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PRIVATE USE OF PUBLIC FACILITIES: A COMMENT ON GILMORE V. CITY OF MONTGOMERY

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Perhaps the principal shortcoming of constitutional adjudication in the Supreme Court of the United States is the Court's recurrent failure to set forth principles of decision that rise above the result reached in any particular case.[1] The other branches of the national government, the states, the bar, and ultimately the public at large require guidance concerning the pressing constitutional issues of the day. That guidance can come only from the Supreme Court, for, to be sure, "[i]t is emphatically the province and duty of the judicial department to say what the law is."[2] To the extent the Court shrinks from its duty, declining to decide cases or leaving the doctrine underlying its decisions unclear or unstated, the nation is left adrift, without the fundamental understanding upon which the rule of law depends.

A number of reasons may be given for the Court's failure to provide more guidance. First among them is the basic paradox of the modern Court's docket. The Court's role is to decide cases involving questions that transcend the immediate interests of the litigants. Yet, under Article III of the Constitution, the Court has jurisdiction to decide only actual cases or controversies between adversaries with a substantial stake in the outcome.[3] Thus any particular

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1. Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Hart, *Foreword: The Time Chart of the Justices, The Supreme Court, 1958 Term*, 73 HARV. L. REV. 84 (1959); *see* Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

2. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

3. Muskrat v. United States, 219 U.S. 346 (1911).

opinion cannot range beyond the needs of the case at bar, even if a more precise statement of lasting standards would seem to demand it.[4] A second reason for the Court's failure to set forth clear principles of decision may be found in the judicial temperament. Even in those cases in which the Court has power to act, there is a certain resistance to activism. Accordingly, the Court may couch its opinions in careful language, groomed to the peculiar facts of the case at hand, or resort to evasive procedural devices in order to avoid premature or particularly far-reaching decisions.[5] There is a third reason for uninstructive opinions. The Supreme Court's failure to set forth lasting principles for the solution of problems in the future may be traced to the Court's result-oriented approach to constitutional adjudication.[6] While the issue is not free from doubt,[7] respected opinion holds that the Court's practice of coming to a constitutional decision after weighing and balancing the interests and factors involved is at odds with the concept of a written Constitution.[8] The approach borrows the case-by-case method of the common law, resolving cases on the basis of judgment on the relative weight to be given conflicting policies and values. Interpretation of the Constitution, it can be argued, requires more rigorous fidelity to a definite benchmark, the written Constitution. Constitutional adjudication is not properly the adjustment process of a continuously developing common law, but rather a consistent adherence to established principles arising from specific provisions of the basic document.[9] Finally, it has been suggested that the Supreme Court's docket is so crowded with cases, each requiring the Justices' undivided attention, that there is simply insufficient time devoted to any one case to permit the careful scrutiny which reasoned judg-

4. P. FREUND, THE SUPREME COURT OF THE UNITED STATES 16 (1961).

5. *See* Bickel, *Foreword: The Passive Virtues, The Supreme Court, 1960 Term*, 75 HARV. L. REV. 40 (1961); *cf.* DeFunis v. Odegaard, 416 U.S. 312, 321 (1974) (Brennan, J., dissenting). One common example of this technique is the practice of remanding a case to a lower court for development of the record. Of this Mr. Justice Brandeis was the master. P. FREUND, *supra* note 4, at 120-21.

6. *See* Wechsler, *supra* note 1; Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1 (1959); Black, *Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967); *see also* Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424 (1962).

7. *See* Kadish, *Methodology and Criteria in Due Process Adjudication: A Survey and Criticism*, 66 YALE L.J. 319 (1957).

8. Black, *The Bill of Rights*, 35 N.Y.U.L. REV. 865 (1960).

9. Reich, *Mr. Justice Black and the Living Constitution*, 76 HARV. L. REV. 673, 736-44 (1963).

ment demands.[10] In recent years, notwithstanding the Judiciary Act of 1925,[11] the Court's docket has expanded enormously, and the consequence may well be the steady deterioration of the quality of decision-making as well as opinion-writing.[12]

To varying extents, the Supreme Court's recent opinion in *Gilmore v. City of Montgomery*[13] is illustrative of the operation of each of these factors. The result is a thoroughly unsatisfactory constitutional decision, which fails to establish principles against which the future conduct of the parties or others can be judged. Although

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10. Hart, *supra* note 1.

11. The Act of 1925 established the principle that the Supreme Court should decide only cases of general importance to the nation. Specifically, the Act enlarged the Court's *certiorari* jurisdiction and reserved appellate review for a narrow category of cases. This left the Court with substantial discretionary control of its own docket. *See* P. FREUND, *supra* note 4, at 12-13.

12. Years ago, Professor Hart warned the Court of the result suggested in the text. After an extensive examination of the Court's 1958 term, he determined that opinions, on an average, must have been prepared in twenty-four working hours. The conclusion he drew was sobering.

> If what has just been said is accepted, the conclusion emerges inexorably that the number of cases which the Supreme Court tries to decide by full opinion, far from being increased, ought to be materially decreased. An average of twenty-four hours may be enough time, or more than enough, in which to prepare a superficially plausible rationalization of what is in substance an ipse dixit. It may even be enough time in which to prepare a genuinely workmanlike opinion which accurately reports the facts of record and the issues arising out of them and deals systematically and conscientiously with all the contentions of counsel and the relevant precedents which counsel cite. But opinions which bring to problems the fresh illumination of personal research and of hard, independent thought cannot be written that fast. Anyone who has spent his life in working with ideas can speak with assurance about this. Ideas which will stand the test of time as instruments for the solution of hard problems do not come even to the most gifted of lawyers in twenty-four hours. Indeed, they do not come with dependability to any single individual even in much longer periods of study and reflection. Such ideas have ordinarily to be hammered out by a process of collective deliberation of individuals, gifted or otherwise, who recognize that the wisdom of all, if it is successfully pooled, will usually transcend the wisdom of any. This, of course, is the theory and the justification in principle of all collegial tribunals, and especially of tribunals of last resort. . . .
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> The opinions of the Justices, if one turns to them, confirm the conclusion that the Court is trying to decide more cases than it can decide well. Regretfully and with deference, it has to be said that too many of the Court's opinions are about what one would expect could be written in twenty-four hours.

Hart, *supra* note 1, at 99-100. For a more recent analysis of the Supreme Court's caseload, *see* FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972); *see also* REPORT ON THE FEDERAL JUDICIAL BRANCH, Remarks of the Honorable Warren E. Burger, Chief Justice of the United States, delivered before the American Bar Association, Washington, D.C. August 6, 1973; *but see* Tidewater Oil Co. v. United States, 409 U.S. 151, 174 (1972) (Douglas, J., dissenting) (suggesting that the Court is not overworked with respect to cases that are set down for argument and full opinion).

13. 417 U.S. 556 (1974).

the case presented an excellent opportunity for analyzing the constitutional limitations on private use of public recreational facilities, the Court's treatment of the problem is sadly lacking. This article will examine the opinion in *Gilmore* in some depth, in an effort to identify and analyze the Court's reasons for failing to develop principles for dealing with analogous cases in the future. The intent is to demonstrate that standards *can* be found, if the tools of analysis are employed; and that useful standards, however flawed, are far superior to none at all. In short, we are entitled to demand more from the Supreme Court. To paraphrase Professor Freund, albeit in another context, the question is not whether the Court can do everything but whether it can do something.[14]

On first blush, the facts of *Gilmore* were not overly complex. Indeed, the lower courts had strived to clarify the issues for decision. The petitioners in the class action suit were black residents of Montgomery, Alabama. As a part of long-standing litigation designed to desegregate Montgomery's public recreational facilities, the petitioners asked the federal district court for an order banning the use of public facilities by segregated school and non-school private groups. Their contention was that the city's authorization of such use constituted state action in violation of the equal protection clause of the fourteenth amendment and the city's affirmative duty to disestablish the dual school system in Montgomery. The district court, in a four-part order, enjoined the city authorities from permitting the use of public recreational facilities by any private segregated school group or any non-school group which had a racially discriminatory admissions policy.[15] On appeal, the Fifth Circuit

14. P. FREUND, *supra* note 4, at 89.

15. Gilmore v. City of Montgomery, 337 F. Supp. 22 (M.D. Ala. 1972). Specifically, the district court's order provided:

> 1. That the City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private school, or private school affiliated group, which school or group is racially segregated or which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.
>
> 2. That said City of Montgomery, Alabama, its officers, agents, servants, employees, and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private school, or private school affiliated group, if such school or group is racially segregated or if it has a racially discriminatory admissions policy.
>
> 3. That said City of Montgomery, Alabama's policy and practice of permitting the use of city owned or operated recreational facilities by any private group, club or organization which has a racially discriminatory admissions policy be and the same is hereby declared unconstitutional.

Court of Appeals reversed in part and remanded the case with directions. The Fifth Circuit upheld the district court's order insofar as it enjoined what the circuit called "exclusive" use of public facilities by private segregated school groups. But the circuit court invalidated that part of the order which enjoined non-exclusive use of facilities by private school children. Additionally, the circuit court held that the district court's injunction against the use of facilities by non-school groups was not founded upon a sufficient showing of state action.[16]

Thus the case in the Supreme Court was focused along rather clearly defined lines. The district court's order, as it had been circumscribed by the circuit court's opinion, posed the problem of private use of public facilities in three situations: (1) The exclusive use of facilities by private segregated school groups; (2) The non-exclusive use of facilities by private segregated school groups; and (3) The use of facilities by private non-school groups with racially discriminatory admissions policies. The parties hoped for but did not receive clear statements of principle on any of the three. Generally, adjudication of the case in the Supreme Court accomplished very little. The Court emphasized "[t]he usual prudential tenets limiting the exercise of judicial power"[17] and declined to deal with issues that the parties might not have standing to raise. In addition, the holding on the issue it did decide was tied so closely to the particular facts of the case at bar that it is questionable whether future litigants may reasonably and safely rely upon it. The brunt of the case was remanded to the trial court for development of the record, and the fluid test for determining state action was left intact, with no principled elaboration to guide the lower courts. Perhaps the case, coming as it did in the rush to summer recess, presented too many complex problems for the Court to treat in the time allotted. In any event, the law on private use of public recreational facilities was left in obscurity. The question which must be asked is whether the reasons the *Gilmore* Court offered for failing to give more guidance for the future were sufficient.

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4. That said City of Montgomery, Alabama, its officers, agents, servants, employees and those acting in concert with it, be and each is hereby enjoined from permitting or in any way sanctioning the use of city owned or operated recreational facilities by any private group, club or organization which is not affiliated with a private school and which has a racially discriminatory admissions policy.

Id. at 26.

16. Gilmore v. City of Montgomery, 473 F.2d 832 (5th Cir. 1973).

17. 417 U.S. at 571 n.10.

I. Exclusive Use of Public Facilities by Private Segregated Schools

The majority opinion, delivered by Mr. Justice Blackmun, began with an extensive review of the litigation. The petitioners had originally initiated the action in 1958, in an attempt to desegregate the public parks in Montgomery. In its first order in the case, the district court held a city ordinance mandating segregation unconstitutional and enjoined its enforcement.[18] However, even before the district court's order was rendered, the city closed all its recreational parks, athletic fields, swimming pools, and playgrounds. These were not reopened until 1965.[19] The case lay dormant until 1970 when the petitioners asked that the city be held in contempt for deliberately violating the 1959 parks desegregation order. In separate litigation, it had been established that the city had conspired with the local YMCA to operate a segregated recreational program in Montgomery, using public facilities.[20] The 1970 claims were settled by agreement early in 1971, but later in that same year the petitioners returned to the district court with a motion for supplemental relief. That motion raised for the first time the allegation that the city was violating the equal protection clause by permitting segregated private groups to use public recreational facilities. This motion became the basis for the Supreme Court's opinion.

The Court turned first to the "exclusive use" test adopted by the circuit court. While the district court had enjoined any use of public facilities by private segregated school groups, the circuit court upheld the order only insofar as it reached the "*exclusive* possession of public recreational facilities such as football stadiums, baseball diamonds, basketball courts, and tennis courts *for official athletic contests and similar functions* sponsored by racially segregated private schools."[21] Understandably, the Supreme Court had difficulty. Justice Blackmun found the concept of exclusive use helpful "not so much as a controlling legal principle but as a description of a type of use and, in the context of this case, suggestive of a means of allocating public recreational facilities."[22] The Su-

18. Gilmore v. City of Montgomery, 176 F. Supp. 776 (M.D. Ala. 1959). On appeal, the Fifth Circuit affirmed the order and further instructed the district court to retain jurisdiction, in order to assure compliance. Gilmore v. City of Montgomery, 277 F.2d 364 (5th Cir. 1960).

19. 417 U.S. at 559 n.1.

20. Smith v. YMCA, 316 F. Supp. 899 (M.D. Ala. 1970), *aff'd as modified*, 462 F.2d 634 (5th Cir. 1972).

21. 473 F.2d at 836-37 (emphasis supplied).

22. 417 U.S. at 566.

preme Court read "exclusive use" to mean, at least implicitly, that a public facility is in the complete and exclusive possession of a private group and the city has consciously allocated the use of the facility to that group rather than some other private or public organization.[23]

Next, Justice Blackmun took up the question of the 1959 parks desegregation order. Apparently analogizing from the school desegregation cases,[24] he reasoned that after the 1959 order the city was under an affirmative constitutional duty to eliminate any practice in the city parks which reflected the discredited "separate but equal" doctrine.[25] However, rather than complying promptly with the desegregation order, the city orchestrated an elaborate scheme for evading the plain meaning of the order. Here Justice Blackmun drew upon the facts established in the *YMCA* case and made a part of the record in *Gilmore*.[26] He said that "[i]n light of these facts . . . it was entirely appropriate for the District Court carefully to scrutinize any practice or policy that would tend to abandon to segregated private groups facilities normally open to members of all races on an equal basis."[27]

Finally, the Court turned to the "[p]articularly important" point "that the city's policies operated directly to contravene an

23. On this second point, Justice Blackmun was ambiguous. His precise words were: "It [exclusive use] also implies, *without mandating*, a decision-making role for the city in allocating such facilities among private and, for that matter, public groups." 417 U.S. at 566 (emphasis supplied). Apparently, Justice Blackmun understood the circuit court as referring only to organized functions, implying planning and scheduling on the part of city authorities. The city was necessarily in the position of allocating scarce resources. Since only one group at a time can hold complete possession of a facility, the circuit court's concept of exclusive use must have included decision-making by the City of Montgomery. On the other hand, nothing in the circuit court's opinion said precisely that. Hence, Justice Blackmun's careful language.

24. *E.g.*, Green v. County Bd., 391 U.S. 430 (1968).

25. The Court cited Watson v. Memphis, 373 U.S. 526 (1963). *Watson* held only that the City of Memphis must desegregate its public parks immediately. Although the Court had indicated in Dawson v. Mayor, 220 F.2d 386, *aff'd*, 350 U.S. 877 (1954), that parks would be controlled by the principles established in *Brown*, neither *Dawson* nor *Watson* established any *affirmative* duty to eliminate "root and branch every vestige of the separate but equal doctrine" in public parks. It is noteworthy that the Court did not use that language in a *school* case until Green v. County Bd., 391 U.S. 430, 438 (1968), decided five years after *Watson*. Prior to *Green*, many courts assumed that the law, even in school cases, was summed up in the famous dictum from Fourth Circuit Judge John Parker: "The Constitution . . . does not require integration. It merely forbids discrimination." Briggs v. Elliott, 132 F. Supp. 776, 777 (E.D.S.C. 1955). Accordingly, Justice Blackmun's opinion in *Gilmore* seems to have broken new ground, extending the affirmative duty established in the school cases to public parks.

26. *See* Smith v. YMCA, 316 F. Supp. 899 (M.D. Ala. 1970), *aff'd as modified*, 462 F.2d 634 (5th Cir. 1972).

27. 417 U.S. at 567.

outstanding school desegregation order."[28] The district court had, as early as 1964, declared the Montgomery school system to be segregated and ordered appropriate relief.[29] Here again, the city had an affirmative duty to disestablish segregation: the dual school system. Justice Blackmun used strong language in condemning any arrangement which significantly tends to perpetuate segregated public schools. He agreed with both lower courts that the use of public facilities for organized recreational and athletic events by private segregated schools constitutes significant aid to the schools and thus may be enjoined. The Supreme Court, again following the lower courts, listed three ways in which private schools are aided. First, private schools' use of public facilities permits them to provide complete athletic programs that enhance their attractiveness to white students. Second, use of public facilities for recreational events results in a capital savings for private schools. Consequently, they are able to divert funds that might pay for recreational facilities to other programs. Third, private schools are able to generate revenue by operating concessions during events held on public property.

In light of the foregoing, the Supreme Court upheld that part of the circuit court's order which affirmed the district court's ban on the exclusive use of public facilities by private segregated school groups. Perhaps the most striking aspect of the holding was its extremely narrow character. First, the Court dwelled at length upon the history of the litigation and the city's long-standing recalcitrance in civil rights matters. Then, adopting a restricted understanding of "exclusive use," the Court emphasized the two outstanding orders requiring the desegregation of public schools and

28. *Id.* The Court quoted from the landmark opinion in Cooper v. Aaron, 358 U.S. 1 (1958):

> [T]he constitutional rights of children not to be discriminated against . . . can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly by them through evasive schemes for segregation whether attempted "ingeniously or ingenuously."

Id. at 17. The *Gilmore* Court also relied upon Norwood v. Harrison, 413 U.S. 455 (1973), the recent case which struck down the Mississippi program of supplying textbooks to all children—including those attending private segregated schools. *Norwood* held that any state assistance to private segregated schools is prohibited if it has "a significant tendency to facilitate, reinforce, and support private discrimination." *Id.* at 466. For an examination of the effect of "white-flight" academies on public education, *see* Note, *Segregation Academies and State Action*, 82 YALE L.J. 1436 (1973).

29. Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705 (M.D. Ala. 1964), 253 F. Supp. 306 (M.D. Ala. 1966), 289 F. Supp. 647 (M.D. Ala.), *aff'd as modified*, 400 F.2d 1, 402 F.2d 782 (5th Cir. 1968), *rev'd and remanded sub nom.*, United States v. Montgomery County Bd. of Educ., 395 U.S. 225 (1969) (instructing the circuit court to affirm the district court's order).

parks in Montgomery and the city's affirmative duty to desegregate both the schools and parks. Only then was the Court prepared to affirm the lower courts on the only issue upon which they had agreed. In consequence, the *Gilmore* holding on the exclusive use of public recreational facilities by private segregated schools is of questionable value as precedent. It is unlikely that many cases will arise with the same wealth of factual support for injunctive relief. Of course, constitutional doctrine characteristically assumes a life of its own and often controls subsequent cases even when factual distinctions are apparent.[30] Whether the *Gilmore* holding will reach beyond the peculiar facts which gave rise to it thus remains to be seen.

II. Non-Exclusive Use of Public Facilities by Private Segregated Schools

If those who seek principles of decision from Supreme Court opinions were disappointed at the Court's handling of the first issue in *Gilmore,* they found even less of precedential value in the remainder of the opinion. The Court turned next to an issue that had divided the lower courts—non-exclusive use of public facilities by school groups. The Court said simply that, "[u]pon this record," it was unable to draw conclusions.[31] Essentially, the Court gave two reasons for failing to deal thoroughly with the question presented. First, the Court expressed doubt as to the petitioners' standing. Second, the Court complained that the factual record was inadequate for a solid constitutional judgment on the merits. These must be taken in turn.

A. Standing

While the Court was persuaded that the exclusive use of facilities injured the petitioners, it was not sure that non-exclusive use would, in every case, result in cognizable harm to them. The Court noted that the petitioners were parties in the *parks* desegregation case, but, to the extent the resolution of the question might rest on the city's lack of compliance with the *school* desegregation order, it was questionable whether these petitioners were the proper parties to complain.[32] On the surface, the reasoning seems plausible. Certainly, if a litigant can claim no injury in fact, he has no stake in

30. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 343-44 (1974).
31. 417 U.S. at 570.
32. *Id.* n.10.

the outcome and the jurisdictional requirement of a case or controversy is absent.[33] And, if the *Gilmore* petitioners were not parties to the school desegregation suit, the Court might reasonably hold that they must make a showing of injury before being entitled to relief based on a violation of the order in that case. However, three points come immediately to mind.

First, the Court in *Gilmore* affirmed the lower courts' decision to grant relief to the petitioners on their claim concerning exclusive use of public facilities by school groups. Since that holding was based, at least in part, on a finding that the city had violated the school desegregation order, it is clear that the Court found no difficulty in the petitioners' reliance upon the city's duties arising from the school desegregation order—so long as the petitioners could show injury in fact. Apparently, the Court was prepared to say that exclusive use of facilities injured these petitioners, but it was unwilling to concede that non-exclusive use would necessarily do the same. The mind's eye sees black children barred at the gate when segregated academy teams have exclusive possession of a playing field, but allowed to enter when segregated teams occupy only a portion of the field. Second, the *Gilmore* petitioners were clearly able to demonstrate just the injury in fact the Court demanded. Indeed, their case was built on the proposition that they were denied an equal opportunity to use public facilities as a consequence of the city's policy. Whether black people were denied access to an entire facility or only some part of it, the result was the same—discrimination on the basis of race. Moreover, the *Gilmore* petitioners suffered psychological injury whether they rested their claim on alleged violation of outstanding orders or some other unlawful conduct on the part of city authorities.[34] Third, even a cur-

33. O'Shea v. Littleton, 414 U.S. 488 (1974); *cf.* National Lawyer's Guild v. Board of Regents, 490 F.2d 97 (5th Cir. 1973) (dismissing as moot a petition seeking an order requiring a college to make facilities available for a meeting to be conducted by a private group).

34. Specifically, the petitioners argued as follows:

> The petitioners of course complain that they have lost the full or partial use of specific recreational facilities during the time they are used by an all-white school group, but more importantly they emphasize that the more substantial burden stems from the fact that the city has become associated with and has lent its prestige to the private racial discrimination. . . . Petitioners in the case *sub judice* are made to suffer the "Constitutional odium of official approval" of racial segregation whenever the city permits the use of its recreational facilities by private segregated schools.

Brief for Petitioners at 30 (citations omitted). Thus the real issue for the petitioners was the "psychological burden" involved in the city's policy. *Id.* at 41; *see* Wright v. City of Brighton, 441 F.2d 447 (5th Cir.), *cert. denied,* 404 U.S. 915 (1971). For a general argument that the

sory examination of the papers filed in the school desegregation suit would have revealed that the definition of the class in that action—Negro children living and residing in various areas of Montgomery, Alabama[35]—overlapped the definition of the class in *Gilmore*—Negro citizens of the City of Montgomery.[36] Indeed, it seems rather clear that the *Gilmore* petitioners, or persons represented by them, were, in fact, within the class in the school case. In effect, the same litigants brought both suits, and there was no basis whatever for denying the petitioners in one the benefits of the relief granted in the other. The upshot is that the petitioners' lack of standing was not a real issue in *Gilmore*. The question was raised only as a make-weight argument in support of the Court's more fundamental decision to forego a thorough treatment of the case.[37]

B. Adequacy of the Record

The Court also said it would be improper to determine what relief might be warranted concerning "all the many and varied situations" in which public facilities were used by private groups. The resolution of the remaining questions was left to the district court on remand. Justice Blackmun said specifically that the district court should identify what public facilities were available in Montgomery and to what uses they might be put by private groups. Then, "under appropriate circumstances," the district court might well find violations of the two outstanding desegregation orders or state action involving the city in the discriminatory conduct of private groups. He gave two examples of situations in which the district court might find violations of the outstanding desegregation orders. First, if an all-white private school basketball team were invited to participate in a tournament held on public property with integrated teams, Justice Blackmun suggested that the discrimination practiced by the segregated school might have so pervasive an influence

Article III case or controversy requirement demands no more than injury in fact, *see* Association of Data Processing Service Organization v. Camp, 397 U.S. 150, 169 (1970) (opinion of Justices Brennan and White); Jaffee, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff*, 116 U. PA. L. REV. 1033 (1968).

35. Carr v. Montgomery County Bd. of Educ., 232 F. Supp. 705, 706 (M.D. Ala. 1964).

36. Gilmore v. City of Montgomery, 176 F. Supp. 776, 777 (M.D. Ala. 1959).

37. It is worth noting that, during the last term, the Supreme Court dealt with a number of standing cases. *E.g.*, Schlesinger v. Reservists, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974). Perhaps, then, the reference to standing in *Gilmore* can be attributed to a heightened sensitivity to the issue. Unfortunately, the case has created confusion for lower courts charged with interpreting footnote 10. *See* Gooden v. Mississippi State Univ., 499 F.2d 441 (5th Cir. 1974).

on the educational system that a violation of the school desegregation order might be found.[38] The second example involved non-exclusive use of public facilities that might violate the parks desegregation order. Here Justice Blackmun pointed out that Montgomery provided all-white private and all-black public baseball leagues with playing fields and equipment. He suggested that the district court might find that such a dual system constitutes a violation of the outstanding order to desegregate the city parks.[39] The majority opinion thus focused on the type of use private schools might give to public facilities, rather than upon the extent to which *any* use enhances the programs of private schools and thus constitutes a significant benefit conferred upon them by the City of Montgomery. The opinion also emphasized the complicity of city authorities in scheduling even non-exclusive uses of public facilities by private school groups. Finally, the majority opinion looked to the district court for the determination of the merit of the petitioners' claim about any particular use.

The petitioners' principal objective in taking their case to the Supreme Court was to free the law from the unworkable "exclusive use" test adopted by the Fifth Circuit.[40] To be sure, Justice Blackmun rejected the test "as a controlling legal principle,"[41] but he failed to deal thoroughly with the problems raised. What the circuit court meant by "exclusive use" is anything but clear. The circuit first stated that the district court had enjoined "exclusive possession of public recreational facilities . . . for the purpose of official school functions. . . ."[42] In reality, the district court had not mentioned "exclusive use" but instead had simply enjoined "use."[43] In any event, the circuit went on to say that "to the extent that the [district] court's order may be read to prohibit the use and enjoyment of public recreational facilities by individual children or groups of students enrolled at private schools in common with other members of the public, we find the order to be overbroad."[44] Thus the circuit seemed to adopt a facile distinction between exclusive possession of facilities for official functions on the one hand and

38. 417 U.S. at 571.
39. *Id.* at 572.
40. Letter to the writer from Joseph J. Levin, Jr., General Counsel of the Southern Poverty Law Center and Counsel for Petitioners in *Gilmore*. July 18, 1974.
41. 417 U.S. at 566.
42. 473 F.2d at 837.
43. *See* note 15, *supra*.
44. 473 F.2d at 837.

individual enjoyment of facilities on the other. A possible example might be the difference between two private schools assuming exclusive possession of a playing field for an organized baseball game between school teams and two students enrolled at private schools stopping by the same field the next morning for a game of catch. This led Justice Blackmun to adopt his exceedingly narrow "understanding of the term."[45] He took "exclusive use" to include only formal arrangements for the playing of official games by private schools. The affirmance of the lower courts' action thus reached only cases in which private schools take over exclusive possession of public facilities, implicitly by prior agreement with city authorities. In short, the organized ball game may be enjoined but the game of catch, undertaken without the city's knowledge, is something else again.[46]

The difficulty with Justice Blackmun's "understanding of the term" is that it stems from a spot reading of the circuit court's opinion. After suggesting the simplistic distinction outlined above, the circuit court went on to discuss the use of facilities by private school groups in common with other groups and individuals. The court said that permitting private school groups to visit recreational facilities, such as zoos, museums, and parks, does not involve the city in the same degree of state action which condemns the exclusive use of facilities for school functions.[47] The court indicated that permitting this "non-exclusive" use did not violate the Montgomery school desegregation order, because the schools involved could not raise revenue from communal use of public facilities. Nor could they save capital by duplicating public school operations at public expense. Neither public nor private schools attempt to maintain their own zoos and museums.[48]

The circuit's elaboration on the meaning of non-exclusive use revealed the inadequacy of the exclusive use test itself. For the circuit, even organized use of public recreational facilities by segregated school groups is permissible, so long as other individuals and groups may use the same facility at the same time. Perhaps, in the

45. 417 U.S. at 566.

46. There is a temptation to say flatly that this type of unorganized use of public recreational facilities by individuals cannot be enjoined. Still, nothing in the majority opinion in *Gilmore* makes that result clear. It bears repeating that the Supreme Court *decided* precious little in *Gilmore*. And by reversing that part of the circuit court's judgment, which would have controlled this simple example, the Court hardly clarified the issue.

47. 473 F.2d at 837.

48. *Id.*

case of a field trip to the city zoo, the distinction is plausible.[49] But there are other, more difficult cases. The petitioners suggested,[50] and Justice Blackmun noted,[51] a good example. If a private school group occupies two tennis courts in a group of ten, the circuit's exclusive use test would apparently hold that the use is permissible. Eight courts remain available for use by others. But certainly, while the two courts are being used by the school group, black children are denied use of those courts, not simply because they arrived late, but because they arrived black.[52] Perhaps more importantly, the use

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49. The city offered an extreme version of the *Gilmore* petitioners' case:

> The petitioners urge that any assistance whatsoever to private schools, with the possible exception of basic essentials, would be unconstitutional. It would indeed be harsh and unconstitutionally unwarranted [sic] to deny individual children and groups of students who may attend private schools the right to use in common with other members of the public, a municipal museum or zoo. . . .
>
> The petitioners would deprive children who may be enrolled in all-white private schools the opportunity to participate along with other members of the public in all types of municipally sponsored programs. The argument of the petitioners would prohibit a group of private school children from being admitted, during school hours, to the audience of this Court. Would petitioners also restrict a group of students from an all-white private school from the Smithsonian Institute, the Library of Congress or from field trips to the Washington Monument or Lincoln Memorial? The "any aid whatsoever" argument of petitioners would lead to at least these far-reaching and unwarranted consequences.

Brief for Respondents at 37-38 (footnotes omitted). To this the petitioners replied:

> The respondents argue in favor of the Fifth Circuit's position by raising the spectre of wholesale exclusion of all private school groups from public facilities and functions throughout the nation. That is quite clearly a bogus issue. The petitioners and the District Court strictly limit their position to cover only organized school activities dealing with recreational programs, and the only situation before the Court is that of recreation. The District Court carefully found that city provision of recreational facilities conferred benefits on the segregationist academies, and recreation is certainly a normal part of most schools' regular program of learning and instruction which they may provide on their own grounds. Whether field trips to public monuments or museums involve similar aid to private institutions is problematical, but in any event such situations must survive or fail on its [sic] own merits if litigated.

Reply Brief for Petitioners at 23-24 (footnotes omitted). Mr. Justice Marshall's separate opinion in *Gilmore* took the petitioners' part and accused the majority of rendering an advisory opinion, to the extent matters other than recreation were treated. 417 U.S. at 576 (Marshall, J., concurring and dissenting). In view of the majority's remarkable avoidance of most issues in the case, Justice Marshall's view lacks persuasiveness. Perhaps he was impatient with the tendency of the respondents, and indeed the courts, to ask what future cases might be controlled by analogy to a holding on recreational facilities. But that, after all, is an essential function of the judicial process.

50. Reply Brief for Petitioners at 26.

51. 417 U.S. at 566 n.7.

52. As Justice Blackmun put it:

> We understand the term "exclusive use" not to include the situation where only part of a facility may be allocated to or used by a group, even though that allocation or use results in the *pro tanto* exclusion of others. For example, the use of two of a

of the tennis courts can be translated readily into aid to the private schools concerned.[53]

The petitioners offered an alternative analytical framework for dealing with particular cases. They would have discarded the exclusive use test and replaced it with a standard focusing on the constitutional prohibition of public aid to segregated private schools.[54] Their brief criticized the exclusive use test for permitting Montgomery to provide some aid to private academies in the form of nonexclusive use of public facilities, while forbidding only the substantial aid implicated in exclusive use.[55] According to the petitioners, the key issue was "not the exclusivity of use but whether the city provision of facilities . . . had 'a significant tendency to facilitate, reinforce, and support private discrimination.' "[56] The petitioners then suggested an approach with "*res ipsa loquitur* overtones."[57] They argued that if a private school desires to use a public facility,

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total of 10 tennis courts by a private school group would not constitute an exclusive use; the use of all 10 would. This is not to say that the use of two by a private school group would be constitutionally permissible.

Id.

Of course, even if a private school has complete possession of a facility on one date, its use of the facility is not exclusive in the sense that other dates remain open. The argument that exclusive use implies a long-term lease was not seriously advanced in *Gilmore.* This was probably due to the existence of Fifth Circuit cases holding that a single act on the part of the state is sufficient to invoke the fourteenth amendment. Thus a school board's sale of a school building to a private segregated school is invalid even though the board plays no continuing role in the school's operation. McNeal v. Tate County School Dist., 460 F.2d 568 (5th Cir. 1971); Wright v. City of Brighton, 441 F.2d 447, 450 (5th Cir.), *cert. denied,* 404 U.S. 915 (1971).

53. *Cf.* Norwood v. Harrison, 413 U.S. 455 (1973). In fairness, it should be pointed out that, in a case decided after *Gilmore,* the Fifth Circuit affirmed its commitment to desegregate public education in ringing terms. In an *en banc* opinion by Judge Gewin, the court set aside the lease of a former public school building to a private segregated academy. On the question of state assistance to segregated schools, the court said:

> Our previous pronouncements concerning state involvement with private segregated schools demonstrate that covert efforts by local government officials to circumvent the effectiveness of school desegregation decrees through the leasing or the sale of public school property to "white flight" academies will not be sanctioned. Those who seek to continue or re-establish the previously discarded segregated order through private means are prohibited from receiving government largesse in their endeavors. Local government units that are under court mandates to operate unitary school systems have an emphatic duty and responsibility to assure that their relationships or undertakings with private parties in no respect encourage, aid, facilitate, or result in the establishment or operation of private segregated schools.

United States v. Mississippi, 499 F.2d 425 (5th Cir. 1974).

54. Brief for Petitioners at 30.

55. *Id.*

56. *Id; quoting* Norwood v. Harrison, 413 U.S. 455, 466 (1973).

57. Brief for Petitioners at 31.

that use must be beneficial to the school, and therefore a violation of the fourteenth amendment. The petitioners clarified their test by including only activity that can be traced to the private school's planned curriculum or recreational program. Thus the offending activity is that undertaken by the *school*; it is the *school* which cannot constitutionally receive aid from the city. *Individual* use, outside the ambit of school programs, is unaffected. In sum, the petitioners argued that segregated private schools must be barred from *any* program-oriented use of public recreational facilities, irrespective of the exclusivity of that use.[58]

The petitioners qualified their approach to accommodate two fundamental notions apparent in the Supreme Court's decisions. First, with a nod to the *Moose Lodge* case,[59] the petitioners conceded that the city does not become unconstitutionally involved in private discrimination by providing essential services to segregated schools. Accordingly, the petitioners did not object to the city's provision of electricity, water, and police and fire protection. On the other hand, they distinguished public recreational facilities as not traditional municipal monopolies essential to the public health and safety. Like the textbooks in *Norwood,*[60] recreational facilities need not come from government but may be procured privately.[61] Second, the petitioners agreed that, under *Pierce v. Society of Sisters,*[62] the city must not deny to private schools the right to exist. Generally, private individuals have a right to associate with whom they please, and the government has no power to infringe unnecessarily upon

58. *Id.* at 43. The petitioners suggested that three factors be considered in determining whether a particular use of public facilities is "program-oriented:"

1. Is the activity occurring during school hours?
2. Are school officials accompanying the students?
3. Was the activity arranged by officials of the school?

59. Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

60. Norwood v. Harrison, 413 U.S. 455 (1973); *see* note 28, *supra.*

61. Justice Blackmun's opinion for the Court in *Gilmore* considered municipal recreational facilities of a piece with the "traditional state monopolies" held not to constitute state action in *Moose Lodge.* 417 U.S. at 568. The only authority given was Evans v. Newton, 382 U.S. 296 (1966), in which Mr. Justice Douglas wrote:

> A park, on the other hand, is more like a fire department or police department. . . . Mass recreation through the use of public parks is plainly in the public domain. . . .

Id. at 302. Perhaps significantly, however, Justice Blackmun's reference to *Evans* came in his discussion of the possible state action involved in Montgomery's policy of allowing non-school groups to use public facilities. There was no hint in his discussion of school groups that he considered the city's provision of facilities insufficient to confer a benefit on the schools and thus to violate the school desegregation order.

62. 268 U.S. 510 (1925).

that freedom. Thus, suggested the *Gilmore* petitioners, the City of Montgomery would not become unconstitutionally involved with private discrimination if it were to grant segregated schools licenses necessary for their operation.[63] Indeed, under *Pierce,* the city might be required to issue such a license. The petitioners argued, however, that recreational facilities are not essential to the existence of private schools and may, indeed must, be withheld.

The thrust of the petitioners' approach was to require private schools to furnish for themselves anything of benefit to them which is available from sources other than government. The petitioners sought to turn the focus away from the question of whether blacks are denied access to public facilities used exclusively by private schools and toward the question of whether private schools receive significant benefit from use of public property.[64] The same approach was adopted by Mr. Justice Brennan in his separate opinion in *Gilmore.* Justice Brennan found it unnecessary to remand the case for consideration of the non-exclusive use of public facilities by private school groups. He would have held that a city cannot provide public facilities for any school-sponsored use that enables the

63. That, of course, was the holding in *Moose Lodge.* The petitioners properly recognized that the exception for state monopolies under *Moose Lodge* blurs into the exception under *Pierce:*

> For to deny a school the right to fire and police protection or water and sewerage facilities or lights and heat for the classroom would most surely cause such schools to cease to function just as effectively as if their operation were made illegal by city ordinance.

Brief for Petitioners at 47-48.

64. The petitioners' emphasis upon the city's responsibility flowing from the school desegregation order was demonstrably unsettling to the majority. Justice Blackmun was apparently troubled by the focus on the extent to which the segregationist academies in Montgomery were benefitted, when the basis of the petitioners' case was racial discrimination in the operation of public recreational facilities. It was as though the petitioners had obtained access to a federal forum to complain about one thing but then sought to address the evils associated with something else. The argument thus appeared disjointed, leading the majority to intimate the existence of standing issues in the case. *See* Part II-A, *supra.* While the majority's difficulty was perhaps understandable in light of the peculiar circumstances in *Gilmore,* it is unfortunate that the Court did not fully appreciate the way in which the various issues coalesced to describe Montgomery's long-standing, many-faceted opposition to racial integration in any form. By 1974, civil rights groups in the city were simply unable to litigate one issue without finding the case spilling over into other related questions, some already litigated and some not. Surely, in such a situation, it would be blinking reality to deny blacks the ability to take advantage of ground already won on other fronts in the course of litigating different, yet related, questions. Thus it was entirely appropriate for the *Gilmore* petitioners to first establish their injury due to the discriminatory operation of recreational facilities and then to rely on the city's special duty to disestablish the dual school system to establish their right to injunctive relief.

school to "duplicate public school operations at public expense."[65] Justice Brennan's formula would require an inquiry in every case as to whether the private school may construct and maintain its own facility, if a public facility were unavailable.[66] The separate opinion by Justice White took a similar approach but shunned the case-by-case analysis suggested by Justice Brennan. Justice White was prepared to hold that private segregated schools may not use public facilities of any kind for school-sponsored events that form a part of the curriculum.[67] Although Justice White did not discuss his apparent disagreement with Justice Brennan, he seemingly found it unnecessary to determine whether the schools may be able to save capital by using public facilities. The use alone is enough.

Justice Blackmun's opinion for the majority rejected all this. He ruled on the easiest question—use of public facilities for official school functions—and returned the rest of the case to the district court for development of the record. The limited treatment of the non-exclusive use issue was clearly unnecessary. There was ample support in the record for a principled decision on non-exclusive use. In concentrating on the nature of the use rather than its benefit to private schools, the Court missed the single most important issue in the case, so far as *school* use of public facilities was concerned.[68] That significant question was elaborately briefed by the petitioners and should have been determined. The concurring Justices found the record sufficient to support a holding on organized, though non-exclusive, use of public facilities. At the very least, the Court should have been prepared to go as far as Justice Brennan and to hold that private schools cannot validly be permitted to duplicate the programs of public schools at public expense. Justice White's willingness to enjoin any organized use of public facilities by private schools was warranted, but conceivably the petitioners' emphasis upon recreational facilities justified restricting relief to playing fields and similar facilities which can be constructed and maintained by private schools for themselves.[69] The majority's enchantment with the city's role in allocating public facilities apparently

65. 417 U.S. at 577 (Brennan, J., concurring).

66. Justice Brennan indicated, however, that he would be prepared to uphold a ban on any private school use of public recreational facilities, if the district court were to find that such an injunction is necessary to enforce the outstanding desegregation orders. *Id.* at 577.

67. 417 U.S. at 581 (White, J., concurring).

68. In the writer's view, the last issue in *Gilmore,* the use of public facilities by non-school private groups with discriminatory admissions policies, raises even more stimulating questions for examination and decision. This article treats those problems in Part III, *infra.*

69. *See* note 49, *supra.*

stemmed from its understanding of the circuit court's order. While a decision-making role for the city surely would add strength to the argument that a particular use of public facilities by private schools should be enjoined, it is hardly a necessary element of a claim. Of course, any relief granted to the petitioners must be in the form of an order addressed to the city and its agents, for only they have the responsibility to desegregate the public schools and parks in Montgomery. And, in order to comply with an injunction, the city must have or obtain some general knowledge of the uses to which private schools put public facilities. But certainly an order can be enforced even though the authorities have had no hand in scheduling the prohibited activities.[70] The last feature of the majority opinion, its reliance upon the district court to put meat on the bones of its tightly drawn decision, was also unnecessary. In point of fact, the district court had already held that any use of public facilities by private schools violated the school desegregation order.[71] The Supreme Court's opinion did not provide guidance that might cause the district court to change its original position. At the most, the Court's referral back to the district court was a direction to take more testimony before entering a broad injunctive order, even when the evidence already of record supports the award of relief.[72]

III. Use of Facilities by Private Non-School Groups with Discriminatory Admission Policies

The last issue in *Gilmore* was the question of whether the district court acted properly in enjoining any use of public facilities by private non-school groups with racially discriminatory admissions policies.[73] The district court's position was that by providing aid to

70. An example should make this plain. If a private segregated school were to occupy a portion of a park for an organized softball game, the district court might well find a violation of the school desegregation order, even though the city authorities were not involved in scheduling the game and in fact knew nothing about it. *See* 417 U.S. at 577 (Brennan, J., concurring). The city might comply with the order by informing segregated schools that they may no longer make use of public facilities. Then, spot checks by police and occasional reminders would insure continued compliance.

71. *See* note 15, *supra*.

72. In fairness, it must be reported that counsel for the petitioners, in defending the district court's original order, emphasized his intimate understanding of the case and the relevant circumstances in Montgomery. Brief for Petitioners at 21. The Court may have been influenced by that approach. *See* 417 U.S. at 576 (Marshall, J., concurring and dissenting). It is also true that the Supreme Court has always relied heavily upon the lower federal courts in developing and applying constitutional doctrine regarding desegregation of public schools. *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971).

73. The lower courts did not distinguish between private schools with a declared policy against admitting blacks and those with open policies but no black students. The test is

non-school groups that discriminate against blacks, the city had become involved in private discrimination in violation of the fourteenth amendment. Importantly, the court recognized a fundamental difference between the question of school use and non-school group use of facilities. While government has an affirmative duty to foster a unitary public school system, there is no duty to achieve integration in private non-school organizations.[74] Indeed, the courts are without power to require wholly private groups to admit members whom they choose to exclude.[75] Accordingly, while the *Gilmore* petitioners were able to rest their claim for relief against school use of public facilities on the city's special responsibility to disestablish the dual school system, their claim going to non-school group use of facilities rested upon the general constitutional prohibition against state-sponsored racial discrimination. That raised state action questions and the problem was reduced to identifying the ex-

whether desegregation of the public schools is frustrated, and it makes no difference what policies are followed by private schools, so long as they are, in fact, segregated. *See* Gilmore v. City of Montgomery, 473 F.2d 832, 837-38 (5th Cir. 1973). The Fifth Circuit said in United States v. Mississippi, 499 F.2d 425 (5th Cir. 1974) (decided after *Gilmore*):

> Where proscribed state involvement is found to exist with private segregated academies, appropriate relief must be accorded black persons to remove "root and branch" the government's aid in whatever form it manifests itself. . . . The ultimate goal . . . is to make those private enterprises dedicated to segregated schools, private *in fact* as well as in name. In this case, the panel opinion merely required the Academy to make a "boiler plate" promise that it would not discriminate in its admissions policies. In the cultural and economic milieu of Smith County, this relief is patently insufficient.
>
> [I]t is difficult to conclude that a mere declaration by the Academy that it will accept minority applicants would result in any appreciable change in the racial composition of the Academy's student body, especially in view of current admission charges. Moreover, even assuming economic independence, the Academy's obvious policy of segregation which infects its scholastic and sports programs would very likely chill the ambition of any black child who might entertain a desire to attend classes there.

On the other hand, the lower courts saw the issue differently when it came to non-school groups. Here, state aid is unconstitutional only if the private group discriminates on the basis of race. Therefore, the district court's order was addressed only to groups with discriminatory admissions policies. Presumably, the order reached unannounced as well as announced policies, but it clearly did not reach clubs that happen by chance to be all-white. It is noteworthy that Mr. Justice Brennan found this distinction important. While he was prepared to express a view on the exclusive use of public facilities by non-school groups which actually discriminate against blacks, he voted to return the case to the district court for a determination whether there might be all-white groups that do not discriminate. 417 U.S. at 577-81 (Brennan, J., concurring). Apparently, Justice Brennan would not enjoin even exclusive use of facilities by all-white groups that have no conscious policy against admitting blacks to membership.

74. Gilmore v. City of Montgomery, 337 F. Supp. 22, 25-26 (M.D. Ala. 1972).

75. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 172 (1972).

tent of the city's involvement in the private discrimination practiced by non-school groups—the familiar process of "sifting facts and weighing circumstances."[76]

The Supreme Court declined to delve deeply into the question presented, preferring instead to remand the case to the district court for further development of the record. But the Court did make three points that warrant attention. First, the Court said that under the doctrine established in the *Moose Lodge* case,[77] supplying traditional state monopolies, such as electricity, water, and police and fire protection, to private groups does not constitute state involvement in the discrimination practiced by those groups. City government makes these available to all individuals and groups, and each enjoys the services in common with all others. In *Gilmore,* Justice Blackmun now lumped municipal recreational facilities, such as parks, playgrounds, athletic facilities, amphitheaters, museums, and zoos, with the generalized services mentioned in *Moose Lodge* and held that the mere provision of such facilities to a private segregated group does not constitute unconstitutional state action. Accordingly, the Court held the district court's order invalid insofar as it enjoined *any* use of public facilities by *any* private segregated group. On the other hand, the Court said that to the extent the city rations the use of public facilities rather than leaving them open and freely accessible to all, a much different case arises. Thus, if the city placed its power and prestige behind an all-white church baseball league and provided facilities and equipment for its games, the Court suggested, but did not decide, that a violation of the equal protection clause might be found.[78] Finally, the Court drew attention to the first amendment issue lurking beneath the surface of the dispute between the *Gilmore* petitioners and the City of Montgomery. The Court reminded the district court that private citizens are free to associate with whom they choose, and "a person's mere membership in an organization which possesses a discriminatory admissions policy would not alone be ground for his exclusion from public facilities."[79] This again pointed to the distinction between

76. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961). Of course, at least after the decision in *Gilmore* itself, the state *does* have an affirmative duty to end racial discrimination in the operation of public parks. *See* note 25, *supra* and accompanying text. But that is quite different from a duty to disestablish segregation in wholly private groups. The establishment of a duty to integrate private organizations would collide head-on with first amendment freedom of association precedents. *See* note 79, *infra.*

77. 407 U.S. 163 (1972).

78. 417 U.S. at 568.

79. *Id.* at 576. The Court derived the right of association from the first amendment in

exclusive possession—use of a public facility for organized functions—on the one hand and informal use by individuals who hold membership in segregated private groups on the other. And, once again the Court suggested, but did not decide, that only the former might be found to violate the fourteenth amendment.

With deference, it must be said that the Supreme Court's treatment of this last issue in *Gilmore* leaves much to be desired. The question of non-school group use of facilities in Montgomery presented an excellent opportunity for a principled decision on the limits placed by the fourteenth amendment on private use of public recreational facilities—apart from the gloss thrown over the issue by the presence of school desegregation considerations. While the record may not have revealed the specifics of the practice in Montgomery, it contained ample evidence of private group use of recreational facilities in the city and sufficiently delineated those aspects of the problem that might conceivably have been the basis for constitutional adjudication.[80] In order to make clear what the Court might have done, it is necessary to examine the Court's three points, not in train as they appeared in the opinion, but together, as they complement each other in a thorough-going analysis.

The Court first lumped public recreational facilities with other municipal monopolies and concluded that the mere provision of facilities to segregated private groups is not unconstitutional. *Moose Lodge* and *Norwood,* the school textbook case, developed the doctrine that a city does not become a joint participant in private discrimination by furnishing to segregated groups services that are enjoyed in common with others and are not readily available from any other source.[81] Recreational facilities meet the first criterion; they are not provided only in connection with the activities of particular groups—like the textbooks supplied to schools in

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a series of cases principally involving the National Association for the Advancement of Colored People. *See* N.A.A.C.P. v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958); Bates v. City of Little Rock, 361 U.S. 516 (1960); Shelton v. Tucker, 364 U.S. 479 (1960); Louisiana *ex rel.* Gremillion v. N.A.A.C.P., 366 U.S. 293 (1961); N.A.A.C.P. v. Button, 371 U.S. 415 (1963); N.A.A.C.P. v. Alabama *ex rel.* Flowers, 377 U.S. 288 (1964); *see generally* Emerson, *Freedom of Association and Freedom of Expression,* 74 YALE L.J. 1 (1964). More recently, the Court has relied on the right of association in protecting the freedom to organize political parties in order to participate in the electoral process. *E.g.,* Williams v. Rhodes, 393 U.S. 23 (1968). Last term the Court reaffirmed the right in Storer v. Brown, 415 U.S. 723 (1974), and American Party of Texas v. White, 415 U.S. 767 (1974).

80. 417 U.S. at 579 (footnote) (Brennan, J., concurring).

81. Norwood v. Harrison, 413 U.S. 455, 465 (1973); *see* Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972).

Norwood—but rather are furnished to all. But it is arguable whether they fit within the second prong of the test. Although recreational facilities may be supplied principally by government, private groups are able to construct and maintain their own playing fields. Nevertheless, the *Gilmore* Court viewed recreational facilities as similar to other municipal facilities that private groups would not be expected to provide for themselves. These include public parks, museums, and zoos. Accordingly, the Court held that something more must be shown before the city can be subject to an injunction. Thus far, the Court's analysis was arguable but not clearly inadequate.

The difficulty arises in the Court's failure to treat the first amendment issue as it relates to the *Moose Lodge—Norwood* test for state involvement. The Court deferred mentioning that private citizens have a constitutional right of association, derived from the first amendment, until the last paragraph of the majority opinion. But the place for an examination of the implications of that right was in the discussion of the *Moose Lodge—Norwood* doctrine. The Constitution protects the freedom of citizens to form organizations as they see fit, and government has no power to prohibit the maintenance of such associations. Moreover, since the fourteenth amendment addresses only state action, private associations are free to adopt discriminatory admissions policies. Indeed, such policies are clearly an exercise of the freedom of expression and association safeguarded by the first amendment.[82] That being the case, to the extent government denies the use of public facilities to private groups on the basis of admissions policies, it exacts a penalty for the exercise of constitutionally protected rights. The problem is even more acute if private facilities are not available and a municipal policy of withholding public facilities from groups with restricted membership policies results in a curtailment of private associational activity.[83]

82. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 179-80 (Douglas, J., dissenting). Justice Blackmun cited Justice Douglas' language with approval in *Gilmore*. 417 U.S. at 575.

83. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 647 (1970); *cf.* Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (citizens have a first amendment right to distribute leaflets in the Port of New York Authority bus terminal). The Court said in Schneider v. New Jersey, 308 U.S. 147 (1939), that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Id.* at 163.

Indeed, Professor Emerson has argued that, at least in some circumstances, government is obligated to open public facilities for associational activity:

> Here we are concerned with the power and obligation of the government to make the means of expression available on a wider scale by itself supplying the physical or economic facilities.

The first amendment issue thus adds a third prong to the test from *Moose Lodge* and *Norwood.* Not only *may* the state furnish private non-school groups with traditional monopoly services, provided to segregated groups in common with others; but the state *must* permit access to public facilities to make possible the maintenance of private associations.[84] And, it follows as a corollary that once the state has decided to extend largesse to non-school groups, it cannot discriminate among groups on the basis of the views held by those groups. Thus the equal protection clause is also implicated.[85]

This was essentially the argument made in behalf of the private schools in *Norwood.* In that case, it was contended that under *Pierce v. Society of Sisters,*[86] children attending private segregated schools would be denied the equal protection of the laws if they were not permitted to borrow textbooks from the state in the same manner as public school children solely because their parents had exercised the right to send their children to private schools. The Court responded as follows:

> The major development in this area has occurred in the law concerning the right to use the streets, parks and public open places for purposes of assembly. There is no doubt, of course, that the government has power to make such facilities available if it chooses to do so. If it does, the First Amendment imposes certain limits upon the exercise of that power: the government may not discriminate between users, or differentiate on the basis of the content of the expression, or impose conditions other than time, place and manner. More important, despite the doubt at times expressed by the Supreme Court, there is strong support for the proposition that the government has a constitutional duty to make these facilities available for assembly purposes. That obligation flows from the nature of the right of assembly, which contemplates a public gathering that entails the use of space, and the inadequacy of other areas where a public assembly can be held. The right to use the streets, parks and open places in this way constitutes a clear-cut example of the affirmative impact of the First Amendment.

T. EMERSON, *supra* at 646. *Cf.* Healy v. James, 408 U.S. 169, 181-83 (1972) (recognizing that the exercise of the freedom of association may be dependent upon access to property); United States Servicemen's Fund v. Killeen Independent School Dist., 489 F.2d 693 (5th Cir. 1973) (suggesting the question but dismissing the petition at bar as moot).

84. *Cf.* Hague v. C.I.O., 307 U.S. 496 (1939) (opinion of Mr. Justice Roberts):

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.

Id. at 515; *see* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 152 (1969) (embracing the Roberts formulation as firm first amendment doctrine).

85. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972); *see* Lehman v. City of Shaker Heights, 418 U.S. 298, 315 (1974) (Brennan, J., dissenting). The rule was initially established in Fowler v. Rhode Island, 345 U.S. 67 (1953).

86. 268 U.S. 510 (1925).

> We do not see the issue in appellees' terms. In *Pierce*, the Court affirmed the right of private schools to exist and to operate; it said nothing of any supposed right of private or parochial schools to share with public schools in state largesse, on an equal basis or otherwise. It has never been held that if private schools are not given some share of public funds allocated for education that such schools are isolated into a classification violative of the Equal Protection Clause. It is one thing to say that a State may not prohibit the maintenance of private schools and quite another to say that such schools must, as a matter of equal protection, receive state aid.
>
> The appellees intimate that the State *must* provide assistance to private schools equivalent to that it provides to public schools without regard to whether the private schools discriminate on racial grounds. Clearly, the State need not. . . . [A] State's special interest in elevating the quality of education in both public and private schools does not mean that the State must grant aid to private schools without regard to constitutionally mandated standards forbidding state-sponsored discrimination.[87]

Significantly, the question in *Norwood* was the validity of state assistance to private *schools*. Accordingly, the Supreme Court's language must be read in the context of the state's affirmative duty to disestablish the dual school system and to avoid granting to private schools any aid that "has a significant tendency to facilitate, reinforce, and support private discrimination."[88] In the case of non-school private groups, the question is somewhat different. There is no constitutional obligation to integrate private associations; indeed, there is a constitutional bar to state action for that purpose. Consequently, the language in *Norwood* is not conclusive of the issue concerning non-school groups. Here the constitutional right of association is paramount.

It has long been held that once the state opens public facilities for general use, the first amendment protection of freedom of expression and the fourteenth amendment guarantee of equal protection of the laws impose limitations on the state's ability to regulate communicative activity. While reasonable regulations as to time, place, and manner of expression are valid, if administered in an evenhanded fashion,[89] "government may not grant the use of a

87. Norwood v. Harrison, 413 U.S. 455, 462-63 (1973).

88. *Id.* at 466.

89. *E.g.*, Adderley v. Florida, 385 U.S. 39 (1966); Kovacs v. Cooper, 336 U.S. 77 (1949); Cox v. New Hampshire, 312 U.S. 569 (1941). The cases are collected in Mr. Justice Brennan's dissenting opinion in Lehman v. City of Shaker Heights, 418 U.S. 298, 310 (1974). *See also* California v. LaRue, 409 U.S. 109, 117 (1972).

forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or controversial views."[90] Similarly, private groups cannot be denied the use of public facilities solely because they have adopted discriminatory admissions policies. A city policy permitting such groups to use public facilities does not impermissibly involve the government in private discrimination. An admissions policy is merely an exercise of the right of association; it is a form of expression. In allowing racist groups to use public facilities, the city no more becomes involved in discrimination than it becomes associated with the content of speeches made on a street corner. Any rule to the contrary would ascribe to government the views of every speaker who offers his opinions from a public platform.[91]

The Supreme Court's opinion in *Gilmore* only hinted at this result. The Court suggested that if the city becomes involved in scheduling softball games for all-white church leagues and provides facilities and equipment for the games, impermissible state involvement with private discrimination may be found. Although the Court couched its example in terms of the city's conscious participation in rationing scarce public facilities, the real evil is that the softball league would have exclusive possession and use of the public playing field. *That* is the type of private use of public facilities of which the city is aware, placing its power, property, and prestige behind private discrimination. What troubles the Court here is what troubled it in the section of the opinion in which it considered exclusive use of public facilities by segregated school groups—the spectre of black children being denied access to the facility while the private group is in exclusive possession. In the context of school group use of public facilities, the exclusion of blacks was a necessary but less

90. Police Dept. of Chicago v. Mosley, 408 U.S. 92, 96 (1972).

91. *See* National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973):

> No case suggests that a group which discriminates in selecting its membership can be barred from occasional uses of the streets, parks and public meeting places of a community. No case suggests that in maintaining a street, park or public meeting place, a state espouses the views which may be there expressed. No more is the state to be considered as espousing, encouraging, or supporting discriminatory membership policies when it permits an assembly of citizens, organized into a group which practices discriminatory membership policies, to meet in a public place which has been dedicated by practice as a public forum for the exercise of the rights to speech and assembly.

Id. at 1016-17. *Ringers* enjoined a school board's denial of the use of school facilities to a successor to the American Nazi Party solely on the basis of the group's racially discriminatory admissions policy.

significant element of the petitioners' case. The brunt of their argument focused on the benefits conferred on segregated academies permitted to use public facilities. On the other hand, in the context of non-school group use of facilities, the exclusion of blacks alone must entitle the petitioners to relief. To clarify analysis, a clear distinction must be drawn between a discriminatory admissions policy—expression protected by the first amendment—and overt discrimination in determining access to public facilities—action in violation of the fourteenth amendment. It is one thing to say that a private group may consider race in deciding who will be admitted to membership, and it is quite another to permit such a group to turn expression into action in determining who will be admitted to public facilities.[92] The resolution of the problem is straightforward. The state cannot allow private groups to use public facilities in any manner barred to the state itself. Thus, while a private organization may decline to admit black people to membership, it cannot fail to admit them to meetings—if the meetings are held on public property. Certainly, the state cannot bar blacks from public facilities solely because of race, a suspect classification under the equal protection clause;[93] and, that being the case, private groups using public facilities are similarly restricted.[94]

92. Although a dissenting judge assumed otherwise, a close reading of *Ringers* reveals that the majority understood that blacks were not to be denied admission to meetings held on public property. *Id.* at 1018 n.16. *Cf.* Blanton v. State Univ. of New York, 489 F.2d 377, 386-87 (2d Cir. 1973) (a "sleep-in" in a university building is action which may be reasonably regulated consistent with the first amendment).

93. Loving v. Virginia, 388 U.S. 1 (1967); McLaughlin v. Florida, 379 U.S. 184 (1964). The Supreme Court has developed a two-tier analysis under the equal protection clause. While, under "traditional" equal protection analysis, a classification is valid if it bears some rational relationship to a legitimate governmental interest, *see* Dandridge v. Williams, 397 U.S. 471 (1970), the Court has applied a more demanding standard of review in cases in which a "suspect classification" is present. In "suspect classification" cases, the state must show, not merely that its classification is rational, but that it is necessary to accomplish some overriding state purpose or to protect some compelling state interest. McLaughlin v. Florida, *supra*. For recent applications of the two-tier approach, *see In re* Griffiths, 413 U.S. 717 (1973) (alienage), and Frontiero v. Richardson, 411 U.S. 677 (1973) (sex) (plurality opinion). It would seem that a private group that seeks to discriminate at meetings held on public property on the basis of any classification the Supreme Court views as constitutionally suspect will have a difficult time justifying its action—as would the state if the classification were wholly public.

94. Initially, the state action involved is the city's policy, conscious or unconscious, of permitting segregated groups to discriminate in their use of public facilities. If a group attempts to bar blacks at the door and offended blacks press the point, the city may become even more deeply involved by providing police protection to the gathering. Certainly, if, on arriving at the scene to perform a peace-keeping function the police align themselves with the private group and seek to enforce segregation at the meeting, an unquestionable case of

The proposal outlined above needs clarification which can best be achieved through the use of examples. First, assume the case of a private group that bars blacks from membership. Such a group can, indeed must, be permitted to hold meetings in public facilities, but those meetings must be open to blacks. Next, assume that the same group does not need the entire facility but wants to use some portion of it. Nothing has changed. The group must be allowed to hold its meeting, but it cannot discriminate on the basis of race at the door. Clearly, the state cannot rope off parts of public facilities and bar admission to them on the basis of race;[95] the same rule applies to private groups. Now, assume that the group bars admission to a particular black person, not on the basis of race, but on the ground that he is a lawyer and only doctors are allowed to become members and to attend meetings of the organization. The test to be applied is the same as that which would be applicable if the state were to establish such a classification. Assuming that the group can show that the doctor-lawyer classification is not a sham to conceal racial discrimination, the question is whether the classification bears a rational relationship to the purpose of the organization.[96] If the group is a scientific society engaged in cancer research, exclusion of one who has a legal rather than a medical background is rational and not unconstitutional.

It is apparent that the proposed resolution of the question left open in *Gilmore* contemplates a reasoned accommodation of competing interests. Clearly, this approach fully serves the interests of neither blacks nor segregated private groups. Blacks necessarily suffer embarrassment and humiliation when groups who preach racial hatred are permitted to use public facilities. And segregated groups who wish to use public facilities must agree to admit blacks to gatherings, if not to membership.[97] The important point is that this

state participation in private discrimination is presented. *Cf.* United States v. Price, 383 U.S. 787 (1966).

95. Johnson v. Virginia, 373 U.S. 61 (1963) (blacks cannot be required to sit in a special section of a courtroom).

96. McGowan v. Maryland, 366 U.S. 420 (1961); *see generally* Note, *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065 (1969).

97. There may be situations in which this distinction is not so clear. Indeed, the case put by Justice Blackmun in *Gilmore* is a good example. If an all-white church baseball league wishes to schedule games at public playing fields, it must be prepared to permit black children to join in. Practicality may lead inexorably to opening regular team membership to blacks. While this result tends to cut against protection of the right of association in its logical extreme, an accommodation of blacks' right to be free of state-sponsored racial discrimination must be reached even in hard, marginal cases. And a requirement that the baseball league forego its wish to exclude blacks seems to be a reasonable price to pay in exchange for the advantage of using public playing fields. A different result would impermissibly foster

approach does serve the purposes of the constitutional provisions concerned. To the extent a discriminatory admissions policy is mere expression, the policy is fully protected. At the same time, private groups are not permitted to extend expression into action, imposing upon black people the onus of racial discrimination in the operation of public facilities. If the *Gilmore* Court had clearly staked out this ground instead of merely intimating what considerations might be relevant to some future examination of the problem, the district court, indeed the rest of us, would now have a roughly marked path to follow. The Court's concept of state action is fluid, and in order to appraise with confidence any particular application of the doctrine, courts and lawyers need all the additional guidance the Supreme Court can supply. *Moose Lodge* and *Norwood* offered limited help; *Gilmore* promised but failed to provide additional guide lines. As it is, we are left after *Gilmore* with little more than we had before the Court undertook to treat the case.

Of course, the approach suggested here hardly solves all the problems that may arise. After the simple examples suggested above, the hypotheticals become more difficult. What happens if the association of doctors is not a research group but merely a social club? Is there any longer a rational basis for excluding a lawyer from meetings held on public property? If the group has secret protocols or rites, is maintaining their integrity a sufficient reason for excluding non-members? Or does the Constitution effectively bar the Masons from using public meeting places? Do 4-H clubs, the Boy Scouts, or veterans' groups have any authority at all to limit meetings held on public property to dues-paying members? These questions were not presented in *Gilmore*, and clearly the Court did not address them. Even if the Court had adopted the approach suggested above, these questions would remain. The principle that private groups using public facilities are subject to the same restrictions under the equal protection clause as would apply to the state itself throws but dim light on these further and exceedingly difficult problems. The only saving grace is that the Court will not in all likelihood be called upon to decide what standards can validly be applied in determining who can be barred from attending a meeting of the Boy Scouts. That kind of problem seldom engenders the conflict and hostility—and therefore litigation—associated with racial discrimination. To be sure, "[r]ights tend to declare them-

the discriminatory operation of public facilities, a clear violation of the fourteenth amendment.

selves absolute to their logical extreme,"[98] and a decision regarding racial discrimination will bear on analogous future cases. But the proposed resolution of the racial discrimination issue would hardly wrap the Court in a straight jacket in non-racial cases. Indeed, the Court would be left free to accord due deference to non-suspect classifications and to arrive at a reasonable accommodation of interests in a given case.[99] Thus, if the Court in *Gilmore* had dealt in a principled manner with the question which *was* presented in that case, reasonably foreseeable applications of the doctrine established could now be more easily and fairly handled. If a case not involving racial discrimination should arise, there will be time enough to consider, on concrete facts, what is a reasonable ground for barring persons from gatherings on public property.

IV. CONCLUSION

In summary, the opinion in *Gilmore* must be found wanting. Instead of taking advantage of the excellent opportunity the case presented for a principled decision on the merits, the Court employed what can only be considered evasive techniques in order to avoid thorough analysis. The Court implied that the petitioners might lack standing to raise the question of non-exclusive use of public facilities by segregated school groups, even when a thoughtful examination of that argument would have shown it to be without sound basis. Vague complaints about the adequacy of the record ignored critical evidence and concealed shallow analysis. The Court did decide whether school groups may have exclusive use of facilities, but even that holding was tied so closely to the history of civil rights litigation in Montgomery that the decision may have limited value as precedent. Coming to the last question in the case—the use of public facilities by non-school groups—the Court offered only vague references to appropriate considerations rather than princi-

98. Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908) (opinion of Mr. Justice Holmes), *quoted in* Ross v. Moffitt, 417 U.S. 600, 611-12 (1974).

99. By this the writer does not mean to promote the two-tier approach to constitutional adjudication under the equal protection clause. That doctrine is presently under constructive criticism which the writer finds persuasive. *See, e.g.*, Marshall v. United States, 414 U.S. 417, 430 (1974) (Marshall, J., dissenting); *In re* Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J., dissenting); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); *see* note 93, *supra*. All agree, however, that some classifications should be subject to less rigid scrutiny than others, and the suggestion here is that the Supreme Court may well determine that the Boy Scouts should be given considerable leeway in establishing standards for attendance at meetings—if, that is, the Boy Scouts find it necessary to establish standards at all and a person barred from attending a meeting finds it necessary to litigate the matter.

pled decision. Although the Court might have clearly distinguished between discriminatory admissions policies and discrimination at the door of gatherings on public property, protecting the one and condemning the other, the opinion merely returned the case to the district court for further treatment of the fluid state action issue. In consequence, the only test to be followed is the unpredictable process of "sifting facts and weighing circumstances," unaided by doctrinal statements that sketch the boundaries of the analysis in a particular fact situation.

A thorough treatment of the issues raised in *Gilmore* would have recognized at the outset that the circuit's distinction between exclusive and non-exclusive use of public facilities is meaningless in the context of segregated school use of facilities. Once the petitioners established injury in fact arising from the discriminatory operation of facilities, they were entitled to rely on the city's affirmative duty to disestablish the dual school system in Montgomery. Inasmuch as public aid to private segregated schools, which significantly tends to facilitate private school discrimination, is unconstitutional, the petitioners were entitled to an injunction against any program-oriented use of facilities by segregated academies. Outside the context of school desegregation, the circuit's exclusivity test is not only meaningful but critical. The Court in *Gilmore* should have identified the core of the problem concerning non-school group use of public facilities as the interplay between blacks' right to be free of state-sponsored racial discrimination at gatherings held on public property and private groups' first amendment right of association. While wholly private organizations are free to admit whom they choose to membership, once they undertake to hold meetings on public property they become subject to the same equal protection restrictions which would apply to the state itself. Accordingly, blacks cannot be denied admission to meetings solely on the basis of race.

Gilmore thus leaves lingering doubts about the quality of the decision-making and opinion-writing process in the Supreme Court. If, as Professor Hart suggested, the Court is "trying to decide more cases than it can decide well,"[100] perhaps the time has come to become serious about reform of the federal judicial process at the appellate level. The system cannot afford poorly considered and written Supreme Court opinions that fail to serve the law declaration function necessary to reasoned adjudication of the

100. Hart, *supra* note 12.

countless cases that come before the American courts each year. This is not to suggest that the Court can or should attempt the futile task of establishing bright line doctrine to control unforeseeable disputes in the future. Certainly, the future cannot be foreseen, and the Court is properly hesitant to use broad language that may cause logical difficulty later and must be prepared to re-examine its own decisions when necessary. Constitutional principles have ragged edges, and adjustments will always be necessary in borderline cases. On the other hand, the Court cannot fail to decide issues that fairly are presented by docketed cases. Legitimate disputes must be resolved for the sake of litigants, present and future. The system depends for guidance upon principled decisions that are both certain and flexible enough to stand the test of time. This is the essential function of the Supreme Court.