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And Justice for All: Wayte v. United States and the Defense of Selective Prosecution

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NOTES

And Justice for All: *Wayte v. United States* and the Defense of Selective Prosecution

In criminal law enforcement the government exercises broad discretion in choosing cases for prosecution.[1] "[S]o long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion."[2] Nevertheless, selective prosecution constitutes a valid defense to a criminal charge when based on an impermissible criterion such as race,[3] religion, or the exercise of protected statutory and constitutional rights.[4] Although the defense is rooted in equal protection,[5] other constitutional provisions, such as the first amendment right to free speech, may sometimes be involved.[6] According to the recent Supreme Court pronouncement in *Wayte v. United States*,[7] a passive enforcement policy under which the government selects for prosecution only those who report themselves or are reported by others as having violated the law does not abridge either the first amendment's guarantee of free speech or the fifth amendment's implied guaran-

1. United States v. Goodwin, 457 U.S. 368, 380 n.11 (1982) (prosecutor has broad discretion to select the charges against an accused).

2. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). In deciding whether to file criminal charges, prosecutors may consider a wide range of factors, such as the nature of the offense, the likelihood of conviction, the deterrent effect of the prosecution, the defendant's past criminal activity, and the defendant's willingness to assist the government in prosecuting others. United States v. Lovasco, 431 U.S. 783, 794-95 & n.15 (1977); United States v. Berrigan, 482 F.2d 171, 180-81 (3d Cir. 1973); Pugach v. Klein, 193 F. Supp. 630, 634-35 (S.D.N.Y. 1961). "The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in a nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice." United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973) (en banc).

3. Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978). "Within the limits set by the legislature's constitutionally valid definition of chargeable offenses, 'the conscious exercise of some selectivity in enforcement is not itself a federal constitutional violation' so long as 'the selection was [not] deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification.'" *Id.* (quoting Oyler v. Boles, 368 U.S. 448, 456 (1962)). For a general discussion of the defense of selective prosecution, see Annot., 45 A.L.R. FED. 732 (1979).

4. United States v. Goodwin, 457 U.S. 368, 372 (1982). "For while an individual certainly may be penalized for violating the law, he just as certainly may not be punished for exercising a protected statutory or constitutional right." *Id.*

5. Wayte v. United States, 105 S. Ct. 1524, 1531 (1985) (selective prosecution claims should be judged according to "ordinary equal protection standards"); *see also* Givelber, *The Application of Equal Protection Principles to Selective Enforcement of the Criminal Law*, 1973 U. ILL. L.F. 88 (discussing equal protection analysis of selective prosecution defenses).

6. *See* Comment, *Selective Prosecution for Failure to Register for the Draft: Have First Amendment Rights Been Infringed?*, 53 U. CIN. L. REV. 765 (1984); Case Comment, United States v. Wayte: *The Big Chill on Vocal Draft Nonregistrants*, 60 NOTRE DAME L. REV. 102 (1984); Note, *Rethinking Selective Enforcement in the First Amendment Context*, 84 COLUM. L. REV. 144 (1984); *see also* United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc) (discrimination on basis of protected first amendment activities forbidden); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972) (selective enforcement of regulation controlling the use of public concourse of Pentagon violated first amendment).

7. 105 S. Ct. 1524 (1985).

tee of equal protection.[8] This Note examines the history and development of the selective prosecution defense, the reasoning and logic behind the Court's decision in *Wayte*, and the possible effects of that decision on future cases involving selective prosecution.

On July 2, 1980, President Carter issued a Presidential Proclamation that required all male citizens born in or after 1960 to register with the Selective Service System.[9] Pursuant to the Proclamation, the Selective Service adopted a policy of passive enforcement.[10] Under that system it referred to the Justice Department for investigation and possible prosecution only those men who reported their refusal to register or who were reported by third parties.[11] To persuade nonregistrants to comply with the law, the Department of Justice instituted a "beg" policy, whereby it notified nonregistrants by mail that unless they registered within a specified time, prosecution would be considered.[12]

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8. *Id.* at 1534-35. The first amendment of the United States Constitution reads in pertinent part: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

Although the fifth amendment, unlike the fourteenth, does not contain an equal protection clause as such, its due process clause has been held to embody the equal protection concept. Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The Supreme Court's current "approach to Fifth Amendment equal protection claims [is] precisely the same as to equal protection claims under the Fourteenth Amendment." Weinberger v. Wisenfield, 420 U.S. 636, 638 n.2 (1975).

9. *Wayte*, 105 S. Ct. at 1527 (citing Proclamation No. 4771, 3 C.F.R. 82 (1980), *reprinted in* 50 U.S.C. app. § 453 (1982)). The relevant section of the Military Selective Service Act provides:

> [I]t shall be the duty of every male citizen of the United States, and every other male person residing in the United States, who, on the day or days fixed for the first or any subsequent registration, is between the ages of eighteen and twenty-six, to present himself for and submit to registration at such time or times and place or places, and in such manner, as shall be determined by proclamation of the President and by rules and regulations prescribed hereunder.

50 U.S.C. app. § 453(a) (1982). Upon signing the Proclamation, President Carter stated that he was "deeply concerned about the unwarranted and vicious invasion of Afghanistan by the Soviet Union and occupation by them of this innocent and defenseless country." Presidential Remarks on Signing Proclamation 4771, 16 WEEKLY COMP. PRES. DOC. 1274 (July 2, 1980). He viewed the institution of draft registration as a precautionary measure "designed to make our country strong and to maintain peace." *Id.* at 1275. The President also "emphasize[d] that the registration act is not a draft . . . . [S]eparate legal action would be required by Congress . . . to initiate a draft . . . ." *Id.* at 1274.

10. *Wayte*, 105 S. Ct. at 1528.

11. *Id.* In furtherance of its passive enforcement policy, the Selective Service sent letters on June 17, 1981, to all reported violators, stating that it had information that the person was required to register but had not done so, requesting that the person comply with the law, and warning that a violation could result in criminal prosecution. Wayte received a copy of this letter, but did not respond. Later the Selective Service transmitted to the Department of Justice the names of Wayte and 133 other young men identified under its passive enforcement system, all of whom had not registered in response to the Service's earlier letter. *Id.*

12. *Id.* Although the Justice Department relied upon initial referrals from the Selective Service pursuant to the passive enforcement system, it had its own procedures for handling cases once referred. Brief for Petitioner at 9, *Wayte*. A September 28, 1982, Justice Department memorandum stated that the prosecution policy for all nonregistration cases required alleged nonregistrants to be notified by registered mail that unless they registered within a specified time, prosecution would be considered. In addition, FBI agents were to interview alleged nonregistrants if they continued to refuse to register. The memorandum described the policy as "designed to ensure that (1) the refusal to register is willful and (2) only persons who are most adamant in their refusal to register will be prosecuted." *Id.* Testifying before the district court, a senior legal advisor in the Department of Justice defined the "beg" policy: " 'We ask you to register, and if you register any time before indictment, we do not prosecute you.' " *Id.* (citing Jt. App. 862, testimony of David Kline).

Under this policy, those who registered late were not prosecuted, while those who never registered were investigated further.[13]

David Wayte fell within the class required to register, but did not do so.[14] Instead he wrote to the Selective Service and the President, declaring that he had not registered and did not intend to register.[15] Wayte received a "beg" letter, but failed to respond.[16] In 1982 he was indicted for knowingly and willfully failing to register in violation of the Military Selective Service Act.[17]

In the United States District Court for the Central District of California, Wayte moved to dismiss the indictment on the ground of selective prosecution.[18] After a pre-trial hearing, the district court concluded Wayte had established a prima facie case of selective prosecution and shifted the burden to the government to prove otherwise.[19] The court ordered the government to provide Wayte with documents relating to the prosecution of nonregistrants and to make presi-

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13. *Wayte*, 105 S. Ct. at 1528.

14. *Id.* at 1527.

15. *Id.* On August 4, 1980, Wayte wrote to the President, "I decided to obey my conscience rather than your law. I did not register for your draft. Nor will I ever cooperate with yours or any other military system, despite the laws I might break or the consequences which may befall me." *Id.* at 1527-28 n.2. Similarly, in a letter to the Selective Service, Wayte stated, "I have not registered for the draft. I plan never to register. I realize the possible consequences of my action, and I accept them." *Id.*

16. *Id.* Subsequently, the President announced a grace period to afford nonregistrants a further opportunity to register without penalty, which lasted from January 7, 1982, until February 28, 1982. Wayte still did not register. On June 28, 1982, FBI agents interviewed Wayte, and he continued to refuse to register. *Id.* at 1529. By the time Wayte was indicted on July 22, 1982, it had been almost 2 years since he wrote his first letter protesting the draft registration on August 4, 1980. *Id.* at 1527 n.2, 1529.

17. *Wayte*, 105 S. Ct. at 1529 (citing Military Selective Service Act, Pub. L. No. 80-759, §§ 3, 12(a), 62 Stat. 604, 605, 622 (codified as amended at 50 U.S.C. app. §§ 453, 462(a) (1982)). For text of § 453(a), see *supra* note 9. Section 462(a) provides:

> [A]ny . . . person who . . . evades or refuses registration or service in the armed forces or any of the requirements of this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both.

50 U.S.C. app. § 462(a) (1982).

18. United States v. Wayte, 549 F. Supp. 1376, 1378 (C.D. Cal. 1982), *rev'd*, 710 F.2d 1385 (9th Cir. 1983), *aff'd*, 105 S. Ct. 1524 (1985).

19. *Id.* at 1382. To determine if Wayte had established a prima facie case, the district court applied a two-prong test developed in United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974), and applied by the United States Court of Appeals for the Ninth Circuit in United States v. Scott, 521 F.2d 1188, 1195 (9th Cir.), *cert. denied*, 424 U.S. 955 (1975). *Wayte*, 549 F. Supp. at 1380. That test requires the defendant to show (1) that others similarly situated generally have not been prosecuted for conduct similar to the defendant's, and (2) that the government's discriminatory selection was based on impermissible grounds such as race, religion, or exercise of the defendant's first amendment right of free speech. *Id.*

The court held Wayte had satisfied the first requirement because he had shown that out of over 500,000 nonregistrants the 13 indicted had all been vocal nonregistrants. *Id.* at 1379 & n.3. In addition, because the government had access to Social Security and motor vehicle registration records in many states, "[t]he inference is strong [that] the government could have located non-vocal non-registrants, but chose not to." *Id.* at 1381. The court found the second requirement was also met because an enforcement procedure that focuses upon the vocal offender is inherently suspect, the government was aware that a disproportionate number of vocal nonregistrants would be prosecuted under the passive enforcement system, and the involvement of high government officials in prosecutorial decisions strongly suggested impermissible selective prosecution. *Id.* at 1381-82.

dential advisor Edwin Meese III[20] available to testify at an evidentiary hearing on the issue of selective prosecution.[21] Citing executive privilege, the government refused to comply.[22] The district court therefore dismissed the indictment on the ground that the government had failed to rebut the prima facie finding.[23]

The United States Court of Appeals for the Ninth Circuit reversed the district court's dismissal.[24] The majority conceded that defendant had established that he was singled out for prosecution from others similarly situated.[25] The court noted, however, that Wayte had failed to demonstrate that the government had purposefully focused its investigation on him because of his protest activities.[26] Rather, the evidence suggested only that the government was aware that the passive enforcement system would result in the prosecution of religious and vocal objectors.[27] Moreover, the court accepted the government's justifications for its passive enforcement policy: (1) the identities of nonreported nonregistrants were not known, and (2) nonregistrants who expressed their refusal to register made clear their willful violation of the law.[28] Because Wayte presented no evidence that he was prosecuted because he had exercised his first amend-

20. Mr. Meese has since been nominated and confirmed as United States Attnorney General. *See* N.Y. Times, Feb. 24, 1985, at A1, col. 6.

21. *Wayte*, 549 F. Supp. at 1378 n.1. The district court examined *in camera* government documents related to the prosecution of draft nonregistrants. *Id.* at 1385. Based on this information, the court concluded that the government's normal prosecutorial procedure was not followed in draft nonregistration cases. *Id.* at 1382. Ordinarily, U.S. Attorneys would ultimately decide which nonregistrants to prosecute. Yet government documents indicated that the White House had an interest in the prosecution of nonregistrants and that both Meese and a Presidential Military Manpower Task Force had expressed concern over the potential consequences of passive enforcement on vocal nonregistrants. The district court stated that "[t]he involvement of Mr. Meese and the Task Force in prosecutorial policy decisions creates, at the very least, a strong inference of impropriety with regard to the Government's motive in seeking the prosecution of this defendant, and others similarly situated." *Id.*

22. *Id.* at 1378 & n.1.

23. *Id.* at 1385. Applying a balancing test, the court determined that "[t]he Government's generalized assertion of a 'deliberate process' executive privilege must yield to the defendant's specific need for documents . . . ." *Id.* at 1378 n.1.

24. United States v. Wayte, 710 F.2d 1385, 1389 (9th Cir. 1983), *aff'd*, 105 S. Ct. 1524 (1985). Several commentators have written on the court of appeals decision in *Wayte*. *See* Comment, United States v. Wayte: *The Use of Selective Prosecution as a Defense in Cases Concerning Avoidance of Draft Registration*, 6 CRIM. JUST. J. 345 (1983); Case Comment, *supra* note 6; Note, United States v. Wayte: *Selective Prosecution and the Right to Dissent*, 14 GOLDEN GATE U.L. REV. 58 (1984); Note, *Uncle Sam Wants You: Selective Prosecution of Draft Nonregistrants*, 16 LOY. U. CHI. L.J. 115 (1984); Note, *Constitutional Law—Passive Enforcement of Draft Registration: Does It Constitute Selective Prosecution in Violation of Equal Protection Because It Discriminates Against Persons Based on Their Exercise of First Amendment Rights?*—United States v. Wayte, 57 TEMP. L.Q. 671 (1984) [hereinafter cited as Note, *Passive Enforcement*].

25. *Wayte*, 710 F.2d at 1387. The court of appeals applied the same test as the district court: "To establish selective prosecution, a defendant must show that others similarly situated have not been prosecuted and that the prosecution is based on an impermissible motive." *Id.* The court agreed with the district court's finding that the first element of the test had been established by defendant's showing that out of over 500,000 nonregistrants the 13 indicted had all been vocal nonregistrants. *Id.*

26. *Id.*

27. *Id.* The court of appeals stated that conscious exercise of some selectivity in prosecution is not constitutionally impermissible unless it is deliberately based upon an unjustifiable standard. *Id.* (citing Oyler v. Boles, 368 U.S. 448, 456 (1962); United States v. Steele, 461 F.2d 1148, 1151 (9th Cir. 1972)).

28. *Id.* at 1388.

ment rights, and the government's justifications for its passive enforcement system defeated the inference of improper motive, the court concluded that Wayte had failed to make an initial prima facie showing of selective prosecution.[29] Thus, he was not entitled to discovery of government documents and testimony.[30]

Recognizing both the importance of the issue of selective prosecution and a division in the circuit courts over the appropriate criteria to apply, the United States Supreme Court granted certiorari.[31] For the first time, the Supreme Court would address the defense of selective prosecution directly.[32] Because both equal protection and first amendment issues were involved, *Wayte* posed an opportunity to clearly define the legal standards and quantum of evidence necessary to raise the defense successfully.

Wayte advanced three first amendment arguments in support of his selective prosecution defense.[33] First, he maintained that expressions of opposition to draft registration constituted protected political expression.[34] Because the passive enforcement system selected for prosecution only those nonregistrants who exercised their first amendment right to criticize the draft by writing to government officials or by voicing their opposition, the system constituted an

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29. *Id.*

30. *Id.* The majority noted, "That access to the documents might have been helpful to [Wayte] does not in itself entitle him to discovery. . . . The government's refusal to comply with the discovery orders was justified." *Id.*

Judge Schroeder dissented, stating that "Wayte's prosecution was a part of the government's deliberate policy . . . designed to punish only those who had communicated their violation of the law to others." *Id.* at 1389. Because "an enforcement procedure focusing solely upon vocal offenders is inherently suspect," Schroeder contended that the burden of proof should shift to the government to show nondiscriminatory intent. *Id.* at 1390 (Schroeder, J., dissenting). She also observed that the government's justifications for passive enforcement were unpersuasive because alternate means of enforcement were available to the government. "The district court noted that a law student armed only with a telephone was able to obtain lists, from several randomly chosen states, of persons legally required to register; those lists could have been compared with the government's list of actual registrants to locate violators." *Id.* (Schroeder, J., dissenting) (citing *Wayte*, 549 F. Supp. at 1381 & n.6).

31. *Wayte*, 105 S. Ct. at 1530-31 (1985). In United States v. Schmucker, 721 F.2d 1046, 1052 (6th Cir. 1983), *vacated*, 105 S. Ct. 1860 (1985), the United States Court of Appeals for the Sixth Circuit applied a first amendment analysis to the defense of selective prosecution and held that a vocal nonregistrant prosecuted under the passive enforcement system was entitled to a full evidentiary hearing on his selective prosecution claim. Conversely, in United States v. Eklund, 733 F.2d 1287, 1290 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985), the United States Court of Appeals for the Eighth Circuit applied the traditional two-prong equal protection test and upheld the criminal conviction of a vocal nonregistrant under the passive enforcement system. For a more detailed discussion of these two cases, see *infra* text accompanying notes 113-33.

32. Previously, the Supreme Court had addressed selective prosecution only in dicta in a few cases. *See infra* notes 70-88 and accompanying text.

33. Brief for Petitioner at 17-39.

34. *Id.* at 17. Wayte argued that the content of his letters "represent[ed] core political speech 'on public issues [that] has always rested on the highest rung of the hierarchy of First Amendment values.' " *Id.* at 17-18 (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)). Wayte continued, " '[The First Amendment embodies] a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.' " *Id.* at 18 n.21 (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

According to Wayte, the fact that criticisms of governmental policy may be accompanied by or construed as confessions does not make such criticisms any less an exercise of first amendment rights. *Id.* at 21; *see infra* text accompanying notes 201-02.

impermissible content-based regulatory policy that abridged first amendment rights.[35] Second, Wayte asserted that the government's motive in instituting the passive program was irrelevant to a first amendment analysis of that program's impact on protected expression.[36] Prior Supreme Court cases had established the principle that first amendment rights may be abridged even though the infringement was unintended.[37] Finally, Wayte argued that the government had failed to demonstrate that the passive enforcement system furthered a compelling interest and did not unnecessarily limit protected speech.[38]

The government defended its passive enforcement policy on two grounds.[39] First, the government maintained that it was not impermissibly discriminatory to select Wayte for prosecution.[40] A prosecutor has broad discretion in initiating a criminal case, not subject to judicial review unless deliberately based on impermissible considerations.[41] In addition, Wayte had failed to show that he was singled out for prosecution from others similarly situated;[42] and the passive enforcement system served legitimate governmental interests by encouraging prosecutorial and cost efficiency, by ensuring convictions only of willful viola-

35. Brief for Petitioner at 22. Wayte noted that only those individuals who wrote and stated their refusal to register were referred for investigation or potential prosecution, while nonregistrants who did not confess were ignored. Wayte concluded, "The Selective Service passive enforcement policy was, therefore, not activated by violation of the draft registration law or even by First Amendment activity in general, but rather was aroused only by First Amendment activity conveying a particular political message." *Id.* at 23. Thus, " 'such a law visits punishment on people solely because they have expressed rather than remained silent about their opposition to the government.' " *Id.* at 25 (quoting United States v. Schmucker, 721 F.2d 1046, 1050 (6th Cir. 1983), *vacated*, 105 S. Ct. 1860 (1985)).

36. *Id.* at 26.

37. *Id.* at 28. The Supreme Court has held that " '[i]n the domain of . . . indispensable liberties, whether of speech, press, or association, the decisions of this Court recognize that abridgement of such rights, *even though unintended*, may inevitably follow from varied forms of government action.' " *Id.* (quoting NAACP v. Alabama, 357 U.S. 449, 461 (1958) (emphasis added)). Wayte conceded that motive is relevant to an equal protection analysis of selective prosecution. *Id.* at 29. However, he reasserted his position that in this case the passive enforcement policy should be analyzed under the first amendment, which protects political speech. *Id.* at 30-31.

38. *Id.* at 31-39. According to Wayte passive enforcement did not promote general deterrence because nonregistrants who either did not oppose the draft or opposed it silently escaped prosecution. *Id.* at 34. Wayte also maintained that passive enforcement was unnecessary to identify "willful" nonregistrants because the Justice Department's "beg" policy, which notified nonregistrants of their duty to register and provided an opportunity to avoid prosecution by doing so, could have accomplished the same goal within an active enforcement system. *Id.* Finally, Wayte argued that the government had adequate opportunity to develop an active enforcement system. *Id.* at 37.

39. Brief for the United States at 18-49.

40. *Id.* at 18.

41. *Id.* (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)). The government asserted, " 'The presumption is always that a prosecution for violation of a criminal law is undertaken in good faith and in a nondiscriminatory fashion for the purpose of fulfilling a duty to bring violators to justice.' " *Id.* at 24 (quoting United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973) (en banc)). Thus, defendants have a "heavy burden" to prove that they were selected for prosecution based on an impermissible motive. *Id.*

42. *Id.* at 25. The government advocated the use of a two-prong equal protection test to judge selective prosecution claims requiring proof of discriminatory effect and motive. *Id.* at 23-24. The government emphasized that Wayte had failed to demonstrate that the government knew of both vocal and nonvocal nonregistrants but chose to prosecute only the vocal ones. Accordingly, he had failed to establish the first element of the equal protection test: that he was was singled out for prosecution from among others similarly situated. *Id.* at 27.

tors, and by promoting general deterrence.[43] Second, the government argued that Wayte's prosecution did not violate the first amendment. Nonregistrants were prosecuted because they confessed to violating the registration law, and these confessions were not protected by the first amendment.[44] Thus, the government concluded that Wayte had failed to establish the defense of selective prosecution.

In a majority opinion written by Justice Powell, the Supreme Court accepted the government's analysis and announced that selective prosecution defenses should be judged "according to ordinary equal protection standards."[45] To successfully assert the defense, a defendant must show that the government's enforcement policy (1) had a "discriminatory effect" and (2) "was motivated by a discriminatory purpose."[46] The Court held that Wayte had failed to prove either part of this two-prong test.[47] According to the majority, Wayte first had not presented sufficient evidence that the passive enforcement of draft registration laws had a discriminatory effect. Wayte had demonstrated only that those who reported themselves were prosecuted, not that the enforcement policy selected nonregistrants for prosecution on the basis of their speech.[48] Under the "beg" policy, nonregistrants who protested draft registration were not prosecuted if they later registered. In addition, no one who engaged in protests of draft registration, but who was not reported to the government as a violator, was investigated or prosecuted.[49] Therefore, the Supreme Court concluded that the

43. *Id.* at 29. The government also maintained that Wayte had failed to prove that he had been selected for prosecution based on a discriminatory purpose, the second element of the equal protection test. According to the government, it was admission of nonregistration, not the content of any criticism or protest of the draft policy, that triggered prosecution. *Id.* at 30.

Moreover, vocal nonregistrants had an opportunity to avoid prosecution by registering under the "beg" policy. *Id.* at 32. Thus, the government denied any conscious selection process for prosecutions, and stressed that defendants selected themselves for prosecution through their persistent refusal to register. *Id.*

Finally, the government argued that the passive enforcement system served legitimate purposes. First, it allowed the government to identify and prosecute nonregistrants "with a minimal expenditure of its limited investigatory and prosecutorial resources." *Id.* at 34. Second, it provided evidence of the nonregistrant's intent not to comply, an element of the offense. Third, prosecuting visible offenders was an effective way to promote general deterrence. *Id.*

44. *Id.* at 41-42. The government noted that "[t]here is nothing in the Constitution that precludes the government from considering a volunteered admission of guilt in determining whether to bring a prosecution, and it does not matter whether that admission is cojoined with other statements that come within the First Amendment." *Id.* at 31.

45. *Wayte*, 105 S. Ct. at 1531 (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)).

46. *Id.* (citing Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976)). The Supreme Court acknowledged that a showing of discriminatory motive is not necessary when the government has openly and flagrantly discriminated. *Id.* at 1531 n.10. The Court noted, however, that no such claim was presented here because Wayte could not argue that the passive enforcement policy discriminated on its face. *Id.*

This two-part equal protection analysis is essentially the same as the *Berrios* test, *infra* note 109 and accompanying text, on which the district court and the court of appeals relied, *supra* notes 19 & 25.

47. *Id.* at 1532.

48. *Id.*

49. *Id.* The Court mentioned that no matter how vehement or outspoken the expression of opposition to draft registration, it created no exposure to enforcement efforts unless coupled with an indication to the government that the person had failed to register as required by law. On the other

government "treated all reported nonregistrants similarly [without subjecting] vocal nonregistrants to any special burden."[50]

Even if there was a discriminatory effect, the Court observed that Wayte's evidence had failed to establish that the passive enforcement policy was motivated by improper factors, the second prong of the equal protection test.[51] Rather, Wayte had proved only that the government was aware that the passive enforcement policy would result in prosecution of vocal objectors. However, " '[d]iscriminatory purpose' . . . implies more than . . . intent as awareness of consequences. It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[52] Absent a showing that the government had prosecuted Wayte *because of* his protest activities, the Supreme Court held that his defense of selective prosecution failed.[53]

The Supreme Court also rejected Wayte's challenge of the passive enforcement policy on first amendment grounds for two reasons.[54] First, the majority noted that the government's "beg" policy removed any burden on free expression.[55] "By simply registering after they had reported themselves to the Selective Service, nonregistrants satisfied their obligation and could thereafter continue to protest registration. No matter how strong their protest, registration immunized them from prosecution."[56] Second, the Court held that the passive enforcement policy was justified because it furthered important governmental interests unrelated to the suppression of first amendment rights.[57] The policy helped encourage prosecutorial and cost efficiency, ensure convictions only of willful violators, and promote general deterrence.[58] Further, it did not restrict first amendment freedoms more than was necessary to encourage registration for

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hand, the government "did prosecute people who reported themselves or were reported by others but who did not publicly protest." *Id.*

50. *Id.*

51. *Id.*

52. *Id.* (quoting Personnel Adm'r v. Feeney, 442 U.S. 252, 279 (1979)).

53. *Id.*

54. *Id.* In particular the Court responded to Wayte's claim that " '[e]ven though the [government's passive] enforcement policy did not overtly punish protected speech as such, it inevitably created a content-based regulatory system with a concomitantly disparate, content-based impact on nonregistrants.' " *Id.* at 1533 (quoting Brief for Petitioner at 23).

55. *Id.* at 1533 n.12.

56. *Id.* According to the Supreme Court, the only freedom denied Wayte was that of refusing to register under the Military Selective Service Act, "a 'right' without foundation either in the Constitution or the history of our country." *Id.* (citing Selective Draft Law Cases, 245 U.S. 366 (1918)).

57. *Id.* at 1533. The majority noted that that any incidental effect of government regulation on first amendment rights is justified

> "if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."

Id. (quoting United States v. O'Brien, 391 U.S. 367, 377 (1968)).

The Court in *Wayte* said neither the first nor third conditions were disputed. *Id.*

58. *Id.* at 1534. The reasons the government offered in defense of the passive enforcement policy were sufficiently compelling to satisfy the second requirement of the *O'Brien* test, according to the Court. *Id.* at 1533.

the national defense.[59] Because passive enforcement was only an interim solution designed to carry out the government's compelling interest while an active enforcement program was being developed, the Court concluded there was no first amendment violation.[60]

Justice Marshall, in a dissenting opinion joined by Justice Brennan, maintained that the real issue before the Court was whether Wayte had earned the right to discover government documents relevant to his claim of selective prosecution.[61] Marshall argued that "[i]f the District Court correctly resolved the discovery issue, Wayte was entitled to additional evidence . . . [and] the Court cannot reject his claim on the merits" for lack of proof.[62] Thus, the dissent focused its analysis on whether the district court had abused its discretion in determining that Wayte had presented a nonfrivolous showing of selective prosecution entitling him to discovery.[63]

Marshall cited three elements of a prima facie case of selective prosecution. A defendant must demonstrate (1) that he is a member of a recognizable, distinct class; (2) that a disproportionate number of this class was selected for prosecution; and (3) that the selection procedure was subject to abuse.[64] Wayte had met the first element, according to the dissent, by showing that he was a member of a class of vocal opponents to the government's draft registration.[65] He had presented a colorable claim as to the second element by presenting evidence that top officials in the Justice Department were aware that the vast majority of indi-

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59. *Id.* at 1534. Thus, the passive enforcement policy also met the final requirement of the *O'Brien* test. *Id.*

60. *Id.* The Court emphasized that the Selective Service was engaged in developing an active enforcement program when it investigated Wayte, but at that time it had found no practical approach to obtaining the names and current addresses of likely nonregistrants. After failing to obtain a list by using Social Security and IRS records, the Selective Service eventually located the information through state driver's license records. *Id.* at 1534 & n.14. *See infra* note 175.

61. *Id.* at 1535 (Marshall, J., dissenting).

62. *Id.* at 1538 (Marshall, J., dissenting). The majority did not address the discovery issue, claiming that it was not raised in the petition for certiorari, in the brief on the merits, or at oral argument. *Id.* at 1529-30 n.5. Justice Marshall pointed out, however, that in addressing the merits of Wayte's selective prosecution claim, the Court must also decide the antecedent discovery question—whether Wayte had made a sufficient showing of a constitutional violation to be entitled to discovery of government documents. *Id.* at 1538-39 n.1 (Marshall, J., dissenting). Marshall also noted the irony that the majority chose to address Wayte's claim that passive enforcement placed a direct burden on the exercise of first amendment rights, even though that issue also had not been presented in Wayte's petition for certiorari or ruled upon by the district court or by the court of appeals. *Id.*

63. *Id.* at 1540 (Marshall, J., dissenting). To be entitled to discovery, according to Marshall, a defendant must present sufficient facts in support of his selective prosecution claim " 'to take the question past the frivolous state.' " *Id.* at 1539 (Marshall, J., dissenting) (quoting United States v. Hazel, 696 F.2d 473, 475 (6th Cir. 1983)). "In general, a defendant must present 'some evidence tending to show the existence of the essential elements of the defense.' " *Id.* (quoting United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974)).

Once a district court has ruled in favor of discovery, Marshall maintained that the decision is reviewable only if there has been an abuse of discretion. *Id.* at 1540 (Marshall, J., dissenting). Thus, without a determination that the trial court acted arbitrarily or made a finding without record support, the dissent emphasized that an appellate court should not disturb a lower court's discovery orders. *Id.* (citing United States v. Nixon, 418 U.S. 683, 702 (1974)).

64. *Id.* at 1541 (Marshall, J., dissenting) (citing Castaneda v. Partida, 430 U.S. 482, 494 (1977)).

65. *Id.*

viduals prosecuted would be vocal opponents of draft registration.[66] Finally, Wayte had established the third element by demonstrating that the government recognized that the passive enforcement policy had potentially serious first amendment problems, making it easy to punish speech under the guise of enforcing the laws.[67] Thus, the dissent concluded that the district court did not abuse its discretion in finding that Wayte had presented sufficient facts to support a nonfrivolous claim of selective prosecution entitling him to discovery.[68] On this basis Marshall and Brennan would have deferred a decision on the merits until a final resolution of discovery matters had been reached on remand.[69]

The Supreme Court has never invalidated a criminal conviction on the basis of selective prosecution.[70] Nevertheless, dicta in several cases prior to *Wayte* laid the foundation for the defense.[71] As early as 1886 in the landmark case *Yick Wo v. Hopkins*,[72] the Supreme Court used a selective enforcement rationale to strike down a municipal ordinance that required all persons running laundries in wooden buildings to obtain an operating license.[73] Without addressing the facial validity of the ordinance, the Court held that because it was administered in a discriminatory fashion to deny licenses only to Chinese laundry operators, enforcement of the ordinance resulted in a denial of equal protection of the laws under the fourteenth amendment.[74] The famous rule enunciated was that although a law may "be fair on its face and impartial in appearance . . . if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights," there is a denial of equal protection of the laws under the fourteenth amendment.[75] Thus, equal protection became the basis for the selective prosecution defense.

The Supreme Court again commented on selective enforcement of the law in *Snowden v. Hughes*.[76] Snowden, the Republican runner-up in an Illinois state-house primary election, claimed a denial of equal protection when the election board failed to certify him as a candidate as required by state law.[77] The

66. *Id.* Wayte introduced one Justice Department memorandum stating that under the passive enforcement system " 'the chances that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning.' " *Id.* (citation omitted). *See* Brief for Petitioner at 6.

67. *Wayte*, 105 S. Ct. at 1542 (Marshall, J., dissenting).

68. *Id.* (Marshall, J., dissenting).

69. *Id.* at 1543 n.3 (Marshall, J., dissenting).

70. Note, *Passive Enforcement*, *supra* note 24, at 677.

71. *Id.*

72. 118 U.S. 356 (1886).

73. *Id.* at 357-58. In 1880 San Francisco had passed two ordinances banning commercial laundries in wooden buildings unless one obtained a permit from the Board of Supervisors. *Id.* Petitioner, a Chinese native living and operating a laundry in San Francisco, had his premises inspected by the fire and health officials, who found everything to be in good condition. Nevertheless, the Board of Supervisors denied his perimit. Before the Supreme Court, petitioner demonstrated that the city had denied permits to over 150 Chinese laundry operators, although all but one of the non-Chinese applicants had been granted permits. *Id.* at 358-59.

74. *Id.* at 373-74.

75. *Id.*

76. 321 U.S. 1 (1944).

77. *Id.* at 3-4. By mutual agreement between the Republican and Democratic Parties and in

Court dismissed the claim, noting that "unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination."[78]

In *Two Guys from Harrison-Allentown v. McGinley*[79] the Supreme Court implied in dicta that selective prosecution also might be a defense to a criminal prosecution. Appellant, a corporation that operated a large discount department store in Pennsylvania, had sought to enjoin enforcement of a Sunday closing law based on alleged selective application of the law.[80] The Court, however, denied relief, stating that "[s]ince appellant's employees may defend against any such proceeding that is actually prosecuted on the ground of unconstitutional discrimination, we do not believe that the court below was incorrect in refusing to exercise its injunctive powers."[81]

Oyler v. Boles[82] in 1962 was the last case before *Wayte* in which the Supreme Court considered the defense of selective prosecution. Oyler had been prosecuted pursuant to West Virginia's habitual criminal statute, which imposed more severe penalties on defendants with prior offenses than on those with no previous record.[83] He alleged that other repeat offenders subject to the statute were not prosecuted as habitual criminals and that his selection for prosecution under the statute was thus a denial of equal protection.[84] The Court rejected defendant's challenge for two reasons. First, Oyler had failed to prove that prosecutors had knowledge of the habitual criminals' prior offenses. Second, he had failed to show a discriminatory motive on the part of the prosecutor.[85] The Court stated that the "conscious exercise of some selectivity in criminal law

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accordance with Illinois state law, the third district nominated the Democratic candidate and the two Republican candidates receiving the highest vote in the primary election as candidates for representatives in the general assembly. *Id.*

78. *Id.* at 8; *see also* Edelman v. California, 344 U.S. 357, 359 (1953) (noting the necessity of showing systematic or intentional discrimination for successful claim of discriminatory law enforcement). The Court in *Snowden* suggested that the element of intentional or purposeful discrimination, necessary to establish a denial of equal protection of the law, may appear on the face of the action taken with respect to a particular class or person or may be shown by extrinsic evidence, but it is not presumed. *Snowden*, 321 U.S. at 8.

79. 366 U.S. 582 (1961).

80. *Id.* at 586. The Pennsylvania statute forbade all worldly employment, business, and sports on Sunday, with exceptions for works of charity and necessity. *Id.* at 585 & n.2. Appellant corporation sought an injunction to restrain enforcement of the statute, alleging discriminatory enforcement against it by the district attorney because the statute had not been enforced against other store owners. *Id.* at 586.

81. *Id.* at 588-89.

82. 368 U.S. 448 (1962).

83. *Id.* at 449.

84. *Id.* at 454-55. Oyler alleged that of six men subject to prosecution as habitual offenders in his county, he was the only man sentenced under the statute. He also introduced statistical data based on prison records that 904 other known offenders in the state had not been prosecuted under the statute. *Id.* at 455.

85. *Id.* at 456. The Court first found there was no indication that the records Oyler relied upon had been available to prosecutors. Therefore, his allegations set forth no more than a failure to prosecute others due to a lack of knowledge of their prior offenses. Second, the court reasoned that although Oyler's statistics might imply a policy of selective enforcement, he failed to allege that the selection was deliberately based upon an unjustifiable standard. *Id.*

enforcement is not in itself a federal constitutional violation . . . [so long as the selection is not] deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification."[86] Thus, the Court held that Oyler's evidence was insufficient to support a finding of denial of equal protection.[87]

Following *Oyler*, the selective prosecution doctrine was applied by several federal courts in reversing convictions and in dismissing criminal indictments.[88] For example, in *United States v. Crowthers*[89] the United States Court of Appeals for the Fourth Circuit held that selective and discriminatory enforcement of regulations relating to disturbances on government property violated defendants' right to equal protection of the laws.[90] Defendants had been prosecuted for disorderly conduct for holding a "Mass for peace" on the Pentagon grounds.[91] Because sixteen other political and religious ceremonies had been held on the grounds in recent months without prosecution, the court ruled that defendants had established a prima facie case of selective prosecution and shifted to the government the burden of rebutting the inference of invidious discrimination to suppress unpopular views.[92] After the government failed to meet this burden, the court reversed defendants' convictions.[93]

In *United States v. Steele*[94] the United States Court of Appeals for the Ninth Circuit upheld a claim of selective prosecution for protestors who had refused to comply with the census law. The court noted that mere selectivity in prosecution is not impermissible.[95] To establish the defense of selective prosecution, "one must prove that the selection was deliberately based on an unjustifiable standard, such as race, religion, or other arbitrary classification," such as the exercise of first amendment rights.[96] Convicted of willful refusal to complete a census questionnaire, Steele presented evidence that only vocal critics of the

86. *Id.*

87. *Id.*

88. *See* United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc) (prosecution for failure to possess draft card after anti-war protests); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972) (indictment for refusal to complete census questionnaire after vocal demonstration against the census); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972) (selective enforcement of regulation controlling public concourse of Pentagon); United States v. Haggarty, 528 F. Supp. 1286 (D. Colo. 1981) (selection for prosecution for illegal strike based on holding union office); United States v. Robinson, 311 F. Supp. 1063 (W.D. Mo. 1969) (prosecution for wiretapping initiated only against nongovernment employees).

89. 456 F.2d 1074 (4th Cir. 1972).

90. *Id.* at 1080.

91. *Id.* at 1076. Defendants were convicted of violating 41 C.F.R. § 101-19.304 (1972) (prohibiting disorderly conduct on government property). *Crowthers*, 456 F.2d at 1076.

92. *Crowthers*, 456 F.2d at 1078. The court acknowledged that the government can regulate and control public demonstrations, so long as it does so in an impartial manner. The government may not, however, allow public meetings in favor of government policy while denying meetings opposed to that policy. The court concluded, "What the government has done here is to undertake to suppress a viewpoint it does not wish to hear under the guise of enforcing a general regulation prohibiting disturbances on government property." *Id.* at 1079.

93. *Id.* at 1081.

94. 461 F.2d 1148 (9th Cir. 1972).

95. *Id.* at 1151.

96. *Id.* (citing Oyler v. Boles, 368 U.S. 448, 456 (1962)); *see also* Snowden v. Hughes, 321 U.S. 1 (1944) (requiring allegation of intentional or purposeful discrimination for claim of selective prosecution).

census had been chosen for prosecution.[97] The court noted that "an enforcement procedure that focuses solely upon the vocal offenders is inherently suspect."[98] Because Steele had presented evidence that created a strong inference of selective prosecution, the burden shifted to the government to rebut his prima facie case.[99] When the government failed to present a valid basis for its selection of only vocal offenders, the court reversed defendant's conviction.[100]

Similarly, in *United States v. Falk*[101] the United States Court of Appeals for the Seventh Circuit held that there is a presumption that prosecution for violation of a criminal law is undertaken in good faith, but "when a defendant alleges intentional purposeful discrimination and presents facts sufficient to raise a reasonable doubt about the prosecutor's motive," the burden shifts to the government to rebut the inference of selective prosecution.[102] Convicted for failing to possess his draft card, Falk alleged that he had been singled out for prosecution because of his first amendment activities in counseling others to avoid the draft and to protest American involvement in Vietnam.[103] The court concluded that Falk had established a prima facie case of selective prosecution by showing the existence of a published government policy to refrain from prosecution for nonpossession of draft cards, his status as a public advocate of draft resistance, an Assistant United States Attorney's statement that several high level officials had participated in the decision to prosecute him, and the ultimate delay in bringing the indictment.[104] Therefore, the court remanded the case for a hearing, placing the burden of going forward with proof of nondiscrimination on the

97. *Steele*, 461 F.2d at 1150-51. Defendant was convicted of violating 13 U.S.C. § 221(a) (1972) (prohibiting willful failure to comply with census survey). *Steele*, 461 F.2d at 1150. He introduced evidence that only four persons in Hawaii had been prosecuted under the statute. All were public advocates of noncompliance with the census on the grounds that it constituted an unconstitutional invasion of privacy. Steele also demonstrated that at least six other persons who had refused to complete the census forms but not taken a public stand against it were not prosecuted. *Id.* at 1150-51.

98. *Id.* at 1152. The court stated that such an enforcement policy "is vulnerable to the charge that those chosen for prosecution are being punished for their expression of ideas, a constitutionally protected right." *Id.*

99. *Id.* A census official testified that the census operating procedures would normally single out all persons who failed to complete the questionnaire. The fact that the census bureau recollected only four total refusals in Hawaii although the evidence established a minimum of ten led the court to infer a questionable emphasis upon vocal census resisters.

The court also remarked that the government offered no explanation for its selective enforcement of the law, other than prosecutorial discretion. Yet, mere random selection would have been appropriate, according to the court, because the government need not proceed against all offenders. *Id.*

100. *Id.*

101. 479 F.2d 616 (7th Cir. 1973) (en banc).

102. *Id.* at 620-21.

103. *Id.* at 617-19.

104. *Id.* at 623. The court reached its decision based on the cumulative weight of all the facts. First, there was a policy statement by the Director of the Selective Service stating that registrants who turned in their cards, as opposed to burning them, would not be prosecuted. Second, Falk was actively involved in counseling others on legal ways to avoid military service in Vietnam. Third, the decision to prosecute was approved by several high level officials, contrary to what the court considered normal prosecutorial policy. Finally, the indictment for failure to possess a draft card was not brought until almost three years after Falk had returned his card to the Department of Justice. *Id.* at 621-22.

government.[105]

In 1974 the United States Court of Appeals for the Second Circuit in *United States v. Berrios*[106] enunciated a two-prong equal protection test to establish selective prosecution that has been adopted in a majority of the federal circuits.[107] In *Berrios* defendant, charged with violating a federal statute by holding a union office within five years after his conviction for a felony, contended that he had been chosen for prosecution because of his unpopular political views.[108] The court ruled that to establish a prima facie case of selective prosecution the defendant bears a "heavy burden" to show (1) that others similarly situated generally have not been prosecuted for conduct similar to defendant's and (2) that the government's discriminatory selection was based on impermissible grounds such as race, religion, or the exercise of constitutional rights.[109] Although Berrios' evidence of selective prosecution was weak, the court concluded that the trial judge did not abuse his discretion in ordering the government to turn over to the defense documents relating to Berrios' prosecution.[110] The court did remand the case, however, because of the trial judge's failure to limit discovery solely to material in the government memoranda that related to the defense of selective prosecution.[111]

In recent years the defense of selective prosecution has arisen in the context of the government's passive enforcement of draft registration laws. Vocal critics of the draft who refused to register have insisted that they were prosecuted solely for the exercise of their first amendment rights.[112] Prior to *Wayte* the United States Court of Appeals for the Sixth Circuit addressed the first amendment issue in a selective prosecution claim in *United States v. Schmucker.*[113] Schmucker, a Mennonite, informed the Selective Service by letter of his refusal to register for the draft, explaining that registration would violate his religious convictions.[114] Although there were over 500,000 nonregistrants, Schmucker

105. *Id.* at 623-24.

106. 501 F.2d 1207 (2d Cir. 1974).

107. *See* United States v. Mangieri, 694 F.2d 1270 (D.C. Cir. 1982); United States v. Saade, 652 F.2d 1126 (1st Cir. 1981); United States v. Wilson, 639 F.2d 500 (9th Cir. 1981); Barton v. Malley, 626 F.2d 151 (10th Cir. 1980); United States v. Torquato, 602 F.2d 564 (3d Cir.), *cert. denied*, 444 U.S. 941 (1979); United States v. Stout, 601 F.2d 325 (7th Cir.), *cert. denied*, 444 U.S. 979 (1979); United States v. Hayes, 589 F.2d 811 (5th Cir.), *cert. denied*, 444 U.S. 847 (1979); United States v. Legett & Platt, Inc., 542 F.2d 655 (6th Cir. 1976), *cert. denied*, 430 U.S. 945 (1977); United States v. Ojala, 544 F.2d 940 (8th Cir. 1976).

108. *Berrios*, 501 F.2d at 1209. Berrios claimed that he was selected for prosecution because he was an outspoken supporter of Senator McGovern's candidacy for President of the United States and because he was heading an effort to unionize a corporation that apparently had close ties with President Nixon. *Id.*

109. *Id.* at 1211. The court referred to these two elements as "intentional and purposeful discrimination." *Id.* (citing Snowden v. Hughes, 321 U.S. 1, 8 (1944)).

110. *Id.* at 1212.

111. *Id.* at 1212-13. The court also set forth some general guidelines for discovery. To establish a "colorable basis" for discovery of documents needed to establish a defense of selective prosecution, the court announced it would "require some evidence tending to show the existence of the essential elements of the defense and that the documents in the government's possession would indeed be probative of these elements." *Id.* at 1211-12.

112. Note, *Passive Enforcement*, *supra* note 24, at 685.

113. 721 F.2d 1046 (6th Cir. 1983), *vacated*, 105 S. Ct. 1860 (1985).

114. *Id.* at 1048.

was one of only thirteen nonregistrants indicted and convicted for willful violation of the draft registration laws.[115] On appeal, Schmucker contended that the district court had erred in refusing to conduct an evidentiary hearing on his claim that the government had abridged his rights of free speech and religious free exercise by prosecuting only vocal nonregistrants.[116] Although it discussed the two-prong equal protection analysis of selective prosecution, the court focused on first amendment considerations.[117]

The court held that a prosecutorial policy directed solely at vocal nonregistrants violated the first amendment because it punished critics for speaking out against the government and ignored those who engaged in covert noncompliance.[118] Acknowledging that the government may prohibit certain types of speech and may limit prosecutions in certain cases to persons confessing their crimes, the court emphasized that absent compelling justifications, the government's prosecution policy must be content neutral.[119] In response to the government's argument that defendant had been prosecuted simply because he reported his violation, the court observed that defendant's letters were not mere confessions, but were also criticisms of government policy protected by the first amendment.[120] Thus, the court remanded the case for a full evidentiary hearing

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115. *Id.* at 1048-49. Schmucker was convicted of knowingly and willfully refusing to register in violation of 50 U.S.C. app. §§ 453, 462a (1982). *Schmucker*, 721 F.2d at 1048. For the text of these sections, see *supra* notes 9 & 17.

116. *Schmucker*, 721 F.2d at 1048.

117. *Id.* at 1048-50. The court noted that an indictment must be dismissed on grounds of selective prosecution if (1) the defendant has been singled out from other similarly situated violators and (2) the defendant's selection for prosecution was based on impermissible grounds such as race, religion, or the exercise of one's constitutional rights. *Id.* This is the same two-part equal protection test set forth in *United States v. Berrios*. *See supra* text accompanying note 109. According to the court in *Schmucker*, a defendant who makes a preliminary showing of selective prosecution is entitled to an evidentiary hearing. *Schmucker*, 721 F.2d at 1049.

The court found that Schmucker met the first element of the test by showing that out of over 500,000 violators of the registration law, only 13 vocal nonregistrants had been prosecuted. However, the court did not focus on the government's motivation in implementing the passive enforcement policy, the second element of the test. Instead, the court stated that the issue before it was whether the passive program violated the first amendment by prosecuting only vocal nonregistrants who openly objected to draft registration on religious, moral, or political grounds. *Id.*

118. *Id.* at 1049. The court noted that the effect of passive enforcement was to discourage "dissenters from expressing their criticism of government policy." *Id.*

119. *Id.* at 1050. The court conceded the government could prohibit fraudulent or libelous speech without violating the first amendment. Nevertheless, the court stated that " '[w]hen government regulation discriminates among speech-related activities in a public forum, the Equal Protection Clause mandates that the legislation be finely tailored to serve substantial state interests, and the justifications offered for any distinctions it draws must be carefully scrutinized.' " *Id.* (citing Carey v. Brown, 447 U.S. 455, 461 (1980)).

120. *Id.* at 1050-51. The government asserted that defendant's letter was not only an exercise of free speech, but also "an unequivocal confession of the commission of a crime which virtually invited the initiation of criminal prosecution." *Id.* at 1050 (citing Brief for the United States at 37-38, *Schmucker*). The court, however, ruled that *Schmucker* was analogous to *Cohen v. California*, 403 U.S. 15 (1971), in which the Supreme Court invalidated under the first amendment a state prosecution for disturbing the peace by wearing a jacket bearing the words "Fuck the Draft." *Id.* at 26. The *Schmucker* court interpreted *Cohen* to mean that prosecution for wearing the jacket created a strong inference that the state brought the case because of the political meaning of the slogan. *Schmucker*, 721 F.2d at 1051.

The court relied on Justice Harlan's warning in *Cohen* that " 'we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process. Indeed, governments might soon seize upon the censorship of particu-

on the issue of selective prosecution.[121]

In contrast, the United States Court of Appeals for the Eighth Circuit in *United States v. Eklund*[122] employed the traditional two-prong selective prosecution analysis in a similar draft registration case.[123] Like Wayte, Eklund had written to the Selective Service expressing his opposition to draft registration and his refusal to comply, and he had been convicted for failure to register with the Selective Service. On appeal Eklund contended that he was a victim of impermissible selective prosecution.[124] The court accepted the district court's finding that Eklund had satisfied the first element of the equal protection test by showing that he had been treated differently from others similarly situated.[125] Nevertheless, focusing on the second element, the court held that because Eklund had not established an improper motive, he had failed to present a prima facie case of selective prosecution.[126]

Eklund cited three factors showing the government's discriminatory motive to prosecute only vocal violators: the government's delay in implementing a broader, active enforcement system, statements in government memoranda demonstrating awareness that only vocal nonregistrants would be punished under the passive program, and the participation of high-level executive officials in formulating the prosecution policy.[127] The court responded that it was unwilling to infer improper governmental motive on these grounds because: the government was implementing an active enforcement system,[128] government awareness of the adverse effect on vocal nonregistrants did not establish the intent to have that impact,[129] and there was no indication that high level officials intended to base prosecutions on vocal resistance.[130] Because Eklund did not raise a reason-

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lar words as a convenient guise for banning the expression of unpopular views.'" *Id.* (quoting *Cohen*, 403 U.S. at 26). Applying the same reasoning to the facts of *Schmucker*, the court concluded that the government was forbidding criticism of itself under the guise of prosecuting confessions. *Id.* at 1051-52.

121. *Schmucker*, 721 F.2d at 1052.

122. 733 F.2d 1287 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985).

123. *Id.* at 1290. The court applied the two-prong equal protection test as set forth in *Berrios*. *Id.*; see *supra* text accompanying note 109.

124. *Eklund*, 733 F.2d at 1289.

125. *Id.* at 1290. Because the court disposed of the case under the second part of the *Berrios* test, it did not decide whether the trial court's finding that Eklund received treatment different from others similarly situated was correct. *Id.*

126. *Id.* at 1291.

127. *Id.*

128. *Id.* at 1292. The court pointed to evidence that the government had tried and failed to implement an active enforcement system with Social Security and IRS records. *Id.* at 1291-92. In 1982 the Selective Service employed an alternative active program using state driver's license records. Given the government's long range plans to identify and prosecute both vocal and silent offenders, the court refused to infer impermissible government motive from the temporary use of the passive enforcement system. *Id.*

129. *Id.* at 1293. The court observed that Eklund had failed to show that the government had declined to prosecute known silent offenders or that the government had prosecuted vocal offenders who signed up late under the "beg" policy. Also, the court emphasized that "absent bad faith, selectivity based upon the amount of publicity a prosecution will receive falls well within the exercise of prosecutorial discretion." *Id.* at 1294 (citing United States v. Catlett, 584 F.2d 864, 868 (8th Cir. 1978)).

130. *Id.* at 1295. The court did not find it unusual for high level government officials to be

able doubt concerning the government's purpose in prosecuting him, the court concluded that he was not entitled to an evidentiary hearing on his claim of selective prosecution.[131]

Wayte v. United States[132] is significant because the Supreme Court resolved a division in the circuits over selective prosecution and for the first time delineated the appropriate standards for raising the defense. Claims of selective prosecution, the Court announced, should be judged according to ordinary equal protection standards.[133]

Application of equal protection criteria to selective protection cases is consistent with the Court's past treatment of the defense.[134] The equal protection standards require that a person invoking the defense demonstrate that a government policy both "had a discriminatory effect and that it was motivated by a discriminatory purpose."[135] The Supreme Court has interpreted the two parts of this equal protection analysis in prior cases involving facially neutral statutes that discriminated on the basis of race and gender. For example, in *Washington v. Davis*[136] unsuccessful black applicants for employment as police officers al-

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involved in formulating policy for enforcement of draft registration laws that pertained to national security interests and involved several thousand violators. *Id.*

131. *Id.* at 1291. The court stated that a defendant is entitled to a hearing on a claim of selective prosecution only when he has alleged "sufficient facts to take the question past the frivolous stage." *Id.* at 1290 (citing United States v. Erne, 576 F.2d 212, 216 (9th Cir. 1978)). Otherwise, the prosecution is presumed to have been undertaken in good faith. *Id.* at 1291 (citing United States v. Falk, 479 F.2d 616, 620 (7th Cir. 1973) (en banc)).

The dissent in *Eklund* objected to the majority's ruling based on the facts. *Id.* at 1307 (Heaney, J., dissenting). Focusing on the government's two year delay in implementing an active enforcement system, the dissent reasoned that the government had an adequate opportunity to develop reasonable, alternative methods of enforcement. Although the government had been unable to obtain Social Security records with correct addresses, the dissent noted that the same information could have been obtained from state drivers license records that had been available to the Selective Service during the entire period in question.

In addition the dissent contended that the passive enforcement policy was applied in a discriminatory manner. Although the Selective Service sent warning letters to 103 nonregistrants in June 1981, as of September 1982 only the 13 nonregistrants who had written letters refusing to register had been indicted. Based on these facts, the dissent concluded that Eklund had presented a nonfrivolous showing of selective prosecution and was therefore entitled to an evidentiary hearing on the issue. *Id.* at 1307-08.

132. 105 S. Ct. 1524 (1985).

133. *Id.* at 1531.

134. *See supra* notes 70-87 and accompanying text.

135. *Wayte*, 105 S. Ct. at 1531. One caveat to this rule is that a showing of discriminatory motive is not required in those rare cases in which the equal protection claim is based on an overtly discriminatory classification. *Id.* at 1531 n.10 (citing Strauder v. West Virginia, 100 U.S. 303 (1880) (systematic exclusion of blacks from grand juries is itself such unequal application of law as to show intentional discrimination)); *see also* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977) (Court will infer discriminatory intent from disproportionate adverse impact only when the effect of facially neutral legislation indicates a stark pattern of discrimination); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (exclusion of almost 400 black voters after redistricting presumed to have been enacted to segregate voters by race); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886) (denial of licenses to 200 Chinese laundry operators gave rise to inference of intentional discrimination); Note, *Passive Enforcement*, *supra* note 24, at 677 n.47 (Court will infer discriminatory intent from the unequal effect of state action only in most compelling equal protection cases).

The Court did not find such a claim in the present case, stating that Wayte could not maintain that the passive enforcement program was facially discriminatory. *Wayte*, 105 S. Ct. at 1531 n.10.

136. 426 U.S. 229 (1976).

leged that a job-related employment test that whites passed in proportionately greater numbers than blacks was racially discriminatory.[137] Applying an equal protection analysis, the Court observed that "[d]isproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination forbidden by the Constitution."[138] A discriminatory purpose must also be proved, although it need not be express or appear on the face of the statute.[139] The Court suggested that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[140] Considering the affirmative efforts of the police department to recruit black officers, the changing racial composition of the recruit classes, and the relationship of the test to the training program, the Court refused to infer a discriminatory purpose from the institution of the employment test even though it had a disproportionate impact on black applicants.[141]

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[142] the Supreme Court again enunciated its interpretation of discriminatory effect and purpose. A nonprofit real estate developer that had contracted to purchase a tract of land on which it intended to build racially integrated low income housing filed suit, alleging that local authorities' refusal to change the tract from a single-family to a multi-family classification was racially discriminatory.[143] The Court reaffirmed that disproportionate impact of an official action is relevant, but stated that proof that a discriminatory purpose was a motivating factor in the decision also is required to show a violation of the equal protection clause.[144] The Court then proceeded to identify some objective factors that may be highly relevant in proving discriminatory intent. These factors include the impact of the official action, the sequence of events leading up to the challenged decision, the evidence of departures from normal procedural policy, and the legislative or administrative history, possibly including official testimony, of the statute under which the defendant was prosecuted.[145] Although the refusal to rezone for low income multi-family housing had a disproportionate impact on

137. *Id.* at 232-33. The police department's recruiting procedures included a written personnel test to determine whether applicants had acquired a particular level of verbal skill. *Id.* at 234-35.

138. *Id.* at 242.

139. *Id.* at 241. The Court stated that a prima facie case of discriminatory purpose could be inferred from the systematic exclusion of blacks from jury selection. *Id.* (citing Akins v. Texas, 325 U.S. 398 (1945)). Once the prima facie case is made out " 'the burden of proof shifts to the State to rebut the presumption of unconstitutional action by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' " *Id.* (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).

140. *Id.* at 242. The Court indicated that it would infer discriminatory intent from a disproportionate adverse impact upon a particular group only in those rare cases in which the action could not be explained on any nondiscriminatory grounds. *Id.*

141. *Id.* at 246.

142. 429 U.S. 252 (1977).

143. *Id.* at 254.

144. *Id.* at 265. The Court noted that a plaintiff does not have to "prove that the challenged action rested solely on racially discriminatory purposes." *Id.* One simply has to demonstrate that a discriminatory purpose was a "motivating factor" in the decision. *Id.*

145. *Id.* at 266-68. The Court stated, "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such *circumstantial and direct* evidence of intent as may be available." *Id.* at 266 (emphasis added).

blacks, evidence that the present zoning classification had existed for seventeen years, that the rezoning request had progressed according to normal procedures, and that the Commission had gone out of its way to accommodate the developers led the Court to hold that the developers had failed to prove discriminatory intent was a motivating factor in the decision.[146]

The Supreme Court enlarged upon its interpretation of discriminatory intent in *Personnel Administrator v. Feeney*.[147] Female civil service employees brought suit alleging that the Massachusetts' veterans' preference statute, which favored qualifying veterans for civil service positions over qualifying nonveterans, unconstitutionally discriminated against females because of their sex.[148] Conceding that the adverse consequences of this legislation for women were foreseeable, the Court responded, " 'Discriminatory purpose,' however, implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."[149] The Court held that the veterans' preference statute did not deprive women of equal protection of the law because consideration of the totality of legislative actions establishing and extending the statute showed that the law was "a preference for veterans of either sex over nonveterans of either sex, not for men over women."[150] Based on these facts the Court concluded that appellees simply had failed to demonstrate that the law reflected a purpose to discriminate on the basis of sex.[151]

Relying on the principles set forth in *Davis*, *Arlington Heights*, and *Feeney*, the Supreme Court in *Wayte* concluded that no discriminatory effect resulted from the government's passive enforcement policy,[152] even though Wayte had introduced evidence that out of an estimated 674,000 nonregistrants the thirteen indicted under the program were all vocal nonregistrants.[153] The Court noted that the government did not prosecute those who reported themselves but later registered under the "beg" policy, nor those who protested registration but did not report themselves or were not reported by others.[154] These facts led the

146. *Id.* at 269-70.

147. 442 U.S. 256 (1979).

148. *Id.* at 259. During her 12 year tenure as a state employee, appellee, who was not a veteran, had passed a number of competitive civil service examinations for better jobs, but because of Massachusetts' veterans' preference statute, she was ranked in each instance below male veterans who had achieved lower test scores than herself. *Id.* at 264.

149. *Id.* at 279 (citing United Jewish Orgs. v. Carey, 430 U.S. 144, 179 (1977) (Stewart, J., concurring)). The Court suggested that a law which has uneven effects upon particular groups within a class does not ordinarily violate the equal protection guarantee of the fourteenth amendment so long as the classification is rationally based. *Id.* at 272. According to the Court, it is only when the adverse consequences of a law upon an identifiable group cannot be plausibly explained on a neutral ground that the impact itself indicates a non-neutral classification. *Id.* at 275.

150. *Id.* at 280. The Court observed that there was no evidence that the veterans' preference statute was enacted with the goal of keeping women from advancing within the Massachusetts civil service. *Id.* at 279.

151. *Id.* at 281.

152. *Wayte*, 105 S. Ct. at 1532.

153. *Id.* at 1529.

154. *Id.* at 1532. The Court noted that the government "did not even investigate those who

majority to conclude that the government treated all reported nonregistrants similarly, without subjecting vocal nonregistrants to any special burden. According to the Court, "[T]hose prosecuted in effect selected themselves for prosecution by refusing to register after being reported and warned by the Government."[155]

Some flaws, however, exist in the majority's reasoning. For instance, as Justice Marshall pointed out in his dissent, the Court limited its analysis of discriminatory effect to reported nonregistrants:

> The claim here is not that the Justice Department discriminated among *known* violators of the draft registration law either in its administration of the "beg" policy, which gave such individuals the option of registering to avoid prosecution, or in prosecuting only some reported nonregistrants. Instead, the claim is that the system by which the Department defined the class of possible prosecutees—the 'passive' enforcement system—was designed to discriminate against those who had exercised their First Amendment rights. . . . If the Government intentionally discriminated in defining the pool of potential prosecutees, it cannot immunize itself from liability merely by showing that it used permissible methods in choosing whom to prosecute from this previously tainted pool.[156]

The majority's reasoning, therefore, is incompatible with the principles set forth in *Yick Wo*.[157] As Justice Marshall observed, in *Yick Wo* the Court properly focused on the prior official action of discriminatory denial of licenses to individuals of Chinese origin that affected the definition of the class from which prosecutees were chosen.[158] Marshall argued that "the referrals [in *Wayte*] made by Selective Service to the Justice Department for investigation and possible prosecution played a similar role and may also have been discriminatory."[159] Thus, the Supreme Court in *Wayte* departs from *Yick Wo* by focusing only on the prosecutions themselves instead of the alleged prior discrimination in identifying the pool of draft registration violators.

Another inconsistency in the majority's analysis is the assertion that the prosecution pool consisted of all reported nonregistrants, not just "vocal" nonregistrants.[160] Under the passive enforcement policy, the government only prosecuted those who had reported themselves or who had been reported by

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wrote letters to Selective Service criticizing registration unless their letters stated affirmatively that they had refused to comply with the law." *Id.*

155. *Id.*

156. *Id.* at 1542-43 (Marshall, J., dissenting) (citing Connecticut v. Teal, 457 U.S. 440, 450-51 (1982)).

157. 118 U.S. 356 (1886) (reversing convictions under a municipal ordinance that prohibited the construction of wooden laundries without a license because municipal licensors discriminatorily denied licenses to individuals of Chinese origin). For a discussion of *Yick Wo*, see *supra* notes 72-75 and accompanying text.

158. *Wayte*, 105 S. Ct. at 1543 (Marshall, J., dissenting).

159. *Id.* (Marshall, J., dissenting). According to the dissent, "If the Court [in *Yick Wo*] had focused only on the prosecutions themselves, as it does now, it would have found no discrimination in the choice, among violators of the ordinance, of the individuals to be prosecuted. Indeed, all but one of these violators were of Chinese origin." *Id.*

160. *Id.* at 1532 n.10.

others.[161] Obviously, those who notified the Selective Service of their resistance were vocal opponents. Likewise, a third party informant was only likely to be aware of an individual's nonregistration if he had spoken about it.[162] Finally, Wayte demonstrated that out of over 674,000 men who had failed to register, 286 of which were known to the Selective Service as of July 1981, the thirteen indicted were all vocal nonregistrants.[163] Based on these facts, it is difficult to conceive how the Supreme Court could find that the passive enforcement policy did not have the inevitable effect of selecting for prosecution only those individuals who had expressed their refusal to register.

After discussing the discriminatory effect of passive enforcement, the majority addressed discriminatory motive, the second part of the equal protection analysis. The Court found that Wayte's evidence had demonstrated only that the government was aware that the passive enforcement policy would have an adverse impact on vocal nonregistrants, and not that the government intended such a result.[164] The Court reiterated its holding from *Feeney* that discriminatory intent implies that the challenged action was selected partly because of its adverse effects upon an identifiable group.[165] Absent a showing that the government prosecuted Wayte *because of* his protest activities, the Court concluded that his claim of selective prosecution failed.[166]

This analysis of discriminatory intent by the Court, however, is superficial. In *Washington v. Davis*[167] the Court remarked that "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts."[168] In *Village of Arlington Heights v. Metropolition Housing Development Corp.*[169] the Court outlined objective factors relevant to identifying discriminatory intent.[170] The *Wayte* court failed to consider the totality of the relevant facts and to fully analyze the objective factors indicating the government's discriminatory motive. Although the Court noted that Wayte had demonstrated that all thirteen nonregistrants indicted were vocal resisters of the draft and that the government was aware of the consequences of its passive enforcement policy,[171] it held that Wayte had failed to prove discriminatory motive. The majority did not address additional factors that tended to establish an impermissible motive. For exam-

161. *Id.* at 1528.

162. *See* Note, *supra* note 6, at 167.

163. *Wayte*, 105 S. Ct. at 1529 & n.3.

164. *Id.* at 1532.

165. *Id.* (citing *Feeney*, 442 U.S. 256 (1979)).

166. *Id.*

167. 426 U.S. 229 (1976).

168. *Id.* at 242.

169. 429 U.S. 252 (1977).

170. *See supra* text accompanying note 145.

171. A memorandum by Assistant Attorney General Lowell Jensen conceded that the first prosecutions were likely to consist largely of persons who publicly refused to register, which would raise " 'thorny selective prosecution claims.' " Brief for Petitioner at 5 n.9. In another memorandum David Kline, Senior Legal Advisor in the United States Department of Justice, reflected, " 'Indeed, with the present universe of hundreds of thousands of non-registrants, the chances that a quiet non-registrant will be prosecuted is probably about the same as the chances that he will be struck by lightning.' " *Id.* at 6 (citing Jt. App. 290-91).

ple, the government's normal prosecutorial policy was not followed. Ordinarily United States Attorneys would ultimately decide which nonregistrants to prosecute, yet the facts indicated that a presidential advisor, Edwin Meese III,[172]; a Presidential Military Task Force; and the White House were heavily involved in these prosecutorial policy decisions.[173]

In addition, the government had adequate opportunity to develop reasonable, alternative methods of enforcement. Between President Carter's reinstatement of registration in July 1980 and the first nonregistration indictment in the summer of 1982, the government had two years to develop a fair random selection system.[174] The government's current implementation of an active enforcement policy using state drivers license records, which presumably were obtainable during the entire period in question, indicates the prior availability of alternative enforcement methods.[175] Although the Selective Service received authority to use social security records in a similar manner in December 1981, it abandoned the effort upon finding that the list of addresses was outdated.[176] Yet, if the Selective Service had matched the data from the correct addresses against the list of persons required to register, it would have identified a far greater pool of draft nonregistrants than it located under the passive enforcement system.[177] As the district court in *Wayte* concluded, "It strains credulity to believe that the investigative agencies of our Government . . . could not locate any non-vocal non-registrants. The inference is strong the Government could have located non-vocal non-registrants, but chose not to."[178]

Wayte did not have to prove that discriminatory intent was the sole purpose behind the passive enforcement policy, although the Supreme Court's ruling leaves that impression. Rather, a showing that the discriminatory purpose was a *motivating factor* is sufficient to shift the burden to the government to disprove purposeful discrimination.[179] Thus, the totality of the facts in *Wayte* were clearly sufficient to cast a reasonable doubt on the government's motive in utilizing the passive enforcement system.

One other confusing aspect of the majority's discussion of discriminatory

172. *See supra* note 20.

173. *See* United States v. Wayte, 549 F. Supp. 1376, 1382 (C.D. Cal. 1982), *rev'd*, 710 F.2d 1385 (9th Cir. 1983), *aff'd*, 105 S. Ct. 1524 (1985).

174. Brief for Petitioner at 11-12.

175. Beginning in 1980 the Selective Service implemented an active enforcement system using Social Security records and state drivers license lists to identify nonregistrants. Suspected violators are notified twice by letter of their duty to register, and if they still do not comply, their names are referred to the Department of Justice for possible prosecution. As of June 1984, more than 160,000 names had been transmitted to the Department of Justice and 599 individuals had been selected for further investigation. At that time all persons subject to the registration requirement had elected to comply with the law pursuant to the government's "beg" policy and no prosecutions had been initiated. Brief for the United States at 10.

176. *Eklund*, 733 F.2d at 1307 (Heaney, J., dissenting).

177. *Id.* (Heaney, J., dissenting).

178. *Wayte*, 549 F. Supp. at 1381.

179. *See* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265-66, 270 n.21 (1977) (proof that discriminatory purpose was a motivating factor shifts burden of proof to other side); Mt. Healthy Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (plaintiff has burden of showing that discriminatory purpose was motivating factor).

effect and purpose is its failure to elaborate more on the prima facie case and discovery issues. In *Castaneda v. Partida*[180] the Supreme Court set forth three criteria for establishing a prima facie case of an equal protection violation in the context of grand jury selection. The party alleging the violation must show that he or she is a member of a recognizable, distinct class, that a disproportionate number of this class was selected for investigation and possible prosecution, and that this selection procedure was subject to abuse or otherwise not neutral.[181] "Once the defendant has shown substantial underrepresentation of his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case."[182]

In *Wayte* the majority disposed of the prima facie case issue in a footnote, assuming that even if Wayte did establish a prima facie case, the "beg" policy would rebut it.[183] The problem with this reasoning, however, was pointed out earlier.[184] The "beg" policy only came into operation after the government had identified its pool of potential prosecutees. If the government intentionally discriminated in defining that initial pool, later application of the "beg" policy would not reverse the impact of that discrimination.

Discovery was another important issue that the Court refused to resolve. The majority reasoned that it need not address whether Wayte was entitled to discovery of government documents because the subject was not raised by Wayte in the petition for certiorari, in the brief on the merits, or at the oral argument.[185] Other considerations, however, suggest the need to address the issue. For example, the grant of certiorari in *Wayte* focused on the conflict in the federal circuits over the defense of selective prosecution.[186] In *United States v. Schmucker*[187] the United States Court of Appeals for the Sixth Circuit held that defendant was entitled to an evidentiary hearing on his claim of selective prosecution. In a similar case, *United States v. Eklund*,[188] the eighth circuit denied defendant's request for an evidentiary hearing. Because the lower courts

180. 430 U.S. 482 (1977). A Texas prisoner filed a habeas corpus petition alleging a denial of due process and equal protection because of gross underrepresentation of Mexican-Americans on the grand jury that had indicted him. *Id.* at 490. The Supreme Court said a showing that the population of the county was 79.1% Mexican-American and that over an 11-year period only 39% of the persons summoned for grand jury service were Mexican-American established a prima facie case of intentional discrimination in grand jury selection, which shifted to the state the burden of proof to dispel the inference. *Id.* at 495-98. When the state failed to rebut the presumption of purposeful discrimination with competent evidence, the Supreme Court affirmed the court of appeals' holding that the grand jury selection process resulted in a denial of equal protection. *Id.* at 501.

181. *Id.* at 494.

182. *Id.* at 495; *see also Davis*, 426 U.S. at 241 (when a prima facie case is established, burden of proof shifts to the state to rebut the presumption of unconstitutional action by showing that permissible neutral selection criteria produced the discriminatory result).

183. *Wayte*, 105 S. Ct. at 1532 n.10.

184. *See supra* notes 156-59 and accompanying text.

185. *Wayte*, 105 S. Ct. at 1530 n.5.

186. *Id.* at 1531. The Court granted certiorari on the question of selective prosecution, "[r]ecognizing both the importance of the question presented and a division in the Circuits." *Id.*

187. 721 F.2d 1046, 1052 (6th Cir. 1983), *vacated*, 105 S. Ct. 1860 (1985). For a discussion of *Schmucker*, see *supra* notes 113-21 and accompanying text.

188. 733 F.2d 1287, 1291 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 1864 (1985). For a discussion of *Eklund*, see *supra* notes 122-31 and accompanying text.

apply similar tests for granting discovery orders and evidentiary hearings, the circuit court division invited the Supreme Court's discussion of the discovery issue in *Wayte*.[189] In addition, the dissent identified the need to address the antecedent discovery question before addressing the merits of the case.[190] If Wayte was entitled to obtain evidence in the government's possession, the Court should not have dismissed his selective prosecution claim on the merits based solely on the evidence in the record. Finally, Justice Marshall noted the following irony: the Court chose to address Wayte's claim that passive enforcement placed a direct burden on the exercise of first amendment rights, although that claim was not presented in Wayte's petition for certiorari or ruled upon by the district court or the court of appeals.[191] The discovery issue was clearly presented in *Wayte*, and the Supreme Court should have dealt with it more fully.

From the majority's equal protection analysis, it appears that a defendant must introduce a virtually direct showing of discriminatory motive to establish a prima facie case of selective prosecution. The impact of such a requirement is to place a formidable burden on those who raise the defense. Because the government is not likely to announce publicly its intent to discriminate and defendants are not generally entitled to discovery until they have made a prima facie case, defendants will rarely succeed in demonstrating that their prosecution was motivated by a discriminatory purpose.[192] Thus, the majority's decision discourages nonfrivolous as well as frivolous selective prosecution claims except in those rare cases in which the government has employed an overtly discriminatory classification.

Although focusing its decision on an equal protection analysis of selective prosecution, the Supreme Court, in an unprecedented action, also addressed the first amendment aspects of the selective prosecution defense in *Wayte*. Infringement of first amendment rights may occur either through a content-based regulation of speech or a content-neutral regulatory measure that incidentally burdens speech.[193] The Court rejected Wayte's claim that the passive enforcement system created a content-based regulatory system and analyzed any indirect burden on speech under *United States v. O'Brien*,[194] by balancing the government's interest in regulation against the adverse impact on freedom of expression.[195]

The Supreme Court struck down content-based regulatory systems in *Co-*

189. *Compare* United States v. Berrios, 501 F.2d 1207, 1211 (2d Cir. 1974) (defendant establishes right to discovery by demonstrating "colorable basis" for selective prosecution claim) *with* United States v. Erne, 576 F.2d 212, 216 (9th Cir. 1978) (defendant entitled to evidentiary hearing on selective prosecution claim after showing the request is not "frivolous").

190. *Wayte*, 105 S. Ct. at 1538-39 n.1 (Marshall, J., dissenting).

191. *Id.* (Marshall, J., dissenting). Marshall noted, "To the extent that the Court discusses [the first amendment] claim on the ground that all of Wayte's constitutional claims are interrelated, it must also discuss the threshold constitutional claim: Whether Wayte made a sufficient showing of a constitutional violation to be entitled to discovery." *Id.* at 1539 (Marshall, J., dissenting).

192. Note, *Passive Enforcement*, *supra* note 24, at 691.

193. Note, *supra* note 6, at 166-67.

194. 391 U.S. 367 (1968). *O'Brien* is discussed *infra* at text accompanying notes 209-13.

195. *Wayte*, 105 S. Ct. at 1532-34.

hen v. California.[196] Cohen was convicted of disturbing the peace for wearing a jacket bearing the words "Fuck the Draft" in the corridor of a Los Angeles courthouse.[197] The Court reasoned that the conviction rested solely upon the offensiveness of the words Cohen used to express himself and not upon any separately identifiable conduct that could be regulated without effectively repressing Cohen's ability to express himself. According to the Court, the state lacked the power to punish Cohen for the underlying content conveyed by the inscription, "so long as there was no showing of an intent to incite disobedience to or disruption of the draft."[198] Absent particularized and compelling reasons for its actions, the Supreme Court concluded, "the State may not, consistently with the First and Fourteenth Amendments, make the simple public display here involved of this single four-letter expletive a criminal offense."[199]

Wayte attempted to analogize his case to *Cohen*, asserting that his letter to the Selective Service was political protest protected under the first amendment.[200] Even though his letters contained confessions of a crime, Wayte argued that this fact did not absolve his vocal protest of its fundamental character as constitutionally protected speech.[201] He relied on Justice Harlan's comment in *Cohen*:

> "[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be the more important element of the overall message sought to be communicated."[202]

The passive enforcement system, according to Wayte, was not activated by violation of the draft law or even by first amendment activity in general, but rather was aroused only by first amendment activity conveying a particular political message, *i.e.*, "I refuse to comply with the registration requirements."[203] Thus, he concluded that passive enforcement "inevitably created a content-based regulatory system with a concomitantly disparate, content-based impact on

196. 403 U.S. 15 (1971).

197. *Id.* at 16.

198. *Id.* at 18. The Court emphasized that " '[o]ne of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation.' " *Id.* at 26 (quoting Baumgartner v. United States, 322 U.S. 665, 673-74 (1944)). According to the Court, "such freedom will ultimately produce a more capable citizenry and more perfect polity . . . [without compromising] the premise of individual dignity and choice upon which our political system rests." *Id.* at 24. Thus, " 'so long as the means are peaceful, the communication need not meet standards of acceptability.' " *Id.* at 25 (quoting Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).

199. *Id.* at 26.

200. Brief for Petitioner at 17-22.

201. *Id.* at 21.

202. *Id.* (quoting *Cohen*, 403 U.S. at 26).

203. *Id.* at 23. Wayte pointed out that in several instances the passive enforcement policy designated for investigation and possible prosecution persons not required to register who had written to the Service expressing their refusal to register, including an 80 year-old retired minister and several women. Nonregistrants who did not write such letters, Wayte argued, were ignored. *Id.*

nonregistrants."[204]

The Supreme Court properly rejected the analysis of passive enforcement as an impermissible content-based regulation of speech. Although the passive policy was content-based in the sense that the government only investigated those who wrote letters to the Selective Service stating affirmatively that they had refused to comply with the law, an uncoerced and unsolicited confession of a crime cannot be characterized as protected speech under the first amendment. As the Supreme Court concluded, "Such a view would allow any criminal to obtain immunity from prosecution simply by reporting himself and claiming that he did so in order to 'protest' the law. The First Amendment confers no such immunity from prosecution."[205]

In addition, from a practical viewpoint passive enforcement did not constitute a content-based regulatory system, and therefore it can be distinguished from the state conduct challenged in *Cohen*. In *Cohen* the only conduct the state sought to punish was communication of the offensive words that defendant used to convey his message to the public.[206] In contrast the government in *Wayte* did not even investigate those who wrote letters to the Selective Service criticizing registration unless their letters stated affirmatively that they had refused to comply with the law.[207] "Enforcement did not depend upon the substance of any protest against registration, the grounds of the objection, or the political viewpoint expressed. . . . Nonregistrants were thus prosecuted based solely on their 'status' as confessors rather than 'their views.' "[208] Based on these considerations, the passive enforcement system was content neutral.

Passive enforcement was also challenged in *Wayte* as an impermissible indirect restriction of speech. By prosecuting only those whose statements against draft registration included a confession, the government may have produced a chilling effect on the normal exercise of protected political protest not in the nature of a confession. The threat of inhibiting constitutionally protected speech along with outright confessions cannot be ignored.

The Supreme Court addressed content-neutral regulations that have an indirect restriction on speech in *United States v. O'Brien*[209] and *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*.[210] In *O'Brien* defendant was convicted for burning his draft registration certificate before a sizable crowd to influence others to adopt his antiwar beliefs.[211] On appeal O'Brien argued that the statute under which he was convicted was unconstitutional because his act of burning his registration certificate was "symbolic speech" protected by the

204. *Id.*

205. *Wayte*, 105 S. Ct. at 1534.

206. *Cohen*, 403 U.S. at 18.

207. Brief for the United States at 47, *Wayte*.

208. *Id.*

209. 391 U.S. 367 (1968).

210. 460 U.S. 575 (1983).

211. *O'Brien*, 391 U.S. at 369. O'Brien was indicted and convicted for willfully and knowingly mutilating and destroying his registration certificate in violation of 50 U.S.C. app. § 462(b) (1965). *O'Brien*, 391 U.S. at 370.

first amendment. The Supreme Court responded that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[212] The Court applied a balancing test to evaluate infringements upon O'Brien's first amendment rights against the government's interests in preventing destruction of draft certificates. Because of the government's substantial interest in continued issuance of draft certificates and the narrowness of the statute punishing knowing destruction or mutilation of such certificates, the Court concluded that there was a sufficient governmental interest to justify O'Brien's conviction.[213]

The Supreme Court again applied a balancing approach in *Minneapolis Star*. The Minnesota legislature had passed a statute that imposed a "use tax" on the cost of paper and ink products above $100,000 consumed in the production of publications.[214] The statute did not on its face restrict speech, nor did the Court find a legislative intent to do so.[215] In ascertaining any indirect burden on speech, the Court asserted that "the appropriate method of analysis . . . is to balance the burden implicit in singling out the press against the interest asserted by the state."[216] The Court found that in allowing the state to single out the press for a different method of taxation, a possible effect would be the creation of a censor to check critical comments by the press. Although the state attempted to justify the statute as a means of obtaining revenue, the Court concluded, "Standing alone, however, [revenue raising] cannot justify the special treatment of the press, for an alternative means of achieving the same interest without raising concerns under the First Amendment is clearly available: the State could raise the revenue by taxing businesses generally . . . ."[217] Because Minnesota offered no satisfactory justification for placing a use tax on ink and paper, the Court invalidated the statute on first amendment grounds.[218]

In determining whether the passive enforcement system placed an indirect restriction on speech, the Supreme Court analogized *Wayte* to *O'Brien*.[219] Applying a balancing test to weigh the justifications for the passive enforcement policy against the burdens on the exercise of first amendment rights, the majority held that the passive enforcement policy was justified because it furthered important governmental interests unrelated to the suppression of free expression. The policy helped encourage prosecutorial and cost efficiency, ensure convictions only of willful violators, and promote general deterrence. It also placed

212. *Id.* at 376.

213. *Id.* at 382.

214. *Minneapolis Star*, 460 U.S. at 578.

215. *Id.* at 592.

216. *Id.* at 586 n.7. The Court noted, "Under a long line of precedents, the regulation can survive only if the governmental interest outweighs the burden and cannot be achieved by means that do not infringe First Amendment rights as significantly." *Id.* (citing United States v. Lee, 455 U.S. 252, 257-58 (1982); *O'Brien*, 391 U.S. at 376-77; and NAACP v. Alabama, 357 U.S. 449 (1958)).

217. *Id.* at 586.

218. *Id.* at 592-93.

219. *Wayte*, 105 S. Ct. at 1533-34.

no greater limitation on speech than necessary to ensure registration for the national defense. Because passive enforcement was only an interim solution designed to carry out the government's compelling interest while an active enforcement program was being developed, the Court concluded there was no first amendment violation.[220]

In applying its balancing test, however, the Supreme Court failed to consider the burdens of the passive enforcement policy. By prosecuting only vocal resisters of draft registration who had confessed, the government may have inhibited the expression of otherwise protected political protest. Thus, even without actually imposing an extra burden on nonconfessing vocal draft opponents, the government could achieve chilling effects, for " '[t]he threat of sanctions may deter [the] exercise of [first amendment] rights almost as potently as the actual application of sanctions.' "[221]

In addition the government's justifications for the passive enforcement policy were not persuasive. First, cost savings alone fail to justify the potential infringement of first amendment rights.[222] The fact that the Selective Service has since successfully adopted an active enforcement program demonstrates that the costs are not prohibitive.[223] Second, the passive enforcement policy was not the sole means of identifying willful nonregistrants; the "beg" policy could have accomplished the same result whether a defendant was initially singled out by an active or a passive system. Third, prosecution of vocal nonregistrants did not necessarily promote general deterrence because nonregistrants could correctly assume that they could continue to ignore the law with impunity so long as they remained silent. A much greater deterrent effect could have been achieved by drawing media attention to the prosecution of a quiet nonregistrant.[224] Finally, although the Court concluded that passive enforcement was the only effective interim solution available to carry out the government's compelling interest, there was no evidence to suggest that the Selective Service was denied access to state driver's license records at any time as a means of implementing an active enforcement system.[225] Considering the potential chill on first amendment rights and the less restrictive prosecutorial policies that were available, the Supreme Court erred in upholding the constitutionality of the passive enforcement system.

The *Wayte* decision is significant because it was the first time the Supreme Court considered first amendment aspects of the defense of selective prosecution. Unlike the equal protection clause, first amendment violations require no proof of an impermissible motive. As the Court stated in *Minneapolis Star*, illicit intent "is not the *sine qua non* of a violation of the First Amendment. . . . [E]ven regulations aimed at proper governmental concerns can restrict unduly the exer-

220. *See supra* notes 57-60 and accompanying text.

221. *Minneapolis Star*, 460 U.S.. at 588 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

222. *See supra* text accompanying note 217.

223. *See supra* note 175.

224. Note, *supra* note 6, at 174.

225. *See supra* notes 174-78 and accompanying text.

cise of rights protected by the First Amendment."[226] Thus, the Supreme Court in *Wayte* leaves open the possibility that where there is a valid first amendment issue involved in a selective prosecution claim, a defendant may be able to circumvent the harsh motive requirement of the equal protection analysis.

In *Police Department v. Mosley*,[227] for example, defendant challenged on first amendment and equal protection grounds a city ordinance prohibiting all picketing within 150 feet of a public school except labor picketing. Finding the "equal protection claim . . . closely intertwined with First Amendment interests,"[228] the Court nevertheless concluded that this content-based discrimination violated the equal protection clause without reference to discriminatory motive.[229] Although *Mosley* involved content-based discrimination, the Court has not prohibited extension of its holding to content-neutral regulations having a speech-based disparate impact.

Accepting the majority's holding that defenses of selective prosecution should be judged according to ordinary equal protection standards, cases[230] and commentaries[231] suggest a variation on the two-prong *Berrios* test[232] that would ease the formidable burden on defendants of establishing almost direct proof of impermissible prosecutorial motive. Defendants would still have to show a discriminatory effect, the first prong of the equal protection analysis. This could be proved by demonstrating that government officials have enforced a law against only a minority of the violators that could reasonably be identified or that the group prosecuted is unrepresentative of the total group of violators in characteristics irrelevant to valid law enforcement purposes. Once the defendant establishes such a discriminatory effect, a presumption of improper prosecutorial motive arises, the second prong of the equal protection analysis. The burden then shifts to the government to rebut the inference of selective prosecution.[233]

Support for this alternative approach can be found in the context of jury selection cases. In *Castaneda v. Partida*[234] the Supreme Court stated that to establish a prima facie case of discrimination against a particular group in the selection of juries a defendant must show that (1) he or she is a member of a recognizable, distinct class, (2) that a disproportionate number of this class was selected for different treatment from others similarly situated, and (3) that the selection procedure was subject to abuse or not neutral.[235] The Supreme Court concluded, "Once the defendant has shown substantial underrepresentation of

226. *Minneapolis Star*, 460 U.S. at 592.

227. 408 U.S. 92 (1972).

228. *Id.* at 95.

229. *Id.* at 102.

230. *See* United States v. Falk, 479 F.2d 616 (7th Cir. 1973) (en banc); United States v. Steele, 461 F.2d 1148 (9th Cir. 1972); United States v. Crowthers, 456 F.2d 1074 (4th Cir. 1972).

231. *See* Givelber, *supra* note 5, at 106-123; Note, *Passive Enforcement*, *supra* note 24, at 693 & n.169.

232. *See supra* text accompanying note 109.

233. *See* Givelber, *supra* note 5, at 106; Note, *Passive Enforcement*, *supra* note 24, at 693-94 & n.169.

234. 430 U.S. 482 (1977).

235. *Id.* at 494-95.

his group, he has made out a prima facie case of discriminatory purpose, and the burden then shifts to the State to rebut that case."[236] This same equal protection analysis was applied to selective prosecution cases in *United States v. Crowthers*,[237] *United States v. Steele*,[238] and *United States v. Falk*.[239] In each case the court concluded that the defendants had presented sufficient evidence to create a strong presumption of invidious discriminatory motive, thus shifting the burden of proof to the government to rebut the inference of selective prosecution.[240]

The government may fear such a presumption will result in an onslaught of selective prosecution claims interfering with the broad discretion normally accorded prosecutors and thereby impeding effective law enforcement. The assumption is invalid, however, for defendants can only establish a prima facie case of selective prosecution by showing that a disproportionate number of a distinct class have been singled out for prosecution by a non-neutral enforcement policy and that similar offenders with different characteristics could easily have been located. In addition, the government can rebut the inference of impermissible prosecutorial motive by presenting evidence that individuals were selected for investigation and possible prosecution through a neutral and random enforcement policy that identifies a cross-section of individuals throughout the population of known violators.[241]

The equal protection clause does not guarantee equal results to all segments of society in the administration of laws, but rather it is designed to "achieve equality in the administration of the process."[242] Thus, equal protection doctrine does not suggest that all selectivity in law enforcement is unacceptable. For example, the IRS proceeds against vocal protestors, but it also routinely investigates silent offenders.[243] Although expression of protest increases a tax protestor's chances of prosecution somewhat, this is not selective prosecution because silent offenders, when discovered, are just as likely to be prosecuted.[244] Therefore, if the government employs fair procedures in the selection of the population from which violators are chosen for prosecution, the right to nondiscriminatory administration of the laws under the equal protection amendment is satisfied.

In conclusion, a defense of selective prosecution is necessary to protect the principle established in *Yick Wo* in 1886 that even though a law is neutral on its face, if it is applied in a discriminatory manner, "the denial of equal justice is

236. *Id.* at 495.

237. 456 F.2d 1074 (4th Cir. 1972).

238. 461 F.2d 1148 (9th Cir. 1972).

239. 479 F.2d 616 (7th Cir. 1973) (en banc).

240. *See supra* notes 90-105 and accompanying text.

241. *See* Note, *Passive Enforcement*, *supra* note 24, at 694.

242. W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 1.6(h), at 30-31 (1985).

243. Comment, *supra* note 6, at 778-79.

244. *Id*; *see also* United States v. Catlett, 584 F.2d 864 (8th Cir. 1978) (dismissing selective prosecution claim under IRS enforcement policy); United States v. Scott, 521 F.2d 1188 (9th Cir. 1975) (upholding vigorous IRS general enforcement policy).

still within the prohibition of the Constitution."[245] In *Wayte v. United States* the Supreme Court, for the first time, announced that it is appropriate to judge defenses of selective prosecution according to ordinary equal protection standards, requiring the defendant to demonstrate both a discriminatory effect and a discriminatory motive.

From the majority's decision, it appears that the Court will require a defendant to introduce virtually direct evidence of impermissible prosecutorial motive and that it will not permit an inference from the totality of the relevant facts to raise a successful selective prosecution defense. Most defendants will be unable to meet such a formidable standard except where the government has flagrantly discriminated. A better approach would be for courts to shift to the government the burden of disproving an invidious discriminatory motive where a defendant presents a prima facie case of selective prosecution by showing that a disproportionate number of a distinct class have been singled out for prosecution by a non-neutral enforcement policy while other violators were easily ascertainable. Otherwise, selective prosecution, in the vast majority of cases, will remain a defense in theory but not in fact, and the scales of the American judicial system will remain off-balance in the administration of justice for all.

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245. *Yick Wo*, 118 U.S. at 373-74; *see supra* text accompanying note 75.