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III. Constitutional Law

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Gould v. Grubb.\textsuperscript{1} The California Supreme Court held that election procedures reserving top ballot positions for incumbents or listing candidates in alphabetical order, are invalid under both the federal and the state constitutions. Relying on a superior court finding that top ballot positioning significantly increases the number of votes the candidate listed first will receive, and reasoning that this dilutes the weight of votes cast by supporters of the other candidates, the court held that these procedures infringe on the right to vote. Accordingly, the court applied the strict scrutiny standard of equal protection. The court declined to prescribe any particular election procedure; rather, it decided that both a rotational scheme and a lottery system would be constitutional means of determining ballot position.

The first challenges before the California Supreme Court to legislation controlling ballot order had come 2 years prior to Gould in Mexican-American Political Association v. Brown\textsuperscript{2} and Diamond v. Allison.\textsuperscript{3} Having initially granted alternative writs of mandate, the court then denied the writs without prejudice when the returns to the petitions denied allegations that candidates listed at the top of the ballot enjoyed a substantial advantage. Declaring that it was confronted with a disputed question of fact that could more properly be determined in superior court, the supreme court refused to take judicial notice of a ballot position advantage.\textsuperscript{4}

One month later, the plaintiffs in Gould v. Grubb, two nonincumbent candidates for the Santa Monica City Council, instituted a mandamus action in Los Angeles Superior Court, challenging a provision in the Santa Monica City Charter that gave a ballot position priority to incumbents.\textsuperscript{5} The superior court sustained a demurrer to an initial

\textsuperscript{1} 14 Cal. 3d 661, 536 P.2d 1337, 122 Cal. Rptr. 377, modified, 14 Cal. 3d 863a (advance sheets) (1975) (Tobriner, J.) (unanimous decision).
\textsuperscript{2} 8 Cal. 3d 733, 505 P.2d 204, 106 Cal. Rptr. 12 (1973).
\textsuperscript{3} 8 Cal. 3d 736, 505 P.2d 205, 106 Cal. Rptr. 13 (1973).
\textsuperscript{4} 8 Cal. 3d 733, 734, 505 P.2d 204, 205, 106 Cal. Rptr. 12, 13 (1973); 8 Cal. 3d 736, 737, 505 P.2d 205, 206, 106 Cal. Rptr. 13, 14 (1973). Justice Tobriner dissented, arguing that the existence of a ballot position advantage is a "common sense proposition" supported by "virtually all of the published empirical data available . . . ." 8 Cal. 3d at 735, 505 P.2d at 205, 106 Cal. Rptr. at 13. Because these two cases were decided together, references to these cases throughout the rest of this Note will be to Mexican-American Political Association v. Brown only.
\textsuperscript{5} Article XIV § 1403 of the Charter of the City of Santa Monica provided: "Unless otherwise provided by ordinance . . . all elections shall be held in accordance
pleading, which sought to have the candidates listed in alphabetical order. The plaintiffs then amended their petition to request an order requiring that the position of the candidates on the ballot be determined on a rotational basis or, if that was not possible, by lot. After a 4-day trial, during which both sides presented extensive expert testimony, the superior court found a ballot position advantage to incumbents, both in general and in the upcoming Santa Monica City Council election. Seeing no compelling state interest or rational basis for the preference given to incumbents, the court held that the election procedures violated the equal protection clauses of the California and United States Constitutions. Because it was too late to set up a rotational system, the court required that the order of the candidates on the ballot be determined by lot.

The California Supreme Court affirmed. After dismissing the possibility that the issue might be moot, the court determined that the trial court's finding—that top positioning on the ballot increases a candidate's chances of being elected—was supported by substantial evidence. The court concluded that because such a ballot position advantage dilutes the votes of supporters of other candidates, it infringes on the right to vote. The California Supreme Court's decision affirming the trial court raises three key issues: (1) how should courts deal with questions of fact upon which constitutional decisions will be made? (2) What is the true nature of the right to vote for purposes of constitutional adjudication? (3) Should the effect of ballot position advantages be seen as violating the right to vote?

I. Development of Constitutional Facts

While the supreme court's disposition of Mexican-American Political Association v. Brown did not control Gould v. Grubb, it certainly

with the provisions of the Elections Code of the State of California . . . .” Since Santa Monica had enacted no other ordinance at the time of the April 10, 1973 election, ballot position was determined by Cal. Elec. Code § 22870 (West 1961), which provided that in municipal elections “[t]he name of the incumbent shall appear first upon the list of all candidates for any office, and if two or more positions are to be filled at the same time and more than one incumbent is running, the name of each of the incumbents shall appear in alphabetical order followed by the names of all other candidates printed on the ballot in alphabetical order.” 14 Cal. 3d at 665 n.3, 536 P.2d at 1339 n.3, 122 Cal. Rptr. at 379 n.3 (1975).

With respect to the April 10, 1973, election for the City Council of the City of Santa Monica.” Id. at 666 n.4, 536 P.2d at 1340 n.4, 122 Cal. Rptr. at 380 n.4

6. The trial court found: “The first four positions on the ballot in Santa Monica are advantageous vis-a-vis other positions because the persons whose names occupy such positions receive additional votes which they would not otherwise receive if they occupied other positions. This is true in general, and also with respect to the April 10, 1973, election for the City Council of the City of Santa Monica.” Id. at 666 n.4, 536 P.2d at 1340 n.4, 122 Cal. Rptr. at 380 n.4

7. Id. at 666, 536 P.2d at 1340, 122 Cal. Rptr. at 380.

8. 8 Cal. 3d 733, 505 P.2d 204, 106 Cal. Rptr. 12 (1973). See notes 2-4 supra and accompanying text.
foreshadowed the result. By initially granting, then denying, the alternative writ of mandate in Mexican-American Political Association v. Brown on the ground that the court could not take judicial notice of a ballot position advantage, the court indicated its willingness to strike down incumbent first procedures if an effect on the number of votes received by a candidate could be proved. Not surprisingly, therefore, the City of Santa Monica's appeal\(^9\) in Gould v. Grubb concentrated on challenging the trial court's finding that there is a ballot position advantage.\(^10\)

Conceding that the evidence supported a finding that there is a ballot position advantage in general, the city argued that the superior court's finding of a ballot position advantage in the April 10, 1973 Santa Monica City Council election was not supported by substantial evidence. First, the city pointed out that the studies used to prove the existence of a ballot position advantage did not include studies of Santa Monica elections.\(^11\) Second, the city argued that an advantage to candidates given top ballot positions had been demonstrated only in "low visibility" elections, and that no competent evidence had been introduced to prove the election at issue would be a low visibility election.\(^12\) The supreme court dismissed these contentions in short order. Declaring that the record did not indicate that Santa Monica elections differed significantly from other elections, the supreme court concluded that "the trial court could properly infer that the experts' general findings applied to Santa Monica elections."\(^13\) As for the city's second contention, the court pointed out that while the ballot position advantage is greatest in low-visibility elections, some of the experts testified that there is a ballot position advantage in virtually all elections.\(^14\)

The court's quick dismissal of the city's arguments on appeal, however, was not sensitive to the fact that the evidence conclusively

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9. Technically, the appellants were the city clerk and the four incumbent city council members running for reelection. 14 Cal. 3d at 863a, 536 P.2d at 1338 n.1, 122 Cal. Rptr. at 378 n.1.
10. See Brief for Appellants.
11. 14 Cal. 3d at 667, 536 P.2d at 1341, 122 Cal. Rptr. at 381. The nonincumbent candidates' witnesses included Henry M. Bain and William James Scott, Jr., who had studied ballot position advantages by comparing a candidate's performance in different ballot positions in elections employing a ballot rotation system. H. BAIN & D. HECOCK, BALLOT POSITION AND VOTER'S CHOICE (1957); Scott, California Ballot Position Statutes: An Unconstitutional Advantage to Incumbents, 45 S. Cal. L. Rev. 365 (1972). Because Santa Monica had never used a ballot rotation system, these experts concluded that a study of Santa Monica elections would not yield conclusive results. 14 Cal. 3d at 667-68 nn. 6 & 7, 536 P.2d at 1341 nn. 6 & 7, 122 Cal. Rptr. at 381 nn. 6 & 7.
12. 14 Cal. 3d at 667, 536 P.2d at 1341, 122 Cal. Rptr. at 381.
13. Id. at 668, 536 P.2d at 1341, 122 Cal. Rptr. at 381.
14. Id.
supported neither side. While it is true that there was substantial evidence to support the trial court's findings, it is also true that had the trial court refused to find any ballot position advantage in the Santa Monica City Council election, that decision, too, would have been supported by the evidence. In *Bohus v. Board of Election Commissioners*, involving a challenge to a Chicago practice reserving the top ballot position for the Democratic candidate, an expert witness maintained that there was a ballot position advantage, relying on a study also used in *Gould*. Despite the expert testimony the Seventh Circuit upheld the trial court's finding that plaintiffs had failed to prove the existence of a ballot position advantage in Chicago. Stating that the finding was not clearly erroneous, the court reasoned: "There is nothing in the record indicating that this witness analyzed election returns relative to candidate placement in Chicago or Cook County." In *Gould*, not only did the nonincumbent candidates introduce no studies of Santa Monica elections, but the city produced a study purporting to demonstrate the absence of a ballot position advantage in Santa Monica elections. While the superior court "could properly infer" that the general pattern applied to Santa Monica elections, there is no indication that it had to do so. *Gould* hinged on a finding of fact which could have come out in favor of either party.

Even though *Gould* was decided on the basis of a trial court's interpretation of facts in a particular situation, the decision applies to all elections. The supreme court stated its holding in general terms, in no way indicating that it is to be limited to the Santa Monica election or to other cases where a ballot position advantage is found: incumbent first and alphabetical order candidate listings are unconstitutional. Even if proof of a ballot position advantage were to be required in each case, however, the result would be the same. In each case the plaintiff could present the same evidence of general voting patterns, and the trial court

15. The substantial evidence rule requires that an appellate court affirm a judgment, even if against the weight of the evidence, if there is sufficient evidence to support it. Any conflicts in testimony, or differences in inferences which may reasonably be drawn from the evidence, must be settled in the manner most favorable to the trial court's decision. 6 B. Witkin, *California Procedure* § 245 (2d ed. 1971).
16. 447 F.2d 821 (7th Cir. 1971).
17. H. Bain & D. Hecock, supra note 11.
18. 447 F.2d at 823.
20. *See* 14 Cal. 3d at 674, 676, 536 P.2d at 1345, 1347, 122 Cal. Rptr. at 385, 387. Indeed, the holding applies to all elections is implicit in the court's determination that the case was not moot. The reason for deciding the case, when the election in question had already passed, was to resolve the issues presented so that they need not be relitigated. If each election is unique, however, requiring proof of a ballot position advantage in each case, it is doubtful whether the case presented such "recurrent election issues." *Id.* at 666 n.5, 536 P.2d at 1340 n.5, 122 Cal. Rptr. at 380 n.5.
would feel compelled to accept the supreme court's invitation to infer that the general trend applies to the particular election in question.

That the trial court's findings of fact—subject only to the substantial evidence requirement—controlled the outcome of Gould presents troublesome implications. The decision, which applies to election procedures throughout the state, could have been decided as a result of litigation tactics, the prejudices of the trial court, or the supreme court's decision on which case to hear first. The underlying issue, therefore, is the duty of the supreme court to make sure that the facts on which it bases its decisions are developed in a way that ensures adequate protection of the public interest.

To ensure that factual questions, as well as legal questions, are properly presented, courts have relied on doctrines such as standing, ripeness, and mootness, requiring that the parties assume genuinely adversarial postures with respect to the issues litigated. No such problem confronted the supreme court in Gould, however, except for the possibility of mootness. Not only had the election taken place, but the City Council had enacted an ordinance under which the ballot order was to be determined by lot. Since candidates qualify only a short time before an election, it would have been almost impossible to obtain appellate review before the election—thus the situation was one "capable of repetition, yet evading review." Similarly, the city ordinance had been enacted only to insulate elections from attack until the city could get a definitive ruling on appeal. Because the decision would affect its future elections, the city had an active interest in pursuing its

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21. The parties cited seven other superior court decisions in California on ballot position advantages, at least two of which upheld the use of alphabetical listings. Brief for Appellants at 12; Joint Petition for Hearing at 16.


23. In addition, Proposition 9, the initiative Political Reform Act of 1974, had eliminated all state statutory provisions granting top ballot positions to incumbents. CAL. GOV'T CODE § 89000 (West Supp. 1975). But this would not have prevented charter cities like Santa Monica from having incumbents listed first. See Rees v. Layton, 6 Cal. App. 3d 815, 820-22, 86 Cal. Rptr. 268, 271-72 (2d Dist. 1970). Nor did it affect alphabetical listings. 14 Cal. 3d at 666 n.5, 536 P.2d at 1340 n.5, 122 Cal. Rptr. at 380 n.5.


25. In Bullock v. Carter, 405 U.S. 134 (1972), temporary legislation enacted to protect Texas elections while the state's appeal was pending did not render the case moot. Santa Monica failed to draft its ordinance so that it would apply only while its appeal was pending, but its failure to do so did not indicate a lack of interest in prosecuting its appeal. See 14 Cal. 3d at 666 n.5, 536 P.2d at 1340 n.5, 122 Cal. Rptr. at 380 n.5.
appeal. Thus, the case presented a continuing controversy and was not moot. Furthermore, the events which raised the issue of mootness in no way affected the development of the facts at trial. Indeed, the supreme court may have chosen to hear the instant case, instead of another ballot position case, because of the unusually good factual record presented.20

Even though facts are presented in a truly adversarial context, the question remains whether the supreme court should be satisfied whenever the facts are supported by substantial evidence, as presented in the trial court. It is not unusual for the outcome of litigation to depend on findings of fact the trial court could have made in favor of either party, but in most cases the factual determinations will have little impact on parties other than those before the court. However, questions such as the one before the supreme court in Gould—whether candidates receive extra votes by virtue of being listed at the top of the ballot—involve "constitutional facts," facts relating to the operation of an enactment and bearing on its constitutional validity.27 Constitutional facts, as contrasted with adjudicative facts, involve questions broader than those affecting only the parties before the court, and may be ascertained through sources outside the record or beyond the normal scope of judicial notice.28

Concern about constitutional facts is especially grave because of the need to ensure that constitutional issues—having impact beyond the particular case at bar—are decided upon adequate information. The problem normally appears when the impact of legislation is not set out on the record. When this happens, the court may ask the parties for more information or for additional briefs; or, more frequently, it may proceed on the basis of the existing record and its own research.29 For a more comprehensive presentation of the facts, a remand ordering further development of the record is possible.30 This was the effect of the disposition of Mexican-American Political Association v. Brown.31

26. See Joint Petition for Hearing at 3. ("Clearly, from a factual viewpoint, this was the best litigated 'ballot order' case of the many which have been filed recently.")

27. For an interesting presentation of the problems involved in adjudication of constitutional facts, see D’Amico v. Board of Medical Examiners, 11 Cal. 3d 1, 13-16, 520 P.2d 10, 19-21, 112 Cal. Rptr. 786, 795-97 (1974). In D’Amico the court struck down a statutory scheme on the basis of admissions by the Attorney General. The court resolved the question—whether it should base its decision on admissions of constitutional facts—on a procedural issue (whether, because of a possible conflict of interest, the Attorney General had an adequate stake in defending the statutes).

28. See 2 DAVIS, ADMINISTRATIVE LAW TREATISE § 15.03 (1958).


31. 8 Cal. 3d 733, 505 P.2d 204, 106 Cal. Rptr. 12 (1973). See notes 2-4 supra and accompanying text.
In that case dismissal was without prejudice to subsequent proceedings in superior court. Shortly after the dismissal, Gould v. Grubb was filed in superior court, and the plaintiffs set out to prove the facts that the supreme court earlier had decided were beyond judicial notice.

The California Supreme Court's effort to have the constitutional facts relating to ballot order fully developed at the trial court level is commendable. The court should be careful to ensure that its decisions are based on adequate information, especially when the information may be used to overturn legislation. Having the facts developed at the trial court level before the supreme court reaches a decision is the best way to make sure that the facts are fully presented. In addition to requiring that the facts be presented to a trial court, however, the supreme court should retain and use other techniques for ascertaining constitutional facts. The court should review findings of constitutional fact more carefully than it reviews adjudicative facts. It should be willing, if necessary, to look beyond the record for corroboration of findings that may be questionable. This is not to say that the supreme court abdicated its responsibility for development of constitutional facts in Gould. Indeed, it is unlikely that Justice Tobriner, who was willing to take judicial notice of a ballot position advantage in Mexican-American Political Association v. Brown, would have accepted without question a finding that there was no ballot position advantage in Gould. It does suggest, however, that the court should have tried to develop more fully the techniques used to guarantee that factual issues underlying constitutional decisions are adequately resolved. Doctrines such as mootness, designed to ensure that the parties have a sufficient stake in the decision, are helpful; but such doctrines will not always enable the court to make well-informed decisions. Having the facts set out in full in superior court before the supreme court decides is a further step toward complete investigation of important facts but it should not necessarily be the last step. Gould should not be read as holding that the court's responsibility for reviewing findings of constitutional facts is satisfied whenever the findings are supported by substantial evidence. Rather, it should be recognized that the court's concern for development of constitutional facts, reflected in its initial treatment of the ballot position advantage question, may require a more thorough examination of determinations of constitutional fact.

II. Dilution of the Right to Vote

Satisfied that there is an advantage to candidates listed first on the

32. Biklé, Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action, 38 HARv. L. REV. 6 (1924); Karst, supra note 29.
33. 8 Cal. 3d 733, 735, 505 P.2d 204, 205, 106 Cal. Rptr. 12, 13 (1973). See note 4 supra.
ballot, the court turned to the question whether classifications that reserve the top ballot position to particular candidates deny equal protection, as guaranteed by the state and federal constitutions. Because the right to vote was affected, the court subjected the issue to "strict scrutiny," which meant that the city had to justify the classification by a "compelling" interest. The court reasoned that reserving the top ballot position for particular candidates infringes on the right to vote of those voters who support other candidates. The effectiveness of their votes is diluted because of the extra votes received by the candidates listed at the top of the ballot:

In light of the trial court's finding that candidates in the top ballot position receive a substantial number of votes simply by virtue of their ballot position, a statute, ordinance or election practice which reserves such an advantage for a particular class of candidates inevitably dilutes the weight of the vote of all those electors who cast their ballots for a candidate who is not included within the favored class.

In deciding that a classification reserving top ballot positions for certain candidates constitutes infringement of the right to vote, and in invoking strict scrutiny, the court virtually guaranteed that ballot position preference schemes would be ruled invalid. Compelling state interests rarely, if ever, can be found to support a classification.

A Gould-type dilution of the vote, however, does not fall within the type of classifications previously invalidated by cases protecting the right to vote. Although it used them interchangeably, the California Supreme Court relied on three groups of cases: (1) those involving the denial of the franchise to particular classes of citizens; (2) reapportionment cases; and (3) cases involving access to the ballot by candidates.

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34. Although it made no distinction between the requirements of the two provisions, the court was careful to rest its decision on both the California and the United States Constitutions. Thus, the court presented an independent state ground for the decision, precluding United States Supreme Court review even though the language of U.S. Const. amend. XIV is almost identical to that of Cal. Const. art. 1 § 7(a). See New York City v. Central Savings Bank, 306 U.S. 661 (1939).

35. The court applied the two-level test of equal protection, by which "suspect classifications," for example racial classifications, or legislation affecting "fundamental interests," like the right to vote, are subject to strict scrutiny. These classifications are invalid unless they are necessary to the accomplishment of a compelling state interest. Other classifications are subject to the rational basis test, which requires only that legislation be rationally related to a legitimate state purpose. 14 Cal. 3d at 669-70, 536 P.2d at 1342-43, 122 Cal. Rptr. at 382-83; Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. at 601, 609 (1971).

36. 14 Cal. 3d at 670, 536 P.2d at 1343, 122 Cal. Rptr. at 383.

37. See Dunn v. Blumstein, 405 U.S. 330, 363-64 (1972) (Burger, C.J., dissenting): "Some lines must be drawn. To challenge such lines by the 'compelling state interest' standard is to condemn them all. So far as I am aware, no state law has ever satisfied this seemingly insurmountable standard, and I doubt one ever will, for it demands nothing less than perfection."
The next three subsections of this Note will discuss each of these groups of cases, with a view towards demonstrating that they do not clearly control the result in Gould. To decide whether Gould properly applied these cases, the fourth subsection of this part of the Note will explore the basic principles behind judicial protection of the right to vote.

a. Denial of the Franchise

One group of cases relied on by the supreme court applies strict scrutiny to classifications limiting the vote to particular groups of citizens. These cases usually involve absolute denial of the franchise; but some concern serious diminution of the franchise—such as where, on the basis of property ownership or some other factor, some individuals are given more votes than others. It does not follow, however, that all statutes diluting the weight of an individual's vote are invalid. For example, even statutes requiring extraordinary majorities may be valid. Thus, the effect of requiring a two-thirds majority is to give the opponents of an issue two votes each. On the other hand, each voter has the option of voting against the issue; and, in exercising or refusing to exercise that option, each voter has the same power over the outcome as does every other voter. In Westbrook v. Mihaly, the California Supreme Court, relying on the analogy of allowing opponents of an issue to vote twice, struck down a provision of the California constitution requiring a two-thirds majority for bond issues. However, the United States Supreme Court vacated the decision and remanded it for reconsideration in light of Gordon v. Lance, which applied the rational basis standard in upholding a similar statute and pointed out that, unlike cases involving outright denial of the franchise, “no independently identifiable group” was affected.

The effect on the individual voter's power is even less in cases involving ballot position advantages. If a two-thirds vote is required, one vote against the proposition increases the number of supporters needed by two. A vote in favor of the candidate given the top position on the ballot, however, increases the number of votes other candidates must receive by only one. Votes may be diluted by the extra votes received by the candidate listed first, but each voter has equal voting

42. 403 U.S. 1, 5 (1971).
power. *Gordon v. Lance* did not rule out the possibility that election procedures favoring particular candidates may be unconstitutional, for the Court expressly reserved the question whether a state may require extraordinary majorities to elect public officials. But it should also be clear that the situation in *Gould* did not amount to denial of the franchise.

If anything, the cases involving denial of the franchise cut against the dilution argument. The California Supreme Court reasoned that the right to vote is infringed if it can be diluted by the votes of uninformed or unconcerned voters:

Indeed, in a close race it is quite possible that a candidate with fewer "conscious" supporters than an opponent will actually win an election simply because his high position on the ballot affords him the advantage of receiving the vote of unconcerned or uninformed voters.

In *Kramer v. Union Free School District*, on the other hand, the United States Supreme Court rejected the argument that voting in school district elections could be limited to property taxpayers and parents, because they had the greatest interest in the election. It could be argued that voters who have lived in the state less than a year, who cannot pass English literacy tests, or who are unwilling to pay a $1.50 poll tax, may be less informed about or concerned with the issues in an election. Nevertheless, restrictions on such voters have been struck down, even though their votes may "dilute" the votes of other, more interested voters.

b. Reapportionment

A second line of cases relied on by the court deals with reapportionment. These cases appear to provide more support for the dilution argument, because they rely on an equal voting power argument to support the requirement of equal apportionment. It is unconstitutional to dilute an individual's voting power by counting his vote along with the greater number of votes cast in a district with a much larger population than other districts given the same representation:

[T]he right of suffrage can be denied by a debasement or dilution of

43. *Id.* at 8 n.6.
44. 114 Cal. 3d at 670, 536 P.2d at 1343, 122 Cal. Rptr. at 338.
the weight of a citizen’s vote just as effectively as by wholly prohibit-
ing the free exercise of the franchise. 50

Yet, as Justice Harlan has observed, the reapportionment opinions “speak in conclusory terms of ‘debasement’ or ‘dilution’ of the ‘voting power’... without explanation of what these concepts are.” 51

Equal representation is just as important, or more important, than equal voting power as a basis for the reapportionment cases. The difference between the two is exemplified by Calderon v. City of Los Angeles,52 in which the supreme court invalidated districting because it was based on voter registration instead of population. It should be observed, however, that where districting is based on population, voters in districts where a higher percentage of the citizens register and vote will have their votes diluted, as compared with voters in districts where fewer persons vote. In light of this observation, it is apparent that both equality of representation and nondiscrimination against identifiable groups are more important than preserving the equality of the votes actually cast.53

Another obstacle to applying the reapportionment cases to cases such as Gould is that they may or may not require strict scrutiny. The ambiguity was introduced in Reynolds v. Sims:54 malapportionment “must be carefully and meticulously scrutinized,”55 but some deviations from population equality are permissible if they are “based on legitimate considerations incident to the effectuation of a rational state policy...”56 Reapportionment cases still cannot be fit squarely within either the strict scrutiny or the rational basis standards of review.57 Indeed, while the equal protection test applied in reapportionment cases appears to be more rigorous than the traditional rational basis test, the California Supreme Court itself purported to apply a rational basis test in a recent apportionment decision.58


52. 4 Cal. 3d 251, 481 P.2d 489, 93 Cal. Rptr. 361 (1971).


55. Id. at 562.

56. Id. at 579.


58. Legislature v. Reinecke, 10 Cal. 3d 396, 405, 516 P.2d 6, 12, 110 Cal. Rptr. 718, 724 (1973): “It is now settled that as it applies to state electoral districting ‘the proper equal protection test is not framed in terms of “governmental necessity,” but instead in terms of a claim that a State may “rationally consider,”’’ quoting Mahan v. Howell, 410 U.S. 315, 326 (1973). If Gould had adopted the rational basis test, it might still have been able to strike down the practice of listing incumbents first. Recent cases before the California Supreme Court may indicate a trend towards a more rigorous
c. Restrictions on Candidates

The third group of cases relied on in Gould involves election laws that affect voters indirectly by limiting the ability of candidates to get on the ballot. Laws affecting candidates may affect the right to vote by depriving voters of a choice; but not every law making it difficult for a candidate to get on the ballot will be strictly scrutinized.\textsuperscript{60} In Bullock v. Carter the Supreme Court reasoned: "In approaching candidate restrictions, it is essential to examine in a realistic light the nature and extent of their impact on voters."\textsuperscript{60} Since a Texas law requiring extremely high filing fees had a "real and appreciable impact on the exercise of the franchise," the Court invoked strict scrutiny.\textsuperscript{61} Relying on Bullock, the California Supreme Court found a "real and appreciable impact" in Gould, because of the extra votes received by candidates listed first.\textsuperscript{62}

\textsuperscript{60} See Jenness v. Fortson, 403 U.S. 431 (1971) (requirement that independent parties obtain signatures from 5 percent of the electorate upheld).

\textsuperscript{61} 405 U.S. 134, 143 (1972).

\textsuperscript{62} Id. at 144.
Although the supreme court found appreciable impact on the voting franchise in *Gould*, it should be noted that cases dealing with barriers to candidates provide little guidance to judges attempting to ascertain when a burden on candidates has sufficient impact on voters to require strict scrutiny. Those cases which have found appreciable impact on voters have concerned restrictions that have kept a candidate off the ballot entirely.\(^6\) It follows that procedures that only affect the number of votes a candidate will receive from poorly informed voters should have a less severe impact on the votes of those who support that candidate.\(^6\) In addition to the differences between the factual circumstances in cases finding appreciable impact on voters and in cases such as *Gould*, the cases invalidating restrictions on candidates have placed at least some reliance—unlike *Gould*—on alternative grounds to invoke strict scrutiny.\(^6\) Finally, *Gould* is the first case to invalidate incumbent first or alphabetical order candidate listings based on the right to vote of the candidate's supporters.\(^6\) Ballot order provisions may affect election outcomes; but it is not clear that this results in the type of impact on voters contemplated in the cases invalidating candidate restrictions.\(^6\)

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\(^6\) Cf. New York State Democratic Party v. Lomenzo, 460 F.2d 250 (2d Cir. 1972) (state need not permit candidates for delegate to Democratic National Convention to designate their choice for President on the ballot). Anderson v. Martin, 375 U.S. 399 (1964), which struck down a statute requiring designation of a candidate's race, was based on racial discrimination. Riddell v. National Democratic Party, 508 F.2d 770 (5th Cir. 1975), invalidating a restriction on the use of the party name on the ballot, was based on freedom of association.

\(^6\) See, e.g., Bullock v. Carter, 405 U.S. 134 (1972) (wealth discrimination); Williams v. Rhodes, 393 U.S. 23 (1968) (freedom of association); Thompson v. Mellon, 9 Cal. 3d 96, 507 P.2d 628, 107 Cal. Rptr. 20 (1973) (right to travel). In Moore v. Ogilvie, 394 U.S. 814 (1969), the Court relied on reapportionment cases in overturning a statute requiring candidates to gather 200 signatures from each of at least 50 of the state's 102 counties, when the 53 smallest counties had only 6.6 percent of the voters.


\(^6\) Once again, the cases may even cut against the dilution argument. In making it easier for third-party candidates to get on the ballot, these cases increase the possibility that the vote will be splintered and the election won by a candidate who might have come in second if the third-party candidate had been kept off the ballot. See Williams v.
d. The Right to Vote and the Need for Judicial Protection: the Implications of Gould

A demonstration that the extra votes received by the candidate listed at the top of the ballot dilute the votes of supporters of other candidates is not enough to bring Gould squarely within the established precedents. To determine whether ballot position advantages affect the right to vote so as to require strict scrutiny, it is necessary to explore the rationale behind the leading cases and to consider both the nature of the right to vote and the reasons for its careful protection by the judiciary.

The Constitution nowhere expressly provides for the right to vote, and the basis for the right has not been well articulated. Yet the right is basic to our system of government:

Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

The underlying basis for the right to vote was perhaps best expressed in Kramer v. Union Free School District:

The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on the assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as a basis for presuming constitutionality.

Because it is the means by which citizens are guaranteed a voice in government, the franchise is preservative of all other rights, and must be given special protection. A statute infringing the right to vote is one which interferes with a citizen's ability to be fairly represented. Although the theory of representation has not been well developed, it clearly should encompass the requirement that all citizens be allowed to

Rhodes, 393 U.S. 23 (1968) (enabling George Wallace to have his name printed as a candidate for President).
68. Harper v. Board of Elections, 383 U.S. 663, 665 (1966). Several provisions protect against abridgement of the right to vote on particular grounds. U.S. Const. amend. XV (race); amend. XIX (sex); amend. XXIV (poll tax in federal elections); amend. XXVI (age for voters 18 and older). Yet no particular provision gives rise to a broadly defined right to vote in state and local elections.
71. See Casper, supra note 57, at 2-3.
participate. It also should require adherence to the principle of majority rule.\textsuperscript{72}

While majority rule is a guiding principle, however, it does not dictate that the majority always prevail.\textsuperscript{73} Achievement of that ideal would be impossible. First, even if the preferences of those who actually voted were the same as those of the population as a whole, there would be no way the choice between two or more candidates could effectively measure majority preferences on all of the issues elected officials are required to decide.\textsuperscript{74} Moreover, a variety of other influences, including bicameralism, the committee system, and lobbying, may result in legislative action which does not reflect the will of the majority.\textsuperscript{75} Even so, elections remain an essential device for ensuring that, while political leaders may not always follow majority preferences, they will stay within bounds the majority can tolerate.\textsuperscript{76} Thus, while not every law affecting elections should be suspect, it is important to guard against distortions that threaten the essential function of elections.

The scope of the protection guaranteed by the right to vote should be guided by consideration of the proper role of judicial intervention, as well as by consideration of how effectively citizens are being represented. The statement that voting is an individual right,\textsuperscript{77} is more a conclusion than a clue to when a judicial activism is appropriate. What voting rights cases share with cases involving other individual rights is that the individuals whose rights are affected cannot expect fair treatment by the legislature; the judiciary is the only available forum.\textsuperscript{78} Legislators whose political fates depend on apportionment schemes that deviate widely from an equal population standard can hardly be expected to reform the system.\textsuperscript{79} Nor do legislators from established parties have any interest in making the ballot more accessible to independent candidates. Similarly, voters who are denied the ballot are at the same time impeded in their efforts to elect legislators who will extend the franchise to them. Along with the importance of voting to a democratic system, it is this self-reinforcing nature of infringements on voting which has defined the right to vote and the need for judicial intervention.\textsuperscript{80}

\begin{itemize}
\item\textsuperscript{72} See Choper, \textit{The Supreme Court and the Political Branches: Democratic Theory and Practice}, 122 U. Pa. L. Rev. 810 (1974).
\item\textsuperscript{73} Gordon v. Lance, 403 U.S. 1, 6 (1971).
\item\textsuperscript{74} R. DAHL, A PREFACE TO DEMOCRATIC THEORY 124-31 (1956).
\item\textsuperscript{75} Choper, supra note 72, at 817-45.
\item\textsuperscript{76} R. DAHL, supra note 74, at 131-33.
\item\textsuperscript{77} Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 736-37 (1964) (malapportionment invalid, even though approved in statewide referendum).
\item\textsuperscript{78} Choper, \textit{On the Warren Court and Judicial Review}, 17 Cath. U.L. Rev. 20, 42 (1967).
\item\textsuperscript{79} Auerbach, \textit{The Reapportionment Cases: One Person, One Vote—One Vote, One Value}, 1964 Sup. Ct. Rev. 1, 67.
\item\textsuperscript{80} See Baker v. Carr, 369 U.S. 186 (1962).
\end{itemize}
Faced with a provision reserving the top ballot position for incumbents, the Gould court confronted a situation that clearly came within the policies calling for judicial protection of the right to vote. Since top ballot positioning significantly increases the chances of reelection, it was clear that incumbent legislators would be most reluctant to give up the advantage. No doubt, the self-reinforcing nature of this favoritism to incumbents is what moved the court when it stated: "[W]e emphatically reject the notion that the government may consciously choose to favor the election of incumbents over nonincumbents in a manner which distorts the preferences of participating voters." Especially because a rotational system presented a readily available alternative that would ensure that voter preferences would be reflected more closely, there was good reason for the court to strike down incumbent first ballot procedures.

Alphabetical order ballot listings, however, presented a different issue—not all incumbent legislators stood to benefit from such a provision, and the self-reinforcing aspect was therefore minimal. Yet the supreme court applied the same strict scrutiny standard to the alphabetical order listing that it applied to incumbent first listings. Alphabetical order listings were held to be unconstitutional even though there were legitimate reasons for such listings, including facilitating the location of candidates on the ballot. Of course, the need for manageable judicial standards could have mandated application of the same strict scrutiny standard to a situation in which the dangers were not as serious as those posed by incumbent first procedures. But extending strict scrutiny to alphabetical listings was unnecessary. Protection against particular interests seeking to perpetuate themselves in power could still have been provided by limiting strict scrutiny to classifications favoring a group of candidates likely to share common political interests. There was no

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if there were any other relief available to the people of Tennessee. But the majority of the people of Tennessee have no "practical opportunities for exerting their political weight at the polls" to correct the existing "invidious discrimination." . . . The legislative policy has riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented.

Id. at 258-59 (Clark, J., concurring).
81. 14 Cal. 3d at 673, 536 P.2d at 1345, 122 Cal. Rptr. at 385.
82. Id. at 674-75, 536 P.2d at 1346, 122 Cal. Rptr. at 386.
83. In the reapportionment cases, Justice Stewart would have required only that "the plan must be such as not to permit the systematic frustration of the will of a majority of the electorate . . . ." Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 753-54 (1964) (Stewart, J., dissenting). The Court's rejection of this standard reflects, in part, the difficulty of drawing lines once it is accepted that some deviation is allowable. But see Gaffney v. Cummings, 412 U.S. 735 (1973) (minor deviations from equal population do not require justification). See also Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (which struck down restrictions on voting in local school districts, even though the restrictions were required by state law, and the voters excluded from school district elections were not excluded from state elections).
need to extend strict scrutiny to classifications which, like alphabetical listings, are effectively arbitrary.

The court’s invalidation of alphabetical order listings is especially puzzling in light of its willingness to allow the legislature to choose between a rotational system and a system assigning ballot position by lot. A lottery system dilutes the votes of informed voters just as much as does an alphabetical order system. It might distort election results even more, for the voter is more likely to recognize that there is no significance to the order of the candidates if they are listed alphabetically. Yet the court distinguished a lottery system from an alphabetical system, because the former does not disadvantage any fixed class of candidates. The court appears to have forgotten that it invoked strict scrutiny not because of the effect on candidates, but because of the effect on voters. There is no fixed class of voters who, year after year, support candidates with surnames at the bottom of the alphabet.

The court considered alphabetical order provisions almost as an afterthought, “a subsidiary matter . . . .” It reasoned that the issue was before it because the superior court had implicitly ruled alphabetical order listings unconstitutional by ordering that ballot position be determined by lot, when applicable statutes called for alphabetical listings. Although validity of alphabetical listings was not an important issue to the parties, the court’s decision on the issue will have wider application than its decision on incumbent first listings. Proposition 9, the initiative Political Reform Act of 1974, eliminated all state statutes providing that incumbents be listed first, thereby limiting applicability of the procedure to charter cities. Alphabetical listings, on the other hand, were still provided for in several types of state and local elections.

Because of problems of proof and of developing manageable standards, Gould may have little application beyond ballot order statutes. A variety of statutes may work to the advantage of incumbents, especially those concerned with financing activities that increase a legislator’s contact with the voters. But it will be hard to prove the effect of those provisions and even more difficult to separate those provisions which

84. 14 Cal. 3d at 676, 536 P.2d at 1347, 122 Cal. Rptr. at 387.
85. Id. at 664, 536 P.2d at 1339, 122 Cal. Rptr. at 379.
86. Id. at 674, 536 P.2d at 1346, 122 Cal. Rptr. at 386. The superior court also sustained a demurrer to an initial pleading which asked that candidates be listed alphabetically.
88. See Cal. Elec. Code §§ 10206 (elections in more than one county, but within a single assembly district); 10208 (elections within a single county and assembly district); 10209 (elections for state senator or assemblyman); 10210, 22870 (municipal elections in general law cities and, where applicable, in charter cities).
89. See Buckley v. Valeo, 519 F.2d 821, 861-62 (D.C. Cir. 1975), cert. granted, 96 S. Ct. 32 (1975) (assertion that campaign spending limitations favor incumbents too speculative). Similar problems of proving effect, and of ascertaining what a neutral
illegitimately favor incumbents from those necessary in order to enable legislators to represent their constituents. Similarly, provisions regulating such matters as designation of occupation or name similarity on the ballot may affect elections, but the considerations involved—the need to provide information for the voters while maintaining neutrality—are more complex than those involved in ballot order procedures. In short, there appears to be no clearly neutral election procedure available, which not only makes for difficult policy judgments, but also makes it nearly impossible to prove the effect of the ballot designation procedures. Clearly, Gould cannot be applied every time someone argues that his vote is being diluted.

Conclusion

The California Supreme Court’s treatment of ballot position advantages in Gould v. Grubb reveals some of the dangers posed by judicial intervention in defense of constitutional rights. Having the facts that determine the constitutionality of a statute developed fully at trial, instead of deciding them for the first time on appeal, helps ensure that appellate judicial decisions will be well informed. But letting the trial court make findings first and then basing appellate decisions on review of those findings raises the risk that decisions will be based on questionable factual assumptions, thereby creating a need for more careful review of findings of constitutional facts. In addition to the dangers inherent in the supreme court’s apparent deference to trial court findings of constitutional facts, the breadth of the court’s language raises the possibility that Gould will be read to hold that the right to vote is infringed whenever votes are diluted. This Note has demonstrated that such a holding is unwarranted; but in failing to discuss the policies underlying judicial review of voting procedures, the court provided little indication of the limits of its decision.

At the same time, however, the facts of Gould v. Grubb demonstrate the need for judicial activism. Incumbent first ballot procedures are patently unfair, and their use is particularly suspect in view of the fact that a rotational system can be used to eliminate any ballot position advantage. Because incumbents benefit from the unfairness of the incumbent first listing procedure, the legislative branch of government position would be, may account for the Supreme Court’s unwillingness to interfere with legislative districting so long as districts are of equal population. See Bums v. Richardson, 384 U.S. 73, 89 n.16 (1966) (“The fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness.”)

should not be trusted to eliminate it, and the California Supreme Court provided the vigorous judicial response essential to protect the right to vote.

Andrew H. Sawyer

B. PRIVACY: THE NEW CONSTITUTIONAL LANGUAGE AND THE OLD RIGHT

Achilles: Of this my privacy I have strong reasons.
Ulysses: But 'gainst your privacy the reasons are more important and heroical.*

White v. Davis.1 On November 5, 1974, California amended article I, section 1 of its constitution to include among the inalienable rights of its citizens the right to privacy.2 On March 24, 1975, the California Supreme Court issued its first interpretation of this constitutional language in White v. Davis. Justice Tobriner’s decision fails to give the Bar any guidance as to the assistance it can render the court in elaborating the new state right of privacy. This Note discusses how the court might give content to the privacy right by reference to first and fourth amendment sources of the right. Some curbs on police activity are suggested as within the ambit of the constitutional language. Finally, problems of accommodation between societal and personal interests and problems of remedy for intrusive violations are briefly explored.

I. The Opinion

a. Facts and Procedure

Plaintiff White, a University of California at Los Angeles history professor, sought to enjoin members of the Los Angeles Police Department who allegedly registered as students at UCLA, attended classes there, and submitted reports of class discussion to the police. It was further alleged that these undercover agents had joined university-recognized organizations and made reports on discussions at both public and private meetings of these organizations. The complaint alleged that

* W. SHAKESPEARE, TROILUS AND CRESSIDA Act III, sc. iii, I. 190 (1603).
1. 13 Cal. 3d 757, 533 P.2d 222, 120 Cal. Rptr. 94 (1975) (Tobriner, J.) (unanimous decision).
2. CAL. CONST. art. I, § 1 (1975) now provides: “All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.”
these reports, pertaining to no illegal activities, were recorded in police files. The superior court sustained defendant's demurrer without leave to amend, and plaintiff appealed. On these facts the supreme court reversed, finding violations of the first and fourteenth amendments of the United States Constitution and article I, sections 1 (privacy) and 2 (free speech and assembly) of the California constitution.

b. Structure of the Decision

For several reasons, the decision does not clearly limn the contours of the privacy amendment. First, the court disapproved the entire complex of facts, without isolating specific damning elements in the series of events. Thus one does not know whether the state could have avoided constitutional strictures by sending its agents only to classes or only to meetings of private organizations. One cannot determine whether the police surveillance would be permissible if initiated without probable cause, so long as the information gathered had pertained to some illegal acts. Second, the court carefully restricted its discussion to the given facts. For the moment, the restraint upon police extends no further than university classrooms or activities. The opinion's emphasis on the unique position afforded university discussion, coupled with its evasion of search and seizure law through which the new amendment could be given broader application, stresses the brevity and the limits of the court's privacy analysis. Third, the court considered only injunctive relief, a remedy adequate to correct the abuse of "government snooping." However, more may be required to remedy the second abuse noted by the court, the maintenance of files. Fourth, the court's position permits the defendant to assert some compelling state interest in defense at trial. The court offered no indication as to what interests it might consider compelling.

The discussion of privacy constitutes only one of three major portions of the court's opinion. A hurdle of justiciability was first surmounted. Then the court discussed at length two alternative rationales for reversing the trial court: (1) the defendant's actions violated the right to freedom of association guaranteed by parallel provisions of the

3. 13 Cal. 3d at 762, 533 P.2d at 225, 120 Cal. Rptr. at 97.
4. Id. at 772, 533 P.2d at 232, 120 Cal. Rptr. at 104.
5. Id. at 773, 533 P.2d at 232, 120 Cal. Rptr. at 104.
6. Id. at 769-71, 533 P.2d at 230-31, 120 Cal. Rptr. at 102-03.
7. The court notes the relevance of search and seizure law but considers decision on these grounds unnecessary as free speech considerations require reversal. Id. at 765-67, 533 P.2d at 227-28, 120 Cal. Rptr. at 99-100.
8. Id. at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.
10. 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.
United States and California Constitutions, and (2) the actions violated the California right to privacy. This trifurcation of the discussion belies the conceptual interrelationship of the three issues. The justiciability obstacle perceived by the court, and the freedom of association rationale for its holding stem from the same concerns that motivated the California privacy amendment.

1. Justiciability. The facts in White mirror the facts in Laird v. Tatum, in which the United States Supreme Court dismissed on justiciability grounds a suit challenging extensive army surveillance of civilians. The White court’s eagerness to interpret federal law led it to deal with this issue unsatisfactorily. The court indicated that the complaint in White presented a justiciable controversy because California had dispensed with a specific harm requirement for suits brought under its taxpayer standing statute. This conclusion belies the court’s own synopsis of Laird v. Tatum which pointed to a conception of Laird as a ripeness problem rather than as a question of standing. “No specific harm,” the infirmity which rendered the complaint in Laird v. Tatum nonjusticiable, means that plaintiffs have suffered no judicially cognizable injury. For this reason, a dismissal on ripeness grounds is a statement of the law on the merits.

To declare a case not ripe means that the acts alleged do not justify judicial interference. The courts, then, must wish to distinguish among all the possible behaviors consistent with the allegations. For example, to use the information at issue in Laird v. Tatum to prevent the

11. 408 U.S. 1 (1972). White might be distinguished from Laird v. Tatum on the grounds that the surveillance in White was more restricted in area and numbers and that the situs of surveillance, a university, merited special constitutional protections. It is unlikely that the Supreme Court will limit Laird v. Tatum on the basis of such a distinction. See Socialist Workers Party v. Attorney Gen., 510 F.2d 253, stay denied, 419 U.S. 1314 (Marshall, Circuit Justice, 1974). The surveillance there was of a national political convention, a situs as restricted in area and as constitutionally protected as a university.

12. The court carefully insulated its decision from Supreme Court review by providing two adequate and independent state grounds on which to rest the decision. See Fox Film Corp. v. Muller, 296 U.S. 207 (1935). The grounds on which the California Supreme Court’s opinions rest are occasionally ambiguous. On appeal the United States Supreme Court will remand for clarification. E.g., People v. Krivda, 5 Cal. 3d 357, 486 P.2d 1262, 96 Cal. Rptr. 62 (1971), vacated and remanded for clarification, 409 U.S. 33 (1972), clarified, 8 Cal. 3d 623, 504 P.2d 457, 105 Cal. Rptr. 521 (1973). In its initial opinion the court was ambiguous as to whether it rested its decision on article I, § 19 of the California constitution as well as on the fourth amendment. On remand the court clearly asserted the state ground.


14. Id. at 763-64, 533 P.2d at 227, 120 Cal. Rptr. at 99.

employment of "socialists" is a behavior consistent with the allegations of surveillance and file maintenance which may be constitutionally impermissible. Conversely, using that information to prevent treason, another behavior consistent with the allegations, may be constitutionally permissible. Thus, if the facts alleged in the unripe case constitute the total behavior, that is, the defendant does no more than the allegations, such acts must be legal. Otherwise, there would be no need to distinguish conduct consistent with the acts alleged. While correctly regarding Laird v. Tatum as a ripeness case, the White court ignored its constitutional significance. Instead, the White court attempted to circumvent a federal holding that the facts as alleged do not constitute a cognizable federal injury to anyone by relying upon a state standing statute. Although this attempt was improper since Laird v. Tatum had "not presented a case for resolution by the [federal] courts," the White court still had the option of affording a remedy under California substantive law, either under the state guarantee of freedom of association or under the privacy provision.

2. Anonymity and the First Amendment. The court held in White that the facts alleged violated the first amendment right of freedom of association. The cases which the court cited, NAACP v. Alabama, Talley v. California, and Lamont v. Postmaster General, outline a specific privacy interest that has long received constitutional protection. The need for protection lies in the threat that disclosure of political affiliation will diminish an individual's political activity. This danger increases when an individual adheres to an unpopular minority viewpoint. The Court confronted this situation in NAACP v. Alabama, where the appellate, during a review of its right to do business in the state, resisted an order to disclose its membership list. The Court found that "compelled disclosure of membership in an organization engaged in advocacy of particular beliefs" interferes with the right of freedom of association. The Court broadened protection of this right in Talley v. California when it struck down an ordinance requiring disclosure of the authorship of each handbill circulated in the city. Talley, coupled

17. 408 U.S. 1, 15 (1972) quoted in White v. Davis, 13 Cal. 3d at 764, 533 P.2d at 227, 120 Cal. Rptr. at 99.
18. 13 Cal. 3d at 768, 533 P.2d at 229, 120 Cal. Rptr. at 101.
21. 381 U.S. 301 (1965).
23. Id.
24. Id. at 462.
with more recent cases, indicates that compelled disclosure, even absent such threatened sanctions as political harassment or denial of entrance to a state bar association, violates one's right to anonymity in association. An individual thus has a limited control over the dissemination of and access to information concerning himself. If the state phrases its request with sufficient narrowness, however, it may force disclosure of the information to serve a "compelling" state interest.

The right to anonymity falls within the scope of the right to privacy which one commentator has defined as "the claim of individuals, groups, or institutions to determine for themselves, when, how, and to what extent information about them is communicated to others."

The facts in White do not clearly fall within these first amendment cases used by the California Supreme Court. Many statements recorded by the police in White were freely offered to a group composed of friends, acquaintances, and possibly strangers in the course of classroom discussion. To rebut the contention that voluntary exposition of ideas waives the right to anonymity, the court relies upon the peculiar importance imputed to universities in the first amendment area. Instead, the court might have recognized that the allegations of White directly involved the control of information personal to the declarant, one aspect of the privacy right. Only in conclusion did the court note this more direct and substantial argument:

In the course of classroom debate some thoughts will be hazarded only as the trial balloons of new theories. Yet such propositions, that are tentative only, will nevertheless be recorded by police officers, filtered though [sic] the minds of the listening informers, often incorrectly misstated to their superiors and sometimes maliciously distorted. Only a brave soul would dare to express anything other than orthodoxy under such circumstances.

3. The Right to Privacy. The court gave the state right to privacy rather cursory treatment. After quoting extensively from the election brochure argument, the court listed the principal mischiefs at which the amendment was aimed:

(1) "government snooping" and the secret gathering of personal information; (2) the overbroad collection and retention of unnecessary

30. A. Westin, Privacy and Freedom 7 (1967).
31. 13 Cal. 3d at 768-72, 533 P.2d at 229-31, 120 Cal. Rptr. at 101-03.
32. See note 30 supra.
33. 13 Cal. 3d at 777, 533 P.2d at 235, 120 Cal. Rptr. at 107.
personal information by government and business interests; (3) the improper use of information properly obtained for a specific purpose, for example, the use of it for another purpose or the disclosure of it to some third party; and (4) the lack of a reasonable check on the accuracy of existing records.\textsuperscript{34}

The activities alleged in the complaint fell within two of the categories of conduct which the amendment was intended to proscribe: government snooping, and the collection and retention of unnecessary personal information.\textsuperscript{35} Noting that the amendment was self-executing and hence conferred a judicial right of action on all Californians,\textsuperscript{36} the court concluded that the plaintiff had stated a prima facie violation of the right.\textsuperscript{37} The state could attempt to justify its actions at trial by asserting some compelling state interest.\textsuperscript{38}

\textbf{II. Defining Privacy}

Plaintiffs in \textit{Laird v. Tatum}, as in \textit{White}, had perceived the government conduct as an invasion of their privacy rights,\textsuperscript{39} though neither the circuit court nor the Supreme Court discussed any right or source of a right other than the first amendment. Because of the lack of explicit federal constitutional language guaranteeing a right to privacy, courts have, thus, had to decide privacy issues under constitutional provisions aimed at protecting other interests. For example, a concern for privacy manifests itself in the first amendment doctrine of a right to anonymity in association. The California constitutional right of privacy should encompass at least the interests previously protected under the first amendment but generally regarded as “privacy” interests.

The relationship among the justiciability, freedom of association, and privacy issues should not be surprising. Development of a constitutional right to privacy did not await the state constitutional language on which the court relied.\textsuperscript{40} The sponsors of the amendment assumed in the election brochure argument that the amendment’s language encompassed an already existing right.\textsuperscript{41} Enactment of the amendment thus

\begin{footnotes}
\footnotetext{34.}{13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.}
\footnotetext{35.}{Id.}
\footnotetext{36.}{Id.}
\footnotetext{37.}{Id at 776, 533 P.2d at 234, 120 Cal. Rptr. at 106.}
\footnotetext{38.}{Id.}
\footnotetext{39.}{444 F.2d 947, 949 (D.C. Cir. 1971), rev’d, 408 U.S. 1 (1972).}
\footnotetext{41.}{“The right to privacy is an important American heritage and essential to the fundamental rights guaranteed by the First, Third, Fourth, Fifth and Ninth Amendments of the U.S. Constitution.” \textit{Quoted in White v. Davis}, 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.}
\end{footnotes}
removed one of two hindrances to a thorough articulation of the right to privacy. California courts no longer need be constrained by the absence of constitutional language on which to ground their decision.\footnote{42. Griswold v. Connecticut, 381 U.S. 479 (1965), demonstrates the contortions that courts go through in asserting and denying the privacy right. Justice Douglas, writing for a plurality, found the right in the penumbral emanations of the Bill of Rights. Justice Goldberg preferred to rest his result on the ninth amendment. Id. at 487-93. Justice White rested on the fourteenth amendment alone. Id. at 502. Three Justices dissented.}

The second obstacle to development of the privacy right stems from the basic obscurity of its content. Despite a growing number of cases invoking it on federal constitutional grounds, no one has quite been able to capture its elusive quality in definition.\footnote{43. Thomson, The Right to Privacy, 4 Phil. and Pub. Aff. 295 (1975).} Justices of the Unites States Supreme Court have found fragments of the right in other constitutional guarantees but have failed to articulate any comprehensive definition of the right on which the full Court can agree.\footnote{44. S. Hufstedler, The Directions and Misdirections of a Constitutional Right to Privacy, 26 Record of the Ass'n of the Bar of the City of New York 546, 559 (1971). See note 42 supra and note 45 infra.} The first, fourth, fifth, and ninth amendments of the United States Constitution have been cited as the source for aspects of the privacy right. The first amendment protects associational anonymity, as already noted.\footnote{45. The first amendment line of authority includes the cases discussed in the text at notes 18-30 supra, as well as obscenity cases like Stanley v. Georgia, 394 U.S. 557 (1969). Fourth and fifth amendment support for the privacy right appears and disappears in the case law. Boyd v. United States, 116 U.S. 616 (1886), is frequently read as the first assertion of the privacy right. Justice Brandeis was more explicit in dissent, Olmstead v. United States, 277 U.S. 438, 478 (1928). His dissent became law in Katz v. United States, 389 U.S. 347 (1967). Justice Goldberg asserted the ninth amendment as a source of the right to privacy in concurrence in Griswold v. Connecticut, 381 U.S. 479, 487 (1965).} The substantial “right of the people to be secure in their persons, houses, papers, and effects”\footnote{46. U.S. Const. amend. IV.} encompasses much of what we vaguely denote as “privacy.” The privacy amendment affords an opportunity to approach these problems more coherently and to provide a more extensive protection.

The ambiguity in the definition of privacy and the variety of its sources produce interpretation problems. It has been suggested that other rights overlap and cover completely the right of privacy. Normally, constitutional language has effects independent of other constitutional provisions. Elucidating the impact of a right obscure in its content and at least partially overlapped by other provisions constitutes a difficult task. The language of the amendment’s sponsors in the election brochure argument and an investigation of first and fourth amendment doctrines provide guidelines for interpretation. These guidelines should
lead the court to proscribe police activities and to pronounce personal rights it had been hesitant to promulgate under the first or fourth amendments.

a. Privacy and Data Banks

In condemning the institutional maintenance of unnecessary data on individuals, the court in White made a significant application of the new state right of privacy. Most first amendment cases dealing with files have turned on the use to which the government puts them. While the class of proscribed uses has not been clearly delineated, some use does appear necessary in order to render maintenance objectionable. The United States Supreme Court indirectly approved the simple maintenance of governmental dossiers in Laird v. Tatum. There the plaintiffs sought to enjoin army surveillance of civilian activity. The army maintained files on those individuals or groups it chose to observe. Chief Justice Burger, writing for the Court, found neither the surveillance itself nor the information kept on file sufficient to chill plaintiff's constitutional rights. Though the Court technically dismissed the case as not ripe, this holding constituted a substantive finding that mere maintenance of files without any further action by the maintaining agency is constitutional.

In California Bankers Association v. Shultz, the Court more explicitly recognized the government's right to have files maintained on individuals. Title I of the Bank Secrecy Act requires financial institutions to maintain records of their customers' identities, to make microfilm copies of checks and similar instruments and to keep records of certain other items. The Court found no violation of the fourth amendment, since "[n]either the provisions of Title I nor the implementing regulations require that any information contained in the records be disclosed to the government." Thus, simple maintenance of informa-

47. 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.
49. Id. at 11.
50. See notes 11-16 supra and accompanying text. Justice Marshall, who dissented in Laird v. Tatum, may disagree with this reading. In refusing to stay an order permitting FBI surveillance of the Socialist Workers Party Convention, he phrased the Laird v. Tatum holding more narrowly: plaintiffs had failed to allege specific injuries that could be caused by army surveillance. They had made a pleading error. Marshall found the allegations in the case before him specific enough but refused to grant the stay on the merits. In effect, then, Marshall reached the same conclusion as the Laird v. Tatum majority: simple surveillance and maintenance of files is not constitutionally proscribed. Socialist Workers Party v. Attorney Gen., 419 U.S. 1314 (1974), aff'd 510 F.2d 253 (2d Cir. 1974).
53. 416 U.S. at 52.
tion for government convenience is constitutionally permissible. Use of the information on file, however, may present constitutional difficulties.

Lower court cases illustrate the significance of affirmative governmental acts as a prerequisite for attacking the legitimacy of file maintenance. In *Davis v. Ichord*, the Court of Appeals for the District of Columbia upheld the dismissal of an action challenging the maintenance of records by the House of Representatives Internal Security Committee. The court noted that the plaintiffs had designated no specific instances of the use of dossiers, though they had alleged that the files were routinely made available to federal, state, and local governments. This intimation that exposure of collected information to other governmental agencies might be proscribed was confirmed by the Second Circuit in another case. It reversed a lower court injunction prohibiting FBI surveillance of the national convention of the Socialist Workers Party and of the Young Socialist Alliance. The court did, however, enjoin the FBI from making information gathered at this convention available to the Civil Service Commission.

These file cases parallel the cases ensuring anonymity in association. As in the anonymity cases, the undesired use of the information has adverse consequences on the individual. The possible difficulties in gaining employment or the likelihood of public harassment could inhibit the associational activities of the person. The file cases, however, extend protection to persons not politically affiliated. *White v. Davis* extends this protection further in California by proscribing the very maintenance of certain types of files. Delineating the types of information that may not be maintained remains a difficult task. The court and the election brochure argument speak of unnecessary information. Whether the court will also provide remedies other than injunctive relief and whether the court will follow the election brochure argument and restrain private maintenance of files remains to be seen.

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54. One might argue that the maintenance of files by the government threatens a greater 'chill' than maintenance by a private party. The informal relationship between banks and investigating agencies minimizes this distinction.

55. 442 F.2d 1207 (D.C. Cir. 1970).


57. *Id.* at 257.


59. 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.

60. *Id.*

61. See notes 111-21 *infra* and accompanying text.

62. The election brochure argument, quoted by the court, 13 Cal. 3d at 774, 533 P.2d at 23, 120 Cal. Rptr. at 10, states: "At present there are no effective restraints on the information activities of government and business. This amendment creates a
b. Privacy and Restraints on Police

Generally, the mischief of "government snooping" into which the *White* court classified the police department's activities has been regulated by search and seizure law as developed under both the fourth amendment of the United States Constitution and article I, section 13 of the California constitution. The court, however, scrupulously avoided resting its decision on these grounds. At the outset of his discussion of freedom of association, Justice Tobriner noted that search and seizure law constitutes the primary check on government police activity, but that the speech aspects of the case rendered the discussion of search and seizure concerns unnecessary. This reluctance to pursue the relation of fourth amendment law to privacy is regrettable. Since *Katz v. United States*, much of fourth amendment law has been phrased in privacy terms. Moreover, search and seizure law has been beset by inconsistencies and anomalies which the state privacy guarantee might be used to cure. Additional restraints upon police activities might be imposed under the new language.

One interpretation of search and seizure law states that the fourth amendment should curb abuses of power by the government. The legal and enforceable right of privacy for every Californian." (Italics in both the election brochure and the opinion.) The court interprets this as "the overbroad collection and retention of unnecessary personal information by government and business interests," *id.* at 775, 533 P.2d at 234. 120 Cal. Rptr. at 106 (emphasis added). Conceivably, the argument's language could be interpreted more broadly than the court intimates, thus including control over private security forces. Over half the police personnel in the United States today are private guards and detectives. Klare, *The Boom in Private Police*, 221 The Nation 486 (1975). These people may conduct surveillance or searches and seizures which if conducted by public police personnel would be illegal. The private industry, of course, is currently not subject to the constitutional strictures controlling governmental behavior. *Id.* at 488. They also have had less training. *Id.*

The privacy amendment provides an opportunity for some judicial control of these practices. The balance the court strikes, however, may differ in the private and the government cases. For instance, a court might only require a business to forewarn its employees of its use of private police to prevent employee theft. A warrant may be required of the government.

The issue of judicial control of private intrusions, which in kind, frequency, and degree probably now match government intrusions, was not raised in *White*. It is also beyond the scope of this Note. Should the court follow the election brochure argument, however, and include private action within the amendment's range, the court will have to confront issues of remedy and legitimating interests similar to ones confronted in the state action situation. Only the striking of the balance may be altered.

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63. 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106.
64. *Id.* at 766, 533 P.2d at 228, 120 Cal. Rptr. at 100.
65. *Id.* at 767, 533 P.2d at 228, 120 Cal. Rptr. at 100.
68. *Id.* at 377.
United States Supreme Court's decision in *Katz v. United States* is exemplary of this interpretation. In *Katz*, the police had tapped a public phone at which the defendant conducted his numbers business. The court excluded the resulting evidence from trial. In doing so, it overruled prior case law under which a physical intrusion onto defendant's property or a seizure of tangible property was necessary to establish violation of the amendment's prohibitions. Under *Katz* the legitimacy of the search rests on the suspect's intent. If the suspect seeks privacy, the communication is protected even if done in a public place. The suspect's expectation of privacy, however, must be reasonable. Conversely, it would seem that a knowing exposure of information to potential police detection, even if done in a private place, receives no protection under the fourth amendment.

This latter proposition, however, was rejected in *Katz*, which held that court supervision of otherwise legitimate police activity is necessary. The court may not retroactively approve a search even if properly circumscribed and based upon sufficient probative facts because the citizen has not been afforded significant protections which inure when police activity is subjected to a magistrate's supervision. The magistrate may articulate precise limits upon the surveillance and require detailed notification of all information acquired. This portion of the *Katz* holding suggested that the status of prior cases approving unsupervised police activity such as use of paid informers and undercover agents must be reexamined. Prior to *Katz* the Court had decided a series of cases related to the trial of James Hoffa for jury tampering. The Court approved the use of police informers, whether carrying electronic recording equipment or not. The dissenting opinions, however, revealed a concern for the means used by police in obtaining evidence. The interests asserted in this context are highly relevant to a proper delineation of an express right to privacy. Chief Justice Warren in *Hoffa* objected to the use of an informer who himself is in legal difficulties, because it undermines the standard of justice administered by the Federal courts. Justice Douglas objected in *Osborn* to a police agent's entrance into another's home through the use of a disguise. He felt that such an entrance "to obtain evidence is a search that should bring into play all the protective features of the fourth amendment."
Douglas asserted that government acts which undermine personal relationships infringe upon a valuable privacy interest.

Despite the doubt cast upon the use of unsupervised investigatory tactics by the rationale used in *Katz*, the Court later approved the use of police informers wired for sound in *United States v. White*. The majority found no warrant necessary to record face to face encounters because the suspect takes a calculated risk that anyone with whom he speaks will inform the police. Justice Brennan in that case revealed the continued difference in the Justices' perceptions of the problem. Brennan asserted that these governmental intrusions into an individual's life require the traditional restraint of a judicially authorized warrant issued on a finding of probable cause. Brennan's objection arose not from the unreliability of the evidence obtained, but from the illegitimacy of the means used to obtain the evidence. As in *Katz*, only court supervision of the police activity could legitimate the search. The interests asserted in *Katz* and by the *United States v. White* dissenters are equally applicable to the facts alleged in *White v. Davis*; for one can discern little relevant difference between gathering information through a device placed strategically by the police and gathering information through an individual placed strategically by the police.

The California Supreme Court has itself relied upon and developed the *Katz* "expectation of privacy" rationale in search cases, extending court control over police activities. In *People v. Krivda* the court excluded evidence gathered in a search of defendant's trash barrel. The po-

75. 401 U.S. 745 (1971). California has followed the United States Supreme Court in this attitude towards the use of police informers. In *People v. Murphy*, 8 Cal. 3d 344, 503 P.2d 594, 105 Cal. Rptr. 138 (1973), evidence gathered by an informant who had invited police to tape record certain conversations was admitted.

76. A "majority" in *White* was not easily crystallized. Justice Stewart, writing for four justices of the Court, found that utilization of a voluntary disclosure does not equal a search and seizure. Justice Black reasserted the position taken in his *Katz* dissent, 389 U.S. 347, 364 (1967), that all forms of eavesdropping are beyond the purview of the fourth amendment. It is significant that despite his reservations on the applicability of the fourth amendment in this context, in his earlier dissent in *On Lee v. United States*, 343 U.S. 747, 758 (1952), Black suggested that the Court should deplore such information gathering techniques in the exercise of its supervisory authority over federal criminal justice. Justices Douglas, Harlan, Marshall and Brennan all contended that judicial scrutiny and issuance of a warrant must precede such an investigation. Brennan, however, concurred in the result on the grounds that *Katz* should not be applied retroactively.

77. 401 U.S. at 755.

78. The dissent of Justice Harlan was based partially on the factual distortion which can occur when words spoken informally are transmuted into a permanent record. He also, however, placed primary reliance on the unconstitutional impact of third-party monitoring on the individual's sense of security.

lice had spilled the contents into the back of an empty trash truck and culled it for illegal drugs. The court held that defendant had a reasonable expectation that his trash would not be identified and singled out from the mass of trash in the world.

The California Supreme Court has not merely applied the "expectation of privacy" rationale to limit the permissible scope of police investigation. In accordance with *Katz*, the court has also invalidated searches found reprehensible because of the means utilized to acquire the information. In *Bielicki v. Superior Court*, the court had decided that clandestine observation of toilet stalls from ventilation grills violated the search and seizure provision of the California Constitution. The existence of doors on the stalls gave defendants an "expectation of privacy." In *People v. Triggs*, the police utilized the same practice disapproved in *Bielicki* to observe homosexual activity from a ventilation grill. The police relied on the fact that the toilet stalls were doorless, so that the defendants' activity could have been viewed by any person entering the restroom. The court unanimously excluded this evidence, noting that the police had no probable cause to think a crime was being committed. One suspects, however, that had the police entered the restroom through the public entrance and observed the same behavior the evidence would have been admissible. If this supposition is correct, the court condemned the means used by the police to gather information that could have been gathered in a legitimate fashion.

Entrapment law also reflects the courts' concern for the means used by police investigators. The defense is based solely upon the objectionable nature of police conduct which induces an individual to commit a crime not within his contemplation prior to his encounter with police agents. The line between entrapment and conduct which simply facilitates fruition of a pre-existing design can be difficult to discern. For example, the supply by an undercover agent of a chemical essential for the manufacture of amphetamines has been held not to be entrapment when the drug is available through channels other than the police agent. The courts have drawn these fine lines from a reluctance to impinge too greatly on police activity. This same concern for effective law enforcement has inhibited the extension of fourth amendment controls over police methods such as the use of undercover agents. Crime and disorder have always appeared, in this country, more pervasive and real than the governamental oppression and intrusions against which the fourth amendment protects. If unregulated searches and seizures in-

fringed a more specific or tangible interest, the controls over police behavior would likely be extended.

Is there a strong privacy interest which militates in favor of strict control over illegitimate governmental acts? Why should information made available to one person not be accessible to another or to the government? Privacy, one may argue, can not be a concern in situations where persons have nothing to hide. J. Rachels answers that

even in the most common and unremarkable circumstances we regulate our behaviour according to the kinds of relationships we have with people around us. If we cannot control who has access to us, sometimes including and sometimes excluding various people, then we cannot control the patterns of behaviour we need to adopt . . . or the kinds of relations with other people that we will have.

Thus, the manner in which government or business accumulates information on individuals may drastically affect their privacy interests. Knowledge that one's every act may be recorded and observed frustrates the individual's control of his relations with other individuals. Inability to exclude strangers and government from intimate or friendly relationships will alter the friends' behaviors away from intimacy and understanding towards formality. The adoption of an express right to privacy in California affords an opportunity to recognize this tangible interest in opposition to intrusive police conduct and shift the balance towards greater supervision of investigatory tactics. The difficulty arises in defining the means by which information may be gathered since,

84. In Katz itself the Court noted that fourth amendment protections "go further, and often have nothing to do with privacy at all." 389 U.S. at 350. The Court, of course, does not define privacy or even delineate its reach within the fourth amendment.

85. Rachels, Why Privacy Is Important, 4 PHIL. AND PUB. AFF. 322, 331 (1975). Justice Harlan exhibited a similar concern for the injury which may ensue from unsupervised intrusion into conversation intended for a limited audience. His dissenting opinion in United States v. White, 401 U.S. at 787-89, states:

Authority is hardly required to support the proposition that words would be measured a good deal more carefully and communication inhibited if one suspected his conversations were being transmitted and transcribed. Were third-party bugging a prevalent practice, it might well smother the spontaneity —reflected in frivolous, impetuous, sacrilegious, and defiant discourse—that liberates daily life. Much off-hand exchange is easily forgotten and one may count on the obscurity of his remarks, protected by the very fact of a limited audience, and the likelihood that the listener will either overlook or forget what is said, as well as the listener's inability to reformulate a conversation without having to contend with a documented record. All these values are sacrificed by a rule of law that permits official monitoring of private discourse limited only by the need to locate a willing assistant. [footnotes omitted].

The value which we place upon our ability to select with whom we will share particularly privy information (Rachels) and the importance of affording all members of society the right to express themselves spontaneously "off the record" (Harlan) together constitute a significant privacy interest.

clearly, the government of a complex society needs some information on its citizens.

III. Probable Cause, Compelling State Interests, and Remedies for Invasion of Privacy

Recognition of privacy interests presents two prominent problems. First is the delineation of those interests which outweigh or mitigate the claim of the privacy interest. Second is the problem of remedy.

a. Privacy and Other Governmental Interests

The major difficulty presented by White is the determination of when state activities may legitimately encroach upon the privacy interest. Two alternative approaches exist. The "reasonableness" and "probable cause" limits of the fourth amendment might be utilized as the criteria for justifiable intrusion. The court intimated, however, that it will take the second approach to this problem: a compelling state interest must be demonstrated to override the concern for privacy. This test sounds stronger than it may prove in practice. Legislative history, prior California case law, and the case law under the first amendment indicate that privacy has been accorded a protection which succumbs to interests less compelling than in equal protection contexts.

In June, 1972, prior to the passage of the privacy amendment, the legislative counsel was asked whether the amendment would limit the right of access to Department of Motor Vehicle files. The counsel replied that the Public Records Act interprets the California constitution and that this legislative interpretation would continue to control. The California Supreme Court is not likely to agree with this opinion, since the Public Records Act was passed prior to the constitutional amendment. Presumably one of the purposes of the amendment was to prevent abuses by the government, among which might number provisions of the Public Records Act. The counsel's opinion does indicate, however, that the legislature perceived the amendment as having at best a limited effect on the state's power to acquire and maintain information reasonably necessary for the operation of government. The legislature's view of the amendment's impact, as expressed concurrently with its adoption, may be considered by the court in establishing the contours of the new right since such public interpretive statements may have contributed to the provision's adoption.

89. The Public Records Act permits disclosure of D.M.V. records subject to the agency's discretionary determination that on the facts of a particular case, the public
Prior California decisions give some indication of the state interests which might be considered by the court sufficiently compelling to override the right of privacy. In *City of Carmel-By-The-Sea v. Young*, the court struck down a state statute requiring disclosure of financial information by a broad class of public officials and candidates for public office. In finding the statute overbroad, the court noted that the state's need to prevent conflicts of interest was sufficient to sustain a statute drawn with reasonable specificity. In *County of Nevada v. MacMillen*, the court validated this dictum, sustaining a disclosure statute remarkably similar to the one at issue in *City of Carmel-By-The-Sea*. In a third privacy case, *In re Lifschutz*, the court noted that the patient-psychotherapist relation, while constitutionally protected by the right to privacy, yielded to the state's need to determine the truth in court proceedings. The right of privacy under prior law succumbed rather quickly in the face of an otherwise legitimate state objective. If this same standard is applied to California's new express recognition of the right, it will have a very weak and amorphous meaning.

Similarly, anonymity cases have not uniformly protected individuals' or associations' rights against compelled disclosure. Occasionally, as in *Eisen v. Regents of the University of California*, compelled disclosures have been justified as a condition to receiving certain privileges. In *Eisen* the court found that limited disclosure conditions could constitutionally be imposed upon organizations granted the right to use university facilities. The university's interest in knowing certain information about organizations using its facilities prevailed when balanced against the impairment of Eisen's constitutional rights occasioned by public disclosure of his organization's purpose and the names of its officers.

In other instances the right first advanced in *NAACP v. Alabama* has yielded simply upon a showing that the intrusive regulation is rationally related to a legitimate governmental function. In *Communist Party v. Subversive Activities Control Board*, decided after *NAACP v. Alabama*, the United States Supreme Court held that the sufficiency of congressional findings in section 2 of the Subversive Activities Control Act was not subject to question by the Court. Since the findings

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91. 11 Cal. 3d 662, 522 P.2d 1345, 114 Cal. Rptr. 345 (1974).
demonstrated a legitimate governmental interest of supposed overriding import, the Act was upheld. The Communist Party had to disclose a list of its membership because a legislative recital of the existence of a world Communist conspiracy aimed at overthrow of the government was accepted as a statement of fact. While the standard applied by the Supreme Court need not restrict California courts in their delineation of the state right to privacy, the precedent of Communist Party v. Subversive Activities Control Board suggests one means of skirting any compelling interest requirement.

The frequent references in White to the fact that the surveillance pertained to no illegal activities or acts reflected the court's (and plaintiff's) concern for the broad impact of the United States Supreme Court's holding in Branzburg v. Hayes. There the Court refused to recognize a first amendment privilege for reporters called before the grand jury. In conducting its investigations, the grand jury need only show a tenuous possibility that a crime has been committed. Thus, the White court's grave description of the state's "heavy burden of justification" may lack substance. The question is: how proximate a relation between illegal activities and its surveillance must the state show?

The court in White has left itself an easy escape from the effects of a broad construction of the privacy amendment. The court's future actions will put content into the caveat appended to White v. Davis that the government must assert a compelling state interest in order to justify invasions of privacy. Only the intent of the amendment's sponsors as evidenced in the election brochure argument and the hazy historical trend towards increased recognition of tangible privacy interests stand against continued resort to a diluted compelling interest test.

An alternative method of accommodating privacy and other societal interests exists. The court could adopt the balancing formula prescribed by the fourth amendment. It might investigate the reasonableness of the intrusion and the existence of probable cause for that

97. 367 U.S. at 93-94.
99. 13 Cal. 3d at 772, 533 P.2d at 232, 120 Cal. Rptr. at 104.
100. The court might, of course, use the election brochure argument to construe the amendment broadly. The recital that the privacy right is guaranteed by the first, third, fourth, fifth, and ninth amendments to the United States Constitution, 13 Cal. 3d at 775, 533 P.2d at 234, 120 Cal. Rptr. at 106, could be read as referring not to the Supreme Court's actual delineation of the right but rather to Justice Douglas' conception of it. The words do echo his statement in Griswold v. Connecticut, 381 U.S. 479 (1965). The California court, however, carefully declined to commit itself as to how it would construe this language. There is no particular indication that the court will arrive at this interpretation. It has not always agreed with Justice Douglas' approach to privacy issues. Compare People v. Murphy, 8 Cal. 3d 349, 503 P.2d 594, 105 Cal. Rptr. 138 (1973) (the use of police informers not subject to court supervision), with Osborn v. United States, 385 U.S. 323, 345 (1966) (Douglas, J., dissenting).
intrusion. In the privacy context, the consideration of reasonableness would require that no less intrusive means be available to achieve the desired result. For example, the government could not gather masses of information and cull them for relevant bits. Instead, it would be required to specify narrow and precisely drawn criteria of relevance. Application of a “probable cause” standard would require that the government intrusion be likely to achieve the government purpose asserted and that the purpose be sufficiently important.

This approach parallels in some ways a strictly applied compelling state interest test. Both standards require a substantial reason for the intrusion and limit the invasion to the least intrusive means. To some extent, then, the choice of standards appears to be a choice of verbal formulae. The difference lies in the situations conducive to the application of each test. Generally, a compelling state interest test is applied to justify a statute and not a particular governmental act. The fourth amendment test, however, applies to each instance of a search or seizure. Privacy frequently involves a concern for specific intrusions. One wants to know whether a particular piece of information has been properly obtained, recorded, and maintained. The emphasis on particular governmental behavior makes the fourth amendment approach a more appropriate model for many privacy situations. In other situations—for instance where the legislature has passed a financial disclosure law—the compelling interest standard may be more appropriate. The two approaches may best be regarded as complementary rather than exclusive.

Several obstacles confront a court considering application of the fourth amendment approach in this context. First, such an interpretation may result in preoccupation with fourth amendment strictures developed to restrict one governmental function and leave the new express right to privacy with no independent effect. Second, had a fourth amendment-type test been intended, the amendment could have easily been phrased to indicate this intent more clearly. Most important, however, the fourth amendment approach developed by the courts to date may be inadequate for the new task. In applying the fourth amendment to specific conduct, the United States Supreme Court has tended to dichotomize: either the search is beyond the scope of the fourth amendment and hence permissible or the search was unreasonable and illegal.101 Drawing the latter conclusion compels the use of the full panoply of fourth amendment protections: strict limitation upon the scope of the search, demonstration of probative facts known to the officer conducting the search and, in some cases, acquisition of a warrant. This “all or nothing” approach has led to perplexing results.

101. Amsterdam, supra note 67, at 388.
The fourth amendment protects property owners from unwarranted searches by building inspectors. Welfare mothers, however, receive no similar protection under the United States Constitution from intrusions by social workers. Yet, both groups face similar sanctions for failure to comply with administrative regulation: a loss of income resulting either from a termination of benefits or a fine.

_Camera v. Municipal Court_, a building inspection case, hinted at development of a flexible standard. The Court noted in _Camara_ that the "need for inspection must be weighed in terms of the[se] reasonable goals of code enforcement" and that "the standards or probable cause will vary with the municipal program being enforced." Similarly, in _Schmerber v. California_, the Court, while permitting police to take a blood sample of an unconsenting driver involved in an accident, noted that searches which break the body wall must meet a higher standard than searches which do not. Conversely, in _Terry v. Ohio_, the Court approved a less rigorous standard for stop and frisk searches. Under this doctrine, the police do not need probable cause to believe a crime was or will be committed in order to search. Not all judicial control of these searches, however, has been lifted. The police are limited to a search for weapons.

Search and seizure law does, then, supply some sources for developing a flexible or graduated standard to be applied to both fourth amendment and privacy cases. Such a standard would, under the privacy amendment, permit control of practices not currently deemed intrusive enough to invoke the strong protections afforded by the fourth amendment. The myriad situations and circumstances in which the government intrudes through searches, seizures or other investigatory methods, however, make judicial development of a graduated scale exceedingly difficult if not impossible. The ever more numerous instances when the state may wish to collect and preserve data on individuals make a graduated approach to privacy correspondingly more difficult to develop. To resolve this conundrum in the fourth amendment area, Professor Amsterdam has suggested that the Court require that police searches be conducted only under the auspices of legislative or administrative rules. The judicial role then would be to determine

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105. _Id._ at 535.
106. _Id._ at 538.
whether the search or other intrusion accorded with the relevant regulation, and to rule upon the constitutional adequacy of the regulations governing police conduct. The California Supreme Court might require similar discretionary limits in privacy situations and regulation by administrative or legislative rules. Such a court-compelled requirement would ease supervision of the accuracy and use of file data as well as aid the supervision of actual intrusive conduct.

Two assumptions underlie the assertion that review of regulations governing conduct would be easier than review of conduct alone. First, the agency would be compelled by the rulemaking process to articulate, at least to itself, the policy reasons for its conduct. This would focus attention on the state interest furthered by the particular conduct and promote an evaluation of the need to gather information and of the means of acquisition. A requirement of reasonable specificity would make the agency confront the conflicting values presented by privacy interests and too easily ignored when the accumulation and maintenance of information has few administrative or judicial checks. In addition, the agency can articulate the initial requirements of its own rule better than the courts, as the agency has a greater familiarity with the types of situations likely to be encountered. A court in ruling upon the constitutionality of a particular rule could then look to the entire complex of

110. Implementation of this scheme may require some ingenuity of the courts. It takes time to promulgate regulations and the immediate prohibition of any search and seizure not done pursuant to a regulation would be cause for celebration among the criminally inclined and a source of criticism for the court's action. Prospective application, then, would be necessary. This is not without difficulties. See Mishkin, Foreword: The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 56 (1965). But it has been approved by the California Supreme Court. Westbrook v. Mihailly, 2 Cal. 3d 765, 471 P.2d 487, 87 Cal. Rptr. 839 (1970); Forster Shipbuilding Co. v. County of Los Angeles, 54 Cal. 2d 540, 353 P.2d 736, 6 Cal. Rptr. 24 (1960). None of the California cases, however, allowed a time lag between the effective date of the rule and the filing of the opinion, though the Minnesota Supreme Court postponed its abrogation of sovereign immunity until the end of the next session of the legislature. Spanel v. Mounds View School District, 264 Minn. 279, 118 N.W.2d 795 (1962). In fact, Justice Mosk has argued in concurrence that the California Court has accepted sub silentio the rule of limited retrospectivity, i.e., application of the rule announced to the case at hand. Li v. Yellow Cab, 13 Cal. 3d 804, 830, 532 P.2d 1226, 1245, 119 Cal. Rptr. 858, 877 (1975) (Mosk, J., concurring). The majority may merely have been exercising its judgment to reach a just and reasonable result as the prior case law cautions.

It may be possible for the court to frame a rule and to adhere to limited retrospectivity. In the case before it the court could announce the constitutionally required minima for the type of search and seizure involved in the case before the court. All future searches of that sort must meet at least that standard and the government must promulgate regulations to govern this and other search circumstances within 6 months. The private litigant receives the benefit of his initiative, the police have time to promulgate standards, and the court shifts the drafting burden to the police.
regulations. In this it might discern a pattern or require the state to justify the rule in relation to the entire regulatory framework. A haphazard collection of unrelated rules might not survive constitutional scrutiny. Second, compliance with agency rules by agency personnel may be more likely than compliance with court-made rules. Having promulgated a standard, the agency will acquire an institutional interest in maintaining it.

b. Remedies

Remedies in privacy actions have long presented difficulties. The nature and extent of these difficulties vary with the type of infraction. In search and seizure cases much of the difficulty stems from the complexity of the interest and the unsuitability of the judicial process for devising a scheme to handle the myriad possible infractions. This difficulty emerges most clearly, however, in the context of defining "probable cause", discussed earlier. A second difficulty arises from neglect. Until White the courts had directed their attention exclusively to criminal problems. The exclusionary rule may be effective in criminal proceedings, but hardly provides relief to those who suffer governmental intrusions but are not prosecuted. Until Bivens v. Six Unknown Named Agents of the F.B.I., these persons had no federal remedy against the offending agency. Now an action for damages will lie under the fourth amendment and the federal question jurisdictional statute. The efficacy of damage remedies as a cure for governmental misconduct is questionable, however, since actual damages, even if capable of measurement, may be so small as to preclude suit. These considerations indicate the need to allow attorney's fees and perhaps awards for pain and suffering.

In recognition of this failing, other remedies have also been suggested in file cases. The D.C. Circuit has granted individuals, on statutory grounds and in specific instances, the right to expunge arrest records from criminal files. In Sullivan v. Murphy, the circuit court noted that adverse consequences attached to the existence of an arrest record and ordered the expungement of records from the files of those

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111. See generally Amsterdam, supra note 67.
112. See notes 102-10 supra and accompanying text.
116. S. Hufstedtler, The Directions and Misdirections of a Constitutional Right to Privacy, 26 Record of the Ass'n of the Bar of the City of New York 546, 555 n.38 (1971); Amsterdam, supra note 67, at 360.
illegally detained in mass arrests that occurred during the Mayday demonstration in 1971. In another case,\textsuperscript{118} the same court ordered the F.B.I. to expunge an arrest record upon learning of its inaccuracy, because the FBI circulated the files amongst other investigatory agencies. \textsuperscript{1} Dictum in \textit{Tarleton v. Saxbe}\textsuperscript{119} intimated that a right to accuracy derives from constitutional as well as statutory grounds.

The state constitutional right to privacy will permit implementation and elaboration of a right of access to one's files and a right of expungement of erroneous entries. Should the legislature fail to act,\textsuperscript{120} the California Supreme Court will have to confront the possibility that such a remedy would involve the courts in a large-scale supervisory role for a variety of governmental agencies.\textsuperscript{121} The court, faced with individuals challenging the accuracy or relevance of information within a file, must establish criteria for determining truth and relevance. With some types of information and some types of files this presents no great difficulties. If an arrest has been changed to a detainment\textsuperscript{122} or if an arrest has been declared unlawful,\textsuperscript{123} expungement of that information from records should not be contested. Other files, however, may not contain such hard information but rather refer to events long past or include hearsay or matters of opinion.\textsuperscript{124} The rules of evidence are complex and surely the standard for agency retention of information would be less strict than that for admission in court. These problems will arise even with legislative guidance. The courts will have to determine the constitutional adequacy of any legislative provisions. The existence of a legislative and administrative regulatory scheme, however, would ease the court's burden.

\textit{Conclusion}

The court in \textit{White} adopted a rather circumspect attitude toward the constitutional amendment expressly adding privacy to the inalienable rights of Californians. It chose not to recognize that the first amendment right to anonymity, on which the court relied, and the fourth amendment right to be secure in one's person, which the court cited but made no use of, are sources of the right to privacy and might

\begin{itemize}
\item \textsuperscript{118} Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974).
\item \textsuperscript{119} 507 F.2d 1116, 1124 (D.C. Cir. 1974).
\item \textsuperscript{120} The Public Records Act may marginally apply. \textit{CAL. Gov'T CODE} §§ 6250 et seq. (West 1970).
\item \textsuperscript{121} This consideration influenced the Court in \textit{Laird v. Tatum}, 408 U.S. at 14.
\item \textsuperscript{122} Menard v. Saxbe, 498 F.2d 1017 (D.C. Cir. 1974).
\item \textsuperscript{123} Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir.), \textit{cert. denied}, 414 U.S. 880 (1973).
\item \textsuperscript{124} The files in \textit{Laird v. Tatum} consisted largely of reports garnered from the news media. 408 U.S. at 6.
\end{itemize}
best be considered as subsumed under it. By dealing with the privacy issue independent of its antecedents, the court obfuscated many of the considerations that should be involved in developing the right to privacy. The procedural posture of the case and the judicial inexperience with the types of interests apt to invoke the privacy right for protection may justify this cautious treatment. The court should recognize, however, the sources of the right and consider the amendment as a spur for coping with the ever-increasing files of data kept on individuals and with the increasing use of intrusive means by the government to gather that data.

Lewis A. Kornhauser

C. Ex Parte TEMPORARY RESTRAINING ORDERS AND THE FIRST AMENDMENT

United Farm Workers of America v. Superior Court. This decision creates an important procedural safeguard which protects the exercise of the right of free speech guaranteed by the first amendment to the United States Constitution. The supreme court held that there can be no ex parte issuance of a temporary restraining order without notice or a showing of a reasonable, good faith effort to give notice if the order affects activity which is "within the area of" first amendment guarantees. Notice is required not only when first amendment rights are clearly involved but also when there is a possibility that the activity is within the area of first amendment interests. This holding is significant because it firmly establishes the broad scope of procedural due process which is required in order to adequately protect free speech interests when courts are issuing ex parte temporary restraining orders.

After examining the reasoning of the supreme court in United Farm Workers, this Note will discuss the limits of the decision as

2. Article I, section 2, of the California constitution provides:
   Every person may freely speak, write and publish his or her sentiments on all subjects being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.
3. The language of the case does not indicate that there must be an initial determination upon issuance of an injunction that rights affected are in fact protected by the first amendment or article I, section 2, of the California constitution. The explicit holding requires that an ex parte temporary restraining order may not issue without notice or a showing that a good faith attempt to give notice was made if first amendment interests will be affected. However, what constitutes reasonable notice is left open by the court.
expressed by the majority opinion. It then suggests that the safeguards established by the court should be extended beyond ex parte orders affecting first amendment interests to encompass the issuance of all temporary restraining orders.

I. The Court's Analysis

a. The Factual Context

The issues presented in United Farm Workers arose in the context of a labor controversy between the William Buak Fruit Company (the fruit company) and the United Farm Workers of America (UFW). On Monday, September 23, 1974, the UFW began picketing the fruit company for the purpose of organizing a union. Four days later the fruit company filed a verified complaint supported by three declarations for injunctive relief in Santa Cruz County Superior Court. The complaint named the UFW as one of several defendants. It alleged that the defendants had 1) trespassed on its property “for the purpose of coercing employees,” 2) caused to be threatened or threatened employees with physical harm, 3) induced fear of bodily harm and 4) engaged in mass picketing along the boundary of the fruit company’s orchards. In support of its request for an immediate injunction, the fruit company alleged that there was a danger of irreparable harm to the harvest of an apple crop, valued in excess of $500,000, due to the potential interference of the union.

Notice was not given, either formally or informally, to any of the defendants. Neither did the fruit company show that it had attempted to notify the defendants. Since the defendants received no notice, only the fruit company appeared at the proceedings. On Monday, September 30, 1974, the superior court issued a temporary restraining order which severely limited the number and positioning of pickets allowed near the fruit company’s property, prohibited pickets from blocking ingress to or egress from the property, prohibited physical violence or the threat of physical violence, prohibited trespass upon company prop-

4. The state court’s jurisdiction over the labor controversy was proper. San Diego Bldg. Trades v. Garmon, 359 U.S. 356 (1959), which held that an activity arguably covered by the National Labor Relations Act pre-empts state jurisdiction, was not apposite since labor disputes involving agricultural workers are specifically exempted from the national act. 29 U.S.C. § 152(3) (1970). Agricultural labor disputes arising in California are subject to CAL. LABOR CODE §§ 1140-1166.3 (West Supp. 1975). Furthermore, state action did not present an issue since petitioners contested the action of a state agency: issuance of the temporary restraining order by the superior court.

5. 14 Cal. 3d at 905, 537 P.2d at 1238-39, 122 Cal. Rptr. at 878-79.

6. Id. at 905, 537 P.2d at 1239, 122 Cal. Rptr. at 879.

7. Id.
erty, and prohibited access to the migrant labor camp located on the property.8

Defendants first became aware of the court proceedings when they were served with the temporary restraining order.5 On Thursday, October 3, 1974, the UFW moved to dissolve the temporary restraining order on the grounds that the fruit company had not made a showing of facts sufficient to justify injunctive relief and that the ex parte issuance of the order without notice was unconstitutional as a denial of due process.10 This motion was denied. In an adversary hearing on October 17, 1974, the superior court replaced its temporary restraining order with a preliminary injunction which consisted of provisions nearly identical to those of the previous temporary order.11 The instant case was the appeal from denial, on October 4, 1974, of petitioner's request for a writ of prohibition commanding the superior court to refrain from continuing in effect and enforcing the temporary restraining order.12

b. Mootness

Before reaching the merits, the court in United Farm Workers faced the threshold issue of mootness. By the time the UFW's petition for writ of prohibition came before the supreme court, the temporary restraining order had been replaced with the preliminary injunction issued after the October 17, 1974, hearing.13 Although the challenged temporary restraining order was no longer in force, the court held that

8. Temporary Restraining Order and Order to Show Cause, issued by the Superior Court of the State of California in and for the County of Santa Cruz, quoted in United Farm Workers v. Superior Court, 14 Cal. 3d 902, 906 n.2, 537 P.2d 1237, 1239, n.2, 122 Cal. Rptr. 877, 879 n.2 (1975). In part, the order prohibited the Union "[f]rom entering upon or trespassing upon the property of plaintiff as described herein." The preliminary injunction issued by the same court on October 21, 1974, after an adversary hearing, reiterated the temporary order with one exception: the injunction was changed to allow "reasonable access" to the migrant labor camps located on the plaintiff's property.

The Preliminary Injunction prohibited the Union:
From entering upon or trespassing upon the property of plaintiff as described herein, except that two (2) persons will be allowed to enter upon the premises where plaintiff provides farm labor housing between the hours of 5 p.m. and 9:30 p.m. to conduct peaceful discussions.

Preliminary Injunction, quoted in United Farm Workers v. Superior Court, 14 Cal. 3d 902, 910 n.8, 537 P.2d 1237, 1242 n.8, 122 Cal. Rptr. 877, 882 n.8 (1975).

9. 14 Cal. 3d at 906, 537 P.2d at 1239, 122 Cal. Rptr. at 879.
10. Id.
11. The preliminary injunction was issued on October 21, 1974, pursuant to the hearing of October 17, 1974. Id. at 906, 537 P.2d at 1239, 122 Cal. Rptr. at 879. See note 8 supra.
12. Id.
the case was not moot. In reaching this decision, the court relied upon
_In re William M._,\(^{14}\) which had held:

[If] a pending case poses an issue of broad public interest that is likely
to recur, the court may exercise an inherent discretion to resolve
that issue even though an event occurring during its pendency would
normally render the matter moot.\(^{15}\)

The court noted that _ex parte_ temporary restraining orders have a sig-
nificant impact on labor disputes in California, yet they evade appellate
review because of their short duration.\(^{16}\) Although _In re William M._
had been a criminal case, _United Farm Workers_ unanimously\(^{17}\) extended
its holding to civil cases.\(^{18}\) Thus the court eliminated the requirement
that there be a continuing controversy between parties in order to decide
the mootness issue in a civil case.\(^{19}\)

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15. _Id._ at 23, 473 P.2d at 743, 89 Cal. Rptr. at 39.
16. 14 Cal. 3d at 906, 537 P.2d at 1239, 122 Cal. Rptr. at 879.
17. Justice Richardson concurred in the result but did not concur with the
extension of the scope of the decision “to all situations affecting 'substantial free speech
interests.'” 14 Cal. 3d at 914-15, 537 P.2d at 1245, 122 Cal. Rptr. at 885. Justice
Clark, joined by Justice McComb, also concurred in the result but dissented on the
grounds that the decision limited its application _only_ to cases affecting substantial first
amendment rights. _Id._ at 915-21, 537 P.2d at 1245-50, 122 Cal. Rptr. at 885-90.
18. The court found support in the United States Supreme Court's decision in
_Carroll v. Princess Anne_, 393 U.S. 175 (1968). In _Carroll_, county officials obtained an
_ex parte_ temporary restraining order forbidding the petitioners from holding rallies in the
county for a 10-day period. Although the temporary order had expired before the case
reached the Supreme Court, it held that the issue of whether the temporary restraining
order violated the petitioners' first amendment rights was not moot. The Court noted
that “the decision of the Maryland Court of Appeals [upholding the validity of the _ex
parte_ temporary restraining order] continues to play a substantial role in the response of
officials to [petitioners’] activities.” _Id._ at 178. The _Carroll_ decision, unlike _United
Farm Workers_, rested upon a finding that a continuing controversy existed between
petitioners and the county officials.

The Supreme Court's decision in _Walker v. Birmingham_, 338 U.S. 307 (1967) was
influential in both _Carroll_ and _United Farm Workers_. That decision held that one may
not raise a constitutional challenge as a defense to a contempt charge for refusal to obey
a temporary restraining order, even if void on its face. To hold either _Carroll_ or _United
Farm Workers_ moot would indicate that one may not raise a constitutional challenge by
obeying the order either. Thus, a holding of mootness in _Carroll_ and _United Farm
Workers_, in conjunction with the holding in _Walker_ would eliminate judicial review of a
court order of short enough duration. _United Farm Workers_ is consistent with the
supreme court's previous decision in _In re Berry_, 68 Cal. 2d 137, 436 P.2d 273, 65 Cal.
Rptr. 273 (1968). In that case the court stated that when a person challenges the
constitutional validity of an _ex parte_ injunctive order, one has the _choice_ of obeying the
order and subsequently seeking judicial redress, or of disobeying the order and subse-
quently raising the constitutional challenge as a defense to the inevitable contempt
charge.

19. The court did not find that a continuing controversy existed between the UFW
and the fruit company. This decision was not inevitable. For example, the court could
have found that the _ex parte_ temporary restraining order would affect future union
elections in the fruit company's orchards.
The court’s decision is laudable because it promotes the policies behind the mootness doctrine. One purpose of the doctrine is to ensure that the parties to a proceeding are sufficiently interested and adverse that the arguments before the court are presented fully and accurately. Although the temporary restraining order at issue had expired, the court determined that the likelihood of a future issuance of *ex parte* temporary restraining orders in labor disputes had evoked a full presentation of the issues by the parties to the dispute as well as by *amicus curiae.* Since *ex parte* temporary restraining orders would be utilized by the courts again to control disputes between parties similar in interest to the UFW and the fruit company, a second purpose of the mootness doctrine was served. Rather than resolving a needless or inconsequential controversy, the court conserved judicial resources by reaching a final decision after a sufficient presentation of the issues. Timely decision avoids litigation and eliminates the social cost of leaving a controversy unresolved. The court in *United Farm Workers* promoted judicial economy by deciding the case, and establishing clear standards for the issuance of *ex parte* temporary restraining orders.

c. Procedural Due Process

The *United Farm Workers* decision on the merits parallels the United States Supreme Court’s decision in *Carroll v. Princess Anne.* Both courts decided an issue of *procedure* and explicitly avoided “the thorny problem” of whether the underlying injunction which gave rise to the procedural issue was valid. Neither case confronted the constitutional issue of what activities are protected under the first amendment.

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20. The court did not require a showing that the same parties would be involved in the expected recurrence of the controversy over *ex parte* temporary restraining orders. The concern that there be an identity of parties if a continuing controversy is to be found reflects the notion that if the parties have sufficiently adverse interests the issues in dispute will be fully and adequately presented. *United Farm Workers* continues a movement away from the mechanical identity of parties test for adversity toward a more substantive inquiry into the full presentation of the issues. Recent examples of situations where identity of parties was not required are Dunn v. Blumstein, 405 U.S. 330 (1972), (a challenge to state and local durational residence requirements) and Roe v. Wade, 410 U.S. 113 (1973), (a challenge to Texas anti-abortion laws). In these cases the plaintiff, a person no longer affected by the law in controversy, was allowed to represent the class of persons who were affected. For an excellent discussion of mootness see Kates & Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory,* 62 CALIF. L. REV. 1385 (1974).


22. Id. at 180; United Farm Workers of America v. Superior Court, 14 Cal. 3d 902, 910, 537 P.2d 1237, 1242, 122 Cal. Rptr. 877, 882.

23. The Supreme Court in *Carroll* acknowledged that the speech activities enjoined were more than pure speech; they were most likely inextricably intertwined with violence or incitement to violence. Yet the *Carroll* court refused to decide the first amendment issue.

The supreme court in *United Farm Workers* also indicated that there was no need to
I. The Carroll Decision. Petitioners in Carroll were members of a “white supremacist” political party which held a public rally where aggressively militant speeches were made. Respondent local officials subsequently obtained an *ex parte* restraining order without notice. The order prohibited petitioners from holding any further rallies “which would tend to disturb and endanger the citizens of the County” and remained in effect for ten days. The holding in *Carroll* was clearly circumscribed:

The 10-day order here must be set aside because of a *basic infirmity in the procedure* by which it was obtained. It was issued *ex parte* without notice to petitioners and without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.  

Thus the *Carroll* court condemned the procedure of issuing restraining orders *ex parte* and without notice when the activity is “within the area of” the first amendment. The Supreme Court determined only that

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24. 393 U.S. at 176.  
25. 393 U.S. at 180 (emphasis added).  
26. Both *Carroll* and *United Farm Workers* were based upon the first amendment as it is applied to the states by incorporation into the due process clause of the fourteenth amendment. *United Farm Workers* additionally rested its holding on the California Constitution. 14 Cal. 3d at 912, 537 P.2d at 1243-44, 122 Cal. Rptr. at 883-84.
the rally involved a first amendment interest, not that it was, under the specific circumstances of the case, an activity protected by the first amendment. The decision extended the procedural safeguard of notice beyond instances in which first amendment rights are undoubtedly at issue.

Due to factual differences Carroll was not considered controlling by the United Farm Workers majority and was cited as simply providing "instructive" reasoning "on a number of points."\(^\text{27}\) Despite this disclaimer, United Farm Workers closely paralleled the reasoning and duplicated the holding in Carroll.\(^\text{28}\) For example, "political expression"\(^\text{29}\) traditionally has been protected by the first amendment,\(^\text{30}\) while the status of labor picketing as a protected first amendment activity has frequently been questioned.\(^\text{31}\) The court appeared troubled by the fact

\(^\text{27}\). 14 Cal. 3d at 907, 537 P.2d at 1240, 122 Cal. Rptr. at 880.
\(^\text{28}\). \textit{Id.} at 907-08, 537 P.2d at 1240, 122 Cal. Rptr. at 880.
\(^\text{29}\). "Deliberately derogatory, insulting, and threatening language, scarcely disguised by protestations of peaceful purposes . . . ." can hardly be said to be protected free speech. 393 U.S. at 176. See note 36 \textit{infra}. However tainted with violence, the questioned activity was still "political" expression: "The present case involves a rally and 'political' speech in which the element of timeliness may be important." 393 U.S. at 182.
\(^\text{30}\). The Supreme Court has acknowledged the importance of the first amendment guarantee of protection to political speech and the necessity that such speech be free from prior restraints. In Lovell v. Griffin, 303 U.S. 444, 451-52 (1938), the Supreme Court stated that the elimination of prior restraints was a "leading purpose" in the adoption of the first amendment. Protection of political expression has been extended beyond pure speech to some instances of symbolic conduct. \textit{See} New York Times v. United States, 403 U.S. 713 (1971) (restraining order prohibiting publication of "Pentagon Papers" violated the first amendment even though it was balanced against the presence of national interest); Tinker v. School Dist., 393 U.S. 503 (1969) (black armband in school as symbol of protest was protected); Stromberg v. California, 283 U.S. 359 (1931) (striking a statutory provision which punished people who expressed their "opposition to organized government" by displaying "any flag, badge, banner or device").


However, the facts of Carroll suggest that the political expression at issue was so intermingled with violence that it would not be protected under the first amendment. The Supreme Court in Cantwell v. Connecticut, 310 U.S. 296 (1940), indicated that freedom of speech does not sanction incitement to riot. \textit{Id.} at 308. The decision that first amendment protection does not extend to violence or incitement to riot was reaffirmed in Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

Carroll and United Farm Workers did not differ factually in any significant sense. Both concerned activity which is \textit{possibly} protected by the first amendment. Thus, the difference regarding the context in which the identical procedural question arose is a factual distinction without merit.

\(^\text{31}\). Picketing is a classic example of "speech plus," a phrase which connotes that more is involved than the simple use of words. Picketing, insofar as it is informational,
that picketing, because it necessarily includes conduct, is an “activity the
elements of which may extend beyond the guarantees of the First
Amendment.” But the political rally in Carroll was acknowledged
by the Supreme Court to also contain elements which extended beyond
the guarantees of first amendment protection. The court in United
Farm Workers reached the correct conclusion by closely following the
analysis and conclusion in Carroll. However, the court should have
exposed the factual identity of the Carroll and United Farm Workers
cases and openly stated that Carroll was controlling. The opinion in
United Farm Workers would have then achieved a crisp clarity which it
lacks.

The analysis in Carroll was straightforward. Admitting that there
are special but limited circumstances in which speech is not protected by
the broad guarantees of the first amendment, the court reasoned that a
prior restraint upon speech abridges the exact freedoms the first

 has as its purpose the expression of data and ideas and is well within the scope of the
theory behind the first amendment. However, it also involves conduct, albeit symbolic,
which is not so clearly within the scope of first amendment protections.

Peaceful picketing was held protected in Thornhill v. Alabama, 310 U.S. 88 (1939). The
Supreme Court stated that “the dissemination of information concerning the facts of
a labor dispute must be regarded as within that area of free discussion that is guaranteed
by the Constitution.” Id. at 102. When faced with a claim that labor picketing violated
the privacy and property rights of the person or organization being picketed, the Court
modified the broad language of Thornhill in Lloyd Corp. v. Tanner, 407 U.S. 551
(1972), Flower v. United States, 407 U.S. 197 (1972), Amalgamated Food Employees
Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968), and Marsh v. Ala-
abama, 326 U.S. 501 (1946). These cases proposed a balancing test in which property
and privacy interests are weighed against the “preferred position” of first amendments
rights. See generally McKay, The Preference for Freedom, 34 N.Y.U. L. Rev. 1182,
1184 (1959).

Where picketing does not take place upon privately owned property, the California
rule is that the activity is protected. In Hughes v. Superior Court, 32 Cal. 2d 850, 854,
198 P.2d 885, 889 (1948), the California Supreme Court stated:

  It is now established as the law that the right to picket peacefully and truth-
fully is one of organized labor’s lawful means of advertising its grievances to
the public, and as such is guaranteed by the Constitution as an incident of
freedom of speech.

See McKay v. Retail Auto Salesmen’s Local Union 1067, 16 Cal. 2d 311, 319, 106 P.2d
373, 381 (1942), and the California cases cited in note 23 supra. When picketing takes
place on privately owned property a “balancing test” is used by California courts.
Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers’ Union, 61 Cal. 2d

  32. 14 Cal. 3d at 910, 537 P.2d at 1242, 122 Cal. Rptr. at 882.

  33. See notes 24 and 30 supra.

34. Violence and incitement to riot, although speech, are instances cited by
the Supreme Court in Carroll which do not receive the constitutional protection of the first
amendment. 393 U.S. at 180. The court in United Farm Workers, citing Steiner v.
Long Beach Local No. 128, 19 Cal. 2d 676, 123 P.2d 20 (1942), also noted that violence
in picketing is not protected. 14 Cal. 3d at 912 n.9, 537 P.2d at 1243 n.9, 122 Cal. Rptr.
at 883 n.9.
amendment sought to protect. 55 "A system of prior restraints of expression . . . [bears] a heavy presumption against its constitutional validity." 56 The Supreme Court then turned to a prior decision, Freedman v. Maryland. 57 A system of noncriminal prior restraints upon expression "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." 58 The Carroll Court concluded that notice or attempted notice is a necessary procedural safeguard required before the issuance of an ex parte temporary injunction. 59

Notice was determined to be necessary in Carroll for two reasons. First, a democratic system depends upon citizens having facts and issues readily available. A delay in the dissemination of that information of even a few days may be critical. 60 A temporary restraining order which has as its purpose the delaying of an activity is especially obnoxious to first amendment rights when that activity is the dissemination of information. When one is not given notice or an opportunity to be heard, such a restraining order may seriously infringe one's ability to exercise first amendment freedoms. Second, courts depend upon adversary proceedings to ensure balanced and careful analysis. 61 This is of crucial importance in the first amendment area:

An order issue in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-point objective permitted . . . . [i]n this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' 62

2. Procedural Due Process and the First Amendment. The court's wholesale adoption of Carroll's analysis indicated that the majority considered the issuance of temporary restraining orders ex parte and without notice to be a system of prior restraints. 63 Justice Clark, in his concurring and dissenting opinion, concluded that the ex parte issuance

35. 393 U.S. at 181.
39. 393 U.S. at 185.

It is vital to the operation of democratic government that the citizens have the facts and ideas on important issues before them. A delay of even a day or two may be of crucial importance in some instances. . . .
41. 393 U.S. at 183.
43. The Supreme Court in Carroll reasoned that the issuance of an ex parte restraining order constituted a prior restraint. Such a "prior restraint" or regulation of speech activities is constitutionally valid only if the prior restraint is exercised with sufficient procedural safeguards which obviate the dangers of a censorship system. 393 U.S. at 181.
of a temporary restraining order without notice is not a prior restraint; rather, it serves to "protect" and "promote" first amendment rights. First he noted that the challenged order protected peaceful picketing, but did not protect trespass, obstruction of egress from and ingress to the property, or threats of violence.

Analysis reveals that not one of these five elements of the Temporary Restraining Order constitutes a prior restraint on conduct protected by the First Amendment. Instead, the effect of the TRO was to preserve and promote First Amendment freedom.44

Because unlawful aspects were enjoined "before the otherwise protected activity [became] tainted," he concluded that "the order effectively protected the organizers' First Amendment right, rather than restricted it."45 In answer to Justice Clark's contention that the injunction in United Farm Workers merely "protected" the labor union's first amendment rights and did not infringe upon them, it must be pointed out that the injunction in Carroll could also be construed as merely "protecting" the political party's first amendment rights by prohibiting them from engaging in violence or incitement to violence. Nevertheless, the Supreme Court in Carroll held that such an injunction, arguably "protective," could not be issued without notice or a good faith effort to give notice.

Justice Clark's analysis is faulty for two reasons. First, the holding of United Farm Workers did not require that an activity be undeniably protected by the first amendment before the procedural safeguard of notice is required. Second, the prior restraint which the majority in United Farm Workers and the Supreme Court in Carroll were concerned with was the regulation of activity arguably "within the area of" first amendment protection. Regulations of the broader area of "arguably protected" is not the equivalent of a prohibition of the exercise of a definitely protected first amendment interest. Justice Clark equated the two and then stated that because there was no prohibition of protected rights, there was no prior restraint.

This difference in opinion stems from the fact that Justice Clark does not define regulation as a prior restraint.

As made clear by the United States Supreme Court, regulation of the manner of expression—so long as not functionally prohibitory—does not constitute prior restraint.46

It is important to emphasize that neither Carroll nor United Farm Workers implied that the prior restraint of regulation of rights "within

44. 14 Cal. 3d at 917, 537 P.2d at 1247, 122 Cal. Rptr. at 887. (Clark, J., concurring and dissenting).
45. Id. at 918, 537 P.2d at 1248, 122 Cal. Rptr. at 888 (emphasis in the original).
46. Id.
the area of first amendment interests in unconstitutional. They simply hold that in order for such a prior restraint to be constitutionally valid it must be subject to adequate procedural safeguards.

Justice Clark's analysis assumed that the number and distance limitations on picketers were reasonably necessary and did not impede the union's ability to communicate. Such an assumption should only be made upon a finding of facts. Thus, discussion of both versions of the facts was necessary to the proper functioning of the trial court in 1) balancing the competing interests involved and 2) tailoring any injunctive relief ordered in the "narrowest possible terms." Notice and a meaningful opportunity to be heard were precisely the procedural safeguards which both Carroll and United Farm Workers sought to achieve.

Proceeding to the merits, the court in United Farm Workers reasoned that the ex parte injunctive proceeding suffered from two basic defects. First, the lack of factual and legal contentions from both sides of the controversy severely hampered the ability of the court to make an "initial decision on whether or not the circumstances warrant a temporary restraining order." Second, in the area of first amendment questions, the court must necessarily draft its injunctive orders in a narrow and precise manner so as to avoid an order which is void for overbreadth. A nonadversary hearing would not present sufficient facts or issues to allow the court to properly fulfill this function. These two defects rendered the ex parte proceeding constitutionally infirm.

The court needed only to decide whether on the facts of this case the injunction "affected" or was "in the area of" first amendment rights. It was not necessary for the court to decide, nor did the court decide, that picketing was in fact protected, or that a right of access was guaranteed by the first amendment. The court first decided that the injunction affected first amendment interests because it denied access to

47. Id. at 908, 537 P.2d at 1241, 122 Cal. Rptr. at 881.
48. An order affecting first amendment rights must be drawn in the "narrowest possible terms" to accomplish the specific objective. Otherwise it is void due to overbreadth. Shelton v. Tucker, 364 U.S. 479, 488 (1960). In United Farm Workers Organizing Committee v. Superior Court, 4 Cal. 3d 556, 483 P.2d 1215, 94 Cal. Rptr. 263 (1971), the supreme court held that an injunction regulating labor picketing must be couched in the narrowest terms that will accomplish the pinpoint objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field the state may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved."
4 Cal. 3d at 570, 483 P.2d at 1219, 94 Cal. Rptr. at 268.
49. The majority opinion is clarified if one notes that it uses the terms "affected" first amendment interests and "in the area of" first amendment interests interchangeably. This lack of clarity gives rise to the probability that the holding will be misconstrued. Indeed, the concurring opinion of Justice Richardson and the concurring and dissenting opinion of Justices Clark and McComb interpret the holding as requiring that protected rights, rather than first amendment interests, be affected.
the migrant labor camp which was situated on the fruit company's property. This inquiry was not directed toward a finding that access is a right absolutely protected by the first amendment. Rather, the court made a "cursory survey" of a series of state and federal decisions which held that under certain circumstances access was constitutionally protected. In the absence of an adversary proceeding where both parties are given the opportunity to present their version of the facts, the trial court could not confidently find the lack of those circumstances which warrant protected access. In other words, the trial court could not say with certainty in a right of access case that first amendment rights were not at issue. Indeed, the fact that reasonable access to the

50. 14 Cal. 3d at 909-10, 537 P.2d at 1242, 122 Cal. Rptr. at 882.

The court did not find that there is a general right of access to private property exercisable by labor unions seeking to organize employees of the property owner. The court did recognize, however, that many courts have held that there is under certain circumstances a right of access to migrant labor camps. Those circumstances were not discussed by the majority.

However, the majority did distinguish those cases dealing with right of access by noncustomers to shopping centers from the right of access by union organizers to a labor camp. In the latter case, the union's free speech right to disseminate information and the labor camp residents' right to be fully informed outweighed the owner's "technical rather than substantial" interest in maintaining exclusive control and possession of private property. Petersen v. Talisman Sugar Corp., 478 F.2d 73 (5th Cir. 1973); Franceschini v. Morgan, 346 F. Supp. 833, 839 (S.D. Ind. 1972); In re Lane, 71 Cal. 2d 872, 457 P.2d 561, 79 Cal. Rptr. 729 (1969); Schwartz-Torrance Inv. Corp. v. Bakery & Confectionery Workers' Union, 61 Cal. 2d 766, 772, 394 P.2d 921, 927, 40 Cal. Rptr. 233, 239 (1964).

The right of access to agricultural labor camps is not an unfettered one. Only "reasonable access" is allowed. Velez v. Armenta, 370 F. Supp. 1250 (D. Conn. 1974); United Farm Workers Union v. Mel Finerman Co., 364 F. Supp. 326 (D. Colo. 1973). Contra, Asociacion De Trabajadores Agricolas de Puerto Rico v. Green Giant Co., 376 F. Supp. 357 (D. Del. 1974). Only in the Green Giant case was it found that there is no reasonable right of access to an agricultural labor camp located on the employer's property. Its authority is limited in that it failed to discuss any of the authorities cited above. Rather, the court reasoned, by analogy from the "shopping center cases," that the camp was not open to the public and therefore had not taken on the attributes of a public property devoted to public use which would allow access. See Amalgamated Food Employees Union v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) and Lloyd Corp. v. Tanner, 407 U.S. 551 (1971). This analysis misses a major interest involved: the residents of the labor camp have a first amendment right to be fully informed, which right is hampered when the employer controls the information residents receive not only on the job but off the job as well. By maintaining a labor camp on his property an employer surrenders exclusive possession of that property. To use the words of the Supreme Court in Marsh v. Alabama, 326 U.S. 501 (1946), (right of access to business district of a company town), the employer has a "diluted" property right.

The court's statement in United Farm Workers that the "First Amendment protection of access to labor camps . . . is firmly established . . ." is dictum. 14 Cal. 3d at 913 n.11, 537 P.2d at 1244 n.11, 122 Cal. Rptr. at 884 n.11. The decision does not pivot upon a determination that a right of access was in fact violated.

51. 14 Cal. 3d at 911, 537 P.2d at 1237, 122 Cal. Rptr. at 883. The import of this survey is that if some courts have recognized a right, then that right is arguably "within the area of" first amendment protection. See cases cited in note 50 supra.
private labor camp was eventually permitted after both sides presented argument further illustrates the shortcoming of an ex parte proceeding.\footnote{52}

In footnote eleven the majority clarified and limited its decision: We decide here only that notice and opportunity to be heard are required in cases in which substantial free speech interests are at stake.\footnote{53}

This limitation may have been the source of Justice Clark’s belief that the opinion was limited in its application to only those instances in which protected first amendment rights are in fact violated.\footnote{54} But neither Carroll nor United Farm Workers required that “substantial free speech rights” be violated. Each decision required procedural safeguards if interests arguably within the free speech area would be affected. Hence, the majority footnote cannot be read as requiring a violation of protected first amendment rights before procedural safeguards are mandated. To extend the meaning of the footnote to require a potential violation of first amendment rights before notice is necessary would place the footnote at odds with the majority holding.

The court’s use of the word “substantial” as a modifier should be construed to indicate the high value placed upon the preservation of first amendment rights. This policy was implemented by the court’s extension of the requirement of notice to cases which “touch upon” first amendment interests, as well as those cases in which established first amendment rights would be undeniably violated by an ex parte temporary restraining order. As a guideline for lower courts, “substantial free speech interests” indicates that a frivolous claim outside the penumbra of first amendment interests may be dismissed as “not substantial.”\footnote{55}

This illustrates that the trial court need not engage in constitutional analysis of whether an activity is in fact protected. The issue which the trial court must address is whether a temporary restraining order would affect first amendment interests and, if it does, notice or a good faith attempt to give notice is required.

\section{Procedural Due Process and Article 1, Section 2, of the California Constitution: An Adequate State Ground.}

Justice Richardson, in his concurring opinion, criticized the use of the California constitution as “totally unnecessary.”\footnote{56} It could, he contended, “be construed as an attempt to forestall review of [the California court’s] action by the United States Supreme Court.”\footnote{57} The United States Supreme Court

\nocite{52}See note 8 supra.
\nocite{53}14 Cal. 3d at 913 n.11, 537 P.2d at 1244 n.11, 122 Cal. Rptr. at 884 n.11.
\nocite{54}Id. at 917-21, 537 P.2d at 1247-50, 122 Cal. Rptr. at 887-90.
\nocite{55}The specific labor law guideline which the supreme court has promulgated in United Farm Workers is that labor picketing always involves “substantial” free speech interests. The effect is clear: organizational and informational picketing may not be enjoined by an ex parte temporary restraining order issued without notice.
\nocite{56}14 Cal. 3d at 915, 537 P.2d at 1245, 122 Cal. Rptr. at 885.
\nocite{57}Id.
does not review state court decisions interpreting state law. It will also refuse to review state court decisions if they were based on "adequate state law," even though the state court also interpreted federal law. Hence, an interpretation of federal law promulgated by a state court is often immune from Supreme Court review. The central issue raised by Justice Richardson is whether the California Supreme Court misused the adequate state grounds doctrine by basing its decision on both the federal and state constitutions.

The threshold question is whether the decision fits within the definition of "adequate" state grounds. The Supreme Court has held some state grounds, usually procedural ones, to be inadequate, thus allowing review and eventual resolution of the federal question presented on the merits.\(^5\) In *United Farm Workers*, the state ground was article I, section 2, of the California constitution, which surely reflects a legitimate state policy. This constitutional provision guarantees state protection of speech. Resolution of the issue presented on this basis cannot be seen as illegitimate since it is the judicial enforcement of valid legislative policy and, as such, should be more than adequate.

By implication, Justice Richardson suggested that *United Farm Workers* gave the notice requirements of the first amendment a broader interpretation than would the Supreme Court. While the California Supreme Court has on occasion given a more liberal interpretation to certain federal rights than the United States Supreme Court probably would give, such is not the case in *United Farm Workers*. The court's analysis closely follows the Supreme Court's analysis in *Carroll*; it is highly unlikely that the two courts would differ in their interpretation of notice requirements in the first amendment area.\(^5\)

Furthermore, article I, section 2 of the state constitution can be interpreted at least as broadly as the first amendment. In *Jolicoeur v. Milhaly*,\(^0\) Justice Wright also criticized the use of concurrent state grounds when federal grounds required the same result. He stated:

There is no stronger statement of governing policy consideration in any particular circumstances than an express declaration embodied in our federal constitution . . . . [N]o good purpose is served by a concurrent examination of state or federal policies . . . in an attempt to ascertain that the supreme law of the land must be adhered to because lesser policy considerations likewise require the same result.\(^6\)

However, in a federal system, a state has the ability to develop and enforce its own policy and laws so long as those laws are not in conflict

\(^0\) See note 24 supra.
\(^0\) 5 Cal. 3d 565, 488 P.2d 1, 96 Cal. Rptr. 697 (1971).
\(^0\) Id. at 582-83, 488 P.2d at 12, 96 Cal. Rptr. at 708.
with the supreme law of the land. In this instance, the fact still remains that the court in United Farm Workers was implementing a valid state policy as well as the federal policy explained by the Supreme Court in Carroll. Thus, in the instant case, the use of judicial strategy and tactics by the state supreme court was not an issue. A compelling reason existed which supported basing the United Farm Workers decision upon the state constitution: the independence of the state constitution as a separate provider and protector of personal rights should be preserved.

II. Limitations of the Decision

United Farm Workers was limited to cases which fall in the area of free speech rights. Justice Clark, in his dissenting and concurring opinion, makes a serious criticism of that limitation. Why limit the requirement of notice to a small class of cases in which first amendment rights are affected?

Our judicial system is based on a balancing of competing interests which is best served by the presentation of all sides in an adversary


64. Id. at 915, 537 P.2d at 1246, 122 Cal. Rptr. at 886. In footnote 12 of the opinion the majority states:

The procedure of section 527, of course, remains adequate in all other instances, i.e., when a party seeks a temporary restraining order which is outside the area of First Amendment freedoms and does not substantially affect rights defined in article I, section 2 of the California Constitution.

Id. at 913 n.12, 537 P.2d at 1244 n.12, 122 Cal. Rptr. at 884 n.12 (emphasis added).

Taken literally, this dictum would indicate that the majority had considered all other situations in which a temporary restraining order could issue ex parte pursuant to California Code of Civil Procedure section 527 and had determined that such issuance would not be a denial of due process. A more likely interpretation is that the footnote was included to add emphasis to the point that the court limited its holding to cases presenting issues affecting first amendment interests. Limiting the decision is defensible in that the first amendment issue was the only issue properly before the court. However, such a defense would also militate in favor of a non-literal interpretation of footnote 12. Hence the constitutionality of the ex parte proceeding in other situations remains open. However, Justice Clark has construed the holding of the case too narrowly, limiting its effect only to those cases in which protected first amendment rights are at issue. See note 24 supra.

65. Traditionally the function for which the courts have been deemed uniquely competent is the balancing of competing interests, thus implementing legislative policy articulated by means of law. The competence of the court to decide "close" questions can be questioned. See generally Frankfurter, A Note on Advisory Opinions, 37 Harv. L. Rev. 1002 (1924).

There is no basis for creating an artificial "close question" situation in which the
hearing. The court's rationale that judicial reliance upon the balancing of competing interests and the framing of appropriate relief is best served by notice is not logically limited to the first amendment area. If notice remedies the shortage of factual and legal contentions inherent in ex parte proceedings in the first amendment area, it should also cure those same defects in ex parte proceedings affecting other areas of the law. Furthermore, if a notice requirement is read into section 527 of the California Code of Civil Procedure in the area of first amendment interest, that section could be interpreted to require notice or a good faith attempt to give notice before every temporary restraining order is issued ex parte.

Injunctive relief is available when a dispute threatens to cause irreparable harm. The injunction, theoretically, has the effect of freezing the parties in their present position and, thus, it maintains the status quo. When only one side of the controversy is heard, it is not only extremely difficult to determine precisely what is the status quo, but it is also difficult to determine whether the injunctive relief sought simply maintains the status quo or actually gives one party to the dispute an unwarranted advantage. In some instances, such as in labor disputes, court has insufficient data, simply because the courts have not demanded to hear both sides of a problem. Since ex parte judicial proceedings handicap the court from the first instance, its use should be limited to the extraordinary situation.

66. The California Code of Civil Procedure § 527 provides in relevant part: No preliminary injunction shall be granted without notice to the opposite party; nor shall any temporary restraining order be granted without notice to the opposite party, unless it shall appear from facts shown by affidavit or by the verified complaint that great or irreparable injury would result to the applicant before the matter can be heard on notice.

CAL. CODE CIV. PRO. § 527 (West 1970) (emphasis added).

67. Justice Clark suggested that under the Federal Rules of Civil Procedure "a requirement that reasonable effort be made to give notice is applied across the board . . . . [T]his court should follow the federal lead." 14 Cal. 3d at 916, 537 P.2d at 1246 122 Cal. Rptr. at 886.

However, FED. R. CIV. P. 65(b) provides no greater requirement of notice than does CAL. CODE CIV. PRO. § 527. Rule 65(b) requires only that "the applicant's attorney [certify] to the court in writing the efforts, if any, which have been made to give notice . . . ." before a temporary restraining order can be issued ex parte and without notice. FED. R. CIV. P. 65(b)(2) (emphasis added). If an attorney has made no effort to give notice, the attorney need only state the lack of effort in writing in addition to the reason why no effort was made and the requirement is filled. Id.

The analogy to the federal "lead" is therefore faulty. As written, both the California and federal rules left the requirement of notice to the court's discretion. Justice Clark correctly indicated that the courts are free to mandate notice when notice has not been specifically prescribed by statute. See Macmillan Petroleum Corp. v. Griffin, 99 Cal. App. 2d 523, 526 (1st Dist. 1950); Hicks v. Sanders, 40 Cal. App. 2d 211, 215 (4th Dist. 1940).

68. The analysis provided in FRANKFURTER & GREENE, THE LABOR INJUNCTION (1930) still holds true today, a quarter of a century later:

The injunction cannot preserve the so-called status-quo; the situation does not remain in equilibrium awaiting judgment upon full knowledge . . . . Choice
it may even be impossible to maintain the status quo in a changing world where time is of the essence. Where any action the court takes alters the position of the parties, the case is much stronger for a full-scale determination of the issues in the first instance. The likelihood of the issuance of improvident court injunctive relief will be diminished by providing for an initial adversary hearing which completely presents the competing interests involved.

Conclusion

The United Farm Workers court properly resolved the mootness controversy regarding the temporary restraining order which had since been dissolved. Moreover, the decision of the majority of the court to follow the holding of the United States Supreme Court in *Carroll* ensured that decision's vitality in California. However, the supreme court need not have limited the procedural safeguards surrounding issuance of *ex parte* temporary restraining orders solely to cases which are within the area of free speech interests guaranteed by the first amendment or article I, section 2, of the California constitution. A general requirement of notice, applicable to all areas of the law, mandated before an *ex parte* restraining order can issue would better serve the purposes of injunctive relief.

Nena Manley

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69. In a labor dispute, the mere passage of time usually works a hardship on one party if one takes a premise that the longer one has to convince another of the merit of one's position, the more successful one will be in ultimately persuading the other party. If organizational picketing is forestalled, it leaves those attempting to organize less time to reach those employees to whom information is to be conveyed. On the other hand, the employer always has access to his employees even when picketing has been enjoined.

70. **Frankfurter & Greene, The Labor Injunction** (1930).