor, was denied the right to vote in a school district election because he had no children and did not own any taxable property within the district. The majority in holding that the plaintiff was entitled to vote, based its

13. "The several states may impose age, residence and other requirements, so long as such requirements do not discriminate against any class of citizens by reason of race, color or other invidious ground and are not so unreasonable as to violate the Equal Protection Clause of the Fourteenth Amendment." Id. at 723 (footnote omitted).

14. 405 U.S. at 337. The unpopularity of the Drueding test was pointed out by Mr. Justice Marshall: "It seems to me clear that Drueding is not good law today." Hall v. Beals, 396 U.S. 45, 52 (1969) (Marshall, J., dissenting).

15. 405 U.S. at 335.

16. See, e.g., City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Evans v. Cornman, 398 U.S. 419 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969); Kramer v. Union Free School Dist. No. 15, 395 U.S. 621 (1969); Reynolds v. Sims, 377 U.S. 533 (1964).

17. For examples of classifications which are considered "inherently suspect" see Williams v. Rhodes, 393 U.S. 23 (1968) (political allegiance); Loving v. Virginia, 388 U.S. 1 (1967) (race); Harper v. Board of Elections, 383 U.S. 663 (1966) (wealth).

18. See, e.g., Harper v. Board of Elections, 383 U.S. 663 (1966) (voting); Griffin v. Illinois, 351 U.S. 12 (1956) (criminal procedure); Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942) (procreation). See generally Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969).

19. 395 U.S. 621 (1969). For a full discussion of the emergence of the "compelling state interest" standard see Cocanower 487-503.

20. "Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a 'rational basis' for the distinction made are not applicable." 395 U.S. at 627-28 (footnote omitted).

decision on the "compelling state interest" test,[21] and did not consider state durational residence requirements,[22] whose validity was conceded by the appellant.

In *Cipriano v. City of Houma*,[23] the Court applied the "compelling state interest" test in rejecting the constitutionality of a state statute which only allowed property taxpayers to vote in municipal bond elections. The same reasoning was used in *City of Phoenix v. Kolodziejski*[24] where the issue involved general obligation bonds rather than revenue bonds. The decisions in *Kramer*, *Cipriano*, *City of Phoenix* and other recent cases[25] where state statutes have disenfranchised some voters clearly indicate acceptance of the "compelling state interest" test in cases involving the fundamental right to vote.

Although the Court in *Dunn* concluded that durational residence requirements do not meet the "compelling state interest" test, the Court continued to emphasize the difference between bona fide residence requirements and durational residence requirements.[26] In *Pope v. Williams*,[27] the Court upheld the constitutionality of a state statute which required that new arrivals in the state make a declaration of intent to become citizens one year before they registered to vote.[28] Although several cases have cited *Pope* as authority for requiring durational resi-

21. See note 19 supra.

22. "At the outset, it is important to note what is not at issue in this case. . . . Appellant agrees that the States have the power to impose reasonable citizenship, age, and residency requirements on the availability of the ballot." 395 U.S. at 625 (emphasis omitted).

23. 395 U.S. 701 (1969).

24. 399 U.S. 204 (1970).

25. See, e.g., Evans v. Cornman, 398 U.S. 419, (1970); Harper v. Board of Elections, 383 U.S. 663 (1966); Carrington v. Rash, 380 U.S. 89 (1965). In McDonald v. Board of Election Comm'n, 394 U.S. 802 (1969), the "compelling state interest" test was not used. McDonald involved an action by inmates of a county jail who were denied the right to cast absentee ballots. Chief Justice Warren concluded that: "Such an exacting approach is not necessary here, however, for two readily apparent reasons. First, the distinctions made by Illinois' absentee provisions are not drawn on the basis of wealth or race. Secondly, there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." Id. at 807.

26. 405 U.S. at 343.

27. 193 U.S. 621 (1904).

28. "In other words, the privilege to vote in a State is within the jurisdiction of the State itself, to be exercised as the State may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals in violation of the Federal Constitution." Id. at 632.

dence,[29] the majority in *Dunn* preferred to give *Pope* a narrow reading, indicating that the case "simply stands for the proposition that a State may require voters to be bona fide residents."[30]

In addition to denying one class of residents the right to vote, the Court in *Dunn* concluded that "the durational residence requirement directly impinges on the exercise of a second fundamental personal right, the right to travel."[31] Although the Constitution does not specifically speak of a right to travel, the Court in several decisions has recognized that the right to travel is a fundamental right.[32] As a result, any statute which seeks to impinge on that right must meet the "compelling state interest" test.[33] Moreover, in passing the Federal Voting Rights Act of

29. See, e.g., Fontham v. McKeithen, 336 F. Supp. 153 (E.D. La. 1971); Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971); Drueding v. Devlin, 234 F. Supp. 721 (D. Md. 1964).

30. 405 U.S. at 337, n. 7. "Carefully read, that case simply holds that federal constitutional rights are not violated by a state provision requiring a person who enters the State to make a 'declaration of his intention to become a citizen before he can have the right to be registered as a voter and to vote in the State.' " Id. n. 7, quoting Pope v. Williams, 193 U.S. 621, 634 (1904) (emphasis omitted). Mr. Justice Blackmun in his concurring opinion in Dunn expressed his disagreement with the majority's reading of Pope: "I cannot so blithely explain Pope v. Williams away, as does the Court . . . by asserting that if that opinion is '[c]arefully read,' one sees that the case was concerned simply with a requirement that the new arrival declare his intention. The requirement was that he make the declaration a year before he registered to vote; time as well as intent was involved. For me, therefore, the Court today really overrules the holding in Pope v. Williams and does not restrict itself, as footnote 7 says, to rejecting what it says are mere dicta." 405 U.S. at 361-62 (emphasis omitted). Mr. Chief Justice Burger in his dissenting opinion argued that Pope is "as valid today as it was at the turn of the century." Id. at 363.

31. Id. at 338.

32. See, e.g., Oregon v. Mitchell, 400 U.S. 112 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969). In United States v. Guest, 383 U.S. 745 (1966), the Court observed that: "The constitutional right to travel from one State to another, and necessarily to use the highways and other instrumentalities of interstate commerce in doing so, occupies a position fundamental to the concept of our Federal Union." 383 U.S. at 757. Chief Justice Taney once remarked that: "For all the great purposes for which the Federal government was formed, we are one people, with one common country. We are all citizens of the United States; and, as members of the same community, must have the right to pass and repass through every part of it without interruption, as freely as in our own States." Smith v. Turner, 48 U.S. (7 How.) 282, 492 (1849) (Taney, C.J., dissenting). See generally Z. Chafee, Three Human Rights in the Constitution of 1787, at 185 (1956 ed.).

33. 405 U.S. at 341-42.

1970,[34] Congress concluded that durational residence requirements for voting in presidential and vice-presidential elections do not serve any compelling state interest.[35]

In *Shapiro v. Thompson*,[36] the Court found that state statutes which imposed a one-year waiting period for interstate migrants as a condition to receiving welfare benefits were unconstitutional.[37] While *Shapiro* did not decide the validity of durational residence requirements as applied to voting,[38] the Court in *Dunn* concluded that ". . . *Shapiro* and the compelling state interest test it articulates control this case."[39] Petitioner attempted to distinguish *Shapiro* by arguing that durational residence requirements for voting neither attempt to deter nor in fact do deter travel.[40] The Court rejected this argument:

It is irrelevant whether disenfranchisement or denial of welfare is the more potent deterrent to travel. *Shapiro* did not rest upon a finding that denial of welfare actu-

34. 42 U.S.C. § 1973aa 1(a)-(6) (1970).

35. 42 U.S.C. § 1973aa 1(a)(1)-(6) provides: "Residence requirements for voting—Congressional findings. (a) The Congress hereby finds that the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President, and the lack of sufficient opportunities for absentee registration and absentee balloting in presidential elections —(1) denies or abridges the inherent constitutional right of citizens to vote for their President and Vice President; (2) denies or abridges the inherent constitutional right of citizens to enjoy their free movement across State lines; (3) denies or abridges the privileges and immunities guaranteed to the citizens of each State under article IV, section 2, clause 1, of the Constitution; (4) in some instances has the impermissible purpose or effect of denying citizens the right to vote for such officers because of the way they may vote; (5) has the effect of denying to citizens the equality of civil rights, and due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment; and (6) does not bear a reasonable relationship to any compelling State interest in the conduct of presidential elections."

36. 394 U.S. 618 (1969).

37. "But in moving from State to State or to the District of Columbia appellees were exercising a constitutional right, and any classification which serves to penalize the exercise of that right, unless shown to be neccessary to promote a compelling governmental interest, is unconstitutional." Id. at 634 (citation and emphasis omitted).

38. "We imply no view of the validity of waiting-period or residence requirements determining eligibility to vote, [or] eligibility for tuition-free education . . . ." Id. at 638 n.21 (emphasis omitted).

39. 405 U.S. at 339. For a viewpoint that concludes that voting residence requirements may not violate the right to travel see Note, Shapiro v. Thompson: Travel, Welfare and the Constitution, 44 N.Y.U.L. Rev. 989, 1005-08 (1969).

40. 405 U.S. at 339.

ally deterred travel. Nor have other "right to travel" cases in this Court always relied on the presence of actual deterrence.[41]

It was the determination that the classification involved actually penalized the right to travel which led the Court in *Shapiro* to use the "compelling state interest" test.[42]

Having decided that durational residence laws must be measured by a strict equal protection test, the Court in *Dunn* examined whether Tennessee had shown that its residence requirements furthered a sufficiently substantial state interest. The interests put forth by the state of Tennessee, namely, purity of the ballot box and knowledgeable voters, were rejected by the Court.[43] Today, purity of the ballot box is usually maintained by a system of voter registration,[44] where a resident establishes his qualifications by oath.[45] As a result, the durational residence requirement adds nothing to a simple residence requirement (*i.e.* one which requires bona fide residency) in the effort to stop fraud and "becomes an effective voting obstacle only to residents who tell the truth and have no fraudulent purposes."[46] The argument by Tennessee is further dissipated by the fact that there are two separate waiting periods, one year for the state and ninety days for the county.[47] In addition, the Court pointed out that Tennessee has several criminal statutes capable of deterring voter fraud.[48]

The "knowledgeable voters" argument involves three separate claims,[49] each of which was rejected by the Court.

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41. Id. at 339-40 (footnote omitted).

42. 394 U.S. at 634.

43. 405 U.S. at 345-60. For a list of six state interests that may be advanced by durational residence requirements see Cocanower, supra note 9, at 495-503.

44. Most states have voter registration laws. See, e.g., Cocanower, supra note 9, at 477, 499; Macleod & Wilberding, State Voting Residency Requirements and Civil Rights, 38 Geo. Wash. L. Rev. 93, 96-97 (1969).

45. See, e.g., Tenn. Code Ann. § 2-309 (1971).

46. 405 U.S. at 346-47. It is undisputed that Blumstein was a bona fide resident of the state and county when he attempted to register. Id. at 347.

47. The Court in Dunn concludes that: "It is impossible to see how both could be 'necessary' to fulfill the pertinent state objective. If the State itself has determined that a three-month period is enough time in which to confirm bona fide residence in the State and county, obviously a one-year period cannot also be justified as 'necessary' to achieve the same purpose." Id. at 347 (footnote omitted).

48. See, e.g., Tenn. Code Ann. §§ 2-202, 2-324, 2-1614, 2-2207, 2-2208, 2-2209 (1971).

49. The first involves some surety that the voter has become a member of the

There is simply nothing in the record to support the conclusive presumption that residents who have lived in the State for less than a year and their county for less than three months are uninformed about elections.[50]

The immediate impact of the decision in *Dunn* is that the question of the legitimacy of state durational residence requirements for voting has been decided.[51] Previously, lower courts were divided on the question.[52] In both *Shapiro* and *Dunn* the Court indicated that when a statute infringes upon the right to travel, the "compelling state interest" test will be used to determine the constitutionality of the statute.[53] Furthermore the Court in *Dunn* extended the "compelling state interest" test into the area of durational residence requirements for voting.[54] The importance

community. The Court concludes that "this does not justify or explain the exclusion from the franchise of persons, not because their bona fide residence is questioned, but because they are recent rather than long-time residents." 405 U.S. at 354. The second element sought to assure that the voter " 'has a common interest in all matters pertaining to [the community's] government. . . .' " Id. A similar argument was specifically rejected in Carrington v. Rash, 380 U.S. 89, 94 (1965). The third element was "that a long-time resident is 'more likely to exercise his right [to vote] more intelligently.' " 405 U.S. at 356. The Court concluded that this goal is an "elusive one, and susceptible of abuse." Id.

50. Id. at 358.

51. The Court was to have decided the question in 1969 but the case was dismissed as moot. Hall v. Beals, 396 U.S. 45 (1969) (Marshall, J., dissenting). In Hall, a six month residency requirement was upheld by the lower court. After the appeal to the Supreme Court was initiated, the Colorado legislature reduced the residency requirement for the presidential election from six months to two months. Id. at 48.

52. Durational residence requirements were struck down in Andrews v. Cody, 327 F. Supp. 793 (M.D.N.C. 1971) (1 year); Burg v. Canniffe, 315 F. Supp. 380 (D. Mass. 1970) (1 year); Affeldt v. Whitcomb, 319 F. Supp. 69 (N.D. Ind. 1970) (6 months); Lester v. Board of Elections, 319 F. Supp. 505 (D.D.C. 1970) (1 year); Bufford v. Holton, 319 F. Supp. 843 (E.D. Va. 1970) (1 year); Hadnott v. Amos, 320 F. Supp. 107 (M.D. Ala. 1970) (6 months); Kohn v. Davis, 320 F. Supp. 246 (D. Vt. 1970) (1 year); Keppel v. Donovan, 326 F. Supp. 15 (D. Minn. 1970) (6 months). Other courts have upheld durational residence requirements. Fontham v. McKeithen, 336 F. Supp. 153 (E.D. La. 1971) (6 months and 1 year); Ferguson v. Williams, 330 F. Supp. 1012 (N.D. Miss. 1971) (4 months); Howe v. Brown, 319 F. Supp. 862 (N.D. Ohio 1970) (1 year); Cocanower v. Marston, 318 F. Supp. 402 (D. Ariz. 1970) (1 year); Piliavin v. Hoel, 320 F. Supp. 66 (W.D. Wis. 1970) (6 months).

53. 405 U.S. at 338-39. Cf. Mr. Justice Harlan's dissenting opinion in Shapiro v. Thompson in which he was concerned with this type of wide ranging judicial review and expressed the opinion that "suspect" classifications had been extended to include any constitutional right. 394 U.S. at 658.

54. 405 U.S. at 335.

of the extension of the "compelling state interest" test is noted by Mr. Chief Justice Burger in his dissenting opinion:

> It is no more a denial of equal protection for a State to require newcomers to be exposed to state and local problems for a reasonable period such as one year before voting, than it is to require children to wait 18 years before voting. In both cases some informed and responsible persons are denied the vote, while others less informed and less responsible are permitted to vote. Some lines must be drawn. To challenge such lines by the "compelling state interest" standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection.[55]

It can be argued that the decision in *Dunn* will not be a precedent for the extension of the "compelling state interest" test into other areas. First, *Dunn* concerned itself with the right to vote, an area of concern that was already being examined by Congress[56] and by the Court.[57] Second, the Court's logic in rejecting the arguments advanced by Tennessee in favor of durational residence requirements for voting indicate that those requirements were unnecessary and really served no purpose.[58] Third, the Court in *Shapiro* had already extended the "compelling state interest" test to an infringement on the right to travel, while *Dunn* involved both the right to travel and the right to vote.

At any rate it is clear that the decision in *Dunn* will be used by state courts in striking down durational residence requirements for voting in state elections.[59] Perhaps the best summary of the rationale in *Dunn* was given by the New York Court of Appeals when it struck down a similar residence requirement:

> Broadly imposed political disabilities, such as those embodied in durational residency requirements belong to another day and under current standards are simply too imprecise to withstand constitutional scrutiny.[60]

Whether other state statutes will be subjected to the "compelling state

55. Id. at 363-4 (Burger, C.J., dissenting) (citation omitted). Indeed the only cases where the "compelling state interest" test has been met involved national rather than state interests. See Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

56. See note 34 supra.

57. See Oregon v. Mitchell, 400 U.S. 112 (1970).

58. See notes 45-47 supra.

59. See note 60 infra.

60. Atkin v. Board of Elections, 30 N.Y.2d 377, 379, 285 N.E.2d 687, 688-89, 334 N.Y.S.2d 377, 379 (1972) (citations omitted). The court held that the N.Y. Const. art. II, § 1, and N.Y. Election Law § 150 (McKinney 1964) failed to meet the "compelling state interest" test. Id. at 406, 285 N.E.2d at 689, 334 N.Y.S.2d at 379.

interest" test will depend upon whether the statute involved abridges a fundamental right or is an inherently suspect classification. This in turn ultimately becomes a matter for judicial interpretation. The present members of the Court each have their own views as to what constitutes a fundamental right. The three most "liberal" Justices on the Court—Douglas, Brennan, and Marshall—have shown a willingness to designate rights as "fundamental rights."[61] Perhaps Mr. Justice Douglas has gone as far as any Justice in determining what can be defined as a fundamental right:

> [S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance.[62]

Mr. Justice Rhenquist, on the other hand, has indicated his reluctance to extend the fundamental rights concept:

> The difficulty with this approach, devoid as it is of any historical or textual support in the language of the Equal Protection Clause, is that it leaves apparently to the Justices of this Court the determination of what are, and what are not, "fundamental personal rights." . . . While the determination of the extent to which a right is protected may result in the drawing of fine lines, the fundamental sanction to the right itself is found in the language of the Constitution, and not elsewhere. The same is unfortunately not true of the doctrine of "fundamental personal rights." This body of doctrine created by the Court can only be described as a judicial superstructure, awkwardly engrafted upon the Constitution itself.[63]

Mr. Chief Justice Burger has also indicated his reluctance to define "fundamental rights," or to use the "compelling state interest test."[64] Mr. Justice Stewart, while reluctant to characterize certain human activities as "fundamental," has shown a willingness to use the "compelling state interest" test when a statute infringes on an "established constitutional right."[65]

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61. For examples of Mr. Justice Brennan's views see Eisenstadt v. Baird, 405 U.S. 438 (1972); Oregon v. Mitchell, 400 U.S. 229 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969). For Mr. Justice Marshall's opinion see Dunn v. Blumstein, 405 U.S. at 330 (1972). Mr. Justice Marshall also concurred with Mr. Justice Brennan in Oregon v. Mitchell, supra, and Eisenstadt v. Baird, supra.

62. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). In Griswold, the executive director and the medical director of the Planned Parenthood League of Connecticut gave information, instruction and medical advice to married persons concerning contraception. This was in violation of a Connecticut statute which forbade the use of contraceptives. The Court held that the statute was unconstitutional since it violated the right of privacy of married couples. Id. at 481-86.

63. Weber v. Aetna Casualty, 406 U.S. 164, 170 (1972).

64. See note 55 supra and accompanying text. See also his dissenting opinion in Eisenstadt v. Baird, 405 U.S. 438, 465 (1972).

65. In Shapiro v. Thompson, 394 U.S. 618 (1969), Mr. Justice Stewart agreed

Mr. Justice White has adopted a somewhat pragmatic approach toward the question of what constitutes a fundamental right.[66] He has indicated that when "sensitive areas of liberty" are involved, a strict constitutional standard must be applied.[67] Mr. Justice Blackmun, while hesitant to define what is meant by a fundamental right, has also adopted a pragmatic approach similar to that of Mr. Justice White.[68]

Although he has only been on the Court for a short period, Mr. Justice Powell has indicated that the Court can decide what is meant by a fundamental right. In *Weber v. Aetna Casualty*,[69] the petitioner's deceased common law husband was killed in the course of his employment. His wife was in a mental hospital, and the decedent had been living with the petitioner, his four legitimate children and his two illegitimate children. The question concerned the right of the dependent, unacknowledged illegitimate children to recover under a Louisiana workman's compensation law on an equal footing with their natural father's legitimate children. Writing for the majority, Mr. Justice Powell noted that:

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that the "compelling state interest" test should be used when the right to travel has been infringed upon: "The Court today does not 'pick out particular human activities, characterize them as 'fundamental' and give them added protection . . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands." Id. at 642 (Stewart, J., concurring) (emphasis omitted). But cf. his dissenting opinion in Griswold v. Connecticut, 381 U.S. 479, 530: "With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court." (footnote omitted).

66. See note 67 infra.

67. Griswold v. Connecticut, 381 U.S. 479, 503 (1965) (White, J., concurring). Mr. Justice White took a pragmatic approach toward the statute involved. He believed that Connecticut's ban on the use of contraceptives by married couples did not in any way reinforce the State's ban on illicit sexual relationships. Id. at 505. This pragmatic approach was also reflected in his concurring opinion in Eisenstadt v. Baird, 405 U.S. at 460-65 (1972) (White, J., concurring). In Eisenstadt, the appellant was convicted for exhibiting contraceptive articles during a lecture, and for giving a young woman a package of vaginal foam at the close of his address. While recognizing that some contraceptives can be dangerous and should only be dispensed by those authorized to do so, Mr. Justice White concluded that: "Nothing in the record even suggests that the distribution of vaginal foam should be accompanied by medical advice in order to protect the user's health." Id. at 464.

68. See, e.g., his opinion in Weber v. Aetna Casualty, 406 U.S. 164, 171 (1972) (Blackmun, J., concurring). Mr. Justice Blackmun concurred with the opinion of Mr. Justice White in Eisenstadt v. Baird, 406 U.S. at 460-65 (1972), and with the opinion of Mr. Justice Stewart in Oregon v. Mitchell, 400 U.S. 112, 530 (1970).

69. 406 U.S. 164 (1972).

The essential inquiry . . . is . . . inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger?[70]

The opinions of the various members of the Court indicate that a majority of the present Justices are willing to broaden the concept of fundamental rights, automatically extending the "compelling state interest" test into these areas. Despite the factual limitations in the instant case, it seems likely that the Court will broaden its concept of fundamental rights. However, the question of what particular rights will be classified as fundamental cannot be answered with any degree of certainty.

CONSTITUTIONAL LAW—State Statute Granting Juvenile Court Proceedings to Female Defendants Under the Age of Eighteen but Limiting Such Proceedings to Male Defendants Under the Age of Sixteen Held Violative of Equal Protection Clause. Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972).

Appellant, Danny Ray Lamb, when seventeen years of age, burglarized[1] an automobile, for which felony[2] he was tried and convicted as an adult. An Oklahoma statute required juvenile court proceedings for persons who were children at the time of their alleged offense.[3] Children were defined as males under sixteen years of age and females under eigh-

70. Id. at 167.

1. "Every person who breaks and enters any building or any part of any building, room, booth, tent, railroad car, automobile, truck, trailer, vessel or other structure or erection, in which any property is kept, or breaks into or forcibly opens, any coin operated or vending machine or device with intent to steal any property therein or to commit any felony, is guilty of burglary in the second degree." Okla. Stat. Ann. tit. 21, § 1435 (Supp. 1972).

2. Burglary in the second degree, because it is a crime punishable by imprisonment in the penitentiary for at least two years, Okla. Stat. Ann. tit. 21, § 1436 (1958), is a felony as defined in Okla. Stat. Ann. tit. 21, § 5 (1958).

3. Okla. Stat. Ann. tit. 10, § 1112(a) (Supp. 1972) provides in part: "a child who is charged with having violated any State statute or municipal ordinance shall not be tried in a criminal action, but in a juvenile proceeding in accordance with this Act. If, during the pendency of a criminal or quasi-criminal charge against any person, it shall be ascertained that the person was a child at the time of committing the alleged offense, the court shall transfer the case, together with all the papers, documents and testimony connected therewith, to the juvenile division of the court."

teen years of age.[4] On appeal to the Court of Criminal Appeals of Oklahoma, appellant argued that the statute denying him a juvenile court proceeding because of his age, but which would have granted such a proceeding to a female of the same age, violated the equal protection clause of the fourteenth amendment.[5] That court upheld appellant's conviction and the statute's constitutionality.[6] Appellant, again arguing that the statute denied him the equal protection of the laws, next sought a writ of habeas corpus from the United States District Court for the Northern District of Oklahoma. Like the Court of Criminal Appeals, the federal district court upheld the statute's constitutionality, and denied appellant the relief sought.[7] On appeal, the United States Court of Appeals for the Tenth Circuit reversed the lower federal court's decision, and held for the appellant, declaring the Oklahoma statute violative of the equal protection clause.[8]

4. Law of May 3, 1968, ch. 282, § 101(a), [1968] Okla. Laws 444. A child is now defined as "any person under the age of eighteen (18) years." Okla. Stat. Ann. tit. 10, § 1101(a) (Supp. 1972). Thus, if a seventeen year old male were to burglarize an automobile today in Oklahoma, he would have the benefits of a juvenile court proceeding. The change came too late to aid defendant Lamb who committed his offense on August 3, 1969.

5. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend XIV, § 1.

6. Lamb v. State, 475 P.2d 829 (Okla. Crim. App. 1970).

7. Lamb v. Brown, No. 71-C-63 (N.D. Okla., May 21, 1971).

8. Lamb v. Brown, 456 F.2d 18 (10th Cir. 1972). Ensuing decisions of Oklahoma's Court of Criminal Appeals, applying Lamb v. Brown, made appellant Lamb's victory in the United States Court of Appeals for the Tenth Circuit Pyrrhic as to defendants of like age and opposite sex. Schaffer v. Green, 496 P.2d 375 (Okla. Crim. App. 1972) interpreted the federal decision as holding the 1968 statute unconstitutional in toto. The court next went on to declare unconstitutional a later Oklahoma statute (Law of April 15, 1970, ch. 226, § 2, [1970] Okla. Laws 370 (repealed 1972)), which contained provisions similar to the 1968 law. The court then determined that Okla. Stat. Ann. tit. 21, § 152 (1958), which stated that a child under seven years of age was incapable of committing a crime, and that a child over seven years of age and under fourteen years of age is capable of committing a crime if he knew of the act's wrongfulness, was the applicable statute in defining a child for the purpose of granting a juvenile court proceeding. Thus, the highest age at which one could get a juvenile court proceeding was fourteen. The situation was rectified by the passage of Okla. Stat. Ann. tit. 10, § 1101(a) (Supp. 1972), which defined a child as a person under eighteen years of age. In light of § 1101(a) which went into effect on April 4, 1972, at 4:00 p.m., Freshour v. Turner, 496 P.2d 389 (Okla. Crim. App. 1972), held that if a person committed a crime before 4:00 p.m. of April 4, 1972, and was not yet fourteen years of age at the time the alleged act was committed, he was to

In applying the equal protection clause, the United States Supreme Court has utilized two approaches.[9] The first is the reasonable purpose

have a hearing to determine if he knew of the wrongfulness of his act, and if it were decided that he knew of the wrongfulness of his act, he would get a juvenile court proceeding. If a person were over fourteen years of age, he would be treated as an adult.

It is interesting to note that the judge who wrote the Freshour decision and concurred in the Schaffer decision was the same judge who, before his appointment to the Court of Criminal Appeals in January 1972, sentenced the defendant. In sentencing Danny Ray Lamb, Judge Robert D. Simms of the District Court of Tulsa County rejected the defense attorney's argument that the statute denying juvenile court proceedings to males between the ages of sixteen and eighteen was unconstitutional as violating the equal protection clause of the fourteenth amendment. There is a question as to whether Judge Simms, as an appellate judge, should have disqualified himself, under Okla. Stat. Ann. tit. 20, § 1402 (Supp. 1972), from similar cases involving nominally different 16-18 year olds.

Arguments can be made to show that the Court of Criminal Appeals's application of Lamb v. Brown is not necessarily correct. The issue before the United States Court of Appeals was the unconstitutionality of excluding 16-18 year old males from juvenile court proceedings. On remand from the court of appeals, the federal district court decided to vacate Lamb's conviction, apparently interpreting the higher court's decision as elevating 16-18 year old males to the same status as like-aged females. Lamb v. Brown, No. 71-C-63 (N.D. Okla., April 20, 1972). The Supreme Court, when finding a statute repugnant to the equal protection clause, has usually elevated a previously unfavored group, and not struck down a previously favored group. Thus, in Reed v. Reed, 404 U.S. 71 (1971), where a statute which favored the granting of letters of administration to males was held violative of equal protection, males were not to be disfavored as were females, but females were to be favored as were males. But in Reed the Court had no choice but to elevate a previously unfavored group, for to do otherwise would mean that no one would be able to be administrators. In Reed the choice was either to grant letters of administration to males and females on an equal basis or to grant no letters of administration. Since the latter alternative would have been untenable, the Court had to accept the former. But, it is possible to cure a statute by lowering a previously favored group to the same level as a previously unfavored group. In Skinner v. Oklahoma ex rel Williamson, 316 U.S. 535 (1942), where a statute to sterilize some criminals of one class was declared unconstitutional, the United States Supreme Court gave the Oklahoma Supreme Court the choice of either enlarging the group to include all criminals of one class, i.e., lowering a previously favored group, or contracting the group, i.e., raising a previously unfavored group. It can be said, therefore, that the Oklahoma Court of Criminal Appeal decisions and the district court's decision were permissible, but the latter's decision was the far more humane.

9. For a discussion of the application of the equal protection clause see Tussman & TenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949),

test,[10] which, as applied to equal protection, is premised on the belief that states are unable to function well without some classification of their citizens.[11] The Court defers to the legislature, allowing it to judge a local situation and make distinctions accordingly, but the distinction must admit of a reasonable construction consistent with a legitimate governmental goal.[12] The classification or distinction drawn by the legislature is presumed to be constitutionally valid.[13] Thus, a party who challenges the classification's constitutionality has the burden of proof,[14] which he may meet by showing either that the purpose of the statute is not founded upon a permissible state interest,[15] or that the classification is not reasonably related to the statute's purpose.[16] In either case, the Court will determine the statute's purpose, which may be ascertained from the statutory language, but, if that proves unenlightening, the Court will look at "general public knowledge about the evil sought to be remedied, prior law, accompanying legislation, enacted statements of purpose, formal public pronouncements, and internal legislative history."[17] The purpose need not be specific; a general purpose will suffice.[18] The Court, under the reasonable purpose approach, will accept any reasonably conceivable purpose which is able to support the presumption of constitutionality.[19] To be held unconstitutional the classification has to be "palpably arbitrary."[20]

The second approach is the "compelling state interest" test.[21] Here,

which was updated by Developments in the Law—Equal Protection, 82 Harv. L. Rev. 1065 (1969) [hereinafter cited as Developments].

10. See generally Developments, supra note 9, at 1077-87.

11. Dandridge v. Williams, 397 U.S. 471, 485 (1970); Everson v. Board of Educ., 330 U.S. 1, 6-7 (1947); Barbier v. Connolly, 113 U.S. 27, 31-32 (1885).

12. See, e.g., Reed v. Reed, 404 U.S. 71, 75-76 (1971); Kotch v. Board of River Port Pilots Comm'rs, 330 U.S. 552, 556 (1947).

13. McDonald v. Board of Election Comm'rs, 394 U.S. 802, 808-09 (1969); McGowan v. Maryland, 366 U.S. 420, 425 (1961).

14. Metropolitan Cas. Ins. Co. v. Brownell, 294 U.S. 580, 584 (1935); Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 79-80 (1911).

15. Shapiro v. Thompson, 394 U.S. 618 (1969).

16. Allied Stores v. Bowers, 358 U.S. 522 (1959); Railway Express Agency v. New York, 336 U.S. 106 (1949).

17. Developments, supra note 9, at 1077 (footnote omitted).

18. See, e.g., Goesaert v. Cleary, 335 U.S. 464 (1948).

19. Id. See also McGowan v. Maryland, 366 U.S. 420 (1961).

20. International Harvester Co. v. Missouri, 234 U.S. 199, 215 (1914).

21. See generally, Developments, supra note 9, at 1087-132. An example of compelling state interest is national defense in time of war. Korematsu v. United States, 323 U.S. 214 (1944). Besides compelling state interests, the courts speak,

there is no presumption of constitutional validity.[22] The state has the burden of proving that the classification is related to some overriding state purpose,[23] *i.e.*, the classification "must be shown to be necessary to the accomplishment of some permissible state objective."[24] Reasonableness is not enough. The Court will not be inclined to accept any purpose; the purpose must be specific.[25] The classification will be subjected to "strict scrutiny."[26] The "compelling state interest" test is used, however, only when the statute under review affects "fundamental interests" or is based on "suspect classifications." The Supreme Court has included as "fundamental interests" voting[27] and procreation.[28] Race[29] and national ancestry[30] are at least two "suspect classifications." In those equal protection cases where the Supreme Court has applied the "compelling state interest," test, it has often found invidious discrimination. In *Carrington v. Rash*,[31] the Court held that the provision of the Texas Constitution denying servicemen stationed in Texas the right to vote in state elections was an invidious discrimination against servicemen who were bona fide residents of Texas. There the fundamental interest of voting had been abridged, and the related discrimination invidious.

In dealing with sex discrimination, the courts, until recently, have generally not decided the issues before them with detachment. Two law professors write:

[B]y and large the performance of American judges in the area of sex discrimina-

frequently in areas other than equal protection, of permissible state interests, examples of which are protection of the young from obscenity, Ginsburg v. New York, 390 U.S. 629 (1968), and discouragement of extra-marital sex, Griswold v. Connecticut, 381 U.S. 479, 498 (1964) (concurring opinion). Permissible state interest may be spoken of in equal protection cases utilizing the reasonable purpose test, for a state presumably will have a purpose in enacting a statute.

22. Kramer v. School Dist., 395 U.S. 621, 627-28 (1969); Sei Fujii v. State, 38 Cal. 2d 718, 242 P.2d 617 (1952).

23. See, e.g., McLaughlin v. Florida, 379 U.S. 184 (1964).

24. Loving v. Virginia, 388 U.S. 1, 11 (1967).

25. See, e.g., Korematsu v. United States, 323 U.S. 214 (1944).

26. Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 541 (1942). There are areas outside of equal protection where the Court will carefully scrutinize a statute. These areas include first amendment rights, McGowan v. Maryland, 366 U.S. 420, 449 (1960), and those within the "penumbra" of the Bill of Rights, Griswold v. Connecticut, 381 U.S. 479, 497 (1964) (concurring opinion).

27. See, e.g., Harper v. Board of Elections, 383 U.S. 663 (1966).

28. See Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535 (1942).

29. See, e.g. McLaughlin v. Florida, 379 U.S. 184 (1964)

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

31. 380 U.S. 89 (1965)

tion can be succinctly described as ranging from poor to abominable. With some notable exceptions, they have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues.[32]

True, the above conclusion was drawn from cases concerned in the main with discrimination against women, but it is the principles set up in those cases which will be applied to other sex discrimination cases, including sex discrimination against men. In the past, courts were reluctant to hold that sex discrimination violated equal protection of the laws. The question presented itself: would courts continue to be so reluctant, and if not, which test would they apply? The Supreme Court, deciding this issue in 1971,[33] was confronted with two alternatives.

The first alternative was to apply the reasonable purpose test to sex discrimination cases, continuing a practice which was last seen in *Goesaert v. Cleary*.[34] In that case, the Court examined a Michigan statute[35] which limited the licensing of bartenders to males and to the wives and daughters of the male owner of a licensed liquor establishment. The petitioners argued that to allow some women the opportunity to become barmaids, but to deny that opportunity to other women was a violation of equal protection.[36] The Court gave short shrift to petitioners' contention, stating in a nebulous way:

Since bartending by women may, in the allowable legislative judgment, give rise to moral and social problems against which it may devise preventive measures, the legislature need not go to the full length of prohibition if it believes that as to a defined group of females other factors are operating which either eliminate or reduce the moral and social problems otherwise calling for prohibition.[37]

The decision, an example of restrained review,[38] utilized the reasonable purpose test in applying the equal protection clause. The Court was satisfied by finding that the purpose of the statute under review was to prevent "moral and social problems" from arising. It did not question what these problems were. The petitioners failed to overcome the pre-

32. Johnston & Knapp, Sex Discrimination by Law: A Study in Judicial Perspective, 46 N.Y.U. L. Rev. 675, 676 (1971).

33. Reed v. Reed, 404 U.S. 71 (1971).

34. 335 U.S. 464 (1948).

35. Mich. Stat. Ann. § 18.990(1) (Supp. 1947).

36. Goesaert v. Cleary, 335 U.S. 464 (1948).

37. Id. at 466.

38. In Kotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947), the Court, in an extreme example of restrained review, said that nepotism in the selection of river pilots may be intended to promote public safety.

sumption of the statute's constitutionality by failing to show that the purpose of the statute was not a legitimate goal, and that the classification was not reasonably related to the statute's purpose. The Court, in effect, accepted a phrase of little substance and called it a purpose with which to deny a significant portion of Michigan's population an employment opportunity.

The second alternative, the "compelling state interest" test, was utilized by the California Supreme Court in *Sail'er Inn, Inc. v. Kirby*.[39] The statute in question prohibited women from serving as barmaids except when they were licensees, wives of licensees, or were, singly or with their husbands, the sole shareholders of a corporation holding a license. Among other grounds, the petitioners attacked the statute as violative of the equal protection clause. The court applied the "compelling state interest" test. First, it held "[t]he right to work and the concomitant opportunity to achieve economic security and stability are essential to the pursuit of life, liberty and happiness,"[40] and are thus fundamental interests. In so holding, the court quoted the United States Supreme Court: "the right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of [the Fourteenth] Amendment to secure."[41] The court next held that sex was a suspect classification. Justice Peters, writing for a unanimous court, reasoned:

> Sex, like race and lineage, is an immutable trait, a status into which the class members are locked by the accident of birth. What differentiates sex from the nonsuspect statuses, such as intelligence or physical disability, and aligns it with the recognized suspect classifications is that the characteristic frequently bears no relation to ability to perform or to contribute to society. The result is that the whole class is relegated to an inferior legal status without regard to the capabilities or characteristics of its individual members. . . .
>
> Another characteristic which underlies all suspect classifications is the stigma of inferiority and second class citizenship associated with them. Women, like Negroes, aliens, and the poor have historically labored under severe legal and social disabilities. Like black citizens, they were, for many years, denied the right to vote and, until recently, the right to serve on juries in many states. They are excluded from or discriminated against in employment and educational opportunities.[42]

39. 5 Cal. 3d 1, 485 P.2d 529, 95 Cal. Rptr. 329 (1971).

40. Id. at 17, 485 P.2d at 539, 95 Cal. Rptr. at 339.

41. Id., 485 P.2d at 539, 95 Cal. Rptr. at 339, quoting Truax v. Raich, 239 U.S. 33, 41 (1915).

42. 5 Cal. 3d at 18-19, 485 P.2d at 540-41, 95 Cal. Rptr. at 340-41 (citations omitted).

Holding, therefore, that the statute under review affected a fundamental interest and was based on a suspect classification, the court applied the "compelling state interest" test. The compelling state interest alleged was the protection of the public from improprieties and unwholesome influences and was based upon two premises. The first rationale was "that women who do not have an interest by way of ownership or marriage in the liquor license will not be sufficiently restrained from committing 'improprieties.' "[43] That reasoning was held to be arbitrary and illogical. "There is no reason to believe that women bartenders would have any less incentive than male bartenders to obey the laws governing the sale of alcoholic beverages and the rules set down by their employers in order to retain their jobs and promote their own well-being."[44] The second rationale was "that women bartenders would be an 'unwholesome influence' on young people and the general public."[45] This rationale failed because California statutes "permit women to work as cocktail waitresses, serve beer and wine from behind a bar, or tend bar if they or their husbands hold a liquor license."[46]

The challenge having been drawn, the Supreme Court decided in *Reed v. Reed*[47] not to apply the compelling state interest test to sex discrimination cases as *Sail'er Inn* had done, but neither did it apply the reasonable purpose test quite as *Goesaert* had. In *Reed* the Court was presented with an Idaho statute that favored the appointment of men over women as administrators of estates.[48] Richard Reed, a minor, died intestate. His adopted mother petitioned an Idaho court to have herself named administratrix of her son's estate. Cecil Reed, Richard's adopted father, who was estranged from his wife, also petitioned to be named administrator of his son's estate. The lower court, following the Idaho statute, granted Cecil Reed's petition. On appeal, petitioner argued that the statute violated the equal protection clause. The Court applied the reasonable purpose test.[49] The purpose of the statute under review, as con-

43. Id. at 20, 485 P.2d at 541, 95 Cal. Rptr. at 341.

44. Id., 485 P.2d at 542, 95 Cal. Rptr. at 342.

45. Id., 485 P.2d at 541, 95 Cal. Rptr. at 341.

46. Id. at 21, 485 P.2d at 542, 95 Cal. Rptr. at 342 (citation omitted).

47. 404 U.S. 71 (1971).

48. Probate Practice Act, ch. 3, § 53, [1864] Idaho Laws 335 (repealed 1972).

49. Although the Court failed to apply the compelling state interest test, this does not mean that future courts will not hold sex to be a suspect classification. The Court in Reed had no reason to proceed beyond the reasonable purpose test.

cluded by the Idaho Supreme Court[50] and accepted by the United States Supreme Court, was to reduce "the workload on probate courts by eliminating a class of contests."[51] Without going into details, Mr. Chief Justice Burger, writing for a unanimous Court, concluded:

> To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.[52]

If the Supreme Court had decided *Reed* utilizing a restrained review approach, it may well have concluded that the purpose was reasonable, leaving it to the state legislature to decide how to grant letters of administration. But the days of restrained review seem to be over. The presumption of a statute's constitutionality seems to have weakened. The petitioner retains the burden of proof, but it does not seem as great as it once did. In *Goesaert*, the Court was willing to accept a purpose couched in meaningless words. In *Reed*, the Court refused to accept a purpose of specific words. It seems that the Court will no longer accept any purpose. The purpose will now be subjected to a true test of reasonableness and the Supreme Court will accept only those that meet its broadened anti-discriminatory standards.

To this legal mire is added *Lamb v. Brown*,[53] where a statute was challenged as being violative of the equal protection clause for denying juvenile court proceedings to males between the ages of sixteen and eighteen but granting such proceedings to females in the same age group. The Court of Criminal Appeals of Oklahoma upheld the constitutionality of the statute that the federal court was later to declare unconstitutional. It reasoned:

> [A]s we view the section of the statutes, we do not find it to be so repugnant to the Constitution of the United States as defendants would attempt to lead the Court to believe. As we view the situation, the statute exemplifies the legislative

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Having found no rational basis for the distinction drawn, it did not have to face the compelling state interest test to declare the statute unconstitutional.

50. 93 Idaho 511, 465 P.2d 635 (1970), rev'd, 404 U.S. 71 (1971).

51. 404 U.S. at 76. The statute under review was enacted in 1864 when Idaho was a territory not yet sufficiently populated to qualify for statehood. It seems unlikely that the purpose of the statute at the time of enactment was to reduce the workload of the probate courts. It is more likely that the statute favored men because women of that era lacked business experience. The purpose reviewed was the modern purpose of the statute.

52. Id.

53. 456 F.2d 18 (10th Cir. 1972).

judgment of the Oklahoma State Legislature, premised upon the demonstrated facts of life; and we refuse to interfere with that judgement.[54]

The purpose of the statute then was "premised on the demonstrated facts of life."[55] If the tenth circuit were to have followed *Goesaert* strictly, it would have accepted the reasoning of the Oklahoma court, and held the purpose to be reasonable, or at least not palpably arbitrary. But the court of appeals in *Lamb* followed, without referring to it, *Reed v. Reed*,[56] refusing to accept the reasoning of Oklahoma's Court of Criminal Appeals. Circuit Judge Barrett, writing for a unanimous court, held:

Lamb v. State . . . is not helpful in our search for a rational justification for the disparity in treatment between 16-18 year old males and 16-18 year old females under the statute. "Demonstrated facts of life" could mean many things. The "demonstrated facts" which the Court relied upon are not spelled out. They are not obvious or apparent. We therefore cannot weigh them to determine if they "might suffice to characterize the classification as reasonable rather than arbitrary and invidious."[57]

The court in *Lamb* demands a specific purpose. It is on new ground, for the Supreme Court has not expressly required a specific purpose when applying the equal protection clause to sex discrimination cases. It may well be that the court's approach is a belief that the purpose will be obvious to rational judges. Nevertheless, the Court in *Reed* was presented with a specific purpose although this was not required by its prior decisions. In any event, the tenth circuit in *Lamb* required such a specific purpose. Even though the reasonable purpose test will be applied, it is not the traditional one exemplified by *Goesaert*. The court in *Lamb* has adopted an element of the "compelling state interest" test, *i.e.*, specificity of purpose. Should the purpose fail to be specific as in *Lamb*, the court will be unable to apply the reasonable purpose test at all.

The purpose itself, then, will have to be tested to determine if it is substantial enough to have the reasonableness test applied to it. Although there are no cases in point, the courts presumably will first apply tests of vagueness[58] and overbreadth[59] to the purpose to determine if it is sufficiently specific. In *Lamb* the court is seemingly doing this when writing,

54. Lamb v. State, 475 P.2d 829, 830 (Okla. Crim. App. 1970).

55. Benson v. State, 488 P.2d 383 (Okla. Crim. App. 1971) and Johnson v. State, 476 P.2d 397 (Okla. Crim. App. 1970) subsequently approved the "demonstrated facts of life" reasoning of Lamb v. State.

56. 404 U.S. 71 (1971).

57. 456 F.2d at 20.

58. See, e.g., Palmer v. Euclid, 402 U.S. 544 (1971).

59. See, e.g., Coates v. Cincinnati, 402 U.S. 611 (1971).

" '[d]emonstrated facts of life' could mean many things."[60] If the purpose is broad, encompassing too great an area, the purpose will be constitutionally defective. Likewise, if the purpose is general, vague, lacking in specificity, it too will fail. If the purpose is found wanting on either ground, the statute will be declared unconstitutional. But, once the purpose survives to this point, the courts will be able to apply the reasonable purpose test and decide if the purpose is within the equal protection clause.

Specificity of purpose is not the only new ground upon which *Lamb v. Brown* is based, for the court, in going beyond *Reed*, has shifted the burden of proof. Prior to *Lamb* the appellant had to show the unreasonableness of the legislative classification. The court said it did not know what the "demonstrated facts of life" were, and so could not weigh the reasonableness of such classification. But, under the reasonable purpose test, that is not its job. The Court previously presumed a statute constitutional, and left the burden upon the appellant to prove either that the legislature had no power regarding the purpose,[61] or that the classification was not reasonably related to the legislature's purpose.[62] This court presently implies that even if the appellant did nothing, the statute would still fall because no grounds existed on which the court could determine its reasonableness of classification. This is a significant departure from the reasonable purpose test.

The tenth circuit has blurred the distinctions between the reasonable purpose test and the "compelling state interest" test, presenting a new hybrid test to determine if a statute that discriminates on the basis of sex violates the equal protection clause. *Lamb v. Brown* may well represent the manner in which sex discrimination cases are to be decided; however, until the Supreme Court has had further opportunity to review sex discrimination cases, a trend cannot be posited with any certainty. Yet, *Lamb v. Brown* is the product of a new era, where a classification on account of sex is questioned and subjected to opprobrium, and where sex discrimination, in whatever form, is denounced by vocal elements in society. That *Lamb v. Brown* is a reaction to this new level of consciousness is quite likely. It very well may be a sound reaction, as an attempt to deal with an old problem in the light of today's world. Federal courts, having failed to extend the "compelling state interest" test to sex dis-

60. 456 F.2d at 20.

61. Shapiro v. Thompson, 394 U.S. 618 (1969).

62. Allied Stores v. Bowers, 358 U.S. 522 (1959); Railway Express Agency v. New York, 336 U.S. 106 (1949).

crimination cases as *Sail'er Inn* had done, are perhaps able to handle the new consciousness of sex discrimination by applying a test that is a cross between the reasonable purpose test and the "compelling state interest" test. However, though *Lamb v. Brown* is the law of the Tenth Circuit, it cannot be said with certainty that it is the law of the United States. Supreme Court cases not yet decided will give the answer.

CRIMINAL LAW—Commerce Power Used to Prohibit Intrastate as well as Interstate Loan Sharking—Title II of the Consumer Credit Protection Act Declared Constitutional. Perez v. United States, 402 U.S. 146 (1971).

Petitioner loaned a small storekeeper $1,000, which was to be repaid in fourteen weekly installments of $105. Six or eight weeks later the payments were increased to $130. In two months the storekeeper borrowed another $2,000, and his payments were increased to $205 per week. In a few weeks, petitioner insisted that payments of $330 a week be made. The storekeeper agreed after being told of a man who was hospitalized after refusing to make such payments. The payments were subsequently increased to $500, then $1,000 per week. Finally the storekeeper contacted the FBI. Petitioner was arrested and convicted of making an extortionate extension of credit,[1] a violation of the Consumer Credit Protection Act.[2] Petitioner claimed that Congress had exceeded its powers in enacting this statute, since loan sharking was a local activity which did not fall under the commerce clause of the Constitution.[3] The Court

1. 18 U.S.C. § 891 (1970) provides in part:
"(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.
(7) An extortionate means is any means which involves the use, or an express or implicit threat of [sic] use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

2. 18 U.S.C. §§ 891-96 (1970). The Act is also referred to as the Extortionate Credit Transactions Act.

3. U.S. Const. art. I, § 8. In addition to the commerce power, Congress relied on its power under the bankruptcy clause of the Constitution to sustain the Act. See Congressional Findings and Declaration of Purpose following 18 U.S.C. § 891 (1970). The Court in Perez did not reach petitioner's claim that the Act was an

of Appeals for the Second Circuit,[4] and subsequently the Supreme Court, affirmed petitioner's conviction, holding that the Act was within the power of Congress to control activities affecting interstate commerce under the commerce clause.[5]

From early in our nation's history to the present, the Supreme Court has had to decide the scope of the commerce power.[6] The Court in *Perez* stated that the commerce clause reaches three categories of problems: (1) the use of channels of interstate commerce which Congress deems are being misused, (2) the protection of the instrumentalities of interstate commerce or persons or things in commerce, and (3) the activities affecting commerce.[7]

The Supreme Court was first called upon to consider congressional power with regard to regulation of commerce in *Gibbons v. Ogden*.[8] Ogden had an exclusive right under a New York statute to operate steamboats in New York waters. He obtained an injunction to restrict Gibbons from operating steamboats in New York waters, although Gibbons had a federal license to operate between New York and New Jersey. The Court held that Congress had the power to issue the license under the commerce clause and that New York's attempt to restrict interstate commerce was invalid.[9]

Although some subsequent decisions[10] narrowed the broad view of

improper exercise of congressional power under the bankruptcy clause because it sustained the Act under the commerce power. Several lower courts did sustain the Act under the bankruptcy clause. See United States v. Fiore, 434 F.2d 966 (1st Cir. 1970), cert. denied, 402 U.S. 973 (1971); United States v. Calegro De Lutro, 435 F.2d 255 (2d Cir. 1970); United States v. Curcio, 310 F. Supp. 351 (D. Conn. 1970).

4. United States v. Perez, 426 F.2d 1073 (2d Cir. 1970), aff'd 402 U.S. 146 (1971).

5. Perez v. United States, 402 U.S. 146 (1971).

6. See, e.g., Maryland v. Wirtz, 392 U.S. 183 (1968); United States v. E. C. Knight Co., 156 U.S. 1 (1895); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824). See also U.S.C.A. Const., art. I, § 8, cl. 3 (1968), and cases cited therein.

7. 402 U.S. at 150, citing 18 U.S.C. §§ 2312-15 (1970) (shipment of stolen goods); 18 U.S.C. § 32 (1970) (destruction of aircraft); 18 U.S.C. § 659 (1970) (thefts from interstate shipment).

8. 22 U.S. (9 Wheat.) 1 (1824).

9. Id. at 105 (9 Wheat. at 239).

10. See, e.g., Carter v. Carter Coal Co., 298 U.S. 238 (1936); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Railroad Retirement Bd. v. Alton R.R., 295 U.S. 330 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918); Employers' Liab. Cases, 207 U.S. 463 (1908).

the commerce clause enunciated in *Gibbons*, the broader view has been reaffirmed by later cases.[11] In *NLRB v. Jones & Laughlin Steel Corp.*,[12] the company argued that the NLRB's decision that the company was engaging in unfair labor practices was an attempt to regulate labor relations between employers and employees and not a regulation of interstate commerce. The Court, however, ruled that the important factor was whether the activity affected interstate commerce.[13] If so, the activity can be regulated by Congress.[14]

This "affectation theory" was also employed by the Court in *United States v. Darby*[15] where the validity of the Fair Labor Standards Act of 1938[16] was considered. There the Court sustained Congress' power to exclude from interstate commerce goods which were produced under conditions violating the minimum wages and maximum hours provisions of the Act. The Court held that the power of Congress "extends to those activities intrastate which so affect interstate commerce. . . ."[17]

In 1942, the Supreme Court, in *Wickard v. Filburn*,[18] upheld federal regulation of wheat production, including wheat grown solely for home consumption. The Court held that even though the activity regulated was local in nature and appellee's demand for wheat may have been trivial by itself, the activity could still be reached by Congress if the total effect of appellee's activity on interstate commerce, taken together with that of many others similarly situated, was substantial.[19]

The "affectation theory" was also employed by the Court in two companion cases[20] to sustain the validity of Title II of the Civil Rights Act of 1964.[21] This Act was a deliberate attempt by Congress to eliminate racial discrimination in certain public accommodations,[22] activities which were argued to be purely local and thus beyond the reach of

11. See notes 15-34 infra and accompanying text.
12. 301 U.S. 1 (1937).
13. Id. at 31.
14. Id. at 37.
15. 312 U.S. 100 (1941).
16. 29 U.S.C. §§ 201-19 (1970) (originally enacted as Act of June 25, 1938, ch. 676, 52 Stat. 1060).
17. 312 U.S. at 118.
18. 317 U.S. 111 (1942).
19. Id. at 125, 127-28.
20. Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964); Katzenbach v. McClung, 379 U.S. 294 (1964).
21. 42 U.S.C. §§ 2000a to 2000a-6 (1970).
22. S. Rep. No. 872, 88th Cong., 2d Sess. 1 (1964).

Congress.[23] In *Katzenbach v. McClung*, the Court "found that a substantial portion of the food served in the restaurant had moved in interstate commerce."[24] In holding the proper measure to be the effect on commerce of the class of activities regulated, the *McClung* Court said that Congress appropriately considered the "total incidence"[25] of discrimination on commerce.[26] However, merely finding that the class of activities regulated by Congress has some substantial effect on commerce is not conclusive of the Act's constitutionality. In *Heart of Atlanta Motel v. United States* the effect on interstate commerce was found to be that the motel was readily accessible to interstate highways and seventy-five per cent of its guests were from out of state.[27] The Court, however, enunciated an additional twofold test to determine constitutionality: (1) Congress must have "a rational basis for finding that racial discrimination by motels affected commerce . . . ,"[28] and (2) having established this basis, the government must then prove that the means selected by Congress to remedy this discrimination were "reasonable and appropriate."[29]

In *Maryland v. Wirtz*,[30] the Court upheld the extension of the Fair Labor Standards Act[31] to employees of enterprises such as hospitals, nursing homes and schools.[32] Relying on earlier cases,[33] the Court held that where the class of activities is rationally defined by Congress, and that class of activities affects interstate commerce, it is within the reach of federal power, and the courts have no power "to excise, as trivial, individual instances" of the class.[34]

The Court in *Perez* relied on the above cases to justify the loan sharking portion of the Consumer Credit Protection Act. It should be noted that the Court in so doing relied most heavily on civil cases. This may

23. 379 U.S. 241, 258; 379 U.S. 294, 298-99.

24. 379 U.S. at 296-97.

25. The phrase "total incidence," as used by the Court, referred to the aggregate impact on commerce of a large number of both small and large restaurants that discriminate.

26. 379 U.S. 294, 301.

27. 379 U.S. 241, 243.

28. Id. at 258.

29. Id. at 258-59.

30. 392 U.S. 183 (1968).

31. 29 U.S.C. §§ 201-19 (1970).

32. Id. § 203(s)(4).

33. 392 U.S. at 193. See, e.g., Katzenbach v. McClung, 379 U.S. 294 (1964); Polish Nat'l Alliance v. NLRB, 322 U.S. 643 (1944); Wickard v. Filburn, 317 U.S. 111 (1942).

34. 392 U.S. at 193.

have been for two reasons. In the first place, the Act, while providing criminal penalties,[35] is ostensibly designed to regulate certain economic transactions. Secondly, the Act probably could not have been sustained solely on the state of the law regarding federal criminal statutes.

In an earlier commerce clause case, involving a criminal statute,[36] the Court allowed federal regulatory power to be invoked to exclude lottery tickets from interstate shipment, noting that the power was being exercised to protect the public welfare. In upholding the White-Slave Traffic Act,[37] the Court allowed Congress to prohibit the transportation of a woman across state lines for prostitution or other immoral purposes.[38] The direct use of channels of interstate commerce was an element necessary for federal jurisdiction in both these cases. This requirement was deemed vital in the case of *United States v. Five Gambling Devices*[39] wherein the Court refused to allow indictments under a federal act[40] that required sales and deliveries of gambling devices to be reported, and also required the registration of such devices. The Court found the important factor to be that the government did not allege that defendant either "bought, sold or moved gambling devices in interstate commerce. . . ."[41]

Two sections of the Anti-Racketeering Act[42] were the forerunners of the Extortionate Credit Transactions Act. They require a direct link to interstate commerce in that they prohibit both interference with interstate commerce by robbery or extortion[43] and traveling in interstate commerce or using interstate facilities to aid in racketeering enterprises.[44] Both earlier[45] and more recent federal legislation[46] also required the same type of connection with interstate commerce. Such a standard was missing from the Act challenged in *Perez* and formed a basis of petitioner's argument in the court of appeals. Appellant argued that the statute

35. See note 77 infra. It was also apparent that the legislative thrust was to prevent criminal activity. See note 53 infra.

36. Lottery Case, 188 U.S. 321, 356-58 (1903).

37. 18 U.S.C. §§ 2421-24 (1970).

38. Hoke v. United States, 227 U.S. 308 (1913).

39. 346 U.S. 441 (1953).

40. Act of Jan. 2, 1951, ch. 1194, § 3, 64 Stat. 1135.

41. 346 U.S. at 442.

42. 18 U.S.C. §§ 1951-55 (1970).

43. Id. § 1951.

44. Id. § 1952.

45. Id. § 1201 (originally enacted in 1932).

46. 18 U.S.C. § 2101 (prohibiting the crossing of state lines or using facility of interstate commerce to incite riot) (originally enacted in 1968).

under which he was convicted was unconstitutional because it allowed a conviction for a purely intrastate activity and prohibited all extortionate credit transactions without requiring the government to prove a connection between that activity and interstate commerce.[47] The court rejected these arguments,[48] and declared that the intrastate activity could be regulated since Congress had made a rational determination that the activity had an effect on interstate commerce and that individual proof of effect on commerce is not required in each case.[49]

On appeal,[50] the Supreme Court decided that petitioner was a member of the class whose activities are to be regulated, *i.e.*, one who is engaged in "extortionate credit transactions."[51] Once it was determined that petitioner fell within the class, the Court then had to decide whether the class of activities to be regulated was within the reach of federal power.[52] The Court based its decision largely on evidence presented to Congress.

When Congress passed the Consumer Credit Protection Act, it included strong findings of fact and declarations of purpose which left no doubt that the Act was designed to combat organized crime's loan sharking activities.[53] The evidence upon which Congress had based the Act was abundant. The amendment which ultimately was to become the "loan

47. 426 F.2d 1073, 1074-75 (2d Cir. 1970), aff'd, 402 U.S. 146 (1971).

48. Id. at 1081.

49. Id. at 1078.

50. Perez v. United States, 402 U.S. 146 (1971).

51. Id. at 153.

52. Id. at 152, citing United States v. Darby, 312 U.S. 100, 120-21 (1941).

53. Congress made the following "Findings and Declaration of Purpose" in a note to 18 U.S.C. § 891 (1970):

"(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce."

shark" portion of the Act grew out of a "profound study of organized crime"[54] made by twenty-three Congressmen. In addition, two articles were entered into the Congressional Record, one showing the connection between loan sharking and organized crime[55] and the other containing a report of New York City law enforcement officials concerned with loan sharking.[56]

With reference to loan sharking as a class of activities affecting interstate commerce, the Court noted the evidence presented to Congress and found that "[t]he findings by Congress are quite adequate on that ground,"[57] even though the extortionate credit transaction may be purely intrastate. Apparently the Court took this finding to satisfy not only the "affectation theory" but also the standards established in *Heart of Atlanta Motel*[58] which required a rational basis for the congressional finding. Although the Court did not specifically apply the standards it had set in that earlier case, it likewise must have found that the means selected by Congress to remedy the evil were reasonable and appropriate.[59]

It has been argued that the majority has gone too far in defining the scope of the commerce power.[60] Circuit Judge Hays in his dissenting

54. 114 Cong. Rec. 14391 (1968) (remarks of Representative McDade). The study was reported to Congress at 113 Cong. Rec. 24460 (1967).

55. "The loan shark, then, is the indispensable 'money-mover' of the underworld. He takes 'black' money tainted by its derivation from the gambling or narcotics rackets and turns it 'white' by funneling it into channels of legitimate trade. In so doing, he exacts usurious interest that doubles the black-white money in no time; and, by his special decrees, by his imposition of impossible penalties, he greases the way for the underworld takeover of entire businesses." Cook, If You Are Willing to Put Up Your Body for Collateral—Just Call "the Doctor" for a Loan, N.Y. Times, Jan. 28, 1968, § 6 (Magazine), at 19, col. 1 (reproduced in 114 Cong. Rec. 1429 (1968)).

56. "The problem, the law enforcement experts said, is to collect evidence of loan-sharking that will stand up in court and win convictions." In addition, "[l]oan-sharking seldom comes to the attention of the police . . . because loan-sharking involves a transaction in which two adults . . . participate willingly . . . ." N.Y. Times, Jan. 29, 1968, at 22, col. 1 (reproduced in 114 Cong. Rec. 1431 (1968)). The Perez Court recognized that Congress had considered the State of New York Report, Temporary Commission of Investigation, An Investigation of the Loan Shark Racket (1965), which showed that loan sharking was controlled by organized criminal syndicates. 402 U.S. 146, 155 (1971).

57. 402 U.S. at 155.

58. 379 U.S. 241 (1964).

59. See notes 29-30 supra and accompanying text.

60. See, e.g., Light, The Federal Commerce Power, 49 Va. L. Rev. 717 (1963); 49 Texas L. Rev. 568 (1971).

opinion in *United States v. Perez*[61] wrote that "if extortionate conduct unrelated to interstate commerce can be made a federal crime, so can such crimes as robbery, burglary and larceny."[62] Mr. Justice Stewart in his dissent stressed the fact that under the Act, a defendant could be "convicted without any proof of interstate movement, of the use of the facilities of interstate commerce, or of facts showing that his conduct affected interstate commerce."[63] He concluded, therefore, that the Act was an unconstitutional exercise of congressional power in attempting to regulate a purely local crime.[64] A similar view was also expressed during the congressional debate over the Act by Representative Eckhardt of Texas, who argued that loan sharking was a state offense and federal prosecution of it was a step toward the exercise of a general federal police power.[65]

Nevertheless, loan sharking is now within the province of federal laws, and it is likely to remain there because of its interstate nature[66] as viewed by the Court and Congress, and because of the states' inability to deal effectively with the problem.[67] The federal government is able to draw upon many resources not available to local governments, including the FBI and the strike forces.[68]

It was the general lack of adequate state control over loan sharking that caused Congress to consider the "loan shark" provision of the Consumer Credit Protection Act. With reference to loan sharking, Senator Proxmire of Wisconsin stated, "The problem simply cannot be solved by the states alone. We must bring into play the full resources of the Federal Government."[69]

The states have, in fact, faced many formidable problems in controlling the activities of loan sharks. The lower echelon loan sharks are easily replaced, their loss causing no hardship to the overall operation.[70]

61. 426 F.2d 1073 (2d Cir. 1970), aff'd, 402 U.S. 146 (1971).

62. Id. at 1082.

63. 402 U.S. at 157.

64. Id. at 158 (Stewart, J., dissenting).

65. 114 Cong. Rec. 1610 (1968) (remarks of Representative Eckhardt).

66. See note 53 supra, for the finding by Congress of which the Supreme Court in Perez took note.

67. See notes 69-73 infra and accompanying text.

68. "These are units of Federal anticrime operatives that move into cities that have unusual organized crime problems, in a coordinated effort to convict racketeers." N.Y. Times, Dec. 16, 1968, at 1, col. 8.

69. 114 Cong. Rec. 14490 (1968) (remarks of Senator Proxmire).

70. Johnson, Organized Crime: Challenge to the American Legal System, 53 J. Crim. L.C. & P.S. 399, 416 (1962).

Coupled with this is the difficulty in prosecuting the hierarchy of the operation, which is partially due to an inability to produce evidence since potential witnesses are often either "scared," "bought off," or are ignorant of the identity of those above them in the organization.[71] The failure of states to control loan sharking is also due to the failure of the banking and criminal usury laws of the states to deter loan sharking.[72] Further aggravating the problem is the acute fiscal situation facing the states which causes them to forego the creation of permanent units to combat organized crime.[73]

The Act contains many strong measures aimed at organized crime and is intended to remedy the problems that have plagued state attempts to prevent loan sharking.[74] It provides that there is prima facie evidence that the extension of credit is extortionate if all of the following elements are present:

(1) The debt is unenforceable in a state proceeding.
(2) The annual interest rate exceeds forty-five per cent.
(3) The debtor reasonably believes that the creditor had collected or attempted to collect extensions of credit by extortionate means or the creditor had a reputation for the use of such means of collection.
(4) A total in excess of $100 of credit was outstanding between the debtor and the creditor when the extension of credit was made.[75]

Another section of the Act,[76] aimed primarily at upper echelon loan sharks, prohibits the advancing of money when there are reasonable grounds to believe that it will be used directly or indirectly in extortion-

71. Id. at 417.

72. "Startling as it may seem, the Commission found, and all official witnesses agreed, that the absence of effective usury laws in this state was a significant factor in the underworld's move into loan-sharking." State of New York Report, Temporary Commission of Investigation, An Investigation of the Loan Shark Racket 16 (1965).

73. Loan-Sharking: The Untouched Domain of Organized Crime, 5 Colum. J.L. & Soc. Prob. 91, 109 (1969).

74. See notes 69-73 supra and accompanying text.

75. 18 U.S.C. § 892(b) (1970). In United States v. Calegro De Lutro, 435 F.2d 255 (2d Cir. 1970), the court went so far as to sustain defendant's conviction despite the fact that at trial the victim denied that any threats were made or that he was ever put in fear. The court decided that the testimony of three FBI agents to the contrary was enough to convict the defendant. This case seemingly controverts the requirements of § 892(b)(3).

76. 18 U.S.C. § 893 (1970).

ate credit transactions. Violations of the Act carry a maximum fine of $10,000 (or, in certain instances, twice the amount loaned) or twenty years in prison, or both.[77]

The Act does, however, have some recognizable limitations and has not reached the potential that Congress had foreseen. Law enforcement officials are still plagued by some of the problems which led to the passage of this Act.[78] In addition, this Act does not aid in the production of vital witnesses.[79] The repeal of the immunity provision,[80] problems in witness protection,[81] and the consensual nature of the crime[82] all contribute to the reluctance of the witnesses to testify. The Act is insufficient in remedying these problems.

In spite of the Act's shortcomings, however, the sustaining of the Act by the Supreme Court has ramifications that should be considered. A purely intrastate activity may now be enough to provide the "federal jurisdictional peg." This is a departure from traditional federal criminal statutes which have generally required a jurisdictional nexus such as transportation in,[83] interference with,[84] or use or destruction of an instrumentality of interstate commerce.[85] In other words, the earlier statutes protected interests that were federal.

When it passed the Extortionate Credit Transactions Act, Congress made clear its intent to prohibit all loan sharking, not simply interstate transactions.[86] The Act is a definite extension of federal criminal juris-

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77. 18 U.S.C. §§ 892(a), 893 (which permits a fine of twice the amount loaned), 894(a) (1970).

78. See supra notes 69-73 and accompanying text.

79. In a recent loan-sharking trial, the record indicated that seven key prosecution witnesses failed to appear to testify against the defendant. N.Y. Times, Dec. 8, 1971, at 57, col. 6.

80. Act of Oct. 15, 1970, Pub. L. No. 91-452, title II § 223(a), 84 Stat. 929.

81. Lynch & Phillips, Organized Crime-Violence and Corruption, 20 J. Pub. L. 59, 64-66 (1971).

82. Loan-Sharking: The Untouched Domain of Organized Crime, 5 Colum. J.L. & Soc. Prob. 91, 97 (1969).

83. See, e.g., 18 U.S.C. § 1465 (1970) (obscene matters); 18 U.S.C. §§ 1952-53 (1970) (anti-racketeering); 18 U.S.C. §§ 2312-15 (1970) (stolen property); 18 U.S.C. §§ 2421-24 (1970) (White-Slave Traffic Act).

84. See, e.g., 18 U.S.C. § 1951 (1970) (interference with commerce by threats or violence).

85. See, e.g., 18 U.S.C. § 1992 (1970) (wrecking train or equipment used, operated or employed in interstate commerce); 18 U.S.C. § 876 (1970) (mailing threatening communications). See also notes 36-46 supra and accompanying text.

86. See note 53 supra.

diction to an area previously belonging to the states. Presently, in order for Congress to regulate in areas of former state control, it is only necessary to do the following: first, provide a rational basis of connection between the activity in general and interstate commerce, and second, choose a reasonable means of regulating that activity.[87]

The 1970 Drug Abuse Prevention and Control Act[88] was a legislative attempt to control intrastate as well as interstate traffic in illicit drugs. This Act, like the statute attacked in *Perez*, does not require a showing in each case that interstate commerce has been affected. The Act was also justified by Congressional findings similar to those in *Perez*.[89] Findings resembling those in the 1970 Drug Abuse Act were also made by Congress in the predecessor statute, the 1965 amendments to the Federal Food, Drug, and Cosmetic Act.[90] Several circuit courts have sustained convictions under those 1965 amendments in the face of the same arguments presented in *Perez*.[91] Thus, it is apparent that whenever Congress decides that a problem is national in scope, cannot be adequately handled by the states, and constitutes a substantive evil such as drug abuse or loan sharking, federal regulation is strongly probable. Congress' pragmatic approach to these problems, however, may be slightly less than consistent with our constitutional framework. This view has already been expressed in the form of the fear of a national police force established under the commerce power,[92] and the possibility that such traditionally local crimes as robbery, burglary, and larceny may be made federal offenses.[93]

It is clear, however, that the Court has the ability to prevent the unconstitutional spread of federal power. The Court can strike down further extensions of federal jurisdiction, make its own determination of whether or not a particular activity affects interstate commerce; or at the very least, examine very closely the congressional determinations in this regard. Once it has been determined that the activity affects interstate

87. See notes 28-29 supra and accompanying text.

88. 21 U.S.C. §§ 801-966 (1970).

89. Id. § 801.

90. Act of June 25, 1938, ch. 675, § 511, as added July 15, 1965, Pub. L. No. 89-74, §§ 2-11, 79 Stat. 227 (repealed 1970).

91. United States v. Cerrito, 413 F.2d 1270 (7th Cir. 1969), cert. denied, 396 U.S. 1004 (1970); United States v. Heiman, 406 F.2d 767 (9th Cir. 1969); Whalen v. United States, 398 F.2d 286 (8th Cir. 1968); White v. United States, 395 F.2d 5 (1st Cir.), cert. denied, 393 U.S. 928 (1968).

92. See note 65 supra and accompanying text.

93. 426 F.2d at 1082 (Hays, J., dissenting).

commerce, it is possible that the Court will invoke a balancing process, weighing the importance of the problem being regulated with the interests of the states in retaining control in that area. Such balancing was not expressly done by the Court in *Perez*, but from its decision, it is apparent that the need for regulation was found to outweigh other considerations.

In *United States v. Bass*,[94] the defendant appealed a conviction for possession of firearms in violation of Title VII of the Omnibus Crime Control and Safe Streets Act of 1968.[95] The Court required the government to prove that the defendant received, possessed, or transported a firearm in interstate commerce, stating that simple possession of a firearm by those prohibited from such possession was insufficient to support a conviction. Thus, the Court refused to permit an expansion of the federal police power to criminal activity that did not have a connection with interstate commerce, even though the criminal activity involved a national problem and a substantive evil. While the *Bass* decision may indicate an ability and desire by the Court to prevent the spread of federal power, it is possible to reconcile the *Bass* case with *Perez* because the statute involved in *Bass* was ambiguous and was not subject to the clear-cut interpretation found in the Extortionate Credit Transactions Act.

In considering the impact of the *Perez* decision, it would be folly to say only that the Court has upheld congressional regulation in an area formerly preserved for the states. Equally important is the fact that the door is now open to Congress for further such incursions into areas heretofore not regulated by the federal government.

CRIMINAL PROCEDURE—Free Press and Fair Trial—Trial Judge May Not Close Courtroom to Press and Public Without Showing of Serious and Imminent Threat to the Integrity of the Trial. Oliver v. Postel, 30 N.Y.2d 171, 282 N.E.2d 306, 331 N.Y.S.2d 407 (1972).

During the initial stages of a criminal trial for conspiracy and extortion, several New York newspapers printed articles revealing that the

94. 404 U.S. 336 (1971).

95. 18 U.S.C. App. § 1202(a) (1970). This section states in part: "Any person who . . . receives, possesses, or transports in commerce or affecting commerce, after the date of enactment of this Act, any firearm shall be fined not more than $10,000 or imprisoned for not more than two years, or both."

accused had a previous criminal record and purported underworld connections. The trial judge, respondent in the instant case, denied a defense motion for a mistrial after polling the jury and finding that no juror had seen the articles,[1] but warned newsmen that they would be held in contempt if they reported "anything other than [what] transpires in this courtroom."[2] Subsequently, articles which were critical of respondent's threats of contempt citations and which referred to the previously published articles concerning the accused appeared in the same and other newspapers, prompting respondent to close the courtroom to the press and public. Petitioners, professional journalists, brought this action[3] for a judgment to direct respondent to reopen the courtroom, citing the constitutional guarantees of freedom of the press,[4] and public trial.[5] The New York Court of Appeals, realizing that the problem admitted of a delicate balance between the freedom of the press and the right of an accused to a fair trial,[6] found for petitioners, since there was no showing that respondent's order barring the public was necessary to meet " 'a serious and imminent threat' to the administration of justice."[7]

The New York rule on the free press-fair trial dichotomy is difficult to formulate, since almost all the applicable cases are factually distinguishable. There are a number of approaches which the courts in New York have formulated in attempting to deal with the dichotomy. One approach grants to the press the same, but no greater, rights enjoyed by the general

1. Therefore, there was little possibility of that particular set of articles influencing the jury or prejudicing them against the accused; if otherwise, the defense's motion for a mistrial might have been granted. The trial judge is, of course, interested in eliminating possible sources of reversible error, such as demonstrated outside influences on the jurors' opinions.

2. 30 N.Y.2d 171, 176-77, 282 N.E.2d 306, 307, 331 N.Y.S.2d 407, 410 (1972).

3. N.Y. C.P.L.R. Art. 78 (McKinney 1963).

4. U.S. Const. amend. I; N.Y. Const. art. I, § 8.

5. U.S. Const. amend. VI; N.Y. Judiciary Law § 4 (McKinney 1968).

6. 30 N.Y.2d at 182, 282 N.E.2d at 311, 331 N.Y.S. 2d at 414. The court here takes note of two important Supreme Court decisions which discuss the balancing interests. See Maryland v. Baltimore Radio Show, 321 U.S. 912 (1949) (opinion of Frankfurter, J.); Bridges v. California, 314 U.S. 252 (1941).

7. 30 N.Y.2d at 180, 282 N.E.2d at 310, 331 N.Y.S.2d at 413. By the time of the court's decision, the accused had been acquitted, thereby rendering petitioner's action moot; however, the New York court chose to pass on the proceedings anyway, in view of "the sufficient importance and interest" of the questions presented. For a discussion of standards to determine mootness, see note 39 infra and accompanying text.

public. In *United Press Associations v. Valente*,[8] relied on by the appellate division in *Oliver*[9] to dismiss the newsmen's petition, the New York Court of Appeals held that the application of the press to restrain a trial judge from carrying out an exclusion order in a criminal trial was properly denied. First amendment guarantees do not grant the press any rights not held by the general public:

> [The first amendment has] never been held to confer upon the press a constitutionally protected right of access to sources of information not available to others. . . . [F]reedom of the press is in no way abridged by an exclusionary ruling which denies to the public generally, including newspapermen, the opportunity to "see and hear what transpired."[10]

The court of appeals in *Oliver* attempted to justify its contrary holding by distinguishing *United Press* on several grounds: in *United Press*, the exclusion order was not specifically aimed at writings in the press, whereas Judge Postel in *Oliver* directed his warnings and threats solely to newspapermen; in *United Press*, a criminal case dealing with compulsory prostitution, exclusion of the public was made on grounds of public decency, whereas *Oliver*, which did not deal in any way with a "morals" charge, had no such rationale for its exclusion order; in *United Press*, the court was closed over the accused's objections, whereas in *Oliver* it was done upon the accused's application.[11]

A second approach places the issue in a more fundamental perspective. *People v. Jelke*,[12] a companion case to *United Press*, allowed the *accused* in that same criminal action to appeal the lack of a public trial, when the trial judge, over the accused's objections, barred the press and public in the interest of public decency.[13] The *Jelke* court held that the

8. 308 N.Y. 71, 123 N.E.2d 777 (1954).

9. 37 App. Div. 2d 498, 327 N.Y.S.2d 444 (1st Dep't 1971).

10. 308 N.Y. at 77, 123 N.E.2d at 778.

11. The Oliver court concludes: "In sharp contrast [to United Press], the record in the present case makes it exceedingly plain that the order closing the courtroom—made upon the defendant's application—was aimed specifically at the news media and was intended as a punishment for what the respondent characterized as their 'contumacious conduct' in disregarding his prior admonitions not to publish 'anything other than [what] transpires in this courtroom.' " 30 N.Y.2d at 179, 282 N.E.2d at 309, 331 N.Y.S.2d at 412.

12. 308 N.Y. 56, 123 N.E.2d 769 (1954).

13. "In announcing his ruling [to exclude the press and general public], the trial judge commented upon 'the obscene and sordid details' which the opening statements of the district attorney and defense counsel indicated would be adduced, and he observed that 'the sound administration of justice and . . . the interests of good morals' demanded that the curtain be drawn 'on the offensive

right to a public trial is a fundamental privilege of the defendant in a criminal prosecution, guaranteed, in New York, by statute.[14] Therefore, the exclusionary order was invalid, and the defendant was entitled to a new trial even without affirmatively showing that he was prejudiced by the order. But *United Press* refused to extend that right to professional newsmen or to the public at large. It was a right which only the criminal defendant could invoke. Subsequent New York cases confirmed the *United Press* holding that, in New York, the right to a public trial applies only to the criminally accused,[15] but not to members of the press or general public.[16]

A third approach to the problem examines whether there is or should be any clear public policy for or against court restrictions on press coverage of trials. A New York case, cited by petitioners as implying "a strong public policy against compulsory court-imposed restraints on the press,"[17] is *New York Post v. Leibowitz*.[18] There the issue concerned a trial judge's refusal to allow a newspaper to obtain a transcript of the judge's charge to the jury in a criminal case, after the defendant had been acquitted. The New York Court of Appeals held that the trial judge exceeded his power in directing the court stenographer not to furnish the transcript. The court declared that public policy considerations dictated the fullest possible public scrutiny of judicial proceedings.[19] However, the facts can be distinguished from *Oliver* in that the trial itself was open to the

obscentiy of this already over-publicized trial.' " 308 N.Y. at 60-61, 23 N.E.2d at 770.

14. N.Y. Judiciary Law § 4 (McKinney 1968). In addition, Duncan v. Louisiana, 391 U.S. 145 (1968), later made the sixth amendment provisions regarding public trial applicable to the states through the due process clause of the fourteenth amendment. See also In re Oliver, 333 U.S. 257 (1947) (right to a public trial).

15. In a civil case either party may raise his right to a public trial.

16. See, e.g., James v. Powell, 51 Misc. 2d 705, 273 N.Y.S.2d 730, 731 (Sup. Ct. 1966).

17. Point of counsel, 30 N.Y.2d at 172.

18. 2 N.Y.2d 677, 143 N.E.2d 256, 163 N.Y.S.2d 409 (1957). "We are all agreed that fundamental considerations of public policy demand that court proceedings in a publicly held trial be open to the fullest public scrutiny, so long as the case is not one in which preservation of secrecy in respect of the court records has been recognized by law." Id. at 682, 143 N.E.2d 258, 163 N.Y.S. 412.

19. Compare the instant case, where the press and public were barred from the trial itself while it was in progress, where articles involving the accused in underworld activities were published before the accused's acquittal, and where the issue involved the press's right to attend public trials, and not merely the public's right to obtain certain court transcripts.

public, the accused had already been acquitted, and the issue merely concerned the delivery of a court manuscript to one legally entitled to have it.[20]

Wiggins v. Ithaca Journal News, Inc.,[21] anticipated *Oliver's* call for a balance between freedom of the press and the right of an accused to a fair trial, free from prejudicial press coverage; however, in contrast to *Oliver*, *Wiggins* upheld the trial court's order to the press not to reveal certain information.[22] However, *Wiggins*, like *United Press*, is distinguishable from *Oliver*, in that *Wiggins* concerns a New York youthful offender statute[23] which allows greater privacy in deference to the accused's age. Therefore, the exclusionary order in *Wiggins* does not necessarily justify exclusionary orders in cases dealing with adult offenders, despite the breadth of the court's language concerning the limitations on freedom of the press.

Thus a review of New York precedents discloses no predictable pattern. While *United Press* and *Wiggins* clearly reflect a policy of press exclusion, they are factually distinguishable from *Oliver* for the reasons cited above. *New York Post*, like *Oliver*, points to judicial recognition of the right of the press to cover judicial proceedings and express opinions

20. Most of the cases about to be discussed deal with the judicial common law contempt power and its utilization to punish harmful or offensive extra-record utterances, e.g., newspaper editorials critical of a trial in progress. Although Oliver dealt with an exclusionary order, preceded by threats of contempt, it is still germane to examine proposals regarding the contempt power, since the Oliver court itself would apply the standards for contempt to exclusionary orders. 30 N.Y.2d at 180-81, 282 N.E.2d at 310, 331 N.Y.S.2d at 413.

21. 57 Misc. 2d 356, 292 N.Y.S.2d 920 (City Ct. of Ithaca 1968).

22. Wiggins concerned two youths charged with petit larceny for stealing gasoline cans. The presiding judge directed that respondents—a reporter and a newspaper—not reveal the identity of the youths or the charge, since the accused were to receive youthful offender treatment under N.Y. Code Crim. Pro. § 913-f (now N.Y. Crim. Pro. Law § 720.15 (McKinney 1971)), which provided that "[t]he court . . . may, but only as to the public, order the indictment or information sealed in the case of a youth charged with crime." Nonetheless, respondents did publish the information, and were duly charged with contempt. The court noted that "[f]reedom of the press is not an unbridled right to publish any and all news regardless of its source or its effects. . . . [f]reedom of the press must be balanced against other rights such as the right of an accused to a fair trial free from unwarranted press coverage or, as here, the right for an infant to be spared from the life-long devastating effects of publicity for what might have been one irresponsible act caused solely by immaturity based on age alone." 57 Misc. 2d at 361, 292 N.Y.S.2d at 925.

23. See note 22 supra.

thereon; however, the case is likewise distinguishable from *Oliver* in that it deals only with delivery of a court transcript after the trial was over.

Oliver is significant as the first New York case which holds that in the criminal trial process, the press or general public may not be excluded from the courtroom without a showing that it is necessary to meet serious and imminent threats to the integrity of the trial.

In so deciding, *Oliver* relies on United States Supreme Court cases dealing with freedom of the press and the right of the accused to a trial by an impartial jury free from the outside influences of prejudicial publicity. The most important of these is *Bridges v. California*,[24] the first decision to apply to contempt cases the "clear and present danger"[25] test eventually used by the New York court in *Oliver*. Specifically, the *Bridges* Court formulated " a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[26] The Court emphasized the importance and predominance of free expression:

> [T]he First Amendment does not speak equivocally. It prohibits any law "abridging the freedom of speech, or of the press." It must be taken as a command of the broadest scope that explicit language, read in the context of a liberty-loving society, will allow.[27]

Bridges was upheld and extended in a host of later cases, the most important being *Pennekamp v. Florida*[28] and *Craig v. Harney*.[29]

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24. 314 U.S. 252 (1941). The case concerned a telegram and newspaper editorials, written by the respective petitioners, which were extremely critical of various judicial proceedings involving labor matters. The Supreme Court reversed petitioners' contempt convictions, since their writings did not present a "clear and present danger" to the administration of justice.

25. The test itself derived from certain other freedom of speech cases, notably Schenck v. United States, 249 U.S. 47 (1919); Schaefer v. United States, 251 U.S. 466 (1920); Gitlow v. New York, 268 U.S. 652 (1925).

26. 314 U.S. at 263.

27. Id. (footnote omitted).

28. 328 U.S. 331 (1946). In Pennekamp, petitioners were newspapermen who published editorials and a cartoon criticizing court proceedings, one of which was pending trial. The Supreme Court overturned their contempt convictions, since the danger to fair judicial administration was not clear and immediate, under the Bridges test. Id. at 334, 346-50. Also, the Court repeated the Bridges dictum that freedom of discussion should be given the widest possible latitude compatible with the requirement of the fair administration of justice. Id. at 347.

29. 331 U.S. 367 (1947). The case concerned news articles which unfairly reported a pending case, and an editorial which severely criticized the trial judge (an elected layman). Although a motion for a new trial was pending, the Supreme

In dealing with the dichotomy between free press and fair trial, the *Oliver* court applied the *Bridges* "clear and present danger" test, but may have disregarded an important distinction in so doing: *Bridges* and its progeny dealt with *judge-directed* utterances, *i.e.*, media statements critical of the presiding judge in a given case; whereas *Oliver* also dealt with potential extra-record influences on the jury in a criminal trial.[30] Insofar as Judge Postel's exclusion order was directed at those newspapermen who publicly criticized the judge's threats of contempt, the *Bridges* line of cases has some applicability; but insofar as the exclusion order was aimed at protection of the accused in the eyes of the jury, the *Bridges* cases are distinguishable. As one reviewer has noted:

> The contempt cases [*Bridges, et al.*] enunciated a constitutional standard which has established virtually absolute protection for judge directed publications. Although these decisions do not deal with the problems of publications influencing a jury in a criminal trial, they have been read by the courts as holding that publications in this context are similarly protected. . . . It is suggested that the first meaningful step in analyzing the problem of controlling extra record influence upon a jury is understanding that the problem is not resolved by application of the *Bridges* doctrine.[31]

Court still did not find the clear and present danger to the administration of justice that would have been necessary to sustain the contempt convictions; the Court explicitly followed Bridges and Pennekamp. Id. at 368-70, 375-78. Further, the Court declared that the judicial contempt power is not designed to protect sensitive judges from the vagaries of public opinion. Id. at 376.

30. Recall that Judge Postel polled the jurors to see if any of them had seen the first set of articles which discussed the accused's past criminal record and underworld connections; see note 1 supra and accompanying text. Thus, in part, Judge Postel was apparently trying to prevent extra-record influences on the jury. But, in addition, the judge himself seems to have been offended personally by the second set of articles, which were critical of his threats of contempt; the court of appeals states: "He [Judge Postel] expressed displeasure with the articles and, at one point, took issue with the manner in which they portrayed him." 30 N.Y.2d at 177, 282 N.E.2d at 308, 331 N.Y.S.2d at 410. Immediately thereafter the judge granted the accused's request for exclusion of the public and press, without again polling the jurors and without any indication that the jurors had seen any of the second set of articles. This would indicate that the judge may in part have acted to exclude the press because of the press's personal criticism of him.

31. Barist, The First Amendment and Regulation of Prejudicial Publicity—An Analysis, 36 Fordham L. Rev. 425, 431, 433 (1968). Barist goes on to discuss various reasons for the inapplicability of Bridges to cases like Oliver, where outside influence may affect the jury. For example, even the Supreme Court, in Wood v. Georgia, 370 U.S. 375 (1962), drew a distinction between judge-directed and jury-directed publications. The Court noted, "Neither Bridges, Pennekamp, nor Harney involved a trial by jury. In Bridges it was noted that 'trials are not like elections,

The Supreme Court has at times emphasized strongly the need for a trial court to protect a criminal defendant from potentially damaging publicity, such as may have been present in *Oliver*. For example, in *Sheppard v. Maxwell*,[32] the Court reversed a conviction largely because of "saturating" prejudicial publicity.[33] The Court qualified the well known

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to be won through the use of the meeting-hall, the radio, and the newspaper', and of course, the limitations on free speech assume a different proportion when expression is directed toward a trial as compared to a grand jury investigation." Id. at 389-90 (citation omitted). Likewise, an examination of the historical reasons for the Bridges line of decisions indicates its inapplicability to jury-directed publications. Barist, 36 Fordham L. Rev. at 435-38 (1968).

32. 384 U.S. 333 (1966). This was the well-publicized murder case in which Dr. Samuel Sheppard was brought to trial for the alleged slaying of his wife. The case reached the Supreme Court on a petition for habeas corpus, petitioner contending that he did not receive a fair trial because of the massive publicity accompanying the investigation and trial.

33. In discussing the prejudicial publicity, the Supreme Court said: "There can be no question about the nature of the publicity which surrounded Sheppard's trial. We agree, as did the Court of Appeals, with the findings in Judge Bell's opinion for the Ohio Supreme Court: 'Murder and mystery, society, sex and suspense were combined in this case in such a manner as to intrigue and captivate the public fancy to a degree perhaps unparallelled in recent annals. Throughout the preindictment investigation, the subsequent legal skirmishes and the nine-week trial, circulation-conscious editors catered to the insatiable interest of the American public in the bizarre. . . . In this atmosphere of a 'Roman holiday' for the news media, Sam Sheppard stood trial for his life.' Indeed, every court that has considered this case, save the court that tried it, has deplored the manner in which the news media inflamed and prejudiced the public.

"Much of the material printed or broadcast during the trial was never heard from the witness stand, such as the charges that Sheppard had purposely impeded the murder investigtion and must be guilty since he had hired a prominent criminal lawyer; that Sheppard was a perjurer; that he had sexual relations with numerous women; that his slain wife had characterized him as a 'Jekyll-Hyde'; that he was 'a bare-faced liar' because of his testmony as to police treatment; and, finally, that a woman convict claimed Sheppard to be the father of her illegitimate child. As the trial progressed, the newspapers summarized and interpreted the evidence, devoting particular attention to the material that incriminated Sheppard, and often drew unwarranted inferences from testimony. . . .

"Nor is there doubt that this deluge of publicity reached at least some of the jury. On the only occasion that the jury was queried, two jurors admitted in open court to hearing the highly inflammatory charge that a prison inmate claimed Sheppard as the father of her illegitimate child. Despite the extent and nature of the publicity to which the jury was exposed during trial, the judge refused defense counsel's other requests that the jurors be asked whether they had read or heard specific prejudicial comments about the case . . . . In these circumstances, we can

Bridges language: although freedom of discussion should be given the widest scope compatible with the fair administration of justice, it must not be allowed to divert a trial from its purpose of deciding controversies according to legal procedures based only on evidence received in open court.[34] Furthermore, to prevent prejudice, the Court determined that a trial court is specifically authorized to do what is necessary to protect the defendant:

> Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused. . . . Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom. But where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates, or transfer it to another county not so permeated with publicity. . . . If publicity during the proceedings threatens the fairness of the trial, a new trial should be ordered. But we must remember that reversals are but palliatives; the cure lies in those remedial measures that will prevent the prejudice at its inception. The courts must take such steps by rule and regulation that will protect their processes from prejudicial outside interferences.[35]

Similarly, in *Estes v. Texas*,[36] the Supreme Court held that the defendant had been deprived of his fourteenth amendment right to due process by the televising of his highly publicized trial. The case is distinguishable from *Oliver* in that *Estes* dealt with television coverage of the trial and because several *Estes* jurors admitted having seen pre-trial broadcasts.[37]

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assume that some of this material reached members of the jury." 384 U.S. at 356-57 (footnotes and citations omitted).

34. Id. at 350-51.

35. Id. at 362-63.

36. 381 U.S. 532 (1965).

37. Id. More fully, the Court discussed the damaging publicity that dominated the pretrial period: "The [pretrial] hearing was televised live and repeated on tape in the same evening, reaching approximately 100,000 viewers. In addition, the courtroom was a mass of wires, television cameras, microphones and photographers. The petitioner, the panel of prospective jurors, who were sworn the second day, the witnesses and the lawyers were all exposed to this untoward situation. The judge decided that the trial proceedings would be telecast. He announced no restrictions at the time. This emphasized the notorious nature of the coming trial, increased the intensity of the publicity on the petitioner and together with the subsequent televising of the trial beginning thirty days later inherently prevented a sober search for the truth. This is underscored by the fact that the selection of the jury took an entire week. As might be expected, a substantial amount of that time was devoted to ascertaining the impact of the pretrial televising on the prospective jurors. As we have noted, four of the jurors selected had seen all or part

The *Estes* Court, however, spoke more broadly than the facts before it when it declared that the freedom of the press must not be allowed to get in the way of a fair trial:

> The purpose of the requirement of a public trial was to guarantee that the accused would be fairly dealt with and not unjustly condemned. . . .
>
> The free press has been a mighty catalyst in awakening public interest in governmental affairs . . . and generally informing the citizenry of public events and occurences, including court proceedings. While maximum freedom must be allowed the press in carrying on this important function in a democratic society its exercise must necessarily be subject to the maintenance of absolute fairness in the judicial process. . . . "[T]he life or liberty of any individual in this land should not be put in jeopardy because of actions of any news media."[38]

The approach of the *Oliver* court to the question of outside media publicity and criminal trials seems, at once, to balance freedom of the press with the right of a defendant to a trial free from prejudicial publicity, and to clarify the public interest which underlies this freedom of information.[39] Having distinguished *United Press*,[40] the *Oliver* court

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of those broadcasts." Id. at 550-51. Recall in Oliver there was no showing that any of the jurors saw any of the prejudicial articles; see note 30 supra.

38. 381 U.S. at 538-40 (citations omitted). See also United States v. Bell, 464 F.2d 667 (2d Cir. 1972), where the court held that the press and public may be temporarily excluded from a hearing concerning an airplane hijacker to prevent public revelation of the secret "profile" used by airline personnel to identify potential hijackers. The court summed up those cases where public exclusion has been allowed: "Barring the public including the press from the suppression hearing in this case presents no great constitutional difficulty. While secret proceedings are of course odious and smack of ideologies as repugnant to the Founders as they are today, there is precedent for the proposition that limited exceptions are consitutionally permissible. Thus the exclusion of the public in whole or in part has been found constitutionally acceptable where it was deemed necessary to protect the defendant, Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); where there has been harassment of witnesses, United States ex rel. Bruno v. Herold, 408 F.2d 125 (2d Cir. 1969), cert. denied, 397 U.S. 957 (1970); or to preserve order, United States ex rel. Orlando v. Fay, 350 F.2d 967 (2d Cir. 1965), cert. denied, 384 U.S. 1008 (1966)." [citations omitted] Id. at 670.

39. 30 N.Y.2d at 176, 282 N.E.2d at 307, 331 N.Y.S.2d at 409. The court initially determined justiciability with respect to both mootness and standing questions: first, although the accused's acquittal rendered the appeal for the reopening of the courtroom moot, the court found the questions capable of repetition and of sufficient importance to justify a decision. Id. at 177, 282 N.E.2d at 308, 331 N.Y.S.2d at 411. Regarding the question of mootness, the court relied on United Press Ass'n v. Valente, 308 N.Y. at 76, 123 N.E.2d at 778; East Meadow Community Concerts Ass'n v. Board of Educ., 18 N.Y.2d 129, 135, 219 N.E.2d 172, 175-76, 272 N.Y.S.2d 341, 346 (1966); and Rosenbluth v. Finkelstein, 300 N.Y.

decides the issue using the *Bridges* "clear and present danger" test, the applicability of which is discussed above.[41] In applying this test the court reveals its reasoning:

> [E]ven if we were to assume that such an [exclusionary] order could ever be justified, and we do not here reach or consider that question, it could stand only upon a clear showing—similar to that required to sustain a contempt order—that it was necessary to meet "a serious and imminent threat" to "the integrity of the trial." We find no such showing in the record before us.[42]

The court justifies its decision by noting that there was no evidence that the jurors had seen any of the articles, and, since the articles did not deal with courtroom occurrences, closing the trial could not logically prevent them.[43]

It is interesting to note that the court, mindful of the balancing interests of free press and fair trial, would leave it up to the press to censor itself. In so doing, the court refers to similar dictum in the *Sheppard* case:

> Because of the vital function served by the news media in guarding "against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes

402, 404, 91 N.E.2d 581 (1950). See also H. Cohen & A. Karger, Powers of the New York Court of Appeals 420-21 (rev. ed. 1952). Cf. SEC v. Medical Comm. for Human Rights, 404 U.S. 403 (1972); 30 N.Y.2d at 179, 282 N.E.2d at 309, 331 N.Y.S.2d at 412. See Flast v. Cohen, 392 U.S. 83 (1968); Data Processing Serv. v. Camp, 397 U.S. 150 (1970). Regarding the question of standing, the court determined that petitioners had standing to attack the exclusion order since "[they] were the direct targets of the court's order, and their ability to comment upon the trial as professional journalists [was] thereby impaired . . . ." 30 N.Y.2d at 179, 282 N.E.2d at 309, 331 N.Y.S.2d at 412.

40. See note 11 supra and accompanying text.

41. See note 31 supra and accompanying text.

42. 30 N.Y.2d at 180-81, 282 N.E.2d at 310, 331 N.Y.S.2d at 413 (citation omitted).

43. "The significant fact, however, is that the respondent had determined, by questioning the jurors, that no one of them had read the articles, and there is likewise not the slightest showing or indication that any of them had seen the second series of news items which preceded the order closing the trial.

Moreover, since the articles complained of dealt with Persico's [the accused's] alleged criminal record and underworld connections, and in no way related to any events which had transpired in the courtroom, their publication obviously would not, indeed could not, have been prevented by refusing to allow the press to attend the trial. In other words, even if the reporting in this case was improper and tended to prejudice the defendant, it is manifest that closing the trial was not the means to be employed to cure the prejudice or prevent a continuation of the impropriety." Id. at 181, 282 N.E.2d at 310-11, 331 N.Y.S.2d at 414.

to extensive public scrutiny and criticism", the Supreme Court has emphasized that it has been "unwilling to place any direct limitations on the freedom traditionally exercised by the news media for '[w]hat transpires in the court room is public property.' "[44]

The *Oliver* court, however, admits that on occasion positive action must be taken by trial courts to protect against prejudicial outside influence, and it delineates the actions that may be required. However, the court specifically refuses to pass on the question of whether a trial judge ever has the power to exclude the press and public in order to protect a criminal defendant.[45]

Resolution of the problem of prejudicial publicity presents a fundamental question for which existing solutions may seem inadequate or insufficient, and for which there has been no dearth of other proposals. For example, the American Bar Association has adopted the "Reardon Report," a study of an advisory committee[46] which advocates only limited use of the contempt power, although recognizing that such use may be necessary in at least some instances.[47] Thus, applying the recom-

44. Id. at 182, 282 N.E.2d at 311, 331 N.Y.S.2d at 414. Similarly, in the "Pentagon Papers" case, New York Times Co. v. United States, 403 U.S. 713 (1971), the majority expressed its reluctance to censor other types of media stories. Id. at 714.

45. "Of course, as the Supreme Court observed in Sheppard, the problem of prejudicial publicity is one which the courts must meet not by the mere 'palliative' of declaring mistrial or reversing a conviction but, rather, by taking appropriate remedial steps 'by rule and regulation' to 'protect their processes from prejudicial outside interference.' In most instances, the trial judge will be able to deal effectively with potential prejudice stemming from adverse press publicity by cautioning the jurors to avoid exposure to such publicity and by carefully instructing them to disregard any prejudicial material, which might come to their attention, that was not presented to them in court. However, there may well be extreme situations—in no way comparable to the present case—in which such procedures may be inadequate and ineffectual to assure a fair trial. The court may then find it necessary to sequester the jury . . . . But whether the judge has the power in any case to close the courtroom to the public and the press in order to protect the defendant's right to a fair trial is, as already indicated, a question we need not here pass upon." 30 N.Y.2d at 182-83, 282 N.E.2d at 311, 331 N.Y.S.2d at 415. (footnotes and citations omitted).

46. P. Reardon, Standards Relating to Fair Trial and Free Press, ABA Project on Minimum Standards For Criminal Justice (1966) [hereinafter cited as Reardon Report].

47. The appropriate parts of the committee's recommendation are as follows: "The use of the contempt power against persons who disseminate information by means of public communication, or who make statements for dissemination, can in certain circumstances raise grave constitutional questions. Apart from these

mendations of this study, no contempt order or threat would have been valid under the facts of *Oliver*, since it is either doubtful or at least difficult to prove whether the newsmen's articles were "reasonably calculated to affect the outcome of the trial."[48] However, the Reardon Report remains only a proposal.

Similarly, there are those who would favor a tougher, statutory solution to avoid any problems posed by the questionable constitutionality of the common law contempt power, particularly in view of decisions[49] that curtail that power.[50] By contrast, the Reardon Report does not recommend the enactment of any statutory restrictions on the press, "in the absence of the clearest showing that less drastic measures will not achieve the objective,"[51] and cites five reasons for its position.[52]

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questions, indiscriminate use of that power can cause unnecessary friction and stifle desirable discussion. On the other hand, it is essential that deliberate action constituting a serious threat to a fair trial not go unpunished and that valid court orders be obeyed. It is therefore recommended that the contempt power should be used only with considerable caution but should be exercised in at least the following instances . . . .

(a) Against a person who, knowing that a criminal trial by jury is in progress or that a jury is being selected for such trial:

(i) disseminates by any means of public communication an extrajudicial statement relating to the defendant or to the issues in the case that goes beyond the public record of the court in the case, if the statement is reasonably calculated to affect the outcome of the trial and seriously threatens to have such an effect; or

(ii) makes such a statement with the expectation that it will be so disseminated.

(b) Against a person who knowingly violates a valid judicial order not to disseminate until completion of the trial or disposition without trial, specified information referred to in the course of a judicial hearing from which the public is excluded under sections 3.1 or 3.5(d) of these recommendations." Id. at 14-15.

48. Id. at 14.

49. E.g., Bridges v. California, supra note 24-27 and accompanying text.

50. Barist, supra note 32, at 451. To quote from Barist: "Any program instituting direct control over mass media reporting of criminal cases should receive its authorization from legislative enactment, rather than drawing upon any inherent power of a court. It would seem particularly unwise for control to be exercised by means of a common law contempt power. The rather shabby history of contempt by publication and the open hostility evidenced to its expansion by the Supreme Court indicates that while its continued use may pose an interesting theoretical question, it would adversely affect the constitutionality of any attempt to prohibit extra-record influence." Id.

51. Reardon Report at 69-70.

52. Id. at 70-73 mentions five possible difficulties with statutory restrictions:

Finally, in discussing alternative solutions it might be interesting to note Great Britain's approach to the issue. If the United States places great emphasis on its cherished first amendment guarantee of free press,[53] England must be said to take the opposite position by adjudging virtually any publication made after arrest as grounds for contempt. While the press may report, *a fortiori*, the facts of a trial and its attendant circumstances, definite limits are placed on the reporting of other information.

> [The English] system permits the news media to report the commission of crimes and the fact of arrest, to report judicial proceedings in full, and, within limits, to criticize the outcome after judgment. But beyond this, the media act at their peril. Perhaps prior to arrest, and clearly after arrest, the media may not, for example, publish any statements about the character of the defendant or his prior record, any opinions as to his guilt or innocence, any evidence not introduced—whether or not acquired by independent investigation—or a photograph of the accused when it is reasonably clear that identity is in dispute.[54]

The Reardon Report is critical of the possibility of increased use of the contempt power against the media, as is done in Britian, for certain specified reasons.[55]

1) Problems of draftsmanship: "The draftsman must steer between the Scylla of excessive specificity, which may be taken as implied approval of everything not prohibited, no matter how inflammatory or prejudicial, and the Charybdis of excessive generality, which is sure to lead to uncertainty, ambiguity, and lack of effective enforcement." Id. at 70. 2) Direct statutory restraints on the news media may be unconstitutional. 3) "[P]articular care must be taken not to adopt measures which may impair the benefits derived from informing the public and from a full discussion of issues of public importance." Id. at 71 (footnote omitted). 4) Increase in media self-restraint. Id. at 71-72 nn.201-06. Reticence to interfere with private decision-making. Id. at 72.

53. But see Branzburg v. Hayes, 408 U.S. 665 (1972), wherein the Supreme Court held that the first amendment does not relieve a newspaper reporter of the average citizen's obligation to appear before a grand jury and answer questions pertaining to a criminal investigation. The case is referred to as the "Caldwell case" because of the fact that the reporter in question was Earl Caldwell of the New York Times.

54. Reardon Report at 68-69 (footnote omitted). But see Jaffe, Trial by Newspaper, 40 N.Y.U. L. Rev. 504, 505-13 (1965) for reasons why the United States has taken a contrary view.

55. Reardon Report at 70. The reasons: 1) "the British experience suggests that the exercise of such power by judges may serve to stifle desirable public discussion of issues and to diminish the crusading zeal of the press"; 2) "any significant expansion of the use of the contempt power against the news media would pose constitutional questions that have yet to be resolved." Reardon Report at 70. Bridges, Oliver, et al. would point to the need at least to demonstrate a "clear and present danger."

The solution in *Oliver* may seem to some critics of the press to be no solution at all, since it allows the press great leeway and formulates no stricter standard of behavior than the "clear and present danger" test.[56] Actually, the decision embodies fundamental principles of American law. Freedom of the press and fair trial, both of which are constitutional guarantees, are to be balanced, and publication permitted so long as there is no demonstrable deleterious effect on the accused. The Supreme Court has given trial judges the power[57] to keep prejudicial information from jurors,[58] and this power wisely used can do much to nullify the effects of such publicity. Finally, *Oliver* calls on the press to police itself, which is a more desirable alternative than to permit some external body to decide what may or may not be publicized.

New York City, along with other American urban areas, has seen the recent proliferation of sensational and widely publicized trials, in which potential outside influence resulting from widespread media coverage is a distinct possibility, especially in trials which involve key social undercurrents, *e.g.*, the trials of "political prisoners" and Black Panthers, and the trials of those who have allegedly leaked classified information to the press. This type of trial will almost certainly continue. In this arena of controversy, *Oliver* plays an important role in setting out the rules pursuant to which newsmen may keep the public informed.

SOCIAL SECURITY ACT—Section 402(a)(23)—Percentage Reduction Factor Applied to Aid to Families with Dependent Children Payments Held Not Violative of Statutory or Constitutional Requirements. Jefferson v. Hackney, 406 U.S. 535 (1972).

Appellants, including black and Mexican-American recipients of Aid to Families with Dependent Children (AFDC) in Texas, brought a class action to challenge the state's method of computing aid funds as violative of Section 402(a)(23) of the Social Security Act.[1] AFDC is one of four major categorical assistance programs established by the Social Security

56. For one comment chastising the press for its "characteristic myopia" about the problem of media interference with fair trials, see Comment, The Press in a Black Robe, 45 Chi.-Kent L. Rev. 170, 171 (1969).

57. See, e.g., Sheppard v. Maxwell, notes 32-35 supra and accompanying text.

58. E.g., by means of sequestration. See note 45 supra.

1. 42 U.S.C. § 602(a)(23) (1970), amending § 402(a)(23) of the Social Security Act of 1935.

Act of 1935.[2] Under the program, the federal government provides a proportional share of all assistance given to persons who are within any of the categories, with participating state and local governments paying the remainder.[3] In order to participate, states are required to submit an AFDC plan for approval by the Secretary of Health, Education and Welfare (HEW), and the state plan must conform to the requirements of the Social Security Act and applicable HEW regulations.[4]

While the states are accorded significant discretion in their individual programs,[5] there are two factors which must enter into the determination of benefits to be paid. First, the state must establish a "standard of need," a minimum subsistence level for determining who is eligible for assistance.[6] Second, a state must then decide the "level of benefits" or amount of assistance that will be paid.[7] Some states purport to pay 100 per cent of the amount required to give a family the minimum subsistence income; other states grant a percentage of the standard of need; others impose a maximum on the amount that can be given to any family or individual.[8] Texas, to comply with the amendments to the Social Security Act[9] increased the standard of need for aid recipients by 11 per cent but had changed from a maximum-grant system to a percentage reduction system in which only 75 per cent of the standard of need was paid to AFDC recipients. Additionally, Texas chose to deduct outside income earned by recipients after applying the percentage reduction to the standard of need rather than before, resulting in lower payments or disqualification of some recipients with outside income.[10]

In addition to their statutory claim, appellants made an equal protection argument, contending that the Texas system was not rationally based and discriminated against the proportionately larger number of

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2. Old Age Survivors and Disability Benefits, 42 U.S.C. §§ 301-429 (1970); Aid to Families With Dependent Children, 42 U.S.C. §§ 601-44 (1970); Aid to the Blind, 42 U.S.C. §§ 1201-06 (1970), and Aid for the Permanently and Totally Disabled, 42 U.S.C. §§ 1351-55 (1970).

3. 42 U.S.C. § 603 (1970). See, e.g., King v. Smith, 392 U.S. 309, 316-17 (1968).

4. 42 U.S.C. §§ 601-04 (1970).

5. Rosado v. Wyman, 397 U.S. 397, 408 (1970).

6. Id.

7. Id.

8. Lampton v. Bonin, 299 F. Supp. 336, 349 (E.D. La. 1969) (dissenting opinion).

9. See notes 11-12 infra and accompanying text.

10. See note 51 infra.

blacks and Mexican-Americans in the AFDC program by providing for a lesser percentage of aid than in other social welfare programs. The action was brought in the United States District Court for the Northern District of Texas. A three-judge court rejected the constitutional argument but upheld appellants' claim that the percentage reduction system violated the congressional command of Section 402(a)(23).[11] The United States Supreme Court vacated and remanded the judgment in light of *Rosado v. Wyman*,[12] and the three-judge court entered a new judgment denying all relief and rejecting appellants' new statutory argument that the state's method of deducting outside income after applying a percentage reduction factor to the standard of need violated the congressional enactment. The Supreme Court affirmed, holding that Section 402(a)(23) does not require a computation procedure that maximizes individual eligibility for subsidiary benefits and that appellants had failed to show the Texas system was racially discriminatory or unconstitutionally arbitrary.[13]

In 1967, the Administration introduced legislation to amend the social security laws. The proposals related to the AFDC program looked to more adequate assistance for welfare recipients and set up several training programs along with child care programs designed to permit AFDC parents to take advantage of the training.[14] One of the proposals emerged as Section 402(a)(23), which provides that:

> A State plan for aid and services to needy families with children must . . . (23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.[15]

The proper meaning of this provision—whether it required an actual dollar increase in AFDC payments or simply the application of a cost-of-living factor to the standard of need set by the states[16]—was considered

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11. Jefferson v. Hackney, 304 F. Supp. 1332 (N.D. Tex. 1969).

12. 397 U.S. 397 (1970).

13. Jefferson v. Hackney, 406 U.S. 535 (1972).

14. Rosado v. Wyman, 397 U.S. 397, 409 (1970).

15. 42 U.S.C. § 602(a)(23) (1970), amending § 402(a)(23) of the Social Security Act of 1935.

16. The "standard of need" is the amount each state defines as necessary for subsistence of an individual in that state. 42 U.S.C. §§ 602-03 (1970).

by the federal courts in at least three districts[17] before a definitive examination of the issue was made by the Supreme Court.

In *Lampton v. Bonin*,[18] plaintiffs brought a class action for declaratory relief to prevent the Louisiana Department of Public Welfare from making a 10 per cent reduction in aid to families with dependent children. The department, in accordance with Section 402(a)(23), had raised its standard of need to reflect a 20 per cent rise in living costs, but it reduced its actual AFDC payments by abolishing its system of dollar maximums and adopting a ratable reduction of 42.13 per cent against each recipient family's recognized need. At issue was whether the state could, without violating the federal statute, supply only about half of the amount it had determined was required for bare subsistence. Over a strong dissent, the court construed Section 402(a)(23) narrowly, and reluctantly concluded that Louisiana had complied fully with its mandate.[19]

The *Lampton* decision was handed down on July 16, 1969. Fifteen days later, the three-judge district court in *Jefferson v. Hackney*[20] came to an opposite conclusion. Like Louisiana, the State of Texas had increased its standard of need for AFDC recipients by 11 per cent, removed its maximums on AFDC payments and then through a percentage reduction factor granted only 50 per cent (later raised to 75 per cent) of the calculated need of each AFDC family. Because this system had the result of reducing benefits for the majority of AFDC recipients,[21] the court held that it was violative of Section 402(a)(23), which "in terms of its language, purpose, and legislative history . . . requires that Texas . . . must adjust upwards its AFDC payments to fully reflect the 11% rise in the cost of living."[22] Because of this, the court enjoined the Texas Department of Public Welfare from implementing its plan.[23]

New York's response to the 1967 amendment was challenged in *Ro-*

17. For a comprehensive analysis of § 402(a)(23) prior to the Supreme Court's holding in Rosado v. Wyman, 397 U.S. 397 (1970), see Comment, Section 402(a)(23) of the 1967 Social Security Act Amendments: A False Hope? 58 Geo. L.J. 591 (1970) [hereinafter cited as A False Hope?].

18. 304 F. Supp. 1384 (E.D. La. 1969).

19. Id.

20. 304 F. Supp. 1332 (N.D. Tex. 1969).

21. Id. at 1343.

22. Id. at 1345.

23. Id. at 1346.

sado v. Wyman.[24] New York had changed its system of calculating an AFDC family's standard of need from an examination of each family's individual needs to a computation based simply on the size of the family.[25] New York continued to pay 100 per cent of standard of need, but the effect of its action was to lower the standard of need for some families. The Court of Appeals for the Second Circuit said this was not violative of Section 402(a)(23).[26] Interpreting the statute strictly, as in *Lampton*,[27] the court concluded that the only requirement imposed by the federal statute was an adjustment by the state of its standard of need to reflect increases in living costs. Provided it complied with this requirement, the court said that a state was free to lower its level of AFDC payments by changing its system of calculating the standard of need.

The United States Supreme Court reversed and remanded in *Rosado*,[28] holding that New York's action had significantly reduced the content of its standard of need in violation of Section 402(a)(23). Mr. Justice Harlan agreed with the lower courts that the legislative history of the Act "reveals little except that we have before us a child born of the silent union of legislative compromise."[29] Nevertheless, he added, the express words of the statute clearly mandate that states must (1) re-evaluate their standard of need, and (2) adjust any maximums that are part of their AFDC programs.[30] From this and common-sense assumptions, he concluded that the Act had two broad purposes:

> First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis. Consistent with this interpretation of § 402(a)(23), a State may, after recomputing its standard of need, pare down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system, but it may not obscure the *actual* standard of need.[31]

The Court went on to say that the federal statute "invalidates any state program that substantially alters the content of the standard of need

24. 414 F.2d 170 (2d Cir. 1969), rev'd 397 U.S. 397 (1970).

25. N.Y. Soc. Services Law § 131a (McKinney Supp. 1972) (formerly Soc. Welfare Law).

26. 414 F.2d at 180.

27. 304 F. Supp. at 1389-90.

28. 397 U.S. 397 (1970).

29. Id. at 412.

30. Id.

31. Id. at 412-13.

in such a way that it is less than it was prior to the enactment of § 402(a)(23),"[32] barring legitimate justification. But under the statute a state may "redefine its method for determining need," and may "accommodate any increases in its standard [of need] by reason of 'cost-of-living' factors to its budget by reducing its level of benefits."[33]

The Court's interpretation appeared to support the actions of states like Louisiana and Texas which first increased the standard of need that would provide subsistence for an AFDC family but then, in order to stay within the state's welfare budget, decreased the amount of that standard that the state would pay.[34] The results of the Louisiana, Texas and New York plans were similar, but New York—while paying 100 per cent of standard of need—had in the Court's opinion impermissibly lowered the standard in violation of the congressional mandate.

Apparently recognizing that this interpretation could indeed make Section 402(a)(23) appear to be mere "legislative window dressing,"[35] the *Rosado* Court was careful to add that this did not render the statute meaningless. The Court said that the statute served as a "nudge" to the states toward at least three practical and political goals.[36] First, by requiring an increase in the standard of need, more families with incomes below the new standard would qualify for AFDC aid. The states must then accept responsibility for these additional individuals and "place them among those eligible for the care and training provisions"[37] of the 1967 amendments, including such programs as work incentive and medical aid. Eligibility for these noncash benefits is keyed to receipt of AFDC payments.[38] Second, while states are free to reduce AFDC payments by paying a lower percentage of the standard of need, the state must at least "accept the political consequence of such a cutback . . . bringing to light the true extent to which actual assistance falls short of the minimum ac-

32. Id. at 419.

33. Id.

34. Lampton v. Bonin, 304 F. Supp. 1384 (E.D. La. 1969); Jefferson v. Hackney, 304 F. Supp. 1332 (N.D. Tex. 1969).

35. A False Hope?, supra note 17, at 596.

36. 397 U.S. 397, 413 (1970).

37. Id.

38. Receipt of AFDC aid is a prerequisite for a family to receive family development services, 42 U.S.C. § 602(a)(14) (1970); employment assistance, id. § 602(a)(15)(A); protection against child's neglect or abuse, id. § 602(a)(16); plans to establish paternity and secure support, id. § 602(a)(17)(A); work incentive programs, id. § 602(a)(19)(A)(i), and medical assistance plans, id. § 1396a(a)(10).

ceptable."[39] Finally, by requiring states to make a cost-of-living adjustment to any AFDC payment "maximums" they impose, Congress had encouraged states using a flat maximum system to change to a percentage system "that will more equitably apportion those funds in fact allocated for welfare . . . ."[40]

Because the *Rosado* Court refused to require an increase in AFDC payments, the California Supreme Court a year later concluded that the 1967 amendment as interpreted by *Rosado* was not concerned with reaching the truly destitute.[41] If Section 402(a)(23) was to have any practical effect, the California court reasoned, it must have been intended to bring an additional group of families—those with marginal income or resources—within the AFDC standard of need so that they would qualify for work incentive and other AFDC-related benefits.

The issue that the California court faced in *Villa v. Hall*[42] was whether the state could deduct outside income from the standard of need before applying a percentage reduction factor or statutory maximum to the amount of need remaining. The state argued that the percentage reduction or statutory maximum could first be applied to the standard of need. Outside income would then be deducted from the amount of need remaining.

The California court held that *Rosado* barred this latter approach,[43] reasoning that "by subtracting income from a ratably reduced figure or from a statutory maximum, a state could successfully avoid the [*Rosado*] court's interpretation that the amendment was designed to increase the number of people eligible for aid."[44] To illustrate this, the court gave as an example a family of two with outside income of $201 a month. If the state's standard of need for a family of two was $250 and its ratable reduction was 80 per cent ($200), the family would qualify for AFDC aid only if its $201 income were deducted from the standard of need ($250), with the 80 per cent reduction applied to the unmet need of $49. To deduct outside income after the percentage reduction would disqualify the family even though its income was less than the level established by the state as necessary for subsistence.

The California court relied heavily on a definition of "ratable reduc-

39. 397 U.S. at 413.

40. Id. at 414.

41. Villa v. Hall, 6 Cal. 3d 227, 234, 490 P.2d 1148, 1153, 98 Cal. Rptr. 460, 465 (1971).

42. 6 Cal. 3d 227, 490 P.2d 1148, 98 Cal. Rptr. 460 (1971).

43. Id.

44. Id. at 234, 490 P.2d at 1153, 98 Cal. Rptr. at 465.

tion" and the effect of outside income that had been given by the *Rosado* Court:

> A "ratable reduction" represents a fixed percentage of the standard of need that will be paid to all recipients. In the event that there is some income that is first deducted, the ratable reduction is applied to the amount by which the individual or family income falls short of need.[45]

The issue of how to deduct outside income from an AFDC standard of need reached the United States Supreme Court in *Jefferson v. Hackney*.[46] The petitioners, who were black and Mexican-American recipients of AFDC aid in Texas, were upheld by the three-judge district court in their argument that the ratable reduction system used in Texas violated the intent of Congress in Section 402(a)(23).[47] When this decision was vacated and remanded in light of *Rosado*, appellants in a motion to amend argued that while a percentage reduction system may be consistent with the congressional intent, the procedure used by Texas in accounting for outside income violated that intent.[48]

Like California and 17 other states,[49] Texas first determined an AFDC recipient's standard of need, then applied a percentage reduction factor and then subtracted any non-exempt income the recipient had earned.[50] If outside income exceeded the ratable reduced standard, the family would not qualify for AFDC aid or AFDC-related noncash benefits. The system disqualified a number of families who would have been eligible for AFDC aid had Texas followed the alternative system of deducting outside income from the standard of need and then applying the percentage reduction factor.[51]

Mr. Justice Rehnquist, writing for the majority, acknowledged that

45. 397 U.S. at 409, n.13.

46. 406 U.S. 535 (1972).

47. 304 F. Supp. 1332 (N.D. Tex. 1969).

48. 406 U.S. at 538-39.

49. Id. at 539, n. 4.

50. A portion of earned income must be exempted as a work incentive. 42 U.S.C. § 602(a)(8).

51. In 406 U.S. at 539-40, n.6, the Court gives this example: "Assuming two identical families, each with a standard of need of $200, and outside, nonexempt income of $100, the two systems would produce these results:

Texas System		Alternative System	
$ 200	(need)	$ 200	(need)
× .75	(% reduction factor)	− 100	(outside income)
$ 150	(reduced need)	$ 100	(unmet need)
− 100	(outside income)	× .75	(% reduction factor)
$ 50	(benefits payable)	$ 75	(benefits payable)"

while the alternative system provides a financial incentive for welfare recipients to obtain outside income, "[t]he Texas computation method eliminates any such financial incentive, so long as the outside income remains less than the recipient's reduced standard of need."[52] Nevertheless the Court held that Texas, in raising its standard of need for AFDC recipients by 11 per cent, had fully met the congressional command of Section 402(a)(23) as defined by *Rosado*.[53] As to the argument that fewer persons would qualify for AFDC-related benefits, Mr. Justice Rehnquist concluded that "there is nothing in the legislative history indicating that this [maximizing individual eligibility for subsidiary benefits] was part of the statutory purpose."[54]

By implication, the majority dismissed as dictum the *Rosado* Court's definition of "ratable reduction" and its statement that "income . . . is first deducted, [and] the ratable reduction is [then] applied . . . ."[55] The holding of *Rosado*, the majority said, was that Section 402(a)(23) was intended only to accomplish two purposes: (1) require states to face up to the extent their programs fall short of fulfilling actual need, and (2) prod the states to apportion payments more equitably. The *Jefferson* Court held that when Texas raised its standard of need by 11 per cent and shifted from a maximum grant system to a percentage reduction system, it fulfilled these two requirements.

In strong dissenting opinions, Mr. Justice Douglas and Mr. Justice Marshall interpreted the congressional intent behind Section 402(a)(23) much as the California court had done in *Villa v. Hall*.[56] Both the statute and *Rosado*, they said, require expanded eligibility for AFDC—even if the amount of payments is reduced—in order to make additional persons eligible for subsidiary benefits.[57] In Mr. Justice Marshall's view, the Texas system accomplished welfare reductions "surreptitiously . . . by eliminating those persons who have marginal income . . . ." in violation of *Rosado*'s holding that one purpose of the statute was "to force States to realize the political consequences of reducing welfare payments."[58] Arguing that neither statutory nor case history supports a judgment that permits states to deny aid to eligible persons, Mr. Justice Marshall said:

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52. 406 U.S. at 541.
53. Id. at 542-43.
54. Id. at 543-44.
55. Id. n.11, referring to the Rosado definition, 397 U.S. at 409, n.13.
56. 6 Cal. 3d 227, 490 P.2d 1148, 98 Cal. Rptr. 460 (1971).
57. 406 U.S. at 551 and 558 (dissenting opinions).
58. Id. at 564 (dissenting opinion).

For me, this case is no different from *King v. Smith*, 392 U.S. 309 (1968) (striking down substitute father regulation) or *Townsend v. Swank*, 404 U.S. 282 (1971) (striking down restriction on receipt of aid by college students). The State procedure denies eligible persons aid, and regardless of the State's purposes, the procedure cannot stand in conflict with the federal statute.[59]

The paucity of legislative history regarding Section 402(a)(23) was noted both in the *Rosado*[60] and *Jefferson*[61] decisions. The statute as originally proposed would have required the states to update standards of need annually and to meet them in full.[62] Congress rejected the proposal that states *meet* need and retained only the provision that the standard used to determine need be updated.[63] Further, Congress eliminated the requirement for annual adjustments, substituting a single adjustment before July 1, 1969.[64] A proposal by Senator McGovern that states be required to increase AFDC aid by four dollars a month was defeated.[65]

At the same time, however, the training and self-help provisions added to Section 402 by the 1967 social security amendments indicate:

. . . Congress's major concern was the provision of family counseling and rehabilitation services, work incentives, and family planning programs to reduce out-of-wedlock births, for all persons in the family, in order to promote self-support and child development and to strengthen family life . . . . By making those with marginal incomes eligible for AFDC by raising the standard of need, more persons would be eligible for such services, which Congress considered vital to cut down in the long run the numbers dependent on welfare.[66]

The *Jefferson* Court found little to support this interpretation. More significant, it found, was that at the same time Congress enacted Section 402(a)(23) it included another section designed "to induce States to reduce the number of individuals eligible for the AFDC program."[67]

Equal Protection Clause

Appellants in *Jefferson* also argued that the Texas AFDC system violated the equal protection clause of the fourteenth amendment because

59. Id. at 572 (dissenting opinion).
60. 397 U.S. at 412.
61. 406 U.S. at 544.
62. U.S. Code Cong. & Admin. News, Vol. 2, 90th Cong., 1st Sess. 3209 (1967).
63. See Lampton v. Bonin, 304 F. Supp. at 1388.
64. U.S. Code Cong. & Admin. News, Vol. 2, 90th Cong., 1st Sess. 3209 (1967).
65. 113 Cong. Rec. 16,964 (daily ed. Nov. 21, 1967).
66. 304 F. Supp. at 1389. See also U.S. Code Cong. & Admin. News, Vol. 2, 90th Cong., 1st Sess. 2837 (1967).
67. 406 U.S. at 544.

Texas paid 75 per cent of AFDC need while paying 100 per cent of recognized need to the aged and 95 per cent to the disabled and blind. They argued that a state is obliged to apply the same percentage to each of its welfare programs.[68]

Appellants said that since there is a larger percentage of blacks and Mexican-Americans in AFDC than in the other programs,[69] the lower percentage of aid paid to AFDC recipients reflects a racially discriminatory motive on the part of the state, and the state therefore must justify its action by a compelling state interest.[70] Similarly, they claimed that the distinction between the programs violated Title VI of the 1964 Civil Rights Act,[71] which prohibits racial discrimination in any program or activity receiving federal financial assistance.

The *Jefferson* Court rejected all of these arguments. In response to appellants' first contention, the Court said that while the four categories of public assistance provided for in the Social Security Act have common elements, there is no congressional mandate that all must be administered equally.[72]

The Court relied on the district court's findings that the Texas method of payment to AFDC recipients " 'is not the result of racial or ethnic prejudice and is not violative of the federal Civil Rights Act or the Equal Protection Clause. . . .' "[73] The district court had noted that there had never been a reduction in the amount of money appropriated by the state legislature to the AFDC program and that there had been five increases at the time the action was brought.[74]

Finally, the Court concluded that the presence of more blacks and Mexican-Americans in the AFDC program than in the others was not alone determinative since "given the heterogeneity of the Nation's population, it would be only an infrequent coincidence that the racial com-

68. Id. at 538.

69. Id. at 548. In 1969, the percentage of blacks and Mexican-Americans in the four aid programs was: 87%, AFDC; 55.7%, Aid to the Blind; 46.9%, Aid to Permanently and Totally Disabled, and 39.8%, Old Age Assistance.

70. See Shapiro v. Thompson, 394 U.S. 618, 634 (1969): "[A]ny classification which serves to penalize the exercise of . . . [a constitutional right], unless shown to be necessary to promote a compelling governmental interest is unconstitutional." (emphasis deleted).

71. 42 U.S.C. § 2000d (1970).

72. 406 U.S. at 546.

73. Id. at 547.

74. 304 F. Supp. at 1339-40.

position of each grant class was identical to that of the others."[75] The Court added:

> Applying the traditional standard of review under that amendment [fourteenth], we cannot say that Texas' decision to provide somewhat lower welfare benefits for AFDC recipients is invidious or irrational. Since budgetary constraints do not allow the payment of the full standard of need for all welfare recipients, the State may have concluded that the aged and infirm are the least able of the categorical grant recipients to bear the hardships of an inadequate standard of living.[76]

Mr. Justice Marshall in his dissent chose not to reach the issue of the alleged racial discrimination,[77] concluding instead that, since "the basic aims of the four programs are identical . . . the State concludes that the standard of need is the same for recipients of aid under the four distinct statutes, it is my opinion that Congress required that the State treat all recipients equally with respect to actual aid."[78]

The *Jefferson* holding followed a pattern laid down earlier in equal protection challenges by welfare recipients. In *Shapiro v. Thompson*,[79] the Court held that the state must meet a stringent "compelling interest" test if its welfare restrictions infringed a constitutional right.[80] But where constitutional rights are not involved, the Court in *Dandridge v. Williams*[81] said that the state need only show that its restrictions are reasonable. The Court in *Shapiro* invalidated a one-year residency requirement for welfare benefits as violative of equal protection because it imposed an unconstitutional restriction on the right to travel. But the *Dandridge* Court, in upholding Maryland's maximum grant system of administering its AFDC program, said:

> In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality."[82]

Mr. Justice Marshall dissented sharply in *Dandridge*, arguing that the most basic needs of impoverished human beings were at stake and that,

75. 406 U.S. at 548.
76. Id. at 549.
77. Id. at 577.
78. Id. at 577-78.
79. 394 U.S. 618 (1969).
80. Id. at 634.
81. 397 U.S. 471 (1970).
82. Id. at 485.

when children in large families are denied aid because of the maximum grant system, there is " 'a prima facie violation of the equal protection requirement of reasonable classification,' compelling the State to come forward with a persuasive justification for the classification."[83]

Conclusion

Just as the *Rosado* decision made it clear that Section 402(a)(23) does not require states to increase the amount of their AFDC payments, the *Jefferson* decision approves a formula that permits states to decrease the number of AFDC recipients. Congress's rejection of the original AFDC amendment which would have mandated an increase in AFDC payments is persuasive in the *Rosado* interpretation. In *Jefferson*, however, the Court interprets the federal statute even more narrowly, in effect limiting congressional intent to the substitution of ratable reduction formulas in place of statutory maximums in granting AFDC aid.

The absence of congressional debate on the measure is evidence that Congress intended no major new expenditures as a result of Section 402(a)(23). But by adding new self-help amendments to the Social Security Act at the same time it approved Section 402(a)(23), Congress would seem to have envisioned reaching more low-income families with the training required to raise their standard of living. By tying eligibility for the self-help programs to receipt of AFDC aid and then requiring states to raise the AFDC standard of need, it seems reasonable that Congress sought to add more minimal-income persons to AFDC in order that they might qualify for training. There seems little point in requiring a state to recognize a higher minimum subsistence level unless it results in recognizing the needs of more families with bare subsistence incomes.

In rejecting this reasoning, *Jefferson* encourages the conclusion that Congress intended Section 402(a)(23) as window dressing, giving only the appearance of confronting the problems of the poor. Under *Rosado* and *Jefferson*, a state by simple changes in its bookkeeping method may decrease the amount of its AFDC payments and reduce the number of persons eligible for AFDC aid. Only the most cynical interpretation can align this result with Congress's intent in passing the 1967 amendments.

83. Id. at 519 (dissenting opinion) (footnote omitted). The Court in Townsend v. Swank, 404 U.S. 282 (1971), while striking Illinois restrictions on AFDC as applied to children attending college as inconsistent with the Social Security Act, added in dictum that "we think there is a serious question whether the Illinois classification can withstand the strictures of the Equal Protection Clause." Id. at 291. The Court indicated that were it to reach the equal protection question, it would apply the "traditional test" of rationality to the state's classification.