UNITED STATES REPORTS

VOLUME 366

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1960

OPINIONS AND DECISIONS PER CURIAM
APRIL 24 THROUGH (IN PART) JUNE 5, 1961
ORDERS APRIL 24 THROUGH JUNE 19, 1961

WALTER WYATT
REPORTER OF DECISIONS

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JUSTICES

OF THE

SUPREME COURT

DURING THE TIME OF THESE REPORTS.

EARL WARREN, Chief Justice.
HUGO L. BLACK, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.
POTTER STEWART, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
HAROLD H. BURTON, Associate Justice.
SHERMAN MINTON, Associate Justice.

ROBERT F. KENNEDY, Attorney General.
ARCHIBALD COX, Solicitor General.
JAMES R. BROWNING, Clerk.
WALTER WYATT, Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

SUPREME COURT OF THE UNITED STATES.

Allotment of Justices.

It is ordered that the following allotment be made of the Chief Justice and Associate Justices of this Court among the circuits, pursuant to Title 28, United States Code, Section 42, and that such allotment be entered of record, viz:

For the District of Columbia Circuit, Earl Warren, Chief Justice.

For the First Circuit, Felix Frankfurter, Associate Justice.

For the Second Circuit, John M. Harlan, Associate Justice.

For the Third Circuit, William J. Brennan, Jr., Associate Justice.

For the Fourth Circuit, Earl Warren, Chief Justice.

For the Fifth Circuit, Hugo L. Black, Associate Justice.

For the Sixth Circuit, Potter Stewart, Associate Justice.

For the Seventh Circuit, Tom C. Clark, Associate Justice.

For the Eighth Circuit, Charles E. Whittaker, Associate Justice.

For the Ninth Circuit, William O. Douglas, Associate Justice.

For the Tenth Circuit, Charles E. Whittaker, Associate Justice.

October 14, 1958.

(For next previous allotment, see 357 U. S., p. v.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1960.

STEWART *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 143. Argued February 21, 1961.—Decided April 24, 1961.

Petitioner was tried three times in a federal court for murder. At the first two trials, he did not testify in his own defense; but he did so at the third trial, at which the main issue was whether or not he was insane when the offense was committed. On cross-examination, the prosecutor alluded to the two earlier trials and asked, "This is the first time you have gone on the stand, isn't it, Willie?" Petitioner's counsel moved for a mistrial on the ground that it was prejudicial to inform the jury of petitioner's failure to take the stand in his previous trials. The motion was denied, and petitioner was convicted. *Held:* The question was prejudicial; the error was not harmless; a mistrial should have been granted; and the judgment affirming the conviction is reversed. Pp. 2–10.

107 U. S. App. D. C. 159, 275 F. 2d 617, reversed.

Edward L. Carey argued the cause for petitioner. With him on the brief were *Robert L. Ackerly* and *Walter E. Gillcrist.*

Carl W. Belcher argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Wilkey, Wayne G. Barnett, Beatrice Rosenberg* and *Jerome M. Feit.*

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MR. JUSTICE BLACK delivered the opinion of the Court.

The Fifth Amendment to the United States Constitution provides in unequivocal terms that no person may "be compelled in any criminal case to be a witness against himself." To protect this right Congress has declared that the failure of a defendant to testify in his own defense "shall not create any presumption against him." [1] Ordinarily, the effectuation of this protection is a relatively simple matter—if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted.[2] But where for any reason it becomes necessary to try a particular charge more than one time, a more complicated problem may be presented. For a defendant may choose to remain silent at his first trial and then decide to take the stand at a subsequent trial. When this occurs, questions arise as to the propriety of comment or argument in the second trial based upon the defendant's failure to take the stand at his previous trial. This case turns upon such a question.

Petitioner has been tried three times in the District Court for the District of Columbia upon an indictment charging that he had committed first-degree murder under a felony-murder statute.[3] In all three trials, petitioner's

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[1] "In trial of all persons charged with the commission of offenses against the United States and in all proceedings in courts martial and courts of inquiry in any State, District, Possession or Territory, the person charged shall, at his own request, be a competent witness. His failure to make such request shall not create any presumption against him." 62 Stat. 833, 18 U. S. C. § 3481.

[2] *Wilson* v. *United States,* 149 U. S. 60.

[3] "Whoever, *being of sound memory and discretion,* kills another purposely, either of deliberate and premeditated malice or by means of poison, or in perpetrating or attempting to perpetrate any offense punishable by imprisonment in the penitentiary, or without purpose so to do kills another in perpetrating or in attempting to perpetrate any arson, as defined in section 22–401 or 22–402 of this Code, rape,

chief defense has been insanity but, on each occasion, the jury has rejected this defense and returned a verdict of guilty upon which the District of Columbia's mandatory death sentence has been imposed.[4] After the first two trials, in which petitioner did not testify, the convictions and death sentences were set aside on the basis of trial errors that the Court of Appeals found had prevented a proper consideration of the case by the jury.[5] At the third trial, in an apparent effort to bolster the contention of insanity, petitioner was placed upon the stand and asked a number of questions by defense counsel—a maneuver obviously made for the purpose of giving the jury an opportunity directly to observe the functioning of petitioner's mental processes in the hope that such an exhibition would persuade them that his memory and mental comprehension were defective. Petitioner's responses to these questions were aptly described by the court below as "gibberish without meaning." [6]

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mayhem, robbery, or kidnapping, or in perpetrating or in attempting to perpetrate any housebreaking while armed with or using a dangerous weapon, is guilty of murder in the first degree." District of Columbia Code § 22–2401. (Emphasis supplied.)

[4] Section 22–2404 of the District of Columbia Code provides: "The punishment of murder in the first degree shall be death by electrocution."

[5] The first conviction was set aside because of erroneous instructions on the defense of insanity. 94 U. S. App. D. C. 293, 214 F. 2d 879. The second conviction was set aside because of improper argument by the prosecutor. 101 U. S. App. D. C. 51, 247 F. 2d 42.

[6] 107 U. S. App. D. C. 159, 160, 275 F. 2d 617, 618. The following excerpt from petitioner's testimony is entirely typical:

"Q. Who is your lawyer?

"A. Well, I mean, I am my own lawyer, as far as my concern.

"Q. Have I been representing you here the last couple days?

"A. As far as I am concerned, you all look the same to me.

"Q. Do you know what is going on in this courtroom the last couple days? [*Footnote 6 continued on p. 4.*]

Upon cross-examination, the prosecutor attempted without noticeable success to demonstrate that these irrational answers were given by petitioner in furtherance of his plan to feign a mental weakness that did not exist. To this end, the prosecutor asked petitioner a number of questions about statements petitioner had allegedly made subsequent to his arrest, apparently in the hope that one of these questions would surprise petitioner and provoke a sensible response. When petitioner continued to talk in the same manner that he had used upon direct examination, the prosecutor concluded his cross-examination with the following remarks in the form of questions: "Willie, you were tried on two other occasions." And, "This is the first time you have gone on the stand, isn't it, Willie?" [7]

The defense moved immediately for a mistrial on the ground that it was highly prejudicial for the prosecutor to inform the jury of the defendant's failure to take the stand in his previous trials. The prosecutor defended his actions on the ground that this "is a fact that the Jury is entitled to know." The trial judge agreed with the prosecutor, denied the motion for a mistrial, and the trial proceeded, culminating in the third verdict of guilty and death sentence. On appeal, the case was heard by

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"A. I ain't asked about what is going on. It is up to you go on and describe yourself. I mean, don't ask me. As far as I am just sitting here.

"Q. Did you ever hear the name Harry Honigman [the man with whose murder petitioner was charged] before?

"A. I haven't.

"Q. Do you know you are charged with first degree murder?

"A. As far as I am concerned, I ain't charged with nothing.

"Q. What is first degree murder; do you know?

"A. I don't know."

[7] The record reveals the following exchange at the conclusion of the cross-examination of petitioner by the prosecutor, a Mr. Smithson:

"Q. Willie, you were tried on two other occasions.

all nine members of the Court of Appeals sitting *en banc* and was affirmed by a 5–4 vote [8]—the majority concluding that the issue was controlled by the decision of this Court in *Raffel* v. *United States,*[9] and the minority concluding that the issue was controlled by our decision in *Grunewald* v. *United States.*[10] We granted certiorari to consider whether it was error for the trial court to deny the motion for a mistrial under the circumstances.[11]

In this Court, the Government concedes that the question put to the defendant about his prior failures to testify cannot be justified under *Raffel, Grunewald,* or any other of this Court's prior decisions. This concession, which we accept as proper, rests upon the Government's recognition of the fact that in no case has this Court intimated that there is such a basic inconsistency between silence at one trial and taking the stand at a subsequent trial that the fact of prior silence can be used to impeach any testimony which a defendant elects to give at a later trial. The *Raffel* case, relied upon by the majority below, involved a situation in which Raffel had sat silent at his first trial in the face of testimony by a government agent

"A. Well, I don't care how many occasions, how many case—you say case. I was a case man once in a time.

"Q. This is the first time you have gone on the stand, isn't it, Willie?

"A. What?

"Q. This is the first time you have gone on the stand, isn't it, Willie?

"A. I am always the stand; I am everything, I done told you.

"Mr. Smithson: That is all."

[8] 107 U. S. App. D. C. 159, 275 F. 2d 617.

[9] 271 U. S. 494.

[10] 353 U. S. 391.

[11] 363 U. S. 818. The petition for certiorari also raised objections based upon other alleged errors during the course of the trial. In view of our disposition of the primary issue and because the actions complained of may not arise at any subsequent trial, we find it unnecessary to pass upon these other objections.

that Raffel had previously made admissions pointing to his guilt. On a second trial, Raffel took the stand and denied the truth of this same testimony offered by the same witness. Under these circumstances, this Court held that Raffel's silence at the first trial could be shown in order to discredit his testimony at the second trial on the theory that the silence itself constituted an admission as to the truth of the agent's testimony. The result was that Raffel's silence at the first trial was held properly admitted to impeach the specific testimony he offered at the second trial. Here, on the other hand, the defendant's entire "testimony" comprised nothing more than "gibberish without meaning" with the result that there was no specific testimony to impeach. Any attempt to impeach this defendant as a witness could therefore have related only to his demeanor on the stand, and, indeed, the majority below expressly rested its conclusion upon the view that the prosecution had the right under *Raffel* to test the genuineness of this sort of "demeanor-evidence" by questions as to why it was not offered at previous trials.[12] But if *Raffel* could properly be read as standing for this proposition, such questions would be permissible in every instance, for whenever a witness takes the stand, he necessarily puts the genuineness of his demeanor into issue.[13] The Government quite properly concedes that

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[12] Thus, the majority reasoned: "The logical and permissible first step under Raffel v. United States, supra, was to have him say whether he had previously testified in order to lay the groundwork for developing an inconsistency inherent in the difference in his 'demeanor-evidence' in the two trials." 107 U. S. App. D. C. 159, 167, 275 F. 2d 617, 625.

[13] This is so because the defendant's credibility is in issue whenever he testifies. If the failure to testify at a previous trial were to amount to evidence that testimony at a subsequent trial was feigned or perjurious, the fact of failure to testify would always be admissible.

this cannot be the law since it would conflict with the precise holding of this Court in the *Grunewald* case.[14]

Despite this concession, however, the Government persists in the contention that petitioner's conviction should be upheld, arguing that the error committed was harmless and could not have affected the jury's verdict. This argument is rested upon three grounds: first, that the jury may not even have heard the improper question; secondly, that even if the jury did hear the question, it may not have inferred that petitioner in fact did not testify at his previous trial; and, finally, that even if the jury did infer that petitioner did not testify previously, no inference adverse to petitioner would have been drawn from this fact. The first two of these grounds can be quickly disposed of. We can think of no justification for ignoring the part of a record showing error on a mere conjecture that the jury might not have heard the testimony that part of the record represents. Nor do we believe it reasonable to argue that the jury trying this case would not have inferred that this defendant had failed to testify in his prior trials when the prosecutor asked, "This is the first time you have gone on the stand, isn't it, Willie?" Indeed, the recognition that such an inference will in all likelihood be drawn from leading questions of this kind lies at the root of the long-established rule that such questions may not properly be put unless the inference, if drawn, would be factually true.[15] Thus, the Government's argument that

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[14] The holding in *Grunewald* was that the defendant's answers to certain questions were not inconsistent with his previous reliance upon the Fifth Amendment to excuse a refusal to answer those very same questions. Since defendant's testimony placed his credibility in issue, the necessary implication of that holding is that his prior refusal to testify could not be used to impeach his general credibility.

[15] III Wigmore, Evidence (3d ed.), § 780. Wigmore quotes Chitty, Practice of the Law, 2d ed., III, 901, for the proposition: "It is an

the error was harmless must stand or fall upon the third ground it urges—that the jury's awareness of petitioner's failure to take the stand at his previous trials would not have prejudiced the consideration of his case. The disposition of this contention requires the statement of a few more of the relevant facts of the case.

In connection with the defense of insanity, petitioner had introduced evidence of both mental disease and mental defect, as those terms are applied in the relevant law of the District of Columbia.[16] On the mental disease issue, the testimony was that petitioner was suffering from manic depressive psychosis, a disease which the record shows tends to fluctuate considerably in its manifestations from time to time. On the mental defect issue, the defense introduced evidence that petitioner had an intelligence level in the moronic class. The case went to the jury on both of these points, the jury being directed to acquit if it found the homicide to have been the product either of mental disease or mental defect.[17] Petitioner's "testimony" thus raised at least two different issues in the minds of the jury: first, whether petitioner was simply

established rule, as regards cross-examination, that a counsel has no right, even in order to detect or catch a witness in a falsity, falsely to assume or pretend that the witness had previously sworn or stated differently to the fact, or that a matter had previously been proved when it had not." This Court has previously recognized that principle. *Berger* v. *United States,* 295 U. S. 78, 84.

[16] The difference between the terms "disease" and "defect" was explained in the charge to the jury in the following manner: "We use 'disease' in the sense of a condition which is considered capable of either improving or deteriorating. We use 'defect' in the sense of a condition which is not considered capable of either improving or deteriorating, and which may be either congenital or the result of injury, or the residual effect of a physical or mental disease."

[17] These instructions stemmed from the test of criminal responsibility that prevails in the District of Columbia under the decision of the Court of Appeals in *Durham* v. *United States,* 94 U. S. App. D. C. 228, 214 F. 2d 862.

feigning this testimony; and, secondly, whether, if not, petitioner's condition at the time of his third trial fairly represented his condition at the time of the act charged in the indictment.[18]

We think it apparent that the jury's awareness of petitioner's failure to testify at his first two trials could have affected its deliberations on either or both of these issues. Thus, the jury might well have thought it likely that petitioner elected to feign this "testimony" out of desperation brought on by his failure to gain acquittal without it in the two previous trials. Similarly, even if the jury believed petitioner's "testimony" was genuine, it might have thought that petitioner's condition was caused by a mental disease and concluded that it is unlikely that a disease that had manifested itself only one out of three times for exhibition at trial was active at the occasion of the homicide. Or, on the same assumption, it might have thought that petitioner's failure to exhibit himself at the previous trials indicated that the condition manifested at this trial was the result of a worsening in his mental condition since those trials and, consequently, also since the commission of the acts charged in the indictment. There may be other ways in which the jury might have used the information improperly given it by the prosecution—we have mentioned more than enough already, however, to satisfy ourselves that the Government's contention that the error was harmless must be rejected.

The Government's final contention is that even if the error was prejudicial the conviction should be allowed

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[18] This second issue arises from the fact that the jury was not here trying the question whether petitioner was mentally competent to stand trial. Under the District of Columbia practice, that question is decided in a separate proceeding. See District of Columbia Code § 24–301.

to stand on the theory that the error was not sufficiently prejudicial to warrant the granting of a mistrial and the defense made no request for cautionary instructions. One answer to this argument is to be found in the Government's own brief. For, in its argument regarding the possibility that the jury may not have been aware of the improper question, the Government stresses the fact that the question was not emphasized by any reference to it in the instructions to the jury. During the course of this argument the Government expressly recognizes that the danger of the situation would have been increased by a cautionary instruction in that such an instruction would have again brought the jury's attention to petitioner's prior failures to testify. Plainly, the defense was under no obligation to take such a risk. The motion for a mistrial was entirely appropriate and, indeed, necessary to protect the interests of petitioner.[19]

We thus conclude that this conviction and sentence against petitioner cannot stand. In doing so, we agree with the point made by the Government in its brief—that it is regrettable when the concurrent findings of 36 jurors are not sufficient finally to terminate a case. But under our system, a man is entitled to the findings of 12 jurors on evidence fairly and properly presented to them. Petitioner may not be deprived of his life until that right is accorded him. That right was denied here by the prosecutor's improper questions.

Reversed.

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[19] *Johnson* v. *United States,* 318 U. S. 189, relied upon by the Government, does not sustain its argument on this point. There the defense made no objection at all, choosing instead to rest its chances upon the verdict of the jury. Petitioner here made no such choice for he has repeatedly pressed his right to a mistrial, in the District Court, in the Court of Appeals, and here.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN and MR. JUSTICE WHITTAKER join, dissenting.

The result which the Court draws from its account of the trial seems not unreasonable. But by force of what the Court does not relate, there is such disparity between its account and the almost nine hundred pages of the trial transcript that, in fairness, the Court's opinion hardly conveys what took place before the jury and what must, therefore, rationally be evaluated in attributing any influence on the jury's verdict to the questions which the Government now concedes were improperly asked. "In reviewing criminal cases, it is particularly important for appellate courts to re-live the whole trial imaginatively and not to extract from episodes in isolation abstract questions of evidence and procedure. To turn a criminal appeal into a quest for error no more promotes the ends of justice than to acquiesce in low standards of criminal prosecution." *Johnson* v. *United States,* 318 U. S. 189, 202 (concurring opinion).

What emerges from the transcript, at the outset, is that Willie Lee Stewart's killing of Harry Honikman was practically never in issue. The testimony of two eyewitnesses who positively identified Stewart as the killer [1] was not seriously challenged. A third witness had examined in Stewart's hands, shortly before the killing, the gun which unimpugned ballistic evidence established fired the lethal shots. The testimony of a fingerprint expert, also unimpugned, linked Stewart to the killing. Nowhere in their opening or closing statements did experienced defense counsel ask the jury to doubt that

[1] Honikman's daughter took the stand and testified at the trial. A transcription of her mother's testimony at a previous trial, corroborating the daughter's account of the killing, was read to the jury.

Stewart was the killer: the whole of the defense was that Stewart was not responsible because insane.

Insanity was not merely, as the Court says, Stewart's chief defense; it was his defense. His lawyer put it aptly: "[The prosecutor] knows as well as I, as anybody in this courtroom, the only defense we have is insanity." [2] Thus, there is not involved in this case the danger that the jury, being told as laymen of the defendant's previous failure to testify in his own behalf, reasoned that if Stewart did not do the acts with which he was charged he would have said so. Here, those acts were not contested. If prejudice is not to be blindly assumed, but to be discovered in the record, it must be discovered by some more subtle train of associations.

Stewart's trial took the major part of six court days: twelve calendar days. The Government's opening case, presenting the testimony of the eyewitnesses, fingerprint and ballistic experts, arresting and investigating officers, etc.—ten witnesses in all [3]—consumed a day and a half. Thereafter, beginning on the second court day and running into the third, the defense put in the testimony of a series of witnesses—Stewart's cousin, landlady, friend, sister, employer, wife, neighbor, sister-in-law—all of whom recounted episodes of Stewart's behavior tending to show his unsoundness of mind.[4] These episodes spanned the period of his life from early childhood until the time of the killing, and they painted what, to say the least, is a bizarre portrait.

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[2] This remark was made at the bench, out of the hearing of the jury.

[3] In addition to the testimony of Mrs. Honikman, that of two other witnesses was read to the jury. The remaining seven appeared at this trial.

[4] Three of these eight witnesses took the stand. In the case of the other five, excerpts from their testimony at prior trials were read.

If the jury believed them, they believed, *inter alia:* (1) that Stewart, as a child, threw all his food on the floor, ran away from school, tore his clothes off, cut them up, roamed the house at night; (2) that Stewart's aunts and brother were of unsound mind, in that they would often sit with saliva running out of their mouths and would never say anything; (3) that Stewart, as an adult, once shot at his wife, and sat on his wife and beat her while she was pregnant; (4) that he once punched a hole in a low ceiling with his fist for no apparent reason and, on another occasion, threw all the food out of his refrigerator and beat the refrigerator door so hard with his fists that he broke it; (5) that he locked his children out of the family's room in cold weather; that he threatened to throw one of his children, while a baby, out of the window and threatened to throw another into a burning stove; that he would have done both if not forcibly prevented; (6) that he insisted on pushing through a boarded front door and jumping in and out of the house at a time when the porch was under repair; that he once jumped out of a window; that he threw his nephew's toy piano out of a window; (7) that he attempted to have sexual relations with his sister-in-law in her husband's presence; (8) that, having been told by his employer that he would get a requested pay raise, he kicked down a brick wall that he had been constructing. Following this testimony, defense counsel read to the jury portions of Stewart's military record, revealing that a medical discharge had been recommended for Stewart after a fight with another soldier, largely on the basis of tests taken at that time which placed Stewart's intelligence in the feeble-minded range.

On the third trial day, the defendant took the stand and was examined and cross-examined briefly. His testimony occupies fifteen pages of the eight-hundred-and-eighty-

five-page trial minutes. Let this sample of it give its quality of meaninglessness:

"Q. What is your wife's name, Willie?

"A. You should ask her that. As far as I am concerned, I don't have no wife. I don't consider I have any; therefore, I can't say what her name is.

"Q. Have you ever been married?

"A. I wouldn't say married.

"Q. What do you mean you wouldn't say married?

"A. Well, as far as I concerned, nobody is married, as far as my way of understanding.

"Q. Do you have any children?

"A. I don't consider—I have none. She say I have some. I don't have none. If she say I have some, I guess I have to leave it to her. As far as my concern, I don't have none and I don't want none.

"Q. Do you know where you are now?

"A. Looking at you, as far as I know.

"Q. What is my name?

"A. I don't know.

"Q. Who is your lawyer?

"A. Well, I mean, I am my own lawyer, as far as my concern."

On his direct examination, Stewart testified that he did not know what kind of a building he was in, that he had never shot nobody but that the white folks told him he was supposed to kill; that he considered himself master, as far as the killing situation; that he was the monkey, the monkey with the tail; that he still remained to see that monkey with the tail; that he had been told to kill—his mind tells him to kill—and he was always going to kill until he conquered; that the good man upstairs say so; that he had talked to God and God told him to conquer everybody, that he was the master; he

hated everbody; counsel shouldn't ask him no more. The brief cross-examination proceeded in the same vein. The prosecutor's questions, designed less to elicit any information from the witness than to call forth some revealingly intelligent response, some sign of memory or understanding, which would show that Stewart's apparently grave mental estrangement was a pose, evoked only wild and unresponsive answers. The cross-examination closed on the following dialogue:

"Q. You can see me, can't you, Willie?

"A. Sure. You can see me, too, can't you? We see one another. I am going to be the master and you ain't going to stop me and nobody else.

"Q. Tell me, Willie, do you know a Dr. Williams?

"A. Dr. Williams?

"Q. Yes, E. Y. Williams.

"A. Why you keep asking me? If I told you once, I told you a hundred time, I am my own doctor. Why you keep asking me the same question over and over again. I told you I am my own doctor.

"Q. Do you know a Deputy Marshal by the name of Ballinger?

"A. I am my own marshal. I am everything. That takes care of the whole question. I am everything. Everything you ask me, I am talking to me, I am it.

"Q. Willie, you were tried on two other occasions.

"A. Well, I don't care how many occasions, how many case—you say case. I was a case man once in a time.

"Q. This is the first time you have gone on the stand, isn't it, Willie?

"A. What?

"Q. This is the first time you have gone on the stand, isn't it, Willie?

"A. I am always the stand; I am everything, I done told you.

"Mr. Smithson [the prosecutor]: That is all.

"The Witness: You and nobody else going ever stop me.

"The Court: Mr. Carey [defense counsel], anything further?

"Mr. Carey: That is all."

Defense counsel immediately moved for a mistrial, which was denied. The defense then qualified Dr. E. Y. Williams, a psychiatrist, as an expert witness. Responsive to hypothetical questions predicated upon Stewart's army record, the various instances of odd behavior testified to by the previous lay witnesses, and the circumstances of Honikman's killing, Dr. Williams gave his professional opinion that Stewart was, at the time of the killing, suffering from both a mental defect and a mental disease. He explained in detail the psychiatric significance of Stewart's intelligence quotient of sixty-five, a rating which, he told the jury, would characterize Stewart as a moron. He further typified Stewart's mental disease as manic-depressive psychosis and, by the use of a blackboard, diagrammed and described the cyclic character of that disease. He testified that his own examination of the defendant in 1953 had yielded insufficient personal history to base a diagnosis, but that he had examined Stewart on several occasions since that time and found nothing which would change his opinion that Stewart was a manic-depressive psychotic. Dr. Williams was cross-examined at length on the afternoon of the third and the morning of the fourth days of the trial.

The remaining three trial days were taken up, in large part, by the testimony of seven government witnesses put forward to rebut Stewart's defense of insanity. Two psychiatric experts testified that they had examined

Stewart shortly after the killing in 1953 and found no mental defect or disease. A neighbor and friend of Stewart's who had known him for six years and seen him regularly during at least three years preceding 1953 testified that, on the basis of Stewart's conduct in his presence, he believed that Stewart was normal. An attendant at Saint Elizabeths Hospital, where Stewart had been committed during late 1957 and early 1958, described Stewart's behavior there as that of a model patient who had caused no specific trouble, gotten along with others, played cards and checkers, been seen with a Bible, etc. A police lieutenant at the District of Columbia jail similarly related Stewart's activities at the jail over the four years between the killing and the present trial. Through this witness there were put in evidence as exhibits portions of the jail file tending to show that Stewart had signed certain forms, made certain written requests, and sent numerous letters to his wife and sister-in-law. A third psychiatric expert, who had examined Stewart early in 1958, testified that he found no evidence of mental disease and did not regard Stewart as a mental defective. A fourth testified, on the basis of two examinations made in 1958, that the defendant was not a manic-depressive psychotic. Both of these psychiatrists agreed that Stewart was malingering at the time of their examinations.

It is unnecessary to describe in greater detail here the testimony of these seven government witnesses. All were cross-examined, two of the experts at considerable length. On the sixth trial day, counsel for the Government and for the defense addressed the jury. Neither in these exhaustive closing statements nor in the court's extended charge was any reference made to the two questions, asked several days before and, in effect, unanswered, which are now assigned as prejudicial error. The jury retired, deliberated, and found the defendant guilty.

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On the totality of this record, with solicitous regard for the heavy obligation which rests upon us in a capital case, I cannot but conclude that the prosecutor's questions concerning Stewart's prior failures to testify are of that class of errors "which do not affect the substantial rights of the parties," and which, therefore, this Court, by virtue of an Act of Congress, is under duty to disregard. 40 Stat. 1181 (1919), in its present form 63 Stat. 105, 28 U. S. C. § 2111. This is so in light of a number of considerations, none of which viewed in isolation might be determinative, but whose sum—in the whole context of the trial—convinces me that the Court's conjectures of prejudice are chimerical.

First, Stewart never intelligibly answered the questions. The jury was not told and did not know as a fact that he had not previously taken the stand. The Court now finds that the jury may nevertheless have inferred the information from the leading form of the prosecutor's questions. But this conclusion should not be reached merely on the basis of the broad generalization that "such an inference will in all likelihood be drawn from leading questions of this kind." Such an abstraction does not get us to the heart of the question before us. That question, in one aspect, is whether it is likely that *this* jury in the circumstances of *this* case drew the inference from *this* leading question. It is not only not likely, but overwhelmingly unlikely.

The question was not pressed or persisted in by the prosecutor so as to concentrate the jury's attention on it as an assertion of fact. It was once repeated—when Stewart asked "What?"—and then dropped. It was asked in a setting in which it is not to be assumed, because most improbable, that the jury took in and paid heed to the content of the prosecutor's questions as such, particularly the one now so inflated in importance. On the

stand was a witness who had just testified that he was the master and the monkey with the tail and that he had been told by God to conquer and kill. His responses appeared raving and incoherent. The only significance of his testimony, of course, was his demeanor, and it was upon the manner and character of his responses, not upon the subjects inquired into, that the jury can plausibly be supposed to have focused. The offending question followed a series of others—"You can see me, can't you, Willie?" ". . . Willie, do you know a Dr. Williams?" "Do you know a Deputy Marshal by the name of Ballinger?"—which had absolutely no significance of content, except insofar as they prodded the witness to respond. There is no reason to think that the jury could have regarded the questions concerning previous failure to testify any differently, or attributed special significance to them. In any event, assuming that the jury *were* given to pondering subtle inferences in the face of this manifest madman, they could have learned no more from the prosecutor's questions than what Stewart's own counsel had already elicited. The jury knew that this defendant had been tried before because testimony from prior trials had been read to them. Yet defense counsel asked Stewart on direct examination: "Have you ever taken an oath?" and Stewart answered: "Not that I knows of."

Even had the jurors not been absorbed by the eye-catching spectacle of Stewart on the stand, and even had the unanswered questions been answered, the inference attributed to the jury by the Court would hardly have been a probable one. For the prejudice which the Court conceives does not arise from the simple knowledge that Stewart had not previously testified. It arises only upon the supposition that the jury indulged conjectures concerning the reasons for his not testifying, and upon the

further supposition that, in the course of those conjectures, it rejected alternatives favorable to the defense—for example, that Stewart, being insane, capriciously refused to go on the stand—and fixed on the explanation that Stewart was sane at the time of the earlier trials. Perhaps, were there nothing else in this case, this chain of suppositions might be entertainable. But the weakness of its links is one more factor making it implausible to find prejudice here.

Finally, these two concededly impermissible questions—more accurately, a single question once repeated at the witness' request—must be viewed in the perspective of the proceedings as a whole. Asked and left unanswered on the third day of a six-day trial at which eighteen witnesses testified and the testimony of eight more was read to the jury, the questions were never again adverted to. They had been preceded by a series of what the jury cannot but have found startling accounts of Stewart's behavior, were contemporaneous with a glaring display of the symptoms of madness, and were followed by a two-day battle of expert witnesses—one accoutered with blackboard and chalk—all addressed to the question of Stewart's sanity. It weaves solidities out of gossamer assumptions to attribute to fleeting and argumentative implications of fact in a leading question an impact so ponderous as to discredit and reverse a jury's verdict in the context of a record that impressively carries the contrary meaning. The jury was not left to pick at such threads in order to weave the cords of its verdict. On both sides—by both the prosecution and the defense—strong, heavy cables were furnished it. To suppose that, even if noticed when asked and made the occasion of implausible deductions, these questions amounted to more than a whisper drowned in the compulsion of ear-resounding testimony, seems to me a striking example of pursuing a quest for error.

More than a half-century ago, William H. Taft, reflecting his wide experience even before he became Chief Justice, laid this charge at the door of the courts:

> ". . . The . . . disposition on the part of the courts to think that every provision of every rule of law in favor of the defendant is one to be strictly enforced, and even widened in its effect in the interest of the liberty of the citizen, has led courts of appeal to a degree of refinement in upholding technicalities in favor of defendants, and in reversing convictions that render one who has had practical knowledge of the trial of criminal cases most impatient.
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> ". . . When a court of highest authority in this country thus interposes a bare technicality between a defendant and his just conviction, it is not too much to charge some of the laxity in our administration of the criminal law to a proneness on the part of courts of last resort to find error and to reverse judgments of conviction." [5]

I am convinced that today's decision falls within these weighty strictures. To explain the jury's rejection of Stewart's sole defense of insanity, with its consequent finding of guilt, on the ground, as a matter of assumption, that the jury was influenced by the two questions on which the verdict is reversed here, is to show less respect for the jury system than do the opponents of the system.[6] One does not have to accept all the encomia which opinions of this Court have showered on the jury's functions and values, not to attribute fecklessness to the twelve men and women chosen to sit in this murder case. To make

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[5] Taft, The Administration of Criminal Law, 15 Yale L. J. 1, 15 (1905).

[6] See, *e. g.*, Frank, Courts on Trial (1949), cc. VIII, IX.

such attribution is to be unconsciously betrayed, as sophisticates sometimes are, into a depreciation of the capacities of the run of men. I dissent from the judgment of the Court.

MR. JUSTICE CLARK, with whom MR. JUSTICE WHITTAKER joins, dissenting.

It may be that Willie Lee Stewart "had an intelligence level in the moronic class," but he can laugh up his sleeve today for he has again made a laughingstock of the law. This makes the third jury verdict of guilt—each with a mandatory death penalty—that has been set aside since 1953. It was in that year that Willie walked into Harry Honikman's little grocery store here in Washington, bought a bag of potato chips and a soft drink, consumed them in the store, ordered another bottle of soda, and then pulled out a pistol and killed Honikman right before the eyes of his wife and young daughter. The verdict is now set aside because of some *hypotheticals* as to what the jury *might* have *inferred* from a single question asked Willie as to whether he had testified at his other trials. In my view, none of these conjectures is sufficiently persuasive to be said to cast doubt on the validity of the jury's determination. Let us first review the setting of the fatal question in the trial.

The jury heard evidence for six days and from some 26 witnesses. The printed record here, which is only partial, consists of 400 pages. Willie Stewart's "gibberish" comprises nine pages, representing perhaps some 20 minutes of testimony. It came during the third day of the trial. Mr. Carey, Willie's counsel, had placed him on the stand. He had asked on direct examination, "Have you ever taken an oath?" Willie replied, "Not that I knows of." Willie was also asked by his counsel, "Did you ever stand trial before this trial for the murder of Harry Honikman?" He answered, "Well, you talk. You

just go ahead and explain yourself. Have you ever stand trial? Go ahead. Don't ask me. I don't know." Mr. Carey had not represented Willie on the other trials. Carey then asked, "Were you ever tried for first degree murder before this time?" And Willie replied, "I ain't never been tried. I ain't never been tried." With these openings made by Carey, the Government, on cross-examination, asked the same questions. No issue is made of the examination relating to the fact of prior trials. Then came the question which has brought on this reversal: "This is the first time you have gone on the stand, isn't it, Willie?" There was no objection. Willie answered, "What?" And the Government's counsel again asked the same question in identical words. Still there was no objection. Willie answered: "I am always the stand; I am everything, I done told you." Thereafter Willie was excused as a witness, whereupon his counsel approached the bench and made his motion for mistrial. He asked for no curative instruction. Counsel had set his trap, lain in wait and was now demanding all or nothing. The demand for a mistrial was denied.

A government witness then testified that on the very night of the murder Willie was playing cards, that he exhibited the pistol used in the slaying to one of the players, that he left the card game before the hour of the murder, and that he returned to the card game after the hour of the murder and continued playing cards until about 2 a. m. This witness testified, "he [Willie] seemed normal to me." This was followed by testimony of an aide at St. Elizabeths Hospital and a guard at the District jail as to his conduct all during the period after his arrest up until a few weeks before his third trial. All said that he was perfectly normal; that he talked freely and understood the conversation; that he used a Bible and a dictionary, played bid whist and checkers and was a "model" patient or prisoner. His jail file revealed that

he mailed letters to his wife and sister-in-law, both of whom testified in his behalf, during April, October and November, 1953; July, August, September and October 1954; October, November and December, 1955; January, February and March, 1956; and October, November and December, 1957; and forwarded his wife $10 on each of two occasions, once in 1954 and the other in 1955. On several occasions he sent memo requests for conferences with jail officials. He asked for work to pass the time while in the District jail and actually put in many hours working day-in and day-out during the time of his custody. He first did cleaning, then plumbing, and finally was continually engaged in painting cell blocks throughout the jail. In 1957 his son was ill and he requested permission, which was granted, to visit him in custody. These witnesses all related that Willie "acted normal" during this period. In fact, his only expert witness, a psychiatrist, testified that he could not decide in June 1953 when he examined Willie whether or not he was suffering from a mental disease. However, he stated that after talking with Willie's sister-in-law and hearing the story of Willie's background, he decided that Willie suffered a manic-depressive psychosis. The three government psychiatrists, two of whom examined him in March 1953, found him "perfectly normal." He answered their questions freely, went through various tests cooperatively and was found to be in "average normal range of intelligence." Each agreed that Willie was later malingering, *i. e.,* feigning mental illness. This began shortly before his third trial. In addition, Willie had served two enlistments in the Army before 1953. On discharge he was found "illiterate but mentally adequate."

In the light of this testimony, I find the hypotheses of the Court, with due deference, entirely unrealistic, if not

completely absurd. The crucial date was the time of the killing, 1953, not the date of the third trial, 1958. Despite this and the uncontradicted evidence, detailed above, of Willie's normality all during the period 1953–1958, the Court assumes that, from the asking of the question by the prosecutor, the jury believed that Willie had not testified in the two prior trials and therefore the jury "might" have inferred that (1) Willie "elected to feign this 'testimony' [gibberish] out of desperation brought on by his failure to gain acquittal" previously; or (2) the jury "might have thought" Willie suffered from a mental disease but "concluded that it is unlikely that a disease that had manifested itself only one out of three times for exhibition at trial was active at the occasion of the homicide"; or (3) the jury "might have thought" that the condition was worsening as indicated by his action at the trial.

In the first place, it seems to me a violent assumption to say that the jury believed, solely from the Government's question on cross-examination, that Willie had not testified at the prior trials, especially since he had already testified in response to a query *from his own counsel* on direct examination that he had never been under oath. Moreover, in opening up the issue of prior trials, the defense counsel was obviously trying to leave the impression with the jury that they had not concluded in guilty verdicts. When he received answers such as "you talk"—"You just go ahead and explain"—"Don't ask me," he repeated the question. And the government counsel got like answers to his questions: "I don't care how many occasions," etc. And the answer to the question found prejudicial was first a "What?" and upon its repetition, "I am always the stand." Using the majority's speculative approach, it is the more likely that the jury thought from those questions that the previous trials resulted in hung

juries and never speculated upon the nice distinctions the Court makes as to Willie's demeanor.* The uncontradicted evidence was that he was a faker. They needed no inference to so conclude. Discounting the speculative effects of his own counsel's question on oaths, and the Government's question on testifying, his answers themselves might well have led the jury to believe that he did testify on the previous trials. In any event, a simple instruction to the jury to consider this trial alone, to strike out of its minds and give no consideration whatever to any reference to a former trial or to any event or thing that might or might not have happened there, would have certainly been sufficient. But Willie did not ask for this. He wanted "all or none" and the Court is giving him "all." But, returning to the hypotheses, whether or not Willie "elected" to feign his testimony was not the question. The jury's concern was whether he did feign it, and the uncontradicted testimony was that he did so. Secondly, the only testimony as to Willie's activity on the very night of the killing was that of the card player. He stated that Willie "seemed normal to me." How the jury might infer from the prosecutor's question that Willie had a mental disease but it was inactive at the time of the murder is beyond me. Every witness testified to the contrary—save one psychiatrist—and even he said that his examination of Willie was inconclusive. The jury knew it had been five years since the killing and that both lay and medical evidence—uncontradicted—was that Willie was normal during all that period. Lastly, as to the disease worsening, that possibility had no relevancy to the condition in 1953 at the time of the killing.

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*If there was any impression relating to Willie's failure to take the stand in prior trials, it was surely due to the questioning by his own counsel on the issue of oaths.

I might add that, as I read the Government's brief, it conceded only that the question asked Willie "was of but negligible importance to the government's case." The sole issue, it said, was whether the question was prejudicial. This does not license the Court to find other and further concessions as to the *Raffel* and *Grunewald* cases. Nor do I find the Government contending, in its point that no prejudice resulted from the question, that "the jury may not even have heard the improper question." To so state its attitude makes the Government appear ridiculous. Its true position was that one could not assume, as the Court does, that "the jury noted and focused attention on a question given so little emphasis that it was overlooked by the trial judge." I add that in the light of the long trial, the uncontradicted evidence as to Willie's malingering and the fact that the question was never mentioned again during the remaining three days of the trial, the jury did not need, nor as a matter of relevancy was it able, to go through the mental gymnastics the Court supposes.

I note that the Court does adopt one point made by the Government. It says "that it is regrettable when the concurrent findings of 36 jurors are not sufficient finally to terminate a case." I, too, agree with that, but in view of the Court's approach I would add that its regret is tempered by its willingness to indulge in such hypothesizing as to effectively remove from our law the concept of harmless error in capital cases.

GOLDBERG, SECRETARY OF LABOR, *v.* WHITAKER HOUSE COOPERATIVE, INC., ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

No. 274. Argued March 30, 1961.—Decided April 24, 1961.

Respondent is a cooperative incorporated to manufacture, sell and deal in knitted, crocheted and embroidered goods. Its members make such goods in their homes and deliver them to the cooperative, which pays them periodically "an advance allowance" pending sale of the goods and distribution of any net proceeds to the members. The members manufacture what the cooperative desires, receive the compensation it dictates, and may be expelled from membership for substandard work or failure to obey the cooperative's regulations. *Held:* The cooperative is an "employer" and its members are "employees" within the meaning of § 3 of the Fair Labor Standards Act of 1938, as amended, and the cooperative is subject to the minimum-wage and record-keeping provisions of the Act and the regulations prescribed by the Administrator under § 11 (d) "to prevent the circumvention or evasion of and to safeguard the minimum wage rate" prescribed by the Act. Pp. 28–33.

275 F. 2d 362, reversed.

Bessie Margolin argued the cause for petitioner. With her on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Harold C. Nystrom, Charles Donahue* and *Sylvia S. Ellison.*

Philip S. Bird argued the cause for respondents. With him on the brief was *Cyril M. Joly.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent cooperative was organized in 1957 under the laws of Maine; and we assume it was legally organized. The question is whether it is an "employer" and its members are "employees" within the meaning of the Fair Labor Standards Act of 1938, § 3, 52 Stat. 1060, as

amended, 29 U. S. C. § 203. The question is raised by a suit filed under § 17 of the Act by petitioner to enjoin respondent from violating the provisions of the Act concerning minimum wages (§ 6), record-keeping (§ 11 (c)) and the regulation of industrial homework (§ 11 (d)). And see § 15 (a)(5). The District Court denied relief. 170 F. Supp. 743. The Court of Appeals affirmed by a divided vote. 275 F. 2d 362. The case is here on a petition for certiorari which we granted (364 U. S. 861) because of the importance of the problem in the administration of the Act.

The corporate purpose of the respondent as stated in its articles is to manufacture, sell, and deal in "knitted, crocheted, and embroidered goods of all kinds." It has a general manager and a few employees who engage in finishing work, *i. e.,* trimming and packaging. There are some 200 members who work in their homes. A homeworker who desires to become a member buys from respondent a sample of the work she is supposed to do, copies the sample, and submits it to respondent. If the work is found to be satisfactory, the applicant can become a member by paying $3 and agreeing to the provisions of the articles and bylaws. Members were prohibited from furnishing others with articles of the kind dealt in by respondent.[1] They are required to remain members at least a year. They may, however, be expelled at any time by the board of directors if they violate any rules or regulations or if their work is substandard.[2] Members are not liable for respondent's debts; they may not be

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[1] This provision of the bylaws was purportedly removed by a vote at the annual meeting of June 26, 1958, though a quorum was not present at the meeting. See *Mitchell* v. *Whitaker House Cooperative, Inc.,* 170 F. Supp., at 749, n. 7, 8; 751.

[2] An expulsion may be appealed by filing a petition "to be acted upon by the members at the next meeting." Cf. Me. Rev. Stat., c. 56, § 16.

assessed; each has one vote; their certificates are not transferrable; each member can own only one membership; no dividends or interest is payable on the certificate "except in the manner and limited amount" provided in the bylaws. The bylaws provide that "excess receipts" are to be applied (1) to writing off "preliminary expenses"; (2) to "necessary depreciation reserves"; (3) to the establishment of a "capital reserve." The balance may be used in the discretion of the board of directors "for patronage refunds which shall be distributed according to the percentage of work submitted to the Cooperative for sale." Members are paid every month or every other month for work submitted for sale on a rate-per-dozen basis. This payment is considered to be "an advance allowance" until there is a distribution of "excess receipts" to the members "on the basis of the amount of goods which each member has submitted to [respondent] for sale."

By § 11 (d) of the Act the Administrator is authorized to make "such regulations and orders regulating, restricting, or prohibiting industrial homework as are necessary or appropriate to prevent the circumvention or evasion of and to safeguard the minimum wage rate prescribed in this Act." Section 11 (d) was added in 1949 [3] and provides that "all existing regulations or orders of the Administrator relating to industrial homework are hereby continued in full force and effect."

These Regulations [4] provide that no industrial homework, such as respondent's members do, shall be done "in or about a home, apartment, tenement, or room in a residential establishment unless a special homework certificate" [5] has been issued. Respondent's members have no

[3] Fair Labor Standards Amendments of 1949, § 9, 63 Stat. 910, 916.

[4] See 29 CFR §§ 530.1–530.12.

[5] *Id.*, § 530.2.

such certificates; and the question for us is whether its operations are lawful without them and without compliance by respondent with the other provisions of the Act.

These Regulations have a long history. In 1939, shortly after the Act was passed, bills were introduced in the House to permit homeworkers to be employed at rates lower than the statutory minimum.[6] These amendments were rejected.[7] Thereupon the Administrator issued regulations governing homeworkers; [8] and we sustained some of them in *Gemsco, Inc.*, v. *Walling*, 324 U. S. 244, decided in 1945. In 1949 the House adopted an amendment which would have exempted from the Act a large group of homeworkers.[9] The Senate bill contained no such exemption; and the Conference Report rejected the exemption.[10] Instead, § 11 (d) was added, strengthening the authority of the Administrator to restrict or prohibit homework.[11] Still later respondent was organized; and, as we have said, it made no attempt to comply with these homework regulations.

We think we would be remiss, in light of this history, if we construed the Act loosely so as to permit this homework to be done in ways not permissible under the Regulations. By § 3 (d) of the Act an "employer" is any person acting "in the interest of an employer in relation to an employee." By § 3 (e) an "employee" is one "employed" by an employer. By § 3 (g) the term employ

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[6] See H. R. Rep. No. 522, 76th Cong., 1st Sess., p. 10; 86 Cong. Rec. 4924, 5122.

[7] 86 Cong. Rec. 5499; see also the remarks of Mr. Zimmerman, *id.*, at 5136, and of Mr. Hook, *id.*, at 5224–5225.

[8] The Knitted Outerwear Wage Order, which covers the industry in which respondent is engaged, was issued April 4, 1942. See 7 Fed. Reg. 2592.

[9] 95 Cong. Rec. 11209–11210.

[10] H. R. Rep. No. 1453, 81st Cong., 1st Sess.

[11] 95 Cong. Rec. 14927.

"includes to suffer or permit to work." We conclude that the members of this cooperative are employees within the meaning of the Act.

There is no reason in logic why these members may not be employees. There is nothing inherently inconsistent between the coexistence of a proprietary and an employment relationship. If members of a trade union bought stock in their corporate employer, they would not cease to be employees within the conception of this Act. For the corporation would "suffer or permit" them to work whether or not they owned one share of stock or none or many. We fail to see why a member of a cooperative may not also be an employee of the cooperative. In this case the members seem to us to be both "members" and "employees." It is the cooperative that is affording them "the opportunity to work, and paying them for it," to use the words of Judge Aldrich, dissenting below. 275 F. 2d, at 366. However immediate or remote their right to "excess receipts" may be,[12] they work in the same way as they would if they had an individual proprietor as their employer.[13] The members are not self-employed; nor are they independent, selling their products on the market for whatever price they can command. They are regimented under one organization, manufacturing what the organization desires and receiving the compensation the organization dictates.[14] Apart from formal differences,

[12] There has been no distribution of "excess receipts" to the members. The evidence is that respondent could survive "as a financially solvent enterprise only by doubling its present gross income." As of the date of the trial, respondent was in arrears even as respects what it owed its managerial employees. See 170 F. Supp., at 751.

[13] See *Mitchell* v. *Law*, 161 F. Supp. 795.

[14] When the cooperative desired to reduce its inventory and the rate of production of its members, it withheld the "advance allowances."

they are engaged in the same work they would be doing whatever the outlet for their products. The management fixes the piece rates at which they work; the management can expel them for substandard work or for failure to obey the regulations. The management, in other words, can hire or fire the homeworkers. Apart from the other considerations we have mentioned, these powers make the device of the cooperative too transparent to survive the statutory definition of "employ" and the Regulations governing homework. In short, if the "economic reality" rather than "technical concepts" is to be the test of employment (*United States* v. *Silk,* 331 U. S. 704, 713; *Rutherford Food Corp.* v. *McComb,* 331 U. S. 722, 729), these homeworkers are employees.

Reversed.

MR. JUSTICE WHITTAKER, with whom MR. JUSTICE BRENNAN and MR. JUSTICE STEWART join, dissenting.

It is clear and undisputed that the Fair Labor Standards Act does not apply in the absence of an employer-employee relationship. Here, upon what seems to me to be ample evidence, the District Court found that the cooperative was created and is being operated as a true cooperative under the laws of Maine, 170 F. Supp. 743, and, on appeal, the Court of Appeals approved those findings. 275 F. 2d 362. Unless those findings are clearly erroneous, they must be accepted here. Fed. Rules Civ. Proc., 52 (a), 28 U. S. C. Accepting them excludes any notion that the cooperative was formed or availed of as a "device" to circumvent the Act. It is not seriously contended here that these findings of the two courts below were "clearly erroneous," but rather the Government's principal contention is that the bona fides of the cooperative are immaterial.

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Doubtless, even a true cooperative may have employees. But surely a true cooperative does not automatically become the "employer" of its "members" in the commonly understood sense of those terms, nor, hence, in their sense as used in subparagraphs (d) and (e) of § 3 of the Act, 29 U. S. C. § 203 (d) and (e). Something more is required. For the Act to apply, the cooperative must in a fair sense "employ" its "members." Like the two courts below, I think it may not fairly be said, on this record, that there is any evidence that the cooperative ever did "employ" its "members," or suffer or permit them to work *for it*. Instead, the evidence shows, as the two courts below found and as I read it, that each member worked for herself—in her own home when and as she chose—toward the production of knitted articles which she marketed through her cooperative, receiving immediately "an advance" thereon, and ultimately—after payment of her portion of the cooperative's "expenses" and setting up its "necessary depreciation [and capital] reserves"—the balance of the proceeds of sale would "be distributed [to her] according to the percentage of work [she] submitted to the Cooperative for sale." Like the two courts below, I fail to see in this any element of employment by the cooperative of its members.

If, as seems practically inevitable in the light of the Court's judgment, the cooperative must now be dissolved, will not its assets, including its "depreciation [and capital] reserves" as well as its "excess receipts," have to be refunded to its members "according to the percentage of work submitted [by them respectively] to the Cooperative for sale," and not according to their memberships or investments, just as required by the Maine statute and the cooperative's articles? This seems wholly inconsistent with any notion that the members were employees of the cooperative or that they were suffered to work *for it*, or that it bought or paid them for their knitted articles.

On the basis of the amply supported findings of the two courts below, it seems reasonably clear that the cooperative never did "employ" its "members," and inasmuch as the Act does not apply in the absence of an employment relationship, I think the judgment of the two courts below is consonant with the facts and the law and should be affirmed.

KONIGSBERG *v.* STATE BAR OF CALIFORNIA ET AL.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 28. Argued December 14, 1960.—Decided April 24, 1961.

Under California law, the State Supreme Court may admit to the practice of law any applicant whose qualifications have been certified to it by the California Committee of Bar Examiners. In hearings by that Committee on his application for admission to the Bar, petitioner refused to answer any questions pertaining to his membership in the Communist Party, not on the ground of possible self-incrimination, but on the ground that such inquiries were beyond the purview of the Committee's authority and infringed rights of free thought, association and expression assured him under the State and Federal Constitutions. The Committee declined to certify him as qualified for admission to the Bar on the ground that his refusals to answer had obstructed a full investigation into his qualifications. The State Supreme Court denied him admission to practice. *Held:* Denial of petitioner's application for admission to the Bar on this ground did not violate his rights under the Fourteenth Amendment. Pp. 37–56.

(a) The State's refusal to admit petitioner to practice on the ground that his refusal to answer the Committee's questions had thwarted a full investigation into his qualifications was not inconsistent with this Court's decision in *Konigsberg* v. *State Bar,* 353 U. S. 252. Pp. 40–44.

(b) The Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to answer questions having a substantial relevance to his qualifications; and California's application of such a rule in this instance cannot be said to have been arbitrary or discriminatory. Pp. 44–49.

(c) Petitioner was not privileged to refuse to answer questions concerning membership in the Communist Party on the ground that they impinged upon rights of free speech and association protected by the Fourteenth Amendment. *Speiser* v. *Randall,* 357 U. S. 513, distinguished. Pp. 49–56.

52 Cal. 2d 769, 344 P. 2d 777, affirmed.

Edward Mosk argued the cause for petitioner. With him on the brief was *Sam Rosenwein.*

Frank B. Belcher argued the cause for respondents. With him on the brief was *Ralph E. Lewis.*

Briefs of *amici curiae,* urging reversal, were filed by *David Scribner, Leonard B. Boudin, Ben Margolis, William B. Murrish* and *Charles Stewart* for the National Lawyers Guild; *A. L. Wirin, Fred Okrand* and *Hugh R. Manes* for the American Civil Liberties Union of Southern California; and *Robert L. Brock, Pauline Epstein, Robert W. Kenny, Hugh R. Manes, Ben Margolis, Daniel G. Marshall, William B. Murrish, John McTernan, Maynard Omerberg, Alexander Schullman* and *David Sokol* on behalf of themselves and certain other members of the California Bar.

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case, involving California's second rejection of petitioner's application for admission to the state bar, is a sequel to *Konigsberg* v. *State Bar,* 353 U. S. 252, in which this Court reversed the State's initial refusal of his application.

Under California law the State Supreme Court may admit to the practice of law any applicant whose qualifications have been certified to it by the California Committee of Bar Examiners. Cal. Bus. & Prof. Code § 6064. To qualify for certification an applicant must, among other things, be of "good moral character," *id.,* § 6060 (c), and no person may be certified "who advocates the overthrow of the Government of the United States or of this State by force, violence, or other unconstitutional means . . . ." *Id.,* § 6064.1. The Committee is empowered and required to ascertain the qualifications of all candidates. *Id.,* § 6046. Under rules prescribed by the Board of Governors of the State Bar, an applicant before

the Committee has "the burden of proving that he is possessed of good moral character, of removing any and all reasonable suspicion of moral unfitness, and that he is entitled to the high regard and confidence of the public." *Id.*, Div. 3, c. 4, Rule X, § 101. Any applicant denied certification may have the Committee's action reviewed by the State Supreme Court. *Id.*, § 6066.

In 1953 petitioner, having successfully passed the California bar examinations, applied for certification for bar membership. The Committee, after interrogating Konigsberg and receiving considerable evidence as to his qualifications, declined to certify him on the ground that he had failed to meet the burden of proving his eligibility under the two statutory requirements relating to good moral character and nonadvocacy of violent overthrow. That determination centered largely around Konigsberg's repeated refusals to answer Committee questions as to his present or past membership in the Communist Party.[1] The California Supreme Court denied review without opinion. See 52 Cal. 2d 769, 770, 344 P. 2d 777, 778.

On certiorari this Court, after reviewing the record, held the state determination to have been without rational support in the evidence and therefore offensive to the Due Process Clause of the Fourteenth Amendment. *Konigsberg* v. *State Bar, supra.* At the same time the Court declined to decide whether Konigsberg's refusals to answer could constitutionally afford "an independent ground for exclusion from the Bar," considering that such an issue was not before it. *Id.*, 259–262. The case was remanded

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[1] Konigsberg rested his refusals, not on any claim of privilege against self-incrimination, but on the ground that such inquiries were beyond the purview of the Committee's authority, and infringed rights of free thought, association, and expression assured him under the State and Federal Constitutions. He affirmatively asserted, however, his disbelief in violent overthrow of government.

to the State Supreme Court "for further proceedings not inconsistent with this opinion." *Id.*, 274.

On remand petitioner moved the California Supreme Court for immediate admission to the bar. The court vacated its previous order denying review and referred the matter to the Bar Committee for further consideration. At the ensuing Committee hearings Konigsberg introduced further evidence as to his good moral character (none of which was rebutted), reiterated unequivocally his disbelief in violent overthrow, and stated that he had never knowingly been a member of any organization which advocated such action. He persisted, however, in his refusals to answer any questions relating to his membership in the Communist Party. The Committee again declined to certify him, this time on the ground that his refusals to answer had obstructed a full investigation into his qualifications.[2] The California Supreme Court, by a divided vote, refused review, and also denied Konigsberg's motion for direct admission to practice.[3] 52 Cal. 2d 769,

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[2] The Committee made the following findings relevant to the issues now before us:

"(1) That the questions put to the applicant by the Committee concerning past or present membership in or affiliation with the Communist Party are material to a proper and complete investigation of his qualifications for admission to practice law in the State of California.

"(2) That the refusal of applicant to answer said questions has obstructed a proper and complete investigation of applicant's qualifications for admission to practice law in the State of California."

[3] The essence of the state court's decision appears in the following extracts from its opinion:

". . . The committee action now before us contains no findings or conclusion that petitioner had failed to establish either his good moral character or his abstention from advocacy of overthrow of the government.

"Here it is the refusal to answer material questions which is the basis for denial of certification. . . . [*Note 3 continued on p. 40.*]

344 P. 2d 777. We again brought the case here. 362 U. S. 910.

Petitioner's contentions in this Court in support of reversal of the California Supreme Court's order are reducible to three propositions: (1) the State's action was inconsistent with this Court's decision in the earlier *Konigsberg* case; (2) assuming the Committee's inquiries into Konigsberg's possible Communist Party membership were permissible, it was unconstitutionally arbitrary for the State to deny him admission because of his refusals to answer; and (3) in any event, Konigsberg was constitutionally justified in refusing to answer these questions.

I.

Consideration of petitioner's contentions as to the effect of this Court's decision in the former *Konigsberg* case requires that there be kept clearly in mind what is entailed in California's rule, comparable to that in many States, that an applicant for admission to the bar bears the burden of proof of "good moral character" [4]—a

". . . [T]o admit applicants who refuse to answer the committee's questions upon these subjects would nullify the concededly valid legislative direction to the committee. Such a rule would effectively stifle committee inquiry upon issues legislatively declared to be relevant to that issue." *Id.*, at 772, 774, 344 P. 2d, at 779, 780.

Justice Traynor dissented on the ground that the California Supreme Court, not being required by statute to exclude bar applicants on the sole ground of their refusal to answer questions concerning possible advocacy of the overthrow of government, should not adopt such an exclusionary rule, at least where the Committee of Bar Examiners has not come forward with some evidence of advocacy. He declined to reach constitutional issues. Justice Peters dissented on federal constitutional grounds and in the belief that this Court's decision in the first *Konigsberg* case required immediate admission of the applicant. Chief Justice Gibson did not participate in the decision.

[4] All of the 50 States, as well as Puerto Rico and the District of Columbia, prescribe qualifications of moral character as precondi-

requirement whose validity is not, nor could well be, drawn in question here.[5]

Under such a rule an applicant must initially furnish enough evidence of good character to make a prima facie case. The examining Committee then has the opportunity to rebut that showing with evidence of bad character. Such evidence may result from the Committee's own independent investigation, from an applicant's responses

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tions for admission to the practice of law. See West Publishing Co., Rules for Admission to the Bar (35th ed. 1957); Survey of the Legal Profession, Bar Examinations and Requirements for Admission to the Bar (1952); Jackson, Character Requirements for Admission to the Bar, 20 Fordham L. Rev. 305 (1951); Annot., 64 A. L. R. 2d 301 (1959).

The burden of demonstrating good moral character is regularly placed upon the bar applicant. *Ex parte Montgomery,* 249 Ala. 378, 31 So. 2d 85; *In re Stephenson,* 243 Ala. 342, 10 So. 2d 1; *Application of Courtney,* 83 Ariz. 231, 319 P. 2d 991; Ark. Stat. Ann., 1947, §§ 25–101, 25–103; *Spears* v. *State Bar,* 211 Cal. 183, 294 P. 697; *O'Brien's Petition,* 79 Conn. 46, 63 A. 777; *In re Durant,* 80 Conn. 140, 147, 67 A. 497; Del. Sup. Ct. Rule 31 (1)(A)(a), (2)(A)(a); *Coleman* v. *Watts,* 81 So. 2d 650 (Fla.) (burden of proof on applicant; prima facie showing shifts burden of going forward to Examiners); *Gordon* v. *Clinkscales,* 215 Ga. 843, 114 S. E. 2d 15; *In re Latimer,* 11 Ill. 2d 327, 143 N. E. 2d 20 (semble); *Rosencranz* v. *Tidrington,* 193 Ind. 472, 141 N. E. 58; *In re Meredith,* 272 S. W. 2d 456 (Ky.); *In re Meyerson,* 190 Md. 671, 59 A. 2d 489 (semble); *Matter of Keenan,* 313 Mass. 186, 47 N. E. 2d 12; *Application of Smith,* 220 Minn. 197, 19 N. W. 2d 324 (semble); *On Application for Attorney's License,* 21 N. J. L. 345; *Application of Cassidy,* 268 App. Div. 282, 51 N. Y. S. 2d 202, aff'd, 296 N. Y. 926, 73 N. E. 2d 41; *Application of Farmer,* 191 N. C. 235, 131 S. E. 661; *In re Weinstein,* 150 Ore. 1, 42 P. 2d 744; *State ex rel. Board* v. *Poyntz,* 152 Ore. 592, 52 P. 2d 1141 (burden of proof on applicant; prima facie showing shifts burden of going forward to Examiners); *In the Matter of Eary,* 134 W. Va. 204, 58 S. E. 2d 647 (semble).

[5] For reasons given later (pp. 55–56, *infra*), we need not decide whether California's burden-of-proof rule could constitutionally be applied, as it was by the Committee after the first Konigsberg proceedings, to the requirement of nonadvocacy of violent overthrow.

to questions on his application form, or from Committee interrogation of the applicant himself. This interrogation may well be of decisive importance for, as all familiar with bar admission proceedings know, exclusion of unworthy candidates frequently depends upon the thoroughness of the Committee's questioning, revealing as it may infirmities in an otherwise satisfactory showing on his part. This is especially so where a bar committee, as is not infrequently the case, has no means of conducting an independent investigation of its own into an applicant's qualifications. If at the conclusion of the proceedings the evidence of good character and that of bad character are found in even balance, the State may refuse admission to the applicant, just as in an ordinary suit a plaintiff may fail in his case because he has not met his burden of proof.

In the first *Konigsberg* case this Court was concerned solely with the question whether the balance between the favorable and unfavorable evidence as to Konigsberg's qualifications had been struck in accordance with the requirements of due process. It was there held, first, that Konigsberg had made out a prima facie case of good character and of nonadvocacy of violent overthrow, and, second, that the other evidence in the record could not, even with the aid of all reasonable inferences flowing therefrom, cast such doubts upon petitioner's prima facie case as to justify any finding other than that these two California qualification requirements had been satisfied.[6] In assessing the significance of Konigsberg's refusal to answer questions as to Communist Party membership, the Court dealt only with the fact that this refusal could not provide any reasonable indication of a character not meet-

[6] The Court assumed, but did not discuss, the constitutionality of California's burden-of-proof rule as applied to the nonadvocacy-of-forcible-overthrow requirement of the California statute.

ing these two standards for admission. The Court did not consider, but reserved for later decision, all questions as to the permissibility of the State treating Konigsberg's refusal to answer as a ground for exclusion, not because it was evidence from which substantive conclusions might be drawn, but because the refusal had thwarted a full investigation into his qualifications. See 353 U. S., at 259–262. The State now asserts that ground for exclusion, an issue that is not foreclosed by anything in this Court's earlier opinion which decided a quite different question.

It is equally clear that the State's ordering of the rehearing which led to petitioner's exclusion manifested no disrespect of the effect of the mandate in that case, which expressly left the matter open for further state proceedings "not inconsistent with" the Court's opinion. There is no basis for any suggestion that the State in so proceeding has adopted unusual or discriminatory procedures to avoid the normal consequences of this Court's earlier determination. In its earlier proceeding, the California Bar Committee may have found further investigation and questioning of petitioner unnecessary when, in its view, the applicant's prima facie case of qualifications had been sufficiently rebutted by evidence already in the record. While in its former opinion this Court held that the State could not constitutionally so conclude, it did not undertake to preclude the state agency from asking any questions or from conducting any investigation that it might have thought necessary had it known that the basis of its then decision would be overturned. In recalling Konigsberg for further testimony, the Committee did only what this Court has consistently held that federal administrative tribunals may do on remand after a reviewing court has set aside agency orders as unsupported by requisite findings of fact. *Federal Communications*

Comm'n v. *Pottsville Broadcasting Co.*, 309 U. S. 134; *Fly* v. *Heitmeyer*, 309 U. S. 146.

In the absence of the slightest indication of any purpose on the part of the State to evade the Court's prior decision, principles of finality protecting the parties to this state litigation are, within broad limits of fundamental fairness, solely the concern of California law. Such limits are broad even in a criminal case, see *Bryan* v. *United States*, 338 U. S. 552; *Hoag* v. *New Jersey*, 356 U. S. 464; cf. *Palko* v. *Connecticut*, 302 U. S. 319, 328. In this instance they certainly have not been transgressed by the State's merely taking further action in this essentially administrative type of proceeding.[7]

II.

We think it clear that the Fourteenth Amendment's protection against arbitrary state action does not forbid a State from denying admission to a bar applicant so long as he refuses to provide unprivileged answers to questions having a substantial relevance to his qualifications. An investigation of this character, like a civil suit, requires procedural as well as substantive rules. It is surely not doubtful that a State could validly adopt an administrative rule analogous to Rule 37 (b) of the Federal Rules of Civil Procedure which provides that that refusal, after due warning, to answer relevant questions may result in "the matters regarding which the questions were asked" being

[7] Moreover, even if there could be debate as to whether this Court's prior decision prevented new hearings on matters that had already transpired at the time of the first state hearings, there can be no doubt that such decision did not prevent California from investigating petitioner's actions during the period subsequent to the first hearing. Therefore we would in any case be presented with the question of the constitutionality of the State's refusing to admit petitioner to the practice of law because of his declining to answer whether he has been a member of the Communist Party since the termination of the first set of hearings.

considered for the purposes of the proceeding to be answered in a way unfavorable to the refusing party, or even that such refusal may result in "dismissing the action or proceeding" of the party asking affirmative relief.

The state procedural rule involved here is a less broad one, for all that California has in effect said is that in cases where, on matters material to an applicant's qualifications, there are gaps in the evidence presented by him which the agency charged with certification considers should be filled in the appropriate exercise of its responsibilities, an applicant will not be admitted to practice unless and until he cooperates with the agency's efforts to fill those gaps. The fact that this rule finds its source in the supervisory powers of the California Supreme Court over admissions to the bar, rather than in legislation, is not constitutionally significant. *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362. Nor in the absence of a showing of arbitrary or discriminatory application in a particular case, is it a matter of federal concern whether such a rule requires the rejection of all applicants refusing to answer material questions, or only in instances where the examining committee deems that a refusal has materially obstructed its investigation. Compare *Beilan* v. *Board of Education,* 357 U. S. 399, with *Nelson* v. *County of Los Angeles,* 362 U. S. 1.

In the context of the entire record of these proceedings,[8] the application of the California rule in this instance cannot be said to be arbitrary or discriminatory. In the first *Konigsberg* case this Court held that neither the somewhat weak but uncontradicted testimony, that petitioner had been a Communist Party member in 1941, nor his refusal to answer questions relating to Party membership, could rationally support any substantive adverse

[8] The transcript of the original hearings before the Committee has been made part of the record before us in the present case.

inferences as to petitioner's character qualifications, 353 U. S., at 266–274. That was not to say, however, that these factors, singly or together, could not be regarded as leaving the investigatory record in sufficient uncertainty as constitutionally to permit application of the procedural rule which the State has now invoked, provided that Konigsberg had been first given due warning of the consequences of his continuing refusal to respond to the Committee's questions. Cf. 353 U. S., at 261.

It is no answer to say that petitioner has made out a prima facie case of qualifications, for this is precisely the posture of a proceeding in which the Committee's right to examine and cross-examine becomes significant. Assuming, as we do for the moment, that there is no privilege here to refuse to answer, petitioner could no more insist that his prima facie case makes improper further questioning of him than he could insist that such circumstance made improper the introduction of other forms of rebutting evidence.

We likewise regard as untenable petitioner's contentions that the questions as to Communist Party membership were made irrelevant either by the fact that bare, innocent membership is not a ground of disqualification or by petitioner's willingness to answer such ultimate questions as whether he himself believed in violent overthrow or knowingly belonged to an organization advocating violent overthrow. The Committee Chairman's answer to the former contention was entirely correct:

> "If you answered the question, for example, that you had been a member of the Communist Party during some period since 1951 or that you were presently a member of the Communist Party, the Committee would then be in a position to ask you what acts you engaged in to carry out the functions and purposes of that party, what the aims and purposes of

> the party were, to your knowledge, and questions of that type. You see by failing to answer the initial question there certainly is no basis and no opportunity for us to investigate with respect to the other matters to which the initial question might very well be considered preliminary."

And the explanation given to petitioner's counsel by another Committee member as to why Konigsberg's testimony about ultimate facts was not dispositive was also sound:

> "Mr. Mosk, you realize that if Mr. Konigsberg had answered the question that he refused to answer, an entirely new area of investigation might be opened up, and this Committee might be able to ascertain from Mr. Konigsberg that perhaps he is now and for many years past has been an active member of the Communist Party, and from finding out who his associates were in that enterprise we might discover that he does advocate the overthrow of this government by force and violence. I am not saying that he would do that, but it is a possibility, and we don't have to take any witness' testimony as precluding us from trying to discover if he is telling the truth. That is the point."

Petitioner's further miscellaneous contentions that the State's exclusion of him was capricious are all also insubstantial.[9]

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[9] There is no basis for any intimation that the California Supreme Court fashioned a special procedural rule for the purposes of this particular case. The California Bar Committee has in the past declined to certify applicants who refused to answer pertinent questions. See Farley (Secretary, Committee of Bar Examiners), Character Investigation of Applicants for Admission, 29 Cal. State Bar Journal, 454, 457, 466 (1954). No more does the State's action bear any of the hallmarks of a bill of attainder or of an *ex post facto* regulation, see *Cummings* v. *Missouri*, 4 Wall. 277; cf. *United*

There remains the question as to whether Konigsberg was adequately warned of the consequences of his refusal to answer. At the outset of the renewed hearings the Chairman of the Committee stated:

> "As a result of our two-fold purpose [to investigate and reach determinations], particularly our function of investigation, we believe it will be necessary for you, Mr. Konigsberg, to answer our material questions or our investigation will be obstructed. We would not then as a result be able to certify you for admission."

After petitioner had refused to answer questions on Communist Party membership, the Chairman asked:

> "Mr. Konigsberg, I think you will recall that I initially advised you a failure to answer our material questions would obstruct our investigation and result in our failure to certify you. With this in mind do you wish to answer any of the questions which you heretofore up to now have refused to answer?"

At the conclusion of the proceeding another Committee member stated:

> "I would like to make this statement so that there will be no misunderstanding on the part of any court that may review this record in the future, that I feel that as a member of the Committee that the failure

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States v. *Lovett*, 328 U. S. 303, especially in light of the fact that petitioner was explicitly warned in advance of the consequences of his refusal to answer. Likewise, there is no room for attributing to the Committee a surreptitious purpose to exclude Konigsberg by the device of putting to him questions which it was known in advance he would not answer, and then justifying exclusion on the premise of his refusal to respond. So far as this record shows Konigsberg was excluded only because his refusal to answer had impeded the investigation of the Committee, a ground of rejection which it is still within his power to remove.

> of Mr. Konigsberg to answer the question as to whether or not he is now a member of the Communist Party is an obstruction of the function of this Committee, not a frustration if that word has been used. I think it would be an obstruction. There are phases of his moral character that we haven't been able to investigate simply because we have been stopped at this point, and I for one could not certify to the Supreme Court that he was a proper person to be admitted to practice law in this State until he answers the question about his Communist affiliation."

The record thus leaves no room for doubt on the score of "warning," and petitioner does not indeed contend to the contrary.

III.

Finally, petitioner argues that, in any event, he was privileged not to respond to questions dealing with Communist Party membership because they unconstitutionally impinged upon rights of free speech and association protected by the Fourteenth Amendment.

At the outset we reject the view that freedom of speech and association (*N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 460), as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from a literal reading of the First Amendment.[10] Throughout its history this Court

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[10] That view, which of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms: "Congress shall make no law . . . abridging the freedom of

has consistently recognized at least two ways in which constitutionally protected freedom of speech is narrower than an unlimited license to talk. On the one hand, certain forms of speech, or speech in certain contexts, has been considered outside the scope of constitutional protection.[11] See, *e. g., Schenck* v. *United States,* 249 U. S. 47; *Chaplinsky* v. *New Hampshire,* 315 U. S. 568; *Dennis* v. *United States,* 341 U. S. 494; *Beauharnais* v. *Illinois,* 343 U. S. 250; *Yates* v. *United States,* 354 U. S. 298; *Roth* v. *United States,* 354 U. S. 476. On the other hand, general regulatory statutes, not intended to control the content of speech but incidentally limiting its unfettered exercise, have not been regarded as the type of law the First or Fourteenth Amendment forbade Congress or

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speech, or of the press; or the right of the people peaceably to assemble . . . ." But as Mr. Justice Holmes once said: "[T]he provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth." *Gompers* v. *United States,* 233 U. S. 604, 610. In this connection also compare the equally unqualified command of the Second Amendment: "the right of the people to keep and bear arms shall not be infringed." And see *United States* v. *Miller,* 307 U. S. 174.

[11] That the First Amendment immunity for speech, press and assembly has to be reconciled with valid but conflicting governmental interests was clear to Holmes, J. ("I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent." *Abrams* v. *United States,* 250 U. S. 616, 627); to Brandeis, J. ("But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute." *Whitney* v. *California,* 274 U. S. 357, 373); and to Hughes, C. J. ("[T]he protection [of free speech] even as to previous restraint is not absolutely unlimited." *Near* v. *Minnesota,* 283 U. S. 697, 716.)

the States to pass, when they have been found justified by subordinating valid governmental interests, a prerequisite to constitutionality which has necessarily involved a weighing of the governmental interest involved. See, *e. g., Schneider* v. *State,* 308 U. S. 147, 161; *Cox* v. *New Hampshire,* 312 U. S. 569; *Prince* v. *Massachusetts,* 321 U. S. 158; *Kovacs* v. *Cooper,* 336 U. S. 77; *American Communications Assn.* v. *Douds,* 339 U. S. 382; *Breard* v. *Alexandria,* 341 U. S. 622. It is in the latter class of cases that this Court has always placed rules compelling disclosure of prior association as an incident of the informed exercise of a valid governmental function. *Bates* v. *Little Rock,* 361 U. S. 516, 524. Whenever, in such a context, these constitutional protections are asserted against the exercise of valid governmental powers a reconciliation must be effected, and that perforce requires an appropriate weighing of the respective interests involved. *Watkins* v. *United States,* 354 U. S. 178, 198; *N. A. A. C. P.* v. *Alabama, supra; Barenblatt* v. *United States,* 360 U. S. 109, 126–127; *Bates* v. *Little Rock, supra; Wilkinson* v. *United States,* 365 U. S. 399; *Braden* v. *United States,* 365 U. S. 431. With more particular reference to the present context of a state decision as to character qualifications, it is difficult, indeed, to imagine a view of the constitutional protections of speech and association which would automatically and without consideration of the extent of the deterrence of speech and association and of the importance of the state function, exclude all reference to prior speech or association on such issues as character, purpose, credibility, or intent. On the basis of these considerations we now judge petitioner's contentions in the present case.

Petitioner does not challenge the constitutionality of § 6064.1 of the California Business and Professions Code forbidding certification for admission to practice of those advocating the violent overthrow of government. It

would indeed be difficult to argue that a belief, firm enough to be carried over into advocacy, in the use of illegal means to change the form of the State or Federal Government is an unimportant consideration in determining the fitness of applicants for membership in a profession in whose hands so largely lies the safekeeping of this country's legal and political institutions. Cf. *Garner* v. *Board of Public Works,* 341 U. S. 716. Nor is the state interest in this respect insubstantially related to the right which California claims to inquire about Communist Party membership. This Court has long since recognized the legitimacy of a statutory finding that membership in the Communist Party is not unrelated to the danger of use for such illegal ends of powers given for limited purposes. See *American Communications Assn.* v. *Douds,* 339 U. S. 382; see also *Barenblatt* v. *United States,* 360 U. S. 109, 128–129; cf. *Wilkinson* v. *United States,* 365 U. S. 399; *Braden* v. *United States,* 365 U. S. 431.

As regards the questioning of public employees relative to Communist Party membership it has already been held that the interest in not subjecting speech and association to the deterrence of subsequent disclosure is outweighed by the State's interest in ascertaining the fitness of the employee for the post he holds, and hence that such questioning does not infringe constitutional protections. *Beilan* v. *Board of Public Education,* 357 U. S. 399; *Garner* v. *Board of Public Works,* 341 U. S. 716. With respect to this same question of Communist Party membership, we regard the State's interest in having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change, as clearly sufficient to outweigh the minimal effect upon free association occasioned by compulsory disclosure in the circumstances here presented.

There is here no likelihood that deterrence of association may result from foreseeable private action, see

N. A. A. C. P. v. *Alabama, supra,* at 462, for bar committee interrogations such as this are conducted in private. See Rule 58, Section X, Rules of Practice and Procedure of the Supreme Court of Illinois; cf. Cal. Bus. & Prof. Code, Rules of Procedure of the State Bar of California, Rule 8; *Anonymous* v. *Baker,* 360 U. S. 287, 291–292. Nor is there the possibility that the State may be afforded the opportunity for imposing undetectable arbitrary consequences upon protected association, see *Shelton* v. *Tucker,* 364 U. S. 479, 486, for a bar applicant's exclusion by reason of Communist Party membership is subject to judicial review, including ultimate review by this Court, should it appear that such exclusion has rested on substantive or procedural factors that do not comport with the Federal Constitution. See *Konigsberg* v. *State Bar,* 353 U. S. 252; *Schware* v. *Board of Examiners of New Mexico,* 353 U. S. 232; cf. *Wieman* v. *Updegraff,* 344 U. S. 183. In these circumstances it is difficult indeed to perceive any solid basis for a claim of unconstitutional intrusion into rights assured by the Fourteenth Amendment.

If this were all there was to petitioner's claim of a privilege to refuse to answer, we would regard the *Beilan* case as controlling. There is, however, a further aspect of the matter. In *Speiser* v. *Randall,* 357 U. S. 513, we held unconstitutional a state procedural rule that in order to obtain an exemption a taxpayer must bear the burden of proof, including both the burdens of establishing a prima facie case and of ultimate persuasion, that he did not advocate the violent overthrow of government. We said (p. 526):

> "The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be

> penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the State must bear these burdens. This is especially to be feared when the complexity of the proofs and the generality of the standards applied, cf. *Dennis* v. *United States, supra,* provide but shifting sands on which the litigant must maintain his position. How can a claimant whose declaration is rejected possibly sustain the burden of proving the negative of these complex factual elements? In practical operation, therefore, this procedural device must necessarily produce a result which the State could not command directly. It can only result in a deterrence of speech which the Constitution makes free."

It would be a sufficient answer to any suggestion of the applicability of that holding to the present proceeding to observe that *Speiser* was explicitly limited so as not to reach cases where, as here, there is no showing of an intent to penalize political beliefs. Distinguishing *Garner* v. *Board of Public Works,* 341 U. S. 716; *Gerende* v. *Board of Supervisors,* 341 U. S. 56, and *American Communications Assn.* v. *Douds,* 339 U. S. 382, the Court said (p. 527):

> "In these cases . . . there was no attempt directly to control speech but rather to protect, from an evil shown to be grave, some interest clearly within the sphere of governmental concern. . . . Each case concerned a limited class of persons in or aspiring to public positions by virtue of which they could, if evilly motivated, create serious danger to the public safety. The principal aim of those statutes was not to penalize political beliefs but to deny positions to persons supposed to be dangerous because the position might be misused to the detriment of the public."

But there are also additional factors making the rationale of *Speiser* inapplicable to the case before us. There is no unequivocal indication that California in this proceeding has placed upon petitioner the burden of proof of nonadvocacy of violent overthrow, as distinguished from its other requirement of "good moral character." [12] All it has presently required is an applicant's cooperation with the Committee's search for evidence of forbidden advocacy. Petitioner has been denied admission to the California bar for obstructing the Committee in the performance of its necessary functions of examination and cross-examination, a ruling which indeed presupposes that the burden of producing substantial evidence on the issue of advocacy was not upon petitioner but upon the Committee. Requiring a defendant in a civil proceeding to testify or to submit to discovery has never been thought to shift the burden of proof to him. Moreover, when this Court has allowed a State to comment upon a criminal defendant's failure to testify it has been careful to note that this does not result in placing upon him the burden of proving his innocence. *Adamson* v. *California,* 332 U. S. 46, 58.

In contrast to our knowledge with respect to the burden of establishing a prima facie case, we do not now know where, under California law, would rest the ultimate burden of persuasion on the issue of advocacy of violent overthrow. But it is for the Supreme Court of California first to decide this question. Only if and when that burden is placed by the State upon a bar applicant can there be drawn in question the distinction made in

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[12] Indeed, we cannot tell whether California did so even in the earlier proceeding, since the California Supreme Court's denial of review of the Committee's original rejection of Konigsberg was without opinion, and for all we know may have rested alone on petitioner's failure to meet his state burden of proof as to "good moral character."

the *Speiser* case between penalizing statutes and those merely denying access to positions where unfitness may lead to the abuse of state-given powers or privileges. The issue is not now before us.

Thus as matters now stand, there is nothing involved here which is contrary to the reasoning of *Speiser,* for despite compelled testimony the prospective bar applicant need not "steer far wider of the unlawful zone" (357 U. S., at 526) for fear of mistaken judgment or fact finding declaring unlawful speech which is in fact protected by the Constitution. This is so as to the ultimate burden of persuasion for, notwithstanding his duty to testify, the loss resulting from a failure of proof may, for all we now know, still fall upon the State. It is likewise so as to the initial burden of production, for there is no indication in the proceeding on rehearing of petitioner's application that the Bar Committee expected petitioner to "sustain the burden of proving the negative" (357 U. S., at 526) of those complex factual elements which amount to forbidden advocacy of violent overthrow. To the contrary it is clear that the Committee had assumed the burden of proving the affirmative of those elements, but was prevented from attempting to discharge that burden by petitioner's refusal to answer relevant questions.

The judgment of the Supreme Court of California is

Affirmed.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur, dissenting.

When this case was here before, we reversed a judgment of the California Supreme Court barring the petitioner Konigsberg from the practice of law in that State on the ground that he had failed to carry the burden of proving his good moral character and that he did not advocate forcible overthrow of the Government. In do-

ing so, we held that there was "no evidence in the record" which could rationally justify such a conclusion.[1] Upon remand, the Supreme Court of California referred the matter back to the Committee of State Bar Examiners for further hearings, at which time Konigsberg presented even more evidence of his good character. The Committee produced no evidence whatever which tended in the slightest degree to reflect upon the good character and patriotism which we had already held Konigsberg to have established. The case is therefore now before us with the prior adjudication that Konigsberg possesses the requisite good character and patriotism for admission to the Bar unimpaired.

What the Committee did do upon remand was to repeat the identical questions with regard to Konigsberg's suspected association with Communists twenty years ago that it had asked and he had refused to answer at the first series of hearings. Konigsberg again refused to answer these questions and the Committee again refused to certify him as fit for admission to the Bar, this time on the ground that his refusal to answer had obstructed the required investigation into his qualifications, a ground subsequently adopted by a majority of the Supreme Court of that State.[2]

Thus, California purports to be denying Konigsberg admission to its Bar solely on the ground that he has refused to answer questions put to him by the Committee of Bar Examiners. But when the case was here before, we observed: "There is nothing in the California statutes,

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[1] *Konigsberg* v. *State Bar of California,* 353 U. S. 252, 273. That decision was reached on the basis of a record containing a large quantity of evidence favorable to Konigsberg and some scanty evidence arguably adverse to him.

[2] *Konigsberg* v. *State Bar of California,* 52 Cal. 2d 769, 344 P. 2d 777. Mr. Justice Traynor and Mr. Justice Peters dissented in separate opinions.

the California decisions, or even in the Rules of the Bar Committee, which has been called to our attention, that suggests that failure to answer a Bar Examiner's inquiry is, *ipso facto,* a basis for excluding an applicant from the Bar, irrespective of how overwhelming is his showing of good character or loyalty or how flimsy are the suspicions of the Bar Examiners." [3] And we have been pointed to no subsequent California statutes, rules, regulations or court decisions which require or even permit rejection of a lawyer's application for admission solely because he refuses to answer questions.[4] In this situation, it seems to me that Konigsberg has been rejected on a ground that is not supported by any authoritatively declared rule of law for the State of California.[5] This alone would be

[3] 353 U. S., at 260–261.

[4] The total absence of any authoritative source for this rule is, in my judgment, merely accentuated by the reference in the majority opinion to the article written for the California State Bar Journal by the Secretary of the Committee of Bar Examiners. So far as the cases relied upon in that article are even available for study, they do not in any way support the action of the Bar Committee here.

[5] Thus, it seems to me that California's rejection of Konigsberg is not supported by any "law of the land," as required by the Due Process and Equal Protection Clauses of the Fourteenth Amendment. See *Cohen* v. *Hurley,* decided today, *post,* p. 117, at 135–150 (dissenting opinion). As Daniel Webster argued in the *Dartmouth College* case: "Are then these acts of the legislature, which affect only particular persons and their particular privileges, laws of the land? Let this question be answered by the text of Blackstone: 'And first, it (i. e. law) is a *rule:* not a transient sudden order from a superior, to, or concerning, a particular person; but something permanent, uniform, and universal. Therefore, a particular act of the legislature to confiscate the goods of Titius, or to attaint him of high treason, does not enter into the idea of a municipal law: for the operation of this act is spent upon Titius only, and has no relation to the community in general; it is rather a sentence than a law.' Lord Coke is equally decisive and emphatic. Citing and commenting on the celebrated 29th chap. of *Magna Charta,* he says, 'no man shall be disseized, &c. unless it be by the lawful judgment, that is, verdict of equals, or by the *law*

enough for me to vote to reverse the judgment. There are other reasons, however.

Konigsberg's objection to answering questions as to whether he is or was a member of the Communist Party has, from the very beginning, been based upon the contention that the guarantees of free speech and association of the First Amendment as made controlling upon the States by the Fourteenth Amendment preclude California from denying him admission to its Bar for refusing to answer such questions. In this I think Konigsberg has been correct. California has apparently not even attempted to make actual present membership in the Communist Party a bar to the practice of law, and even if it had, I assume it would not be contended that such a law could be applied to conduct that took place before the law was passed. For such an application would, I think, not only be a clear violation of the *ex post facto* provision of the Federal Constitution, but would also constitute a bill of attainder squarely within this Court's holdings in *Cummings* v. *Missouri*[6] and *Ex parte Garland*.[7] And yet it seems to me that this record shows, beyond any shadow of a doubt, that the reason Konigsberg has been rejected is because the Committee suspects that he was at one time a member of the Communist Party.[8] I agree with the implication of the majority opinion that this is

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of the land, that is, (to speak it once for all,) *by the due course and process of law.'"* (Emphasis as in source.) *Dartmouth College* v. *Woodward,* 4 Wheat. 518, 580–581.

[6] 4 Wall. 277.

[7] 4 Wall. 333.

[8] The suspicions of the Committee doubtless relate to the period around 1941 for the Committee had heard testimony from an ex-Communist that Konigsberg had attended meetings of a Communist Party unit during that period. The unreliability of that testimony was discussed in the Court's opinion when the case was here before. See 353 U. S., at 266–268.

not an adequate ground to reject Konigsberg and that it could not be constitutionally defended.[9]

The majority avoids the otherwise unavoidable necessity of reversing the judgment below on that ground by simply refusing to look beyond the reason given by the Committee to justify Konigsberg's rejection. In this way, the majority reaches the question as to whether the Committee can constitutionally reject Konigsberg for refusing to answer questions growing out of his conjectured past membership in the Communist Party even though it could not constitutionally reject him if he did answer those questions and his answers happened to be affirmative. The majority then goes on to hold that the Committee, by virtue of its power to reject applicants who advocate the violent overthrow of the Government, can reject applicants who refuse to answer questions in any way related to that fact, even though the applicant has sworn under oath that he does not advocate violent overthrow of the Government and even though, as the majority concedes, questions as to the political associations of an applicant subject "speech and association to the deterrence of subsequent disclosure." I cannot agree with that holding.

The recognition that California has subjected "speech and association to the deterrence of subsequent disclosure" is, under the First Amendment, sufficient in itself

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[9] Under the circumstances of this case, it seems clear to me that the action of the State of California in rejecting Konigsberg is also contrary to our decision in *Schware* v. *Board of Bar Examiners of New Mexico,* 353 U. S. 232. In that case, every member of this Court who participated in the decision expressed serious doubts with regard to the probative value of evidence as to a Bar applicant's membership in the Communist Party 15 years previous to our consideration of the case. *Id.,* at 246 (concurring opinion) 251. I cannot believe that such evidence becomes more probative when, as here, it would, if obtained, have been five years older.

to render the action of the State unconstitutional unless one subscribes to the doctrine that permits constitutionally protected rights to be "balanced" away whenever a majority of this Court thinks that a State might have interest sufficient to justify abridgment of those freedoms. As I have indicated many times before,[10] I do not subscribe to that doctrine for I believe that the First Amendment's unequivocal command that there shall be no abridgment of the rights of free speech and assembly shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field. The history of the First Amendment is too well known to require repeating here except to say that it certainly cannot be denied that the very object of adopting the First Amendment, as well as the other provisions of the Bill of Rights, was to put the freedoms protected there completely out of the area of any congressional control that may be attempted through the exercise of precisely those powers that are now being used to "balance" the Bill of Rights out of existence.[11] Of course, the First Amendment originally applied only to the Federal Gov-

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[10] See, *e. g.*, my dissenting opinions in *Braden* v. *United States*, 365 U. S. 431, 441–446; *Wilkinson* v. *United States*, 365 U. S. 399, 422–423; *Uphaus* v. *Wyman*, 364 U. S. 388, 392–393; *Barenblatt* v. *United States*, 360 U. S. 109, 140–144; *American Communications Assn.* v. *Douds*, 339 U. S. 382, 445–453.

[11] James Madison, for example, indicated clearly that he did not understand the Bill of Rights to permit *any* encroachments upon the freedoms it was designed to protect. "If they [the first ten Amendments] are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an *impenetrable bulwark* against *every* assumption of power in the Legislative or Executive; they will be naturally led to resist *every* encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights." 1 Annals of Congress 439 (1789). (Emphasis supplied.)

ernment and did not apply to the States. But what was originally true only of Congress is now no less true with respect to the governments of the States, unless a majority of this Court wants to overrule a large number of cases in which it has been held unequivocally that the Fourteenth Amendment made the First Amendment's provisions controlling upon the States.[12]

The Court attempts to justify its refusal to apply the plain mandate of the First Amendment in part by reference to the so-called "clear and present danger test" forcefully used by Mr. Justice Holmes and Mr. Justice Brandeis, not to narrow but to broaden the then prevailing interpretation of First Amendment freedoms.[13] I think very little can be found in anything they ever said that would provide support for the "balancing test" presently in use. Indeed, the idea of "balancing" away First Amendment freedoms appears to me to be wholly inconsistent with the view, strongly espoused by Justices Holmes and Brandeis, that the best test of truth is the power of the thought to get itself accepted in the competition of the market.[14] The "clear

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[12] See, *e. g., Minersville District* v. *Gobitis,* 310 U. S. 586, 593; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108; *Board of Education* v. *Barnette,* 319 U. S. 624, 639; *Staub* v. *City of Baxley,* 355 U. S. 313, 321.

[13] See *Schenck* v. *United States,* 249 U. S. 47, 52, where Mr. Justice Holmes, writing for the Court, said: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent."

[14] *Abrams* v. *United States,* 250 U. S. 616, 630 (Holmes, J., dissenting). See also *Gitlow* v. *New York,* 268 U. S. 652, 673: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and

and present danger test" was urged as consistent with this view in that it protected speech in all cases except those in which danger was so imminent that there was no time for rational discussion.[15] The "balancing test," on the other hand, rests upon the notion that some ideas are so dangerous that Government need not restrict itself to contrary arguments as a means of opposing them even where there is ample time to do so. Thus here, where there is not a semblance of a "clear and present danger," and where there is more than ample time in which to combat by discussion any idea which may be involved, the majority permits the State of California to adopt measures calculated to suppress the advocacy of views about governmental affairs.

I recognize, of course, that the "clear and present danger test," though itself a great advance toward individual liberty over some previous notions of the protections afforded by the First Amendment,[16] does not go as far as my own views as to the protection that should be accorded these freedoms. I agree with Justices Holmes and Brandeis, however, that a primary purpose of the First Amendment was to insure that all ideas would be allowed to enter the "competition of the market." But I fear that the creation of "tests" by which speech is left unprotected under certain circumstances is a standing invitation to abridge it. This is nowhere more clearly indi-

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have their way." (Holmes, J., dissenting.) And see *Whitney* v. *California,* 274 U. S. 357, 378: "Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law, not abridgment of the rights of free speech and assembly." (Brandeis, J., concurring.)

[15] See *Abrams* v. *United States,* 250 U. S. 616, 630–631 (dissenting opinion); *Gitlow* v. *New York,* 268 U. S. 652, 672–673 (dissenting opinion); *Whitney* v. *California,* 274 U. S. 357, 378–379 (concurring opinion).

[16] See *Bridges* v. *California,* 314 U. S. 252, 260–263.

cated than by the sudden transformation of the "clear and present danger test" in *Dennis* v. *United States*. In that case, this Court accepted Judge Learned Hand's "restatement" of the "clear and present danger test": "In each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." [17] After the "clear and present danger test" was diluted and weakened by being recast in terms of this "balancing" formula, there seems to me to be much room to doubt that Justices Holmes and Brandeis would even have recognized their test. And the reliance upon that weakened "test" by the majority here, without even so much as an attempt to find either a "clear" or a "present" danger, is only another persuasive reason for rejecting all such "tests" and enforcing the First Amendment according to its terms.

The Court suggests that a "literal reading of the First Amendment" would be totally unreasonable because it would invalidate many widely accepted laws. I do not know to what extent this is true. I do not believe, for example, that it would invalidate laws resting upon the premise that where speech is an integral part of unlawful conduct that is going on at the time, the speech can be used to illustrate, emphasize and establish the unlawful conduct.[18] On the other hand, it certainly would invalidate all laws that abridge the right of the people to discuss matters of religious or public interest, in the broadest meaning of those terms, for it is clear that a desire to protect this right was the primary purpose of the First Amendment. Some people have argued, with much force, that the freedoms guaranteed by the First Amend-

[17] 183 F. 2d 201, 212; 341 U. S. 494, 510.

[18] *Roth* v. *United States*, 354 U. S. 476, 514 (dissenting opinion). See also *Labor Board* v. *Virginia Electric & Power Co.*, 314 U. S. 469; *Giboney* v. *Empire Storage Co.*, 336 U. S. 490.

ment are limited to somewhat broad areas like those.[19] But I believe this Nation's security and tranquility can best be served by giving the First Amendment the same broad construction that all Bill of Rights guarantees deserve.[20]

The danger of failing to construe the First Amendment in this manner is, I think, dramatically illustrated by the decision of this Court in *Beauharnais* v. *Illinois*,[21] one of the cases relied upon for this holding today. In that case, a majority of this Court upheld the conviction of a man whose only "crime" was the circulation of a petition to be presented to the City Council of Chicago urging that body to follow a policy of racial segregation in language that the State of Illinois chose to regard as "libelous" against Negroes. Holding that "libelous utterances" were not included in the "speech" protected against state invasion by the Due Process Clause of the Fourteenth Amendment,[22] this Court there concluded that

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[19] See, *e. g.*, Meiklejohn, What Does the First Amendment Mean? 20 U. of Chi. L. Rev. 461, 464.

[20] Cf. *Boyd* v. *United States*, 116 U. S. 616, 635: "[C]onstitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

[21] 343 U. S. 250.

[22] The Court opinion here apparently treats the *Beauharnais* case as having decided that the *Federal* Government has power, despite the First Amendment, to pass so-called "group libel" laws. This, I think, is wholly unjustified. The *Beauharnais* opinion was written on the assumption that the protection afforded the freedoms of speech and petition against state action by the Fourteenth Amendment amounted to something less than the protection afforded these freedoms against congressional action by the First Amendment. Thus, as pointed out in my dissent in that case, the majority in *Beauharnais* never even mentioned the First Amendment but upheld

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the petition which had been circulated fell within that exception and therefore outside the area of constitutionally protected speech because it made charges against the entire Negro population of this country. Thus, Beauharnais was held to have simultaneously "libelled" some fifteen million people. And by this tremendous expansion of the concept of "libel," what some people might regard as a relatively minor exception to the full protection of freedom of speech had suddenly become a vehicle which could be used to justify a return to the vicious era of the laws of seditious libel, in which the political party in power, both in England and in this country, used such laws to put its opponents in jail.[23]

Whatever may be the wisdom, however, of an approach that would reject exceptions to the plain language of the First Amendment based upon such things as "libel," "obscenity" [24] or "fighting words," [25] such is not the issue in this case. For the majority does not, and surely would not, contend that the kind of speech involved in this case—wholly related as it is to conflicting ideas about governmental affairs and policies—falls outside the protection of the First Amendment, however narrowly that Amendment may be interpreted. So the only issue presently before us is whether speech that must be well within the protection of the Amendment should be given complete protection or whether it is entitled only to such pro-

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the state "group libel" law on the ground that it did not violate "civilized 'canons of decency,' reasonableness, etc." See 343 U. S., at 268–269. See also the dissent of Mr. Justice Jackson, at 287–305.

[23] The story of the use by the Federalists of the Alien and Sedition Acts of 1798 as a weapon to suppress the political opposition of the Jeffersonians has been graphically told in Bowers, Jefferson and Hamilton, at 362–411.

[24] See, *e. g., Roth* v. *United States,* 354 U. S. 476.

[25] See, *e. g., Chaplinsky* v. *New Hampshire,* 315 U. S. 568.

tection as is consistent in the minds of a majority of this Court with whatever interest the Government may be asserting to justify its abridgment. The Court, by stating unequivocally that there are no "absolutes" under the First Amendment, necessarily takes the position that even speech that is admittedly protected by the First Amendment is subject to the "balancing test" and that therefore no kind of speech is to be protected if the Government can assert an interest of sufficient weight to induce this Court to uphold its abridgment. In my judgment, such a sweeping denial of the existence of any inalienable right to speak undermines the very foundation upon which the First Amendment, the Bill of Rights, and, indeed, our entire structure of government rest.[26] The Founders of this Nation attempted to set up a limited government which left certain rights in the people—rights that could not be taken away without amendment of the basic charter of government. The majority's "balancing test" tells us that this is not so. It tells us that no right

[26] "The founders of our federal government were too close to oppressions and persecutions of the unorthodox, the unpopular, and the less influential to trust even elected representatives with unlimited powers of control over the individual. From their distrust were derived the first ten amendments, designed as a whole to 'limit and qualify the powers of Government,' to define 'cases in which the Government ought not to act, or to act only in a particular mode,' and to protect unpopular minorities from oppressive majorities. 1 Annals 437. The first of the ten amendments erected a Constitutional shelter for the people's liberties of religion, speech, press, and assembly. This amendment reflects the faith that a good society is not static but advancing, and that the fullest possible interchange of ideas and beliefs is essential to attainment of this goal. The proponents of the First Amendment, committed to this faith, were determined that every American should possess an unrestrained freedom to express his views, however odious they might be to vested interests whose power they might challenge." *Feldman* v. *United States*, 322 U. S. 487, 501 (dissenting opinion).

to think, speak or publish exists in the people that cannot be taken away if the Government finds it sufficiently imperative or expedient to do so. Thus, the "balancing test" turns our "Government of the people, by the people and for the people" into a government over the people.

I cannot believe that this Court would adhere to the "balancing test" to the limit of its logic. Since that "test" denies that any speech, publication or petition has an "absolute" right to protection under the First Amendment, strict adherence to it would necessarily mean that there would be only a conditional right, not a complete right, for any American to express his views to his neighbors—or for his neighbors to hear those views. In other words, not even a candidate for public office, high or low, would have an "absolute" right to speak in behalf of his candidacy, no newspaper would have an "absolute" right to print its opinion on public governmental affairs, and the American people would have no "absolute" right to hear such discussions. All of these rights would be dependent upon the accuracy of the scales upon which this Court weighs the respective interests of the Government and the people. It therefore seems to me that the Court's "absolute" statement that there are no "absolutes" under the First Amendment must be an exaggeration of its own views.

These examples also serve to illustrate the difference between the sort of "balancing" that the majority has been doing and the sort of "balancing" that was intended when that concept was first accepted as a method for insuring the complete protection of First Amendment freedoms even against purely incidental or inadvertent consequences. The term came into use chiefly as a result of cases in which the power of municipalities to keep their streets open for normal traffic was attacked by groups wishing to use those streets for religious or polit-

ical purposes.[27] When those cases came before this Court, we did not treat the issue posed by them as one primarily involving First Amendment rights. Recognizing instead that public streets are avenues of travel which must be kept open for that purpose, we upheld various city ordinances designed to prevent unnecessary noises and congestions that disrupt the normal and necessary flow of traffic. In doing so, however, we recognized that the enforcement of even these ordinances, which attempted no regulation at all of the content of speech and which were neither openly nor surreptitiously aimed at speech, could bring about an "incidental" abridgment of speech. So we went on to point out that even ordinances directed at and regulating only conduct might be invalidated if, after "weighing" the reasons for regulating the particular conduct, we found them insufficient to justify diminishing "the exercise of rights so vital to the maintenance of democratic institutions" as those of the First Amendment.[28]

But those cases never intimated that we would uphold as constitutional an ordinance which purported to rest upon the power of a city to regulate traffic but which was aimed at speech or attempted to regulate the content of speech. None of them held, nor could they constitutionally have held, that a person rightfully walking or riding along the streets and talking in a normal way could have his views controlled, licensed or penalized in any way by the city—for that would be a direct abridgment of speech itself. Those cases have only begun to take on that meaning by being relied upon, again and again as they

[27] Typical of such cases are those referred to by the majority in its opinion here: *Schneider* v. *State,* 308 U. S. 147; *Cox* v. *New Hampshire,* 312 U. S. 569; *Prince* v. *Massachusetts,* 321 U. S. 158; *Kovacs* v. *Cooper,* 336 U. S. 77.

[28] *Schneider* v. *State,* 308 U. S. 147, 161.

are here, to justify the application of the "balancing test" to governmental action that is aimed at speech and depends for its application upon the content of speech. Thus, those cases have been used to support decisions upholding such obviously antispeech actions on the part of government as those involved in *American Communications Assn.* v. *Douds* [29] and *Dennis* v. *United States.*[30] And the use being made of those cases here must be considered as falling squarely within that class.[31]

The Court seeks to bring this case under the authority of the street-regulation cases and to defend its use of the "balancing test" on the ground that California is attempting only to exercise its permissible power to regulate its Bar and that any effect its action may have upon speech is purely "incidental." But I cannot agree that the questions asked Konigsberg with regard to his suspected membership in the Communist Party had nothing more than an "incidental" effect upon his freedom of speech and association. Why does the Committee of Bar Examiners ask a bar applicant whether he is or has been a member of the Communist Party? The avowed purpose of such questioning is to permit the Committee to deny applicants admission to the Bar if they "advocate" forcible overthrow of the Government. Indeed, that is precisely the ground upon which the majority is here upholding the Committee's right to ask Konigsberg these questions. I realize that there has been considerable talk, even in the opinions of this Court, to the effect that "advocacy" is not "speech." But with the highest respect for those who believe that there is such a distinction, I cannot agree with it. For this reason, I think the conclusion is inescapable that this case presents the question of the consti-

[29] 339 U. S. 382, especially at 398–400.

[30] 341 U. S. 494, especially at 508–509.

[31] See also the discussion of these street-regulation cases in my dissenting opinion in *Barenblatt* v. *United States,* 360 U. S. 109, 141–142.

tutionality of action by the State of California designed to control the content of speech. As such, it is a "direct," and not an "incidental" abridgment of speech. Indeed, if the characterization "incidental" were appropriate here, it would be difficult to imagine what would constitute a "direct" abridgment of speech. The use of the "balancing test" under these circumstances thus permits California directly to abridge speech in explicit contradiction to the plain mandate of the First Amendment.

But even if I thought the majority was correct in its view that "balancing" is proper in this case, I could not agree with its decision. In the first place, I think that the decision here is unduly restrictive upon individual liberty even under the penurious "balancing test." The majority describes the State's interest which is here to be "balanced" against the interest in protecting the freedoms of speech and association as an interest in "having lawyers who are devoted to the law in its broadest sense, including not only its substantive provisions, but also its procedures for orderly change." But is that an accurate statement of the interest of the State that is really at stake here? Konigsberg has stated unequivocally that he never has, does not now, and never will advocate the overthrow of the Government of this country by unconstitutional means, and we held when the case was here before that his evidence was sufficient to establish that fact. Since the Committee has introduced no evidence at any subsequent hearing that would lead to a contrary conclusion, the fact remains established.[32] So the issue in

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[32] The majority places some stress upon the fact that the Committee did not have independent investigatory resources with which to seek further evidence. In view of the complete reliance upon this decision to justify the use of an identical procedure in *In re Anastaplo,* decided today, *post,* p. 82, where the bar admission committee not only had investigatory resources but also utilized them to the fullest, this fact must be of little "weight" in the constitutional "balance."

this case is not, as the majority's statement of the State's interest would seem to indicate, whether a person who advocates the overthrow of existing government by force must be admitted to the practice of law. All we really have on the State's side of the scales is its desire to know whether Konigsberg was ever a member of the Communist Party.

The real lack of value of that information to the State is, to my mind, clearly shown by the fact that the State has not even attempted to make membership in the Communist Party a ground for disqualification from the Bar. Indeed, if the State's only real interest was, as the majority maintains, in having good men for its Bar, how could it have rejected Konigsberg, who, undeniably and as this Court has already held, has provided overwhelming evidence of his good character? Our former decision, which I still regard as resting on what is basically just good common sense, was that a man does not have to tell all about his previous beliefs and associations in order to establish his good character and loyalty.

When the majority turns to the interest on the other side of the scale, it admits that its decision is likely to have adverse effects upon free association caused by compulsory disclosures, but then goes on to say that those adverse effects will be "minimal" here, first, because Bar admission interrogations are private and, secondly, because the decisions of Bar admission committees are subject to judicial review. As to the first ground, the Court simply ignores the fact that California law does not require its Committee to treat information given it as confidential.[33] And besides, it taxes credulity to sup-

[33] In this regard, the situation is identical to that invalidated as unconstitutional by our decision in *Shelton* v. *Tucker*, 364 U. S. 479. Indeed, the absence of such a requirement was there stressed as an important part of the ground upon which that decision rested. *Id.*, at 486.

pose that questions asked an applicant and answers given by him in the highly emotional area of communism would not rapidly leak out to the great injury of an applicant—regardless of what the facts of his particular case may happen to be. As to the second ground given, the Court fails to take into account the fact that judicial review widens the publicity of the questions and answers and thus tends further to undercut its first ground. At the same time, such review, as is demonstrated by this and the companion case decided today,[34] provides small hope that an applicant will be afforded relief against stubborn efforts to destroy him arbitrarily by innuendoes that will subject him to lasting suspicions. But even if I thought the Court was correct in its beliefs that the interrogation of a Bar applicant would be kept confidential and that judicial review is adequate to prevent arbitrary exclusions from the Bar, I could not accept its conclusion that the First Amendment rights involved in this case are "minimal."

The interest in free association at stake here is not merely the personal interest of petitioner in being free from burdens that may be imposed upon him for his past beliefs and associations. It is the interest of all the people in having a society in which no one is intimidated with respect to his beliefs or associations. It seems plain to me that the inevitable effect of the majority's decision is to condone a practice that will have a substantial deterrent effect upon the associations entered into by anyone who may want to become a lawyer in California. If every person who wants to be a lawyer is to be required to account for his associations as a prerequisite to admission into the practice of law, the only safe course for those desiring admission would seem to be scrupulously to avoid

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[34] *In re Anastaplo, supra.* See also the discussion in my dissenting opinion in that case, especially at pp. 108–112.

association with any organization that advocates anything at all somebody might possibly be against, including groups whose activities are constitutionally protected under even the most restricted notion of the First Amendment.[35] And, in the currently prevailing atmosphere in this country, I can think of few organizations active in favor of civil liberties that are not highly controversial.[36] In addition, it seems equally clear that anyone who had already associated himself with an organization active in favor of civil liberties before he developed an interest in the law, would, after this case, be discouraged from spending the large amounts of time and money necessary to obtain a legal education in the hope that he could practice law in California.

Thus, in my view, the majority has reached its decision here against the freedoms of the First Amendment by a fundamental misapplication of its own currently, but I hope only temporarily, prevailing "balancing" test. The interest of the Committee in satisfying its curiosity with respect to Konigsberg's "possible" membership in the Communist Party two decades ago has been inflated out of all proportion to its real value—the vast interest of the public in maintaining unabridged the basic freedoms of speech, press and assembly has been paid little if anything more than lip service—and important constitutional rights have once again been "balanced" away. This, of course, is an ever-present danger of the "balanc-

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[35] The situation here is thus identical to that in *Speiser* v. *Randall,* where the Court expressly recognized the danger to protected associations. See 357 U. S. 513, 526.

[36] Cf. *Shelton* v. *Tucker, supra,* at 486, n. 7, where we took note of testimony that efforts were being made to remove from a school system all teachers who supported such organizations as the American Civil Liberties Union, the Urban League, the American Association of University Professors, and the Women's Emergency Committee to Open Our Schools.

ing test" for the application of such a test is necessarily tied to the emphasis particular judges give to competing societal values. Judges, like everyone else, vary tremendously in their choice of values. This is perfectly natural and, indeed, unavoidable. But it is neither natural nor unavoidable in this country for the fundamental rights of the people to be dependent upon the different emphasis different judges put upon different values at different times. For those rights, particularly the First Amendment rights involved here, were unequivocally set out by the Founders in our Bill of Rights in the very plainest of language, and they should not be diluted by "tests" that obliterate them whenever particular judges think values they most highly cherish outweigh the values most highly cherished by the Founders.

Moreover, it seems to me that the "balancing test" is here being applied to cut the heart out of one of the very few liberty-protecting decisions that this Court has rendered in the last decade. *Speiser* v. *Randall* [37] struck down, as a violation of the Federal Constitution, a state law which denied tax exemptions to veterans who refused to sign an oath that they did not advocate "the overthrow of the Government of the United States or of the State of California by force or violence or other unlawful means . . . ." [38] The case arose when certain veterans insisted upon their right to the exemptions without signing the oath. The California Supreme Court rejected the veterans' constitutional contention that the state law violated due process by placing the burden of proof upon the taxpayer to prove that he did not advocate violent overthrow of the Government. This Court reversed, with only

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[37] 357 U. S. 513.

[38] Section 32 of the California Revenue and Taxation Code. This section was set out in full in the majority opinion in *Speiser*. 357 U. S., at 516–517, n. 2.

one Justice dissenting, on the ground that the necessary effect of such an imposition of the burden of proof "can only result in a deterrence of speech which the Constitution makes free." [39] Indeed, the majority opinion in the *Speiser* case distinguished the very cases upon which the majority here is relying on the ground that "the oaths required in those cases performed a very different function from the declaration in issue here. In the earlier cases it appears that the loyalty oath, once signed, became conclusive evidence of the facts attested so far as the right to office was concerned. If the person took the oath he retained his position. The oath was not part of a device to shift to the officeholder the burden of proving his right to retain his position." [40] But that is precisely what is happening here. For, even though Konigsberg has taken an oath that he does not advocate the violent overthrow of the Government, the Committee has persisted in the view that he has not as yet demonstrated his right to admission to the Bar. If that does not amount to the sort of shifting of the burden of proof that is proscribed by *Speiser,* I do not know what would.

The situation in the present case is closely analogous to that condemned in the *Speiser* case and, indeed, the major factual difference between the two cases tends to make this case an even stronger one. Here, as in *Speiser,* the State requires an oath that the person involved does not advocate violent overthrow of the Government. Here, as there, the taking of the oath is not conclusive of the rights of the person involved. And here, as there, contrary to the implications in the majority opinion, I think it clear that the State places upon each applicant for admission to the Bar the burden of proving that he does

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[39] 357 U. S., at 526.

[40] *Id.,* at 528. The cases so distinguished were *Garner* v. *Board of Public Works,* 341 U. S. 716; *Gerende* v. *Board of Supervisors,* 341 U. S. 56, and *American Communications Assn.* v. *Douds,* 339 U. S. 382.

not advocate the violent overthrow of the Government. There is one difference between the two cases, for here Konigsberg agreed to take the oath required and he refused to answer only when the State insisted upon more. Surely he cannot be penalized for his greater willingness to cooperate with the State.

The majority also suggests that the *Speiser* case may be distinguishable because it involved merely the power of the State to impose a penalty, by way of a heavier tax burden, upon a person who refused to take an oath, while this case involves the power of the State to determine the qualifications a person must have to be admitted to the Bar—a position of importance to the public. This distinction seems to me to be little more than a play on words. Speiser had the burden of proving that he did not advocate the overthrow of the Government and, upon his refusal to satisfy this burden, he was forced to pay additional taxes as a penalty. Konigsberg has the burden of proving that he does not advocate the violent overthrow of the Government and, upon his supposed failure to meet this burden, he is being denied an opportunity to practice the profession for which he has expended much time and money to prepare himself. So far as I am concerned the consequences to Konigsberg, whether considered from a financial standpoint, a social standpoint, or any other standpoint I can think of, constitute a more serious "penalty" than that imposed upon Speiser.

In my judgment this case must take its place in the ever-lengthening line of cases in which individual liberty to think, speak, write, associate and petition is being abridged in a manner precisely contrary to the explicit commands of the First Amendment.[41] And I believe the

[41] This line has already been considerably lengthened during this very Term of Court. See, *e. g., Uphaus* v. *Wyman,* 364 U. S. 388; *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43; *Wilkinson* v. *United States,* 365 U. S. 399; *Braden* v. *United States,* 365 U. S. 431.

abridgment of liberty here, as in most of the other cases in that line, is based upon nothing more than a fear that the American people can be alienated from their allegiance to our form of government by the talk of zealots for a form of government that is hostile to everything for which this country now stands or ever has stood. I think this fear is groundless for I believe that the loyalty and patriotism of the American people toward our own free way of life are too deeply rooted to be shaken by mere talk or argument from people who are wedded to totalitarian forms of government. It was this kind of faith in the American people that brought about the adoption of the First Amendment, which was expressly designed to let people say what they wanted to about government—even against government if they were so inclined. The idea underlying this then revolutionary idea of freedom was that the Constitution had set up a government so favorable to individual liberty that arguments against that government would fall harmless at the feet of a satisfied and happy citizenship. Thomas Jefferson voiced this idea with simple eloquence on the occasion of his first inauguration as President of the United States: "If there be any among us who would wish to dissolve this Union or to change its republican form, let them stand undisturbed as monuments of the safety with which error of opinion may be tolerated where reason is left free to combat it." [42]

In the main, this is the philosophy under which this country has lived and prospered since its creation. There have, however, been two notable exceptions, the first being the period of the short-lived and unlamented alien and sedition laws of the late 1700's, and the other

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[42] Thomas Jefferson, First Inaugural Address, March 4, 1801. This address is reprinted in Jones, Primer of Intellectual Freedom 142, 143 (Harvard University Press, 1949).

being the period since the beginning of the "cold war" shortly after the close of World War II, in which there has been a widespread fear of an imagined overwhelming persuasiveness in Communist arguments. The most commonly offered justification for the liberty-stifling measures that have characterized this latter period is that the Communists do not themselves believe in the freedoms of speech, press and assembly so they should not be allowed to take advantage of the freedoms our Constitution provides. But, as illustrated by this and many other cases, the effect of repressive laws and inquisitions of this kind cannot be and is not limited to Communists.[43] Moreover, the fact that Communists practice repression of these freedoms is, in my judgment, the last reason in the world that we should do so. We do not have to imitate the Communists in order to survive. Our Bill of Rights placed our survival upon a firmer ground—that of freedom, not repression.

Nothing in this record shows that Konigsberg has ever been guilty of any conduct that threatens our safety. Quite the contrary, the record indicates that we are fortunate to have men like him in this country for it shows that Konigsberg is a man of firm convictions who has stood up and supported this country's freedom in peace and in war. The writings that the record shows he has published constitute vehement protests against the idea

[43] "Centuries of experience testify that laws aimed at one political or religious group, however rational these laws may be in their beginnings, generate hatreds and prejudices which rapidly spread beyond control. Too often it is fear which inspires such passions, and nothing is more reckless or contagious. In the resulting hysteria, popular indignation tars with the same brush all those who have ever been associated with any member of the group under attack or who hold a view which, though supported by revered Americans as essential to democracy, has been adopted by that group for its own purposes." *American Communications Assn.* v. *Douds*, 339 U. S. 382, 448–449 (dissenting opinion).

of overthrowing this Government by force. No witness could be found throughout the long years of this inquisition who could say, or even who would say, that Konigsberg has ever raised his voice or his hand against his country. He is, therefore, but another victim of the prevailing fashion of destroying men for the views it is suspected they might entertain.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE joins, dissenting.

This judgment must be reversed even if we assume with Mr. Justice Traynor in his dissent in the California Supreme Court, 52 Cal. 2d 769, 774, at 776, 344 P. 2d 777, 780, at 781–782, that "a question as to present or past membership in [the Communist Party] is relevant to the issue of possible criminal advocacy and hence to [Konigsberg's] qualifications." The Committee did not come forward, in the proceeding we passed upon in 353 U. S. 252, nor in the subsequent proceeding, with evidence to show that Konigsberg unlawfully advocated the overthrow of the Government. Under our decision in *Speiser* v. *Randall,* 357 U. S. 513, the Fourteenth Amendment therefore protects Konigsberg from being denied admission to the Bar for his refusal to answer the questions. In *Speiser* we held that ". . . when the constitutional right to speak is sought to be deterred by a State's general taxing program due process demands that the speech be unencumbered until the State comes forward with sufficient proof to justify its inhibition." 357 U. S., pp. 528–529. "There may be differences of degree," Mr. Justice Traynor said, "in the public interest in the fitness of the applicants for tax exemption and for admission to the Bar"; yet, as to the latter also, "Such a procedure is logically dictated by *Speiser* . . . ." 52 Cal. 2d, p. 776, 344 P. 2d, p. 782. And unless mere whimsy governs this Court's decisions in situations im-

possible rationally to distinguish, such a procedure is indeed constitutionally required here. The same reasons apply. For Mr. Justice Traynor was entirely right in saying: "Whatever its relevancy [the question as to past or present Party membership] in a particular context, . . . it is an extraordinary variant of the usual inquiry into crime, for the attendant burden of proof upon any one under question poses the immediate threat of prior restraint upon the free speech of all applicants. The possibility of inquiry into their speech, the heavy burden upon them to establish its innocence, and the evil repercussions of inquiry despite innocence, would constrain them to speak their minds so noncommittally that no one could ever mistake their innocuous words for advocacy. This grave danger to freedom of speech could be averted without loss to legitimate investigation by shifting the burden to the examiners. Confronted with a prima facie case, an applicant would then be obliged to rebut it." *Id.*, p. 776, 344 P. 2d, p. 782.

The Court admits the complete absence of any such predicate by the Committee for its questions. The Court attempts to distinguish the situations in order to escape the controlling authority of *Speiser*. The speciousness of its reasoning is exposed in MR. JUSTICE BLACK'S dissent. I would reverse.

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IN RE ANASTAPLO.

CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

No. 58. Argued December 14, 1960.—Decided April 24, 1961.

A rule of the Supreme Court of Illinois provides that applicants shall be admitted by it to the practice of law after satisfactory examination by the Board of Examiners and certification of qualification by a Committee on Character and Fitness. In hearings before that Committee, petitioner refused to answer any questions pertaining to his membership in the Communist Party, not on the ground of possible self-incrimination, but on the ground that such inquiries violated his freedom of speech and association. The Committee declined to certify him as qualified for admission to the Bar, solely on the ground that his refusals to answer such questions had obstructed the Committee's performance of its functions. The State Supreme Court denied him admission to practice. *Held:* Denial of petitioner's application for admission to the Bar on this ground did not violate his rights under the Fourteenth Amendment. Pp. 83–97.

(a) It is not constitutionally impermissible for a State to adopt a rule that an applicant will not be admitted to the practice of law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications. *Konigsberg* v. *State Bar, ante,* p. 36. P. 88.

(b) Petitioner was not privileged under the Fourteenth Amendment to refuse to answer questions concerning membership in the Communist Party. *Konigsberg* v. *State Bar, supra.* P. 89.

(c) The fact that there was no independent evidence that petitioner had ever been a member of the Communist Party did not prevent the State, acting in good faith, from making this inquiry in an investigation of this kind. Pp. 89–90.

(d) During the hearings before the Committee, petitioner was given adequate warning as to the consequences of his refusal to answer the Committee's questions relating to membership in the Communist Party. Pp. 90–94.

(e) In the circumstances of this case, petitioner's exclusion from the Bar on the ground that he had obstructed the Committee in the performance of its duties was not arbitrary or discriminatory. Pp. 94–97.

18 Ill. 2d 182, 163 N. E. 2d 429, affirmed.

Petitioner argued the cause and filed a brief *pro se.*

William C. Wines, Assistant Attorney General of Illinois, argued the cause for the State of Illinois, respondent. With him on the brief were *William L. Guild,* Attorney General, and *Raymond S. Sarnow* and *A. Zola Groves,* Assistant Attorneys General.

Briefs of *amici curiae,* urging reversal, were filed by *Roscoe T. Steffen* for the American Civil Liberties Union and by *David Scribner, Leonard B. Boudin, Ben Margolis, William B. Murrish* and *Charles Stewart* for the National Lawyers Guild.

Mr. Justice Harlan delivered the opinion of the Court.

The questions presented by this case are similar to those involved in No. 28, *Konigsberg* v. *State Bar of California,* decided today, *ante,* p. 36.

In 1954 petitioner, George Anastaplo, an instructor and research assistant at the University of Chicago, having previously passed his Illinois bar examinations, was denied admission to the bar of that State by the Illinois Supreme Court.[1] The denial was based upon his refusal to answer

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[1] The Illinois procedure for admission to the bar was thus summarized by the State Supreme Court (3 Ill. 2d, at 475–476, 121 N. E. 2d, at 829):

"In the exercise of its judicial power over the bar, and in discharge of its responsibility for the choice of personnel who will compose that bar, this court has adopted Rule 58, (Ill. Rev. Stat. 1951, chap. 110, par. 259.58,) which governs admissions and provides, among other things, that applicants shall be admitted to the practice of law by this court after satisfactory examination by the Board of Examiners and certification of approval by a Committee on Character and Fitness. Section IX of the rule provides for the creation of such committees and imposes upon them the duty to examine applicants who appear before them for moral character, general fitness to practice law and good citizenship. Still another condition precedent to admission to practice law in this State, imposed by the legislature, is the taking of an oath to support the constitution of

questions of the Committee on Character and Fitness as to whether he was a member of the Communist Party.[2] This Court, two Justices dissenting, refused review. 348 U. S. 946. In 1957, following this Court's decisions in the earlier *Konigsberg* case, 353 U. S. 252, and in *Schware* v. *Board of Bar Examiners of New Mexico,* 353 U. S. 232, Anastaplo sought to have the Character Committee rehear his application for certification. The Committee, by a divided vote, refused, but the State Supreme Court reversed and directed rehearing.[3]

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the United States and the constitution of the State of Illinois. (Ill. Rev. Stat. 1951, chap. 13, par. 4.)"

[2] On that occasion the State Supreme Court said (3 Ill. 2d, at 480, 121 N. E. 2d, at 831):

"It is our opinion, therefore, that a member of the Communist Party may, because of such membership, be unable truthfully and in good conscience to take the oath required as a condition for admission to practice, and we hold that it is relevant to inquire of an applicant as to his membership in that party. A negative answer to the question, if accepted as true, would end the inquiry on the point. If the truthfulness of a negative answer were doubted, further questions and information to test the veracity of the applicant would be proper. If an affirmative answer were received, further inquiry into the applicant's innocence or knowledge as to the subversive nature of the organization would be relevant. Under any hypothesis, therefore, questions as to membership in the Communist Party or known subversive 'front' organizations were relevant to the inquiry into petitioner's fitness for admission to the bar. His refusal to answer has prevented the committee from inquiring fully into his general fitness and good citizenship and justifies their refusal to issue a certificate."

[3] In remanding the matter to the Character Committee, the Illinois Supreme Court stated (see 18 Ill. 2d, at 186, 163 N. E. 2d, at 431):

" 'The principal question presented by the petition for rehearing concerns the significance of the applicant's views as to the overthrow of government by force in the light of *Konigsberg* v. *State Bar of California,* 353 U. S. 252, and *Yates* v. *United States,* 1 L. ed. 2d 1356, 77 S. Ct. 1064. Additional questions presented concern the applicant's activities since his original application was denied, and his present reputation. [*Note 3 continued on p. 85.*]

The ensuing lengthy proceedings before the Committee,[4] at which Anastaplo was the only witness, are perhaps best described as a wide-ranging exchange between the Committee and Anastaplo in which the Committee sought to explore Anastaplo's ability conscientiously to swear support of the Federal and State Constitutions, as required by the Illinois attorneys' oath, and Anastaplo undertook to expound and defend, on historical and ideological premises, his abstract belief in the "right of revolution," and to resist, on grounds of asserted constitutional right and scruple, Committee questions which he deemed improper.[5] The Committee already had before it uncontroverted evidence as to Anastaplo's "good moral character," in the form of written statements or affidavits

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" 'We are of the opinion that the Committee should have allowed the petition for rehearing and heard evidence on these matters, and the Committee is requested to do so, and to report the evidence and its conclusions.' "

[4] The proceedings consumed six hearing days, and resulted in a transcript of over 400 pages.

[5] More particularly: petitioner was first asked routine questions about his personal history. He refused, on constitutional grounds, to answer whether he was affiliated with any church. He answered all questions about organizational relationships so long as he did not know that the organization was "political" in character. He refused, on grounds of protected free speech and association, to answer whether he was a member of the Communist Party or of any other group named in the Attorney General's list of "subversive" organizations, including the Ku Klux Klan and the Silver Shirts of America.

Much of the ensuing five sessions was devoted to discussion of Anastaplo's reasons for believing that inquiries into such matters were constitutionally privileged, and to an unjustifiable attempt, later expressly repudiated by the Committee, to delve into the consistency of petitioner's religious beliefs with an attorney's duty to take an oath of office.

A substantial part of the proceedings revolved around Anastaplo's views as to the right to revolt against tyrannical government, and the right to resist judicial decrees in exceptional circumstances.

furnished by persons of standing acquainted with him, and the record on rehearing contains nothing which could properly be considered as reflecting adversely upon his character or reputation or on the sincerity of the beliefs he espoused before the Committee.[6] Anastaplo persisted, however, in refusing to answer, among other inquiries,[7] the Committee's questions as to his possible membership in the Communist Party or in other allegedly related organizations.

Thereafter the Committee, by a vote of 11 to 6, again declined to certify Anastaplo because of his refusal to answer such questions, the majority stating in its report to the Illinois Supreme Court:

> "his [Anastaplo's] failure to reply, in our view, (i) obstructs the lawful processes of the Committee, (ii) prevents inquiry into subjects which bear intimately upon the issue of character and fitness, such as loyalty to our basic institutions, belief in representative government and *bona fides* of the attorney's oath and (iii) results in his failure to meet the burden of establishing that he possesses the good moral character and fitness to practice law, which are conditions to the granting of a license to practice law.
>
> "We draw no inference of disloyalty or subversion from applicant's continued refusal to answer questions concerning Communist or other subversive affiliations. We do, however, hold that there is a strong public interest in our being free to question applicants for admission to the bar on their adherence to our basic institutions and form of government

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[6] Although the transcript of the prior Committee proceedings has not been made part of the record before us, it is evident that it contained nothing which affirmatively reflected unfavorably on petitioner's character or reputation.

[7] See note 5, *supra*.

> and that such public interest in the character of its attorneys overrides an applicant's private interest in keeping such views to himself. By failing to respond to this higher public interest we hold that the applicant has obstructed the proper functions of the Committee. . . . We cannot certify the applicant as worthy of the trust and confidence of the public when we do not know that he is so worthy and when he has prevented us from finding out."

At the same time the full Committee acknowledged that Anastaplo

> "is well regarded by his academic associates, by professors who had taught him in school and by members of the Bar who know him personally . . .";

that it had

> "not been supplied with any information by any third party which is derogatory to Anastaplo's character or general reputation . . .";

and that it had

> "received no information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group."

Further, the majority found that Anastaplo's views

> "with respect to the right to overthrow the government by force or violence, while strongly libertarian and expressed with an intensity and fervor not necessarily shared by all good citizens, are not inconsistent with those held by many patriotic Americans both at the present time and throughout the course of this country's history and do not in and of themselves reveal any adherence to subversive doctrines."

Upon review, the Illinois Supreme Court, over three dissents,[8] confirmed the Committee's report and refusal to certify Anastaplo, reaffirming in its *per curiam* opinion the court's

> ". . . earlier conclusion that a determination as to whether an applicant can in good conscience take the attorney's oath to support and defend the constitutions of the United States and the State of Illinois is impossible where he refuses to state whether he is a member of a group dedicated to the overthrow of the government of the United States by force and violence." 18 Ill. 2d 182, 200–201, 163 N. E. 2d 429, 439.

We granted certiorari, 362 U. S. 968, and set the matter for argument along with the *Konigsberg* case, *ante,* p. 36, and *Cohen* v. *Hurley, post,* p. 117.

Two of the basic issues in this litigation have been settled by our contemporary *Konigsberg* opinion. We have there held it not constitutionally impermissible for a State legislatively, or through court-made regulation as here and in *Konigsberg,* to adopt a rule that an applicant will not be admitted to the practice of law if, and so long as, by refusing to answer material questions, he obstructs a bar examining committee in its proper functions of interrogating and cross-examining him upon his qualifications. That such was a proper function of the Illinois Character Committee is incontestably established by the opinions of the State Supreme Court in this case. 3 Ill.

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[8] Two dissenting opinions were filed. Justice Bristow dissented on constitutional grounds. 18 Ill. 2d, at 201, 163 N. E. 2d, at 439. Justices Schaefer and Davis, joining in a single opinion, did not reach the constitutional questions. 18 Ill. 2d, at 224, 163 N. E. 2d, at 928.

2d, at 476, 121 N. E. 2d, at 829; 18 Ill. 2d, at 188, 163 N. E. 2d, at 432.[9]

We have also held in *Konigsberg* that the State's interest in enforcing such a rule as applied to refusals to answer questions about membership in the Communist Party outweighs any deterrent effect upon freedom of speech and association, and hence that such state action does not offend the Fourteenth Amendment.[10] We think that in this respect no valid constitutional distinction can be based on the circumstance that in *Konigsberg* there was some, though weak, independent evidence that the applicant had once been connected with the Communist Party, while here there was no such evidence as to

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[9] In its second opinion, the State Supreme Court stated (18 Ill. 2d, at 188, 163 N. E. 2d, at 432):

"The committee further advises us that it has conducted no independent investigation into Anastaplo's character, reputation or activities. For the very practical reason that the committee has no personnel or other resources for any such investigation, the committee states that it has traditionally asserted the view that it cannot be expected to carry the burden of establishing, by independent investigation, whether an applicant possesses the requisite character and fitness for admission to the bar and that a duty devolves upon the applicant to establish that he possesses the necessary qualifications and that it is then the duty of the committee to test, by hearings and questioning of the applicant, the worth of the evidence which he proffers. We agree, and have held that the discretion exercised by the Committee on Character and Fitness will not ordinarily be reviewed. *In re Frank*, 293 Ill. 263."

[10] The fact that in *Konigsberg* the materiality of questions relating to Communist Party membership rested directly on the existence of a California statute disqualifying from membership in the bar those advocating forcible overthrow of government, whereas here materiality stemmed from their bearing upon the likelihood that a bar applicant would observe as a lawyer the orderly processes that lie at the roots of this country's legal and political systems, cf. *Barenblatt* v. *United States*, 360 U. S. 109, is of course a circumstance of no significance.

Anastaplo. Where, as with membership in the bar, the State may withhold a privilege available only to those possessing the requisite qualifications, it is of no constitutional significance whether the State's interrogation of an applicant on matters relevant to these qualifications—in this case Communist Party membership—is prompted by information which it already has about him from other sources, or arises merely from a good faith belief in the need for exploratory or testing questioning of the applicant. Were it otherwise, a bar examining committee such as this, having no resources of its own for independent investigation, might be placed in the untenable position of having to certify an applicant without assurance as to a significant aspect of his qualifications which the applicant himself is best circumstanced to supply. The Constitution does not so unreasonably fetter the States.[11]

Two issues, however, do arise upon this record which are not disposed of by *Konigsberg*. The first is whether Anastaplo was given adequate warning as to the consequences of his refusal to answer the Committee's questions relating to Communist Party membership. The second is whether his exclusion from the bar on this ground was, in the circumstances of this case, arbitrary or discriminatory.

I.

The opinions below reflect full awareness on the part of the Character Committee and the Illinois Supreme Court of Anastaplo's constitutional right to be warned in advance of the consequences of his refusal to answer.[12]

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[11] Cf. *Garner* v. *Los Angeles Board*, 341 U. S. 716; *American Communications Assn.* v. *Douds*, 339 U. S. 382.

[12] The Committee's majority report states:

"The Committee repeatedly warned the applicant that questions regarding Communist affiliation were viewed as important by the

Cf. *Konigsberg* v. *State Bar,* 353 U. S., at 261. On the part of Anastaplo, he stands in the unusual position of one who had already been clearly so warned as a result of his earlier exclusion from the bar for refusal to answer the very question which was again put to him on rehearing. See note 2, *supra.* Anastaplo nevertheless, contends in effect that he was lulled into a false sense of security by various occurrences at the Committee hearings: (1) several statements by Committee members indicating that all questions asked and refused an answer should not be considered as bearing the same level of importance in the eyes of the Committee; [13] and (2) a statement by one of the principal Committee members that Illinois had no "per se" rule of exclusion, that is that Anastaplo's refusal to answer would not *automatically* operate to exclude him from the bar.[14]

Committee members and that his failure to respond to them could adversely affect his application for admission to the bar."

The Illinois Supreme Court stated (18 Ill. 2d, at 196, 163 N. E. 2d, at 436):

". . . no problem exists as to inadequate notice of the consequences of a refusal to answer; the applicant was specifically notified both by the Illinois Supreme Court in its opinion in 3 Ill. 2d 471, and by the committee on rehearing that his continued refusal to answer might lead to the denial of his application."

[13] It was stated at one point in the Committee hearings: "It has been pointed out before to you, that the mere fact that a question is asked does not indicate that other people would have asked or approved that question, nor does it indicate that any particular weight will be attached to the answer or failure to answer the question; do you understand?" It should be observed, however, that this remark, as was also the case with an earlier similar remark, was made in the context of questions involving petitioner's religious beliefs. See note 5, *supra.*

[14] This aspect of Anastaplo's contention is based on the following episode relating to the Committee's Communist Party questions:

"Mr. Anastaplo: . . . I would like to find out exactly what this

These suggestions, whether taken separately or together, can only be viewed as insubstantial. The sum and substance of the matter is that throughout the renewed proceedings petitioner was fully aware that his application for admission had already once been rejected on the very ground about which he now professes to have been left in doubt, and that the Committee made manifest both that it continued to attach special importance to its Communist Party affiliation questions, and that adverse

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entails. You are not suggesting that refusal to answer that question would *per se* block my admission to the bar?

"Commissioner Stephan: No, I am saying your refusal to answer that question as to whether you are a member of the Communist Party, could and might.

"Mr. Anastaplo: I see.

"Commissioner Stephan: To us, it is relevant to your character and fitness. If you should answer the question 'yes,' I am not at all sure that would end the inquiry. I think if you should answer it 'yes,' the committee should be entitled to probe further and find out what kind of Communist Party member the applicant might be, whether he is an active member, whether he is a dues-paying member, whether he is a policy-making member, whether he is an officer in a local group, or just what he is. So I would point out the seriousness of that issue to you at this time.

"Mr. Anastaplo: I assume that the committee does not care to state why this is a particularly serious issue with respect to me? I mean—I notice you say nothing about the Ku Klux Klan or the Silver Shirts of America, about which you have also asked with the same amount of emphasis up to this point, and which I have refused to answer for the same reasons. Would you care to indicate why you say this about this question and not about the other ones?

"Commissioner Stephan: I think there is an easy answer to that. This committee has not come into being—this committee cannot completely ignore the history of this proceeding.

"Commissioner ————: But the history includes that question, and that question has been before two of the high courts of the country.

"Commissioner Stephan: Whatever the relevance of other questions, we consider that one quite relevant."

consequences might well follow if Anastaplo persisted in refusing to answer them.

What follows will suffice to show that statements to the effect that the Committee as a whole did not necessarily approve or adopt every question asked by any of its members can hardly be taken as having left petitioner in doubt as to the central importance and general approval of questions about Communist Party membership. At an early stage of the proceedings Anastaplo was informed:

> "Now you have asked for a warning when we put a question to you that we think is a pivotal, important question in connection with your qualification. I must tell you that we consider that question, 'Are you a member of the Communist Party,' such a question; and that the refusal to answer it may have serious consequences to your application."

And at the last hearing one of the leading Committee members responded to Anastaplo's insistence on being told even more explicitly what refusals to answer would be of significance to the Committee, by pointing out that

> "The Supreme Court of Illinois has ruled that it is proper for us to ask you whether you are a member of the Communist Party. You have refused to answer the question." [15]

Further, petitioner's repeated objections throughout the hearings to the effect that there was no basis for the Committee's evident purpose to give much greater emphasis to questions about Communist Party membership than to other unanswered inquiries, dispel any doubt that

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[15] The particular importance which the Committee attached to its Communist Party questions was still further brought home to Anastaplo by the fact that after this Court's decisions in *Beilan* v. *Board of Education*, 357 U. S. 399, and *Lerner* v. *Casey*, 357 U. S. 468, had come down, the Committee wrote Anastaplo specifically drawing his attention to them.

Anastaplo was quite aware that Communist-affiliation questions were to be treated differently from other questions he had refused to answer.

The other aspect of petitioner's claim on lack of adequate warning is equally untenable. It is true that the Committee told Anastaplo that his refusal to answer questions would not *ipso facto* result in his exclusion from the bar, but only that it "could and might." This, however, certainly did not give rise to constitutional infirmity. Even as to one charged with crime due process does not demand that he be warned as to what specific sanction will be applied to him if he violates the law. It is enough that he know what sanction "could and might" be visited on him. Anastaplo was entitled to no more. It is of course indubitable that by reason of the original rejection of his application, Anastaplo knew of Illinois' rule of exclusion for refusal to answer relevant questions—indeed the very questions involved here.[16]

Petitioner having been fairly warned that exclusion from admission to practice might follow from his refusal to answer, it must be found that this requirement of due process was duly met.

II.

Petitioner's claim that the application of the State's exclusionary rule was arbitrary and discriminatory in the circumstances of this case must also be rejected. It is contended (1) that Anastaplo's refusal to answer these

[16] We find it difficult to understand how it can be seriously suggested, as it further is, that petitioner was put off guard by the fact that instead of standing on petitioner's mere refusal to answer such questions, the Committee proceeded to interrogate him widely. Not only are subsequent events generally irrelevant to an earlier warning, but a large part of the questioning which Anastaplo now complains led him astray was in fact devoted to exploring the bearing of these questions on his fitness for admission to the bar and his reasons for declining to answer them.

particular questions did not obstruct the Committee's investigation, because that body already had before it uncontroverted evidence establishing petitioner's good character and fitness for the practice of law; and (2) that the real reason why the State proceeded as it did was because of its disapproval of Anastaplo's constitutionally protected views on the right to resist tyrannical government. Neither contention can be accepted.

It is sufficient to say in answer to the first contention that even though the Committee already had before it substantial character evidence altogether favorable to Anastaplo, there is nothing in the Federal Constitution which required the Committee to draw the curtain upon its investigation at that point. It had the right to supplement that evidence and to test the applicant's own credibility by interrogating him. And to those ends the Committee could insist upon unprivileged answers to relevant questions, such as we have held in our today's *Konigsberg* opinion those relating to Communist affiliations were, even though as to them the Committee could not, as it did not, draw an unfavorable inference from refusal to answer. *Konigsberg* v. *State Bar of California, supra.*

As to the second contention, there is nothing in the record which would justify our holding that the State has invoked its exclusionary refusal-to-answer rule as a mask for its disapproval of petitioner's notions on the right to overthrow tyrannical government.[17] While the Committee's majority report does observe that there was "a serious question" whether Anastaplo's views on the right to resist judicial decrees would be compatible with his taking of the attorney's oath, and that "certain" members of the Committee thought that such views affirma-

[17] Both the Committee's report and the State Supreme Court's opinion make it apparent that this area of Anastaplo's views played no part in his exclusion from the bar. See pp. 86–88, *supra;* 18 Ill. 2d, at 188, 163 N. E. 2d, at 432.

tively demonstrated his disqualification for admission to the bar,[18] it is perfectly clear that the Illinois Bar Committee and Supreme Court regarded petitioner's refusal to cooperate in the Committee's examination of him as the basic and only reason for a denial of certification.[19]

A different conclusion is not suggested by the circumstances that the Committee when it reheard Anastaplo evinced its willingness to consider the effect of petitioner's refusal to answer in light of what might transpire at the hearings, and that it continued to explore petitioner's views on resistance and overthrow long after it became clear that he would refuse to answer Communist-affiliation questions. These factors indicate no more than that the Committee was attempting to exercise an informed judgment as to whether the situation was an appropriate one for waiver of the Committee's continuing requirement, earlier enforced after the first Anastaplo hearings, that such questions must be answered. Finally, contrary to the assumption on which some of the arguments on behalf of Anastaplo seem to have proceeded, we do not understand that Illinois' exclusionary requirement will continue to operate to exclude Anastaplo from the bar any longer than he continues in his refusal to answer. We

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[18] This of course could hardly be so in the context of the illustrations which Anastaplo gave of his views as to when a right to resist might arise. These were: Nazi Germany; Hungary during the 1956 revolt against Russia; a hypothetical decree of this Court establishing "some dead pagan religion as the official religion of the country . . ."; a capital sentence of Jesus Christ. Asked to give a more realistic instance of when resistance would be proper, Anastaplo summarized: "I know of no decree, off hand, in the history of American government, where such a single instance has occurred. No—I grant that it is hard to find these instances. I think it is important to insist that there might be such instances." Nothing in the State Court's opinion remotely suggests its approbation of these views of "certain" Committee members.

[19] *Supra,* pp. 86–88.

find nothing to suggest that he would not be admitted now if he decides to answer, assuming of course that no grounds justifying his exclusion from practice resulted. In short, petitioner holds the key to admission in his own hands.

We conclude with observing that our function here is solely one of constitutional adjudication, not to pass judgment on what has been done as if we were another state court of review, still less to express any view upon the wisdom of the State's action. With appropriate regard for the limited range of our authority we cannot say that the State's denial of Anastaplo's application for admission to its bar offends the Federal Constitution.[20] The judgment of the Illinois Supreme Court must therefore be

Affirmed.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE BRENNAN concur, dissenting.

The petitioner George Anastaplo has been denied the right to practice law in the State of Illinois for refusing to answer questions about his views and associations. I think this action by the State violated rights guaranteed to him by the First and Fourteenth Amendments. The reasons which lead me to this conclusion are largely the same as those expressed in my dissenting opinion in *Konigsberg* v. *State Bar of California,* the companion case decided today, *ante,* p. 56. But this case provides such a striking illustration of the destruction that can be inflicted upon individual liberty when this Court fails to

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[20] Apart from anything else, there is of course no room under our Rules for the suggestion made in petitioner's brief that he be admitted to the Bar of this Court, "independently of the action Illinois might be induced to take." See Rule 5, Revised Rules of this Court.

enforce the First Amendment to the full extent of its express and unequivocal terms that I think it deserves separate treatment.

The controversy began in November 1950,[1] when Anastaplo, a student at the University of Chicago Law School, having two months previously successfully passed the Illinois Bar examination, appeared before the State's Committee on Character and Fitness for the usual interview preliminary to admission to the Bar. The personal history form required by state law had been filled out and filed with the Committee prior to his appearance and showed that Anastaplo was an unusually worthy applicant for admission. His early life had been spent in a small town in southern Illinois where his parents, who had immigrated to this country from Greece before his birth, still resided. After having received his precollege education in the public schools of his home town, he had discontinued his education, at the age of eighteen, and joined the Air Force during the middle of World War II—flying as a navigator in every major theater of the military operations of that war. Upon receiving an honorable discharge in 1947, he had come to Chicago and resumed his education, obtaining his undergraduate degree at the University of Chicago and entering immediately into the study of law at the University of Chicago Law School. His record throughout his life, both as a student and as a citizen, was unblemished.

The personal history form thus did not contain so much as one statement of *fact* about Anastaplo's past life or conduct that could have, in any way, cast doubt upon his fitness for admission to the Bar. It did, however, contain

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[1] As the majority points out, the record in the first series of hearings, which culminated in a denial of certiorari by this Court (348 U. S. 946), is not a part of the record in this case but we take judicial notice of it. *National Fire Ins. Co.* v. *Thompson,* 281 U. S. 331, 336, and cases cited there.

a statement of *opinion* which, in the minds of some of the members of the Committee at least, did cast such doubt and in that way served to touch off this controversy. This was a statement made by Anastaplo in response to the command of the personal history form: "State what you consider to be the principles underlying (a) the Constitution of the United States." Anastaplo's response to that command was as follows:

> "One principle consists of the doctrine of the separation of powers; thus, among the Executive, Legislative, and Judiciary are distributed various functions and powers in a manner designed to provide for a balance of power, thereby intending to prevent totally unrestrained action by any one branch of government. Another basic principle (and the most important) is that such government is constituted so as to secure certain inalienable rights, those rights to Life, Liberty and the Pursuit of Happiness (and elements of these rights are explicitly set forth in such parts of the Constitution as the Bill of Rights.). *And, of course, whenever the particular government in power becomes destructive of these ends, it is the right of the people to alter or to abolish it and thereupon to establish a new government.* This is how I view the Constitution." (Emphasis supplied.)

When Anastaplo appeared before a two-man Subcommittee of the Committee on Character and Fitness, one of its members almost immediately engaged him in a discussion relating to the meaning of these italicized words which were substantially taken from that part of the Declaration of Independence set out below.[2] This dis-

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[2] "We hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted

cussion soon developed into an argument as Anastaplo stood by his statement and insisted that if a government gets bad enough, the people have a "right of revolution." It was at this juncture in the proceedings that the other member of the Subcommittee interrupted with the question: "Are you a member of any organization that is listed on the Attorney General's list, to your knowledge?" And this question was followed up a few moments later with the question: "Are you a member of the Communist Party?" [3] A colloquy then ensued

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among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness."

[3] The following excerpt from the record of the first hearing indicates clearly the connection between Anastaplo's views on the "right of revolution" and the questions subsequently asked him about his "possible" political associations:

"Commissioner MITCHELL: When you say 'believe in revolution,' you don't limit that revolution to an overthrow of a particular political party or a political government by means of an election process or other political means?

"Mr. ANASTAPLO: I mean actual use of force.

"Commissioner MITCHELL: You mean to go as far as necessary?

"Mr. ANASTAPLO: As far as Washington did, for instance.

"Commissioner MITCHELL: So that would it be fair to say that you believe the end result would justify any means that were used?

"Mr. ANASTAPLO: No, the means proportionate to the particular end in sight.

"Commissioner MITCHELL: Well, is there any difference from your answer and my question?

"Mr. ANASTAPLO: Did you ask—

"Commissioner MITCHELL: I asked you whether you thought that you believe that if a change, or overthrow of the government were justified, that any means could be used to accomplish that end.

"Mr. ANASTAPLO: Now, let's say in this positive concrete situation—I am not quite sure what it means in abstract.

"Commissioner MITCHELL: I will ask you in detail. You believe

between Anastaplo and the two members of the Subcommittee as to the legitimacy of the questions being asked, Anastaplo insisting that these questions were not reasonably related to the Committee's functions and that they violated his rights under the Constitution, and the mem-

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that assuming the government should be overthrown, in your opinion, that you and others of like mind would be justified in raising a company of men with military equipment and proceed to take over the government of the United States, of the State of Illinois?

"By shaking your head do you mean yes?

"Mr. ANASTAPLO: If you get to the point where overthrow is necessary, then overthrow is justified. It just means that you overthrow the government by force.

"Commissioner MITCHELL: And would that also include in your mind justification for putting a spy into the administrative department, one or another of the administrative departments of the United States or the government of the State of Illinois?

"Mr. ANASTAPLO: If you got to the point you think the government should be overthrown, I think that would be a legitimate means.

"Commissioner MITCHELL: There isn't any difference in your mind in the propriety of using a gun or using a spy?

"Mr. ANASTAPLO: I think spies have been used in quite honorable causes.

"Commissioner MITCHELL: Your answer is, you do think so?

"Mr. ANASTAPLO: Yes.

"Commissioner BAKER: Let me ask you a question. Are you aware of the fact that the Department of Justice has a list of what are described as subversive organizations?

"Mr. ANASTAPLO: Yes.

"Commissioner BAKER: Have you ever seen that list?

"Mr. ANASTAPLO: Yes.

"Commissioner BAKER: Are you a member of any organization that is listed on the Attorney General's list, to your knowledge? (No answer.) Just to keep you from having to work so hard mentally on it, what organizations—give me all the organizations you are affiliated with or are a member of. (No answer.) That oughtn't to be too hard.

"Mr. ANASTAPLO: Do you believe that is a legitimate question?

"Commissioner BAKER: Yes, I do. We are inquiring into not only your character, but your fitness, under Rule 58. We don't compel you to answer it. Are you a member of the Communist Party?"

bers of the Subcommittee insisting that the questions were entirely legitimate.

The Subcommittee then refused to certify Anastaplo for admission to the Bar but, instead, set a further hearing on the matter before the full Committee. That next hearing, as well as all of the hearings that followed, have been little more than repetitions of the first. The rift between Anastaplo and the Committee has grown ever wider with each successive hearing. Anastaplo has steadfastly refused to answer any questions put by the Committee which inquired into his political associations or religious beliefs. A majority of the members of the Committee, faced with this refusal, has grown more and more insistent that it has the right to force him to answer any question it sees fit to ask. The result has been a series of hearings in which questions have been put to Anastaplo with regard to his "possible" association with scores of organizations, including the Ku Klux Klan, the Silver Shirts (an allegedly Fascist organization), every organization on the so-called Attorney General's list, the Democratic Party, the Republican Party, and the Communist Party. At one point in the proceedings, at least two of the members of the Committee insisted that he tell the Committee whether he believes in a Supreme Being and one of these members stated that, as far as his vote was concerned, a man's "belief in the Deity . . . has a substantial bearing upon his fitness to practice law."

It is true, as the majority points out, that the Committee did not expressly rest its refusal to certify Anastaplo for admission to the Bar either upon his views on the "right of revolution," as that "right" is defined in the Declaration of Independence, or upon his refusal to disclose his beliefs with regard to the existence of God,[4]

[4] As the majority points out, the Committee eventually did expressly disavow any right to insist upon an answer to this question. This came at the end of a long disagreement between Anastaplo and

or upon his refusals to disclose any of his political associations other than his "possible" association with the Communist Party. But it certainly cannot be denied that the other questions were asked and, since we should not presume that these members of the Committee did not want answers to their questions, it seems certain that Anastaplo's refusal to answer them must have had some influence upon the final outcome of the hearings. In any case, when the Committee did vote, 11–6, not to certify Anastaplo for admission, not one member who asked *any* question Anastaplo had refused to answer voted in his favor.

The reasons for Anastaplo's position have been stated by him time and again—first, to the Committee and, later, in the briefs and oral arguments he presented in his own behalf, both before this Court and before the Supreme Court of Illinois. From a legal standpoint, his position throughout has been that the First Amendment gave him a right not to disclose his political associations or his religious beliefs to the Committee. But his decision to refuse to disclose these associations and beliefs went much deeper than a bare reliance upon what he considered to be his legal rights. The record shows that his refusal to answer the Committee's question stemmed primarily from his belief that he had a duty, both to society and to the legal profession, not to submit to the demands of the Committee because he believed that the questions had been asked solely for the purpose of harassing him because he

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certain members of the Committee with respect to the vitality of an old Illinois decision which indicated that a belief in God might be necessary in order to take an oath to testify. The Committee's abandonment of the point came only after Anastaplo produced a more recent Illinois case disapproving the earlier decision. It is interesting to note that neither of the Committee members who had expressed such a strong interest in knowing whether Anastaplo believes in God voted in favor of his certification.

had expressed agreement with the assertion of the right of revolution against an evil government set out in the Declaration of Independence. His position was perhaps best stated before the Committee in his closing remarks at the final session:

> "It is time now to close. Differences between us remain. I leave to others the sometimes necessary but relatively easy task of praising Athens to Athenians. Besides, you should want no higher praise than what I have said about the contribution the bar can make to republican government. The bar deserves no higher praise until it makes that contribution. You should be grateful that I have not made a complete submission to you, even though I have cooperated as fully as good conscience permits. To the extent I have not submitted, to that extent have I contributed to the solution of one of the most pressing problems that you, as men devoted to character and fitness, must face. This is the problem of selecting the standards and methods the bar must employ if it is to help preserve and nourish that idealism, that vital interest in the problem of justice, that so often lies at the heart of the intelligent and sensitive law student's choice of career. This is an idealism which so many things about the bar, and even about bar admission practices, discourage and make unfashionable to defend or retain. The worthiest men live where the rewards of virtue are greatest.
>
> "I leave with you men of Illinois the suggestion that you do yourselves and the bar the honor, as well as the service, of anticipating what I trust will be the judgment of our most thoughtful judges. I move therefore that you recommend to the Supreme Court of Illinois that I be admitted to the bar of this

> State. And I suggest that this recommendation be made retroactive to November 10, 1950 when a young Air Force veteran first was so foolish as to continue to serve his country by daring to defend against a committee on character and fitness the teaching of the Declaration of Independence on the right of revolution."

The reasons for the Committee's position are also clear. Its job, throughout these proceedings, has been to determine whether Anastaplo is possessed of the necessary good moral character to justify his admission to the Bar of Illinois. In that regard, the Committee has been given the benefit of voluminous affidavits from men of standing in their professions and in the community that Anastaplo is possessed of an unusually fine character. Dr. Alexander Meiklejohn, Professor of Philosophy, Emeritus, at the University of Wisconsin, for example, described Anastaplo as "intellectually able, a hard, thorough student and moved by high devotion to the principles of freedom and justice." Professor Malcolm P. Sharp of the University of Chicago Law School stated: "No question has ever been raised about his honesty or his integrity, and his general conduct, characterized by friendliness, quiet independence, industry and courage, is reflected in his reputation." Professor Roscoe T. Steffen of the University of Chicago Law School said: "I know of no one who doubts his honesty and integrity." Yves R. Simon, Professor of Philosophy at the University of Chicago, said: "I consider Anastaplo as a young man of the most distinguished and lofty moral character. Everybody respects him and likes him." Angelo G. Geocaris, a practicing attorney in the City of Chicago, said of Anastaplo: "His personal code of ethics is unexcelled by any practicing attorney I have met in the state of Illinois." Robert J. Coughlan, Division Director of

a research project at the University of Chicago, said: "His honesty and integrity are, in my opinion, beyond question. I would highly recommend him without the slightest reservation for any position involving the highest or most sacred trust. The applicant is a rare man among us today: he has an inviolable sense of Honor in the great traditions of Greek culture and thought. If admitted to the American Bar, he could do nothing that would not reflect glory on that institution."

These affidavits and many more like them were presented to the Committee. Most of the statements came from men who knew Anastaplo intimately on the University of Chicago campus where Anastaplo has remained throughout the proceedings here involved, working as a research assistant and as a lecturer in Liberal Arts and studying for an advanced degree in History and Social Sciences. Even at the present time, he is still there preparing his doctoral dissertation which, understandably enough, is tentatively entitled "The Historical and Philosophical Background of the First Amendment of the Constitution of the United States."

The record also shows that the Committee supplemented the information it had obtained about Anastaplo from these affidavits by conducting informal independent investigations into his character and reputation. It sent agents to Anastaplo's home town in southern Illinois and they questioned the people who knew him there. Similar inquiries were made among those who knew him in Chicago. But these intensive investigations apparently [5] failed to produce so much as one man in Chicago or in the whole State of Illinois who could say or would say, directly, indirectly or even by hearsay, one thing deroga-

[5] The record shows that although Anastaplo repeatedly requested that the Committee allow him to see any reports that resulted from these independent investigations, the Committee, without denying that such reports existed, refused to produce them.

tory to the character, loyalty or reputation of George Anastaplo, and not one man could be found who would in any way link him with the Communist Party. This fact is particularly significant in view of the evidence in the record that the Committee had become acquainted with a person who apparently had been a member of a Communist Party cell on the University of Chicago campus and that this person was asked to and did identify for the Committee every member of the Party whom he knew.

In addition to the information it had obtained from the affidavits and from its independent investigations, the Committee had one more important source of information about Anastaplo's character. It had the opportunity to observe the manner in which he conducted himself during the many hours of hearings before it. That manner, as revealed by the record before us and undenied by any findings of the Committee to the contrary, left absolutely nothing to be desired. Faced with a barrage of sometimes highly provocative and totally irrelevant questions from men openly hostile to his position, Anastaplo invariably responded with all the dignity and restraint attributed to him in the affidavits of his friends. Moreover, it is not amiss to say that he conducted himself in precisely the same manner during the oral argument he presented before this Court.

Thus, it is against the background of a mountain of evidence so favorable to Anastaplo that the word "overwhelming" seems inadequate to describe it that the action of the Committee in refusing to certify Anastaplo as fit for admission to the Bar must be considered. The majority of the Committee rationalized its position on the ground that without answers to some of the questions it had asked, it could not conscientiously perform its duty of determining Anastaplo's character and fitness to be a lawyer. A minority of the Committee described

this explanation as "pure sophistry." And it is simply impossible to read this record without agreeing with the minority. For, it is difficult to see what possible relevancy answers to the questions could have had in the minds of these members of the Committee after they had received such completely overwhelming proof beyond a reasonable doubt of Anastaplo's good character and staunch patriotism. I can think of no sound reason for further insistence upon these answers other than the very questionable, but very human, feeling that this young man should not be permitted to resist the Committee's demands without being compelled to suffer for it in some way.

It is intimated that the Committee's feeling of resentment might be assuaged and that Anastaplo might even be admitted to the Bar if he would only give in to the demands of the Committee and add the requested test oath to the already overwhelming proof he has submitted to establish his good character and patriotism. In this connection, the Court says: "We find nothing to suggest that he would not be admitted now if he decides to answer, assuming of course that no grounds justifying his exclusion from practice resulted. In short, petitioner holds the key to admission in his own hands." However well this familiar phrase may fit other cases, it does not fit this one. For the attitude of the Committee, as revealed by the transcript of its hearings, does not support a belief that Anastaplo can gain admission to the Illinois Bar merely by answering the Committee's questions, whatever answers he should give. Indeed, the Committee's own majority report discloses that Anastaplo's belief in the "right of revolution" was regarded as raising "a serious question" in the minds of a majority of the Committee with regard to his fitness to practice law and that "certain" members of that majority (how many, we cannot know) have already stated categorically that they will

not vote to admit an applicant who expresses such views. Nor does the opinion of the Illinois Supreme Court indicate that Anastaplo "holds the key to admission in his own hands." Quite the contrary, that court's opinion evidences an almost insuperable reluctance to upset the findings of the Committee. Certainly, that opinion contains nothing that even vaguely resembles the sort of implicit promise that would justify the belief asserted by the majority here. And, finally, I see nothing in the majority opinion of this Court, nor in the majority opinions in the companion cases decided today, that would justify a belief that this Court would unlock the door that blocks his admission to the Illinois Bar if Anastaplo produced the "key" and the state authorities refused to use it.

The opinion of the majority already recognizes that there is not one scrap of evidence in the record before us "which could properly be considered as reflecting adversely upon his [Anastaplo's] character or reputation or on the sincerity of the beliefs he espoused before the Committee," and that the Committee had not received any " 'information from any outside source which would cast any doubt on applicant's loyalty or which would tend to connect him in any manner with any subversive group.' " The majority opinion even concedes that Anastaplo was correct in urging that the questions asked by the Committee impinged upon the freedoms of speech and association guaranteed by the First and Fourteenth Amendments. But, the opinion then goes on to hold that Anastaplo can nonetheless be excluded from the Bar pursuant to "the State's interest in having lawyers who are devoted to the law in its broadest sense . . . ." [6] I cannot regard that holding, as applied to a man like Anastaplo, as in any way justi-

[6] *Konigsberg* v. *State Bar of California*, decided today, *ante*, pp. 36, 52, which the majority here relies upon as also having settled the issue in this case.

fied. Consider it, for example, in the context of the following remarks of Anastaplo to the Committee—remarks the sincerity of which the majority does not deny:

> "I speak of a need to remind the bar of its traditions and to keep alive the spirit of dignified but determined advocacy and opposition. This is not only for the good of the bar, of course, but also because of what the bar means to American republican government. The bar when it exercises self-control is in a peculiar position to mediate between popular passions and informed and principled men, thereby upholding republican government. Unless there is this mediation, intelligent and responsible government is unlikely. The bar, furthermore, is in a peculiar position to apply to our daily lives the constitutional principles which nourish for this country its inner life. Unless there is this nourishment, a just and humane people is impossible. The bar is, in short, in a position to train and lead by precept and example the American people." [7]

These are not the words of a man who lacks devotion to "the law in its broadest sense."

The majority, apparently considering this fact irrelevant because the State might *possibly* have an interest in learning more about its Bar applicants, decides that Anastaplo can properly be denied admission to the Bar by purporting to "balance" the interest of the State of Illinois in "having lawyers who are devoted to the law in its broadest sense" against the interest of Anastaplo

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[7] These remarks were made by Anastaplo in his closing argument before the Committee. He also introduced evidence to the Committee that he had earlier expressed similar views in a book review published in 1954. See Anastaplo, Review: Drinker, Legal Ethics, 14 Law. Guild Rev. 144.

and the public in protecting the freedoms of the First Amendment, concluding, as it usually does when it engages in this process, that "on balance" the interest of Illinois must prevail.[8] If I had ever doubted that the "balancing test" comes close to being a doctrine of governmental absolutism—that to "balance" an interest in individual liberty means almost inevitably to destroy that liberty—those doubts would have been dissipated by this case. For this so-called "balancing test"—which, as applied to the First Amendment, means that the freedoms of speech, press, assembly, religion and petition can be repressed whenever there is a sufficient governmental interest in doing so—here proves pitifully and pathetically inadequate to cope with an invasion of individual liberty so plainly unjustified that even the majority apparently feels compelled expressly to disclaim "any view upon the wisdom of the State's action."

I, of course, wholeheartedly agree with the statement of the majority that this Court should not, merely on the ground that such action is unwise, interfere with governmental action that is within the constitutional powers of that government. But I am no less certain that this Court should not permit governmental action that plainly abridges constitutionally protected rights of the People merely because a majority believes that on "balance" it is better, or "wiser," to abridge those rights than to leave them free. The inherent vice of the "balancing test" is that it purports to do just that. In the context of its reliance upon the "balancing test," the Court's disclaimer

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[8] I think the majority has once again misapplied its own "balancing test," for the interests it purports to "balance" are no more at stake here than in *Konigsberg*. Moreover, it seems clear to me that Illinois, like California, is placing the burden of proof upon applicants for the Bar to prove they do not advocate the overthrow of the Government. Thus the decision here, like that in *Konigsberg*, is contrary to *Speiser* v. *Randall*, 357 U. S. 513.

of "any view upon the wisdom of the State's action" here thus seems to me to be wholly inconsistent with the only ground upon which it has decided this case.

Nor can the majority escape from this inconsistency on the ground that the "balancing test" deals only with the question of the importance of the existence of governmental power as a general matter without regard to the importance of its exercise in a particular case. For in *Barenblatt* v. *United States* the same majority made it clear that the "balancing test" is to be applied to the facts of each particular case: "Where First Amendment rights are asserted to bar governmental interrogation resolution of the issue always involves a balancing by the courts of the competing private and public interests at stake *in the particular circumstances shown.*" [9] (Emphasis supplied.) Thus the Court not only "balances" the respective values of two competing policies as a general matter, but also "balances" the wisdom of those policies in "the particular circumstances shown." Thus, the Court has reserved to itself the power to permit or deny abridgment of First Amendment freedoms according to its own view of whether repression or freedom is the wiser governmental policy under the circumstances of each case.

The effect of the Court's "balancing" here is that any State may now reject an applicant for admission to the Bar if he believes in the Declaration of Independence as strongly as Anastaplo and if he is willing to sacrifice his career and his means of livelihood in defense of the freedoms of the First Amendment. But the men who founded this country and wrote our Bill of Rights were strangers neither to a belief in the "right of revolution" nor to the urgency of the need to be free from the control of govern-

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[9] 360 U. S. 109, 126. The majority in *Barenblatt* then proceeded to "balance" those interests on the basis of the particular record of that case. *Id.*, at 127–134.

ment with regard to political beliefs and associations. Thomas Jefferson was not disclaiming a belief in the "right of revolution" when he wrote the Declaration of Independence. And Patrick Henry was certainly not disclaiming such a belief when he declared in impassioned words that have come on down through the years: "Give me liberty or give me death." This country's freedom was won by men who, whether they believed in it or not, certainly practiced revolution in the Revolutionary War.

Since the beginning of history there have been governments that have engaged in practices against the people so bad, so cruel, so unjust and so destructive of the individual dignity of men and women that the "right of revolution" was all the people had left to free themselves. As simple illustrations, one government almost 2,000 years ago burned Christians upon fiery crosses and another government, during this very century, burned Jews in crematories. I venture the suggestion that there are countless multitudes in this country, and all over the world, who would join Anastaplo's belief in the right of the people to resist by force tyrannical governments like those.

In saying what I have, it is to be borne in mind that Anastaplo has not indicated, even remotely, a belief that this country is an oppressive one in which the "right of revolution" should be exercised.[10] Quite the contrary,

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[10] Anastaplo's belief in the "right of revolution," as disclosed by this record, is no different from that expressed by Professor Chafee: "Most of us believe that our Constitution makes it possible to change all bad laws through political action. We ought to disagree vehemently with those who urge violent methods, and whenever necessary take energetic steps to prevent them from putting such methods into execution. This is a very different matter from holding that all discussion of the desirability of resorting to violence for political purposes should be ruthlessly stamped out. There is not one among us who would not join a revolution if the reason for it be made strong enough." Chafee, Free Speech in the United States 178 (Harvard University Press, 1942).

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the entire course of his life, as disclosed by the record, has been one of devotion and service to his country—first, in his willingness to defend its security at the risk of his own life in time of war and, later, in his willingness to defend its freedoms at the risk of his professional career in time of peace. The one and only time in which he has come into conflict with the Government is when he refused to answer the questions put to him by the Committee about his beliefs and associations. And I think the record clearly shows that conflict resulted, not from any fear on Anastaplo's part to divulge his own political activities, but from a sincere, and in my judgment correct, conviction that the preservation of this country's freedom depends upon adherence to our Bill of Rights. The very most that can fairly be said against Anastaplo's position in this entire matter is that he took too much of the responsibility of preserving that freedom upon himself.

This case illustrates to me the serious consequences to the Bar itself of not affording the full protections of the First Amendment to its applicants for admission. For this record shows that Anastaplo has many of the qualities that are needed in the American Bar.[11] It shows, not only that Anastaplo has followed a high moral, ethical and patriotic course in all of the activities of his life, but also that he combines these more common virtues with the uncommon virtue of courage to stand by his principles at any cost. It is such men as these who have most greatly honored the profession of the law—men like Malsherbes, who, at the cost of his own life and the lives of his family, sprang unafraid to the defense of Louis XVI against the

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[11] For a similar case, see *In re Summers*, 325 U. S. 561, in which a 5–4 majority of this Court upheld an informal order of the Illinois Supreme Court denying Bar admission to Clyde W. Summers on the ground that his religious beliefs were inconsistent with the Illinois Constitution.

fanatical leaders of the Revolutionary government of France [12]—men like Charles Evans Hughes, Sr., later Mr. Chief Justice Hughes, who stood up for the constitutional rights of socialists to be socialists and public officials despite the threats and clamorous protests of self-proclaimed superpatriots [13]—men like Charles Evans Hughes, Jr., and John W. Davis, who, while against everything for which the Communists stood, strongly advised the Congress in 1948 that it would be unconstitutional to pass the law then proposed to outlaw the Communist Party [14]—men like Lord Erskine, James Otis, Clarence Darrow, and the multitude of others who have dared to speak in defense of causes and clients without regard to personal danger to themselves. The legal profession will lose much of its nobility and its glory if it is not constantly replenished with lawyers like these. To force the Bar to become a

[12] At the time of his decision to volunteer his services in defense of Louis XVI, Malsherbes, a man of more than seventy, was apparently completely safe from the post-revolutionary blood bath which then enveloped France. For, although active in public life prior to the Revolution, he had always been a friend of the people and, in any case, he had largely passed out of the public mind with his retirement some years earlier. Within a year of his unsuccessful defense of the life of France's former king, however, he, together with his entire family, was convicted by a revolutionary tribunal on the vague charge of conspiracy against "the safety of the State and the unity of the Republic." Malsherbes was then taken to the guillotine where, after being forced to witness the beheading of the other members of his family, he paid with his life for his courage as a lawyer. This story has been interestingly told by John W. Davis. See Davis, The Lawyers of Louis XVI, in The Lawyer, April 1942, p. 5, at 6–13.

[13] The story of Hughes' participation in the fight against the action of the New York Legislature in suspending five of its members in 1920 on the ground that they were socialists is told in John Lord O'Brian, Loyalty Tests and Guilt by Association, 61 Harv. L. Rev. 592, 593–594.

[14] See *Barenblatt* v. *United States*, 360 U. S. 109, 147–148 (dissenting opinion).

group of thoroughly orthodox, time-serving, government-fearing individuals is to humiliate and degrade it.

But that is the present trend, not only in the legal profession but in almost every walk of life. Too many men are being driven to become government-fearing and time-serving because the Government is being permitted to strike out at those who are fearless enough to think as they please and say what they think.[15] This trend must be halted if we are to keep faith with the Founders of our Nation and pass on to future generations of Americans the great heritage of freedom which they sacrificed so much to leave to us. The choice is clear to me. If we are to pass on that great heritage of freedom, we must return to the original language of the Bill of Rights. We must not be afraid to be free.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE joins, dissenting.

I join MR. JUSTICE BLACK's dissent. I add only that I think the judgment must also be reversed on the authority of *Speiser* v. *Randall,* 357 U. S. 513, for the reasons expressed in my dissent in *Konigsberg* v. *State Bar of California, ante,* p. 80.

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[15] See, *e. g., Barsky* v. *Board of Regents,* 347 U. S. 442; *Uphaus* v. *Wyman,* 360 U. S. 72; *Barenblatt* v. *United States,* 360 U. S. 109; *Uphaus* v. *Wyman,* 364 U. S. 388; *Wilkinson* v. *United States,* 365 U. S. 399; *Braden* v. *United States,* 365 U. S. 431; *Konigsberg* v. *State Bar of California, supra.*

COHEN *v.* HURLEY.

CERTIORARI TO THE COURT OF APPEALS OF NEW YORK.

No. 84. Argued December 14–15, 1960.—Decided April 24, 1961.

During a judicial inquiry in a state court into alleged professional misconduct of lawyers, petitioner, a lawyer, was called to testify and produce records before the judge in charge of the inquiry. Relying primarily on his state privilege against self-incrimination, he refused to produce the required records and to answer questions relating to his alleged professional misconduct, and he persisted in such refusal after being warned that it might result in "serious consequences" in the form of an exercise of the court's disciplinary power over attorneys practicing before it. Solely on the ground of such refusal to cooperate in the court's efforts to expose unethical practices and without any independent proof of wrongdoing on his part, petitioner was disbarred by the state court. *Held:* Such disciplinary action did not violate petitioner's rights under the Fourteenth Amendment. Pp. 118–131.

(a) Disbarment of petitioner solely because of his refusal to cooperate in the court's efforts to expose unethical conduct, and without any independent evidence of wrongdoing on his part, was not arbitrary or irrational, and it did not deprive him of liberty without due process of law contrary to the Fourteenth Amendment. *Konigsberg* v. *State Bar, ante,* p. 36; *In re Anastaplo, ante,* p. 82. Pp. 123–125.

(b) A different conclusion is not required by the fact that petitioner's refusal was based on a *bona fide* assertion of his state privilege against self-incrimination. Pp. 125–127.

(c) The Fourteenth Amendment did not give petitioner a *federal* constitutional right not to be required to incriminate himself in the state proceedings. Pp. 127–129.

(d) The State's action does not unconstitutionally discriminate against lawyers as a class. Pp. 129–131.

7 N. Y. 2d 488, 166 N. E. 2d 672, affirmed.

Theodore Kiendl argued the cause and filed a brief for petitioner.

Denis M. Hurley, respondent, argued the cause *pro se.* With him on the brief were *Michael A. Castaldi, Michael Caputo* and *James F. Niehoff.*

Briefs of *amici curiae,* urging affirmance, were filed by *Henry Weiner* for the Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York et al., and by *Robert P. Hobson* for the Standing Committee on Professional Grievances of the American Bar Association.

Briefs of *amici curiae,* urging reversal, were filed by *Leonard B. Boudin* for the New York State Association of Plaintiffs' Trial Lawyers; *Emanuel Redfield* for the New York Civil Liberties Union; and *David Scribner* and *Herman B. Gerringer* for the National Lawyers Guild.

MR. JUSTICE HARLAN delivered the opinion of the Court.

We are called upon to decide whether the State of New York may, consistently with the Fourteenth Amendment, disbar an attorney who, relying on his state privilege against self-incrimination, has refused to answer material questions of a duly authorized investigating authority relating to alleged professional misconduct.[1]

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[1] N. Y. Const., Art. I, § 6. While petitioner, at his appearance before the investigating authority, also claimed a federal privilege not to testify, in his later response to the petition initiating disciplinary proceedings he relied solely upon "the privilege against self-incrimination guaranteed to all persons, lawyers or laymen alike, under Article I Section 6 of the New York State Constitution." It is of course settled that a Fifth Amendment privilege was not available to petitioner in the present case. See, *e. g., Knapp* v. *Schweitzer,* 357 U. S. 371; *Lerner* v. *Casey,* 357 U. S. 468, 478. Nor do we understand it to be contended that the Fourteenth Amendment automatically precluded the State from exacting petitioner's testimony and attaching consequences to his refusal to respond. Cf. *Adamson* v. *California,* 332 U. S. 46, 54; *Palko* v. *Connecticut,* 302 U. S. 319, 323–324; *Twining* v. *New Jersey,* 211 U. S. 78, 110–114. We take the petitioner's position and the remittitur of the Court of Appeals as presenting under the Fourteenth Amendment only a broad claim of fundamental unfairness.

The issue arises in the context of the so-called Brooklyn "ambulance chasing" Judicial Inquiry which this Court had before it in *Anonymous* v. *Baker,* 360 U. S. 287. The origins, authority, and nature of the Inquiry have already been sufficiently described in our opinion in that case. There need only be added here that the purpose of the Inquiry, as reflected in the establishing order of the Appellate Division of the Supreme Court of the State of New York, Second Department, was twofold: "to expose all the evil practices [involved in the improper solicitation and handling of contingent-retainers in personal injury cases] with a view to enabling this court to adopt appropriate measures to eliminate them and to discipline those attorneys found to have engaged in them." 9 App. Div. 2d 436, 437, 195 N. Y. S. 2d 990, 993.

For some years the Second Department has had a court rule "which requires that an attorney who makes contingent-fee agreements for his services in personal injury, wrongful death, property damage, and certain other kinds of cases, must file such agreements with the [Appellate Division] and, if he enters into five or more such agreements in any year, must give to the court in writing certain particulars as to how he came to be retained" (called "Statements of Retainer"). 7 N. Y. 2d 488, 493, 166 N. E. 2d 672, 674; see Rule 3 of the Special Rules Regulating the Conduct of Attorneys and Counselors at Law in the Second Judicial Department, Clevenger's Practice Manual, p. 21–19 (1959). Principally as a result of the large number of Statements of Retainer filed by him during recent years, petitioner was called to testify and produce records before the Justice in charge of the Inquiry.[2] Relying on his con-

[2] The following quotation from the respondent's brief accurately reflects the record:

"During the period 1954 to 1958, inclusive, pursuant to the provisions of said Rule, petitioner, a specialist in negligence cases, filed 228 statements as to retainer in his own name. In addition, 76 such

cededly available state privilege against self-incrimination, petitioner refused to produce the records called for and to answer some sixty other questions. The subject matter of such questions was summarized by the New York Court of Appeals in its opinion in this case (7 N. Y. 2d 488, 494, 166 N. E. 2d 672, 674–675), as follows:

> ". . . Those unanswered questions related to the identity of his law office partners, associates and employees, to his possession of the records of the cases described in his statements of retainer, to any destruction of such records, to his bank accounts, to his paying police officers or others for referring claimants to him, to his paying insurance company employees for referring cases to him, and to his promising to pay to any 'lay person' 10% of recoveries or settlements. He was asked—and refused to answer—as to whether he had made or agreed to make such payments to any of several named persons, as to whether he had hired or paid nonlawyers to arrange settlements of his cases with insurance companies and as to whether his partner or associate Rothenberg had been indicted for and had pleaded guilty to violations of sections 270–a and 270–d of the Penal Law which forbid the solicitation of legal business or the employment by lawyers of such solicitors. . . ."

After petitioner had refused to answer these questions, counsel for the Inquiry warned him that "serious consequences," in the form of an exercise of the Appellate Division's disciplinary power over attorneys practicing before

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statements were filed in the firm name of Cohen & Rothenberg, thus indicating that petitioner and his law firm had been retained on a contingent basis in a total of 304 negligence cases in five years (R. 33–35). The inquiry therefore deemed it advisable to call petitioner as one of its witnesses."

it,[3] might flow from his refusal to respond, even though that refusal was based on a claim of privilege. As the basis for his warning counsel referred to various provisions of the Canons of Professional Ethics [4] and of the New York Penal Law.[5] Petitioner was then given a further opportunity to respond to the unanswered questions, but he declined, preferring to rely upon his claim of privilege.

Thereafter the Justice in charge of the Inquiry recommended to the Appellate Division that petitioner be disciplined. The Appellate Division ordered respondent Hurley to file a petition for disciplinary action. The ensuing petition sought petitioner's disbarment, alleging as grounds therefor:

> "The refusal of . . . Albert Martin Cohen, to produce the records [called for by the Inquiry], and his refusal to answer the questions [summarized above], are in disregard and in violation of the inherent duty and obligation of respondent as a member of the legal profession in that, among other things, such refusals are contrary to the standards of candor and frankness that are required and expected of a lawyer

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[3] Section 90 of the New York Judiciary Law.

[4] ". . . Canon 22 . . . requiring lawyers to be candid and frank when before the court, Canons 28 and 29 forbidding the payment of awards to persons bringing in legal business and requiring lawyers knowing of such practices to inform the court thereof, Canon 34 outlawing division of fees except with other lawyers . . . ." 7 N. Y. 2d 488, 494, 166 N. E. 2d 672, 675. Canons 29 and 34 of the New York Canons of Professional Ethics are found in McKinney N. Y. Laws, Judiciary Law, pp. 774–775. Canons 22 and 28 are found in the 1959 "pocket part," at pp. 210–211. They are similar in all respects to the correspondingly numbered Canons of Professional Ethics of the American Bar Association.

[5] N. Y. Pen. Law §§ 270–a, 270–c, 270–d, 276, "all relating to soliciting and fee splitting." 7 N. Y. 2d 488, 494, 166 N. E. 2d 672, 675.

> to the Court; such refusals are in defiance of and flaunt [*sic*] the authority of the Court to inquire into and elicit information within respondent's knowledge relating to his conduct and practices as a lawyer; by his refusal to answer the aforesaid questions the respondent hindered and impeded the Judicial Inquiry that was ordered by this Court; by his refusals respondent withheld vital information bearing upon his conduct, character, fitness, integrity, trust and reliability as a member of the legal profession. . . ."

The Appellate Division ordered petitioner disbarred, saying (9 App. Div. 2d, at 448–449, 195 N. Y. S. 2d, at 1003):

> "To avoid any possible doubt as to our position, we state again that the basis for any disciplinary action by this court is, not the fact that respondent has invoked his constitutional privilege against self incrimination, but rather the fact that he has deliberately refused to co-operate with the court in its efforts to expose unethical practices and in its efforts to determine incidentally whether he had committed any acts of professional misconduct which destroyed the character and fitness required of him as a condition to his retention of the privilege of remaining a member of the Bar."

The New York Court of Appeals affirmed, Judge Fuld dissenting.[6] 7 N. Y. 2d 488, 166 N. E. 2d 672. We granted certiorari because the case presented still another variant of the issues arising in the *Konigsberg* and *Anastaplo* cases, *ante*, pp. 36, 82.

Starting from the undeniably correct premise that a State may not arbitrarily refuse a person permission to

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[6] Judge Fuld dissented on state constitutional grounds, reaching no federal questions.

practice law, *Konigsberg* v. *State Bar of California,* 353 U. S. 252; *Schware* v. *Board of Bar Examiners,* 353 U. S. 232, petitioner's claim that New York's disbarment of him was capricious rests essentially on two propositions: (1) that the Fourteenth Amendment forbade the State from making his refusal to answer the Inquiry's questions a *per se* ground for disbarment; (2) that in any event such a ground is not permissible when refusal to answer rests on a *bona fide* claim of a privilege against self-incrimination.

I.

The first contention must be rejected largely in light of our today's opinions in the *Konigsberg* and *Anastaplo* cases, *ante,* pp. 36, 82. The fact that such refusal was here made a ground for disbarment, rather than for denial of admission to the bar, as in *Konigsberg* and *Anastaplo,* is not of constitutional moment. And there is no claim here either that the unanswered questions were not material or that petitioner was not duly warned of the consequences of his refusal to answer. By the same token those cases also dispose of petitioner's basically similar contention that the State could proceed against him only by way of independent evidence of wrongdoing on his part.

We do not think it can be seriously contended that New York's judicial inquiry was so devoid of rational justification that the mere act of compelling even unprivileged testimony was a deprivation of petitioner's liberty without due process. History and policy combine to establish the presence of a substantial state interest in conducting an investigation of this kind. That interest is nothing less than the exertion of disciplinary powers which English and American courts (the former primarily through the Inns of Court) have for centuries possessed over members of the bar, incident to their broader responsibility for

keeping the administration of justice and the standards of professional conduct unsullied. Not only is the practice of such judicial investigations long-established, but the subject matter of the present investigation does not lack a rational basis. It is no less true than trite that lawyers must operate in a three-fold capacity, as self-employed businessmen as it were, as trusted agents of their clients, and as assistants to the court in search of a just solution to disputes. It is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court, or that the "payment of awards to persons bringing in legal business" is inconsistent with the personally disinterested position a lawyer should maintain.

Finally, it cannot by any stretch be considered that New York acted arbitrarily or irrationally in applying the disciplinary sanction of disbarment to the petitioner. What Mr. Justice Cardozo (then Chief Judge of the New York Court of Appeals) said in the *Karlin* case is enough to put an end to that contention:

> "If a barrister was suspected of misconduct, the benchers of his inn might inquire of his behavior. We can hardly doubt that refusal to answer would have been followed by expulsion. There was thus little occasion for controversies as to discipline to be brought before the judges unless the benchers failed in the performance of their duties. In case they did fail, a supervisory power was ever in reserve. The inns . . . were subject . . . to visitation by the judges . . . . Short shrift would there have been for the barrister who refused to make answer as to his professional behavior in defiance of the visitors." 248 N. Y., at 472–473, 162 N. E., at 490.

If more than long-lived practice is thought necessary to justify such a sanction, it is to be found in the fact that the denial of continued access to a position that can be misused is permissible to assure that the position may not be held without observance of the obligations lawfully imposed upon it. Revocation of a license for failure to fulfill similar obligations of a licensee is the very sanction which the Federal Government has adopted in a number of situations. See 12 U. S. C. § 481, 47 U. S. C. §§ 308 (b), 312 (a)(4).

II.

A different constitutional conclusion does not result from the fact that petitioner's refusal was based on a good-faith assertion of his state privilege against self-incrimination. Because, from a federal standpoint, there can be no doubt that a State has great leeway in defining the reach of its own privilege against self-incrimination, we regard the scope of federal review here as being limited to the question whether arbitrary or discriminatory state action can be found in the consequences New York has attached to the exercise of the privilege in this instance.

Basic to consideration of this aspect of petitioner's case is the fact that the State's disbarment order was predicated not upon any unfavorable inference which it drew from petitioner's assertion of the privilege, cf. *Slochower* v. *Board of Higher Education,* 350 U. S. 551, 557–558; *Grunewald* v. *United States,* 353 U. S. 391, 421, nor upon any purpose to penalize him for its exercise, but solely upon his refusal to discharge obligations which, as a lawyer, he owed to the court. The Court of Appeals stated:

> "Of course, [petitioner] had the right to assert the privilege and to withhold the criminating answers. That right was his as it would be the right of any citizen and it was not denied to him. He could not

> be forced to waive his immunity . . . . But the question still remained as to whether he had broken the 'condition' on which depended the 'privilege' of membership in the Bar . . . . 'Whenever the condition is broken, the privilege is lost' [citing *Matter of Rouss,* 221 N. Y. 81, 84–85, 116 N. E. 782, 783, Cardozo, J.]. Appellant as a citizen could not be denied any of the common rights of citizens. But he stood before the inquiry and before the Appellate Division in another quite different capacity, also. As a lawyer he was 'an officer of the court, and, like the court itself, an instrument . . . of justice' [citing *People ex rel. Karlin* v. *Culkin,* 248 N. Y. 465, 470–471, 162 N. E. 487, 489, Cardozo, J.], with the inevitable consequences that the court which was charged with control and discipline of its officers had its own right to demand his full, honest and loyal co-operation in its investigations and to strike his name from the rolls if he refused to co-operate. Such 'co-operation' is a 'phrase without reality' as Chief Judge Cardozo wrote in *People ex rel. Karlin* v. *Culkin* (*supra,* p. 471) if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court." 7 N. Y. 2d, at 495, 166 N. E. 2d, at 675.

We do not think that it can be seriously contended that the unavailability of the state privilege in judicial inquiries of this type amounts to a distinction from criminal prosecutions so irrational as to suggest either a denial of due process or a purposeful discrimination of the kind which violates the Equal Protection Clause of the Fourteenth Amendment. A State may rationally conclude that the consequence of disbarment is less drastic than that of a prison term for contempt, albeit arguments to the contrary can be made as well. It may also rationally

conclude that procedures resulting in greater preventive certainty are warranted when what is involved is the right to continue to occupy a position affording special opportunities for deleterious conduct—opportunities, indeed, created by the State's original certification of the petitioner's merit. In this regard all that New York has in effect held is that petitioner, by resort to a privilege against self-incrimination, can no more claim a right not to be disbarred for his refusal to answer with respect to matters within the competence of the Court's supervisory powers over members of the bar, than could a trustee claim a right not to be removed from office for failure to render accounts which might incriminate him. Finally, where illegal or shady practices on the part of some lawyers are suspected, New York could rationally conclude that the profession itself need not be subjected to the disrespect which would result from the publicity, delay, and possible ineffectiveness in their exposure and eradication that might follow could miscreants only be dealt with through ordinary investigatory and prosecutorial processes. "If the house is to be cleaned, it is for those who occupy and govern it, rather than for strangers, to do the noisome work." *People ex rel. Karlin* v. *Culkin,* 248 N. Y. 465, 480, 162 N. E. 487, 493 (Cardozo, J.).

These bases for affording a procedure in such judicial inquiries different from that in criminal prosecutions are more than enough to make wholly untenable a contention that there has here been a denial either of due process or of equal protection.

Although what has already been said disposes of this case, we take note, in conclusion, of two further considerations. First, it is suggested that the Fourteenth Amendment gave petitioner a *federal* constitutional right not to be required to incriminate himself in the state proceedings (although, apart from his claim of funda-

mental unfairness, the petitioner himself does not so contend, Note 1, *supra*). That proposition, however, was explicitly rejected by this Court, upon the fullest consideration, more than fifty years ago, *Twining* v. *New Jersey,* 211 U. S. 78,[7] and such has been the position of the Court ever since.[8] See *Snyder* v. *Massachusetts,* 291

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[7] "Even if the historical meaning of due process of law and the decisions of this court did not exclude the privilege from it, it would be going far to rate it as an immutable principle of justice which is the inalienable possession of every citizen of a free government. Salutary as the principle may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws, and the inviolability of private property. The wisdom of the exemption has never been universally assented to since the days of Bentham; many doubt it to-day, and it is best defended not as an unchangeable principle of universal justice but as a law proved by experience to be expedient. See Wigmore, § 2251. It has no place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administration of the law. It should, must and will be rigidly observed where it is secured by specific constitutional safeguards, but there is nothing in it which gives it a sanctity above and before constitutions themselves. Much might be said in favor of the view that the privilege was guaranteed against state impairment as a privilege and immunity of National citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There seems to be no reason whatever, however, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The States had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. . . ." 211 U. S., at 113–114.

[8] Hence, if any "constitutional privilege against self-incrimination" has here been made a "'phrase without reality'" it can only have been a state privilege which this Court does not have jurisdiction to protect.

U. S. 97; [9] *Brown* v. *Mississippi,* 297 U. S. 278, 285; *Palko* v. *Connecticut,* 302 U. S. 319, 323–324; *Adamson* v. *California,* 332 U. S. 46; [10] *Knapp* v. *Schweitzer,* 357 U. S. 371, 374. This is not to say, of course, that States have free rein either in the choice of means of forcing incriminatory testimony, or in the drawing of inferences from a refusal to testify on grounds of possible self-incrimination, no matter how objectionable or irrational. But these decisions do establish, at the very least, that to make out a violation of the Fourteenth Amendment, something substantially more must be shown than that the state procedures involved have a tendency to discourage the withholding of self-incriminatory testimony.

It is, however, suggested that such additional factors are to be found in New York's assertion of a power to grant a state privilege against self-incrimination without including within its sweep protection from disbarment of a lawyer who asserts this privilege during a judicial inquiry into his professional conduct. It is said that this gives rise to a pernicious doctrine whereby lawyers "may be separated into a special group upon which special burdens can be imposed even though such burdens are not and cannot be placed upon other groups."

This argument wholly misconceives the issue and what the Court has held respecting it. The issue is not, of course, *whether* lawyers are entitled to due process of law in matters of this kind, but, rather, *what* process is constitutionally due them in such circumstances. We do

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[9] "The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state." 291 U. S., at 105.

[10] "California follows Anglo-American legal tradition in excusing defendants in criminal prosecutions from compulsory testimony. . . . That is a matter of legal policy and not because of the requirements of due process under the Fourteenth Amendment." 332 U. S., at 54–55.

not hold that lawyers, because of their special status in society, can *therefore* be deprived of constitutional rights assured to others, but only, as in all cases of this kind, that what procedures are fair, what state process is constitutionally due, what distinctions are consistent with the right to equal protection, all depend upon the particular situation presented, and that history is surely relevant to these inquiries.[11] State banks may be subjected to periodic examinations that would violate the rights of some other kinds of business against unreasonable search and seizure. Compare 12 U. S. C. § 481 with *Boyd* v. *United States,* 116 U. S. 616. A state contractor can be deprived of even the rudiments of a hearing on the issue of whether the state executive department is contracting in accordance with applicable state law. Cf. *Perkins* v. *Lukens Steel Co.,* 310 U. S. 113. The "right" to judicial review of agency determinations can be taken away from railroad employees in one situation but

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[11] Of course it is not alone the early beginning of the practice of judicial inquiry into attorney practices which is significant upon the reasonableness of what transpired here. Rather it is the long life of that mode of procedure which bears upon that issue, in much the same way that a strong consensus of views in the States is relevant to a finding of fundamental unfairness. What is significant is that the *practice* we are now concerned with has survived the centuries which have seen the fall of all those iniquitous *standards* of which we are reminded, and which, incidentally, would be equally unconstitutional today if applied after a full criminal-type investigation and trial. While recognizing that the test was not exclusive, this Court stated many years ago:

"First. What is due process of law may be ascertained by an examination of those settled usages and modes of proceedings existing in the common and statute law of England before the emigration of our ancestors, and shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country. This test was adopted by the court, speaking through Mr. Justice Curtis, in *Murray* v. *Hoboken Land Co.,* 18 How. 272, 280 . . . ." *Twining* v. *New Jersey, supra,* at 100.

guaranteed to professional employees in other situations. Compare *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297, with *Leedom* v. *Kyne,* 358 U. S. 184. A state employee need no longer be entrusted with government property if he refuses to explain what has become of property with which he is charged though his refusal may be protected against a contempt sanction by a state or federal privilege against self-incrimination. Cf. *Lerner* v. *Casey,* 357 U. S. 468.

Clearly enough, factual distinctions are the determinative consideration upon the question of what process is due in each of these cases. Otherwise making state procedures vary solely on the basis of the given occupation would indeed be nothing less than a denial of equal protection to bankers, contractors, railroad employees, and government employees. On the basis of the factual distinctions that we have mentioned above, we consider that a State can constitutionally afford a different procedure—the present procedure—in these judicial investigations from that in criminal prosecutions.

Petitioner's disbarment is not constitutionally infirm, and the Court of Appeals' order must be

Affirmed.

MR. JUSTICE BLACK, with whom THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS concur, dissenting.

We are once again called upon to consider the constitutionality of penalties imposed upon lawyers who refuse to testify before a secret inquiry being conducted by the State of New York into suspected unethical practices among members of the legal profession in and around New York City. In *Anonymous* v. *Baker*,[1] a majority

[1] 360 U. S. 287. The majority there held that witnesses before the inquiry could constitutionally be deprived of a public hearing and the assistance of counsel. But cf. *Chambers* v. *Florida,* 309 U. S. 227, 237: "The determination to preserve an accused's right to pro-

of this Court upheld the power of New York to conduct such a secret inquiry. Here, the majority upholds the disbarment of petitioner, a New York lawyer for thirty-nine years, solely because, in reliance upon an assertion of his constitutional privilege against self-incrimination, he refused to testify before that inquiry. The theory upon which this order of disbarment was upheld by the New York Court of Appeals—a theory which the majority here embraces—is that although lawyers, as citizens, have a constitutional right not to incriminate themselves, they also have a special duty, as lawyers, to cooperate with the courts and that this "duty of co-operation" would become a " 'phrase without reality' . . . if a lawyer after refusing to answer pertinent questions about his professional conduct can retain his status and privileges as an officer of the court." [2] In my judgment, however, the majority is here approving a practice that makes the constitutional privilege against self-incrimination the "phrase without reality." [3]

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cedural due process sprang in large part from knowledge of the historical truth that the rights and liberties of people accused of crime could not be safely entrusted to secret inquisitorial processes."

[2] *Matter of Cohen*, 7 N. Y. 2d 488, 495, 166 N. E. 2d 672, 675.

[3] In my judgment, petitioner's reliance upon his federal privilege against self-incrimination under the Fifth and Fourteenth Amendments is sufficiently shown by this whole record to require the consideration of that question by this Court. As the majority points out, petitioner expressly asserted that privilege before the court conducting the inquiry. Since that time it is true that he has not always spelled out with meticulous specificity this self-incrimination claim under the Fifth and Fourteenth Amendments, but he has consistently and repeatedly urged that his disbarment violates the Fourteenth Amendment. And the record shows throughout that the whole controversy has hinged around the question of the power of the State, under both the State and the Federal Constitutions, to force him to answer the questions he had been asked at the inquiry. Under these circumstances, I cannot allow to pass unnoticed the violation which I think has occurred with respect to petitioner's rights under the Fifth

This almost magical obliteration of the privilege against self-incrimination represents a radical departure from the previously established practice in the State of New York. For, as pointed out in the dissent of Judge Fuld, the New York Court of Appeals had earlier condemned an attempt to introduce precisely the policy it here accepted, saying: " 'The constitutional privilege [not to incriminate one's self] is a fundamental right and a measure of duty; its exercise cannot be a breach of duty to the court.' It follows that . . . the present disciplinary proceeding instituted against the appellant, wherein the single offense charged is his refusal to yield a constitutional privilege, is unwarrantable." [4]

In departing from its prior policy of fully protecting the privilege against compelled self-incrimination guaranteed by both the State and the Federal Constitutions, the New York court relied heavily on several of this Court's recent cases.[5] Those cases, I regret to say, do provide some support for New York's partial nullification of the constitutional privilege against self-incrimination. For those cases are a product of the recently emphasized constitutional philosophy under which no constitutional right is safe from being "balanced" out of existence whenever a majority of this Court thinks that the interests of the State "weigh more" than the particular constitutional guarantee involved.[6] The product of the "bal-

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Amendment. Cf. *Boynton* v. *Virginia,* 364 U. S. 454, 457. While the Court seems to intimate an opposite view, its opinion appears to me actually to pass upon this federal contention.

[4] *Matter of Grae,* 282 N. Y. 428, 435, 26 N. E. 2d 963, 967.

[5] 7 N. Y. 2d, at 496, 166 N. E. 2d, at 676. The cases relied upon were: *Lerner* v. *Casey,* 357 U. S. 468; *Beilan* v. *Board of Education,* 357 U. S. 399; *Nelson* v. *County of Los Angeles,* 362 U. S. 1.

[6] The majority has not even bothered expressly to "strike a balance" in these cases apparently on the theory that the value of the privilege against self-incrimination is so small that it can be "outweighed" by

ancing" here is the conclusion that the State's interest in disbarring any lawyer suspected of "ambulance chasing" outweighs the value of those provisions of our Bill of Rights and the New York Constitution commanding government not to make people testify against themselves. This is a very dubious conclusion, at least to one like me who believes that our Bill of Rights guarantees are essential to individual liberty and that they state their own values leaving no room for courts to "weigh" them out of the Constitution.[7] The First Amendment freedoms have already suffered a tremendous shrinkage from "balancing," [8] and here the Fifth Amendment once again suffers from the same process.[9] I agree with MR. JUSTICE DOUGLAS that the order here under review is in direct conflict with the mandate of the Fifth Amendment as made controlling upon the States by the Fourteenth Amendment.[10]

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any countervailing governmental interest. See, *e. g., Nelson* v. *County of Los Angeles, supra,* at 7–8: "Nor do we think that this discharge is vitiated by any deterrent effect that California's law might have had on Globe's exercise of his federal claim of privilege. The State may nevertheless legitimately predicate discharge on refusal to give information touching on the field of security."

[7] My views of this "balancing" process have been set out at length in the companion cases, *Konigsberg* v. *State Bar of California,* decided today, *ante,* p. 56, at 62–71, 75, and *In re Anastaplo,* decided today, *ante,* p. 97, at 109–113. See also the opinions cited at n. 10 in my dissenting opinion in *Konigsberg.*

[8] See, *e. g., Wilkinson* v. *United States,* 365 U. S. 399; *Braden* v. *United States,* 365 U. S. 431; *Times Film Corp.* v. *City of Chicago,* 365 U. S. 43; *Uphaus* v. *Wyman,* 364 U. S. 388; *Barenblatt* v. *United States,* 360 U. S. 109; *Uphaus* v. *Wyman,* 360 U. S. 72.

[9] It is true that some inroads have already been made into the Fifth Amendment, for both *Lerner* v. *Casey, supra,* and *Nelson* v. *County of Los Angeles, supra,* rested partly upon a willingness of a majority of this Court to "balance" away the full protection of that Amendment.

[10] This conclusion is reached primarily on the basis of agreement with the dissenting opinion of Mr. Justice Harlan in *Twining* v. *New*

In a less important area, I would be content to rest my dissent upon the single ground that a State may not penalize any person for invoking his constitutional privilege against self-incrimination. But, as I see this case, it involves other constitutional problems that go far beyond the privilege against self-incrimination—problems that involve dangers which, though as yet largely peculiar to the members of the legal profession, are so important that they need to be discussed. And, as I understand the majority's opinion, it disposes of those problems on a ground that, from the standpoint of the legal profession, is the most far-reaching possible—that lawyers have fewer constitutional rights than others. It thus places the stamp of approval upon a doctrine that, if permitted to grow, as doctrines have a habit of doing, can go far toward destroying the independence of the legal profession and thus toward rendering that profession largely incapable of performing the very kinds of services for the public that most justify its existence.

The unlimited reach of the doctrine being promulgated can best be shown by analysis of the issue before us as that issue was posed by the court below. In concluding that petitioner should be disbarred for reliance upon the privilege against self-incrimination, the New York Court of Appeals expressly recognized the right of every citizen, under New York law, to refuse to give self-incriminating testimony. "That right," the court said, "was his [petitioner's] as it would be the right of any citizen . . . ." But, the court reasoned, petitioner was more

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Jersey, 211 U. S. 78, 114–127. But even if that case were rightly decided, it would not provide support for the decision here. For the issue with regard to the privilege against self-incrimination here is quite different from the issue posed in the *Twining* case. In that case the only question before the Court was whether comment upon a defendant's failure to take the stand in his own defense was constitutionally permissible.

than an ordinary citizen. "[H]e stood before the inquiry and before the Appellate Division in another quite different capacity, also." [11] The capacity referred to was petitioner's capacity as a lawyer. In that "capacity," the court concluded, petitioner could not properly avail himself of his rights as a citizen. Thus it is clear that the theory adopted by the court below and reaffirmed by the majority here is that lawyers may be separated into a special group upon which special burdens can be imposed even though such burdens are not and cannot be placed upon other groups. Lawyers are thus to have their legal rights determined by something less than the "law of the land" as it is accorded to other people.

In my judgment, the theory so casually but enthusiastically adopted by the majority constitutes nothing less than a denial to lawyers of both due process and equal protection of the laws as guaranteed by the Fourteenth Amendment. For I have always believed that those guarantees, taken together, mean at least as much as Daniel Webster told this Court was meant by due process of law, or the "law of the land," in his famous argument in the *Dartmouth College* case: "By the law of the land is most clearly intended the general law . . . . The meaning is, that every citizen shall hold his life, liberty, property, and immunities, under the protection of the general rules which govern society." [12] I think it is clear that the opin-

[11] 7 N. Y. 2d, at 495, 166 N. E. 2d, at 675.

[12] *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 581. See also *Vanzant* v. *Waddel*, 2 Yerger 260, in which Judge Catron, later Mr. Justice Catron, speaking for the Supreme Court of Tennessee, observed: "The right to life, liberty and property, of every individual, must stand or fall by the same rule or law that governs every other member of the body politic, or 'LAND,' under similar circumstances; and every partial or private law, which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void." *Id.*, at 270. The views expressed by Webster and Judge Catron

ion of the majority in this case says unequivocally that lawyers may not avail themselves of "the general rules which govern society."

The majority recognizes, as indeed it must, that New York is depriving lawyers, because they are lawyers, of the full benefit of a constitutional privilege available to other people. But, instead of reaching the natural and, I think, obvious conclusion that such a singling out of one particular group [13] for special disabilities with regard to the basic privileges of individuals is in direct conflict with the Fourteenth Amendment,[14] it chooses to defend this patent discrimination against lawyers on the theory that there are no protections guaranteed to every man who, in the words of Magna Charta, is being "anywise destroyed" by the Government. The "law of the land" is therefore, in the view of the majority, an accordion-like protection that can be withdrawn from any person or group of persons whenever the Government might prefer "procedures resulting in greater preventive certainty" if it can show some "reasonable" basis for that

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go back at least as far as 1215 and Magna Charta, in which it was provided: "No free man shall be taken or imprisoned, or disseised, or outlawed, or exiled, or anywise destroyed; nor shall we go upon him nor send upon him, but by the lawful judgment of his peers or by the law of the land."

[13] I recognize, of course, that New York also singles out other groups for special treatment with regard to certain constitutional privileges. See *Barsky* v. *Board of Regents*, 347 U. S. 442. That practice, which I regard as also clearly unconstitutional (see my dissenting opinion in that case, *id.*, at 456–467), does not affect the argument here. For discrimination against one group cannot be justified on the ground that it is also practiced against another.

[14] Cf. *Griffin* v. *Illinois*, 351 U. S. 12. In that case, we said: "In this tradition [the tradition of Magna Charta], our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons." *Id.*, at 17.

preference. The majority then proceeds to find such a "reasonable" basis on two grounds: first, that lawyers occupy a high position in our society "affording special opportunities for deleterious conduct" and can, by virtue of that position, be compelled to forego rights that are accorded to other groups; and, secondly, that the powers here exercised over petitioner by the courts of New York are no different than those exercised over lawyers by the courts of England several hundred years ago. In my judgment, neither of these grounds provides the slightest justification for the refusal of the State of New York to allow lawyers to avail themselves of "the general rules which govern society."

I heartily agree with the view expressed by the majority that lawyers occupy an important position in our society, for I recognize that they have a great deal to do with the administration, the enforcement, the interpretation, and frequently even with the making of the Constitution and the other laws that govern us. But I do not agree with the majority that the importance of their position in any way justifies a discrimination against them with regard to their basic rights as individuals. Quite the contrary, I would think that the important role that lawyers are called upon to play in our society would make it all the more imperative that they not be discriminated against with regard to the basic freedoms that are designed to protect the individual against the tyrannical exertion of governmental power. For, in my judgment, one of the great purposes underlying the grant of those freedoms was to give independence to those who must discharge important public responsibilities. The legal profession, with responsibilities as great as those placed upon any group in our society, must have that independence. If it is denied them, they are likely to become nothing more than parrots of the views of whatever group wields governmental power at the moment. Wherever that has happened in the

world, the lawyer, as properly so called and respected, has ceased to perform the highest duty of his calling and has lost the affection and even the respect of the people.

Nor do I believe, as the majority asserts, that the discrimination here practiced is justified by virtue of the fact that the courts of England have for centuries exercised disciplinary powers "over members of the bar, incident to their broader responsibility for keeping the administration of justice and the standards of professional conduct unsullied." The rights of lawyers in this country are not, I hope, to be limited to the rights that English rulers chose to accord to their barristers hundreds of years ago. For it is certainly true that the courts of England could have then, as the majority points out, made "short shrift" of any barrister who refused to "co-operate" with the King's courts. Indeed, those courts did sometimes make "short shrift" of lawyers whose greatest crime was to dare to defend unpopular causes.[15] And in much the same manner, these same courts were at this same time using their "inherent" powers to make "short shrift" of juries that returned the wrong verdict.[16] History, I think, records

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[15] The following excerpt from Hallam, The Constitutional History of England, Vol. I (2d ed.), at 477, indicates the extent to which this sort of thing was done in seventeenth-century England: "Two puritans having been committed by the high-commission court, for refusing the oath ex-officio, employed Mr. Fuller, a bencher of Gray's Inn, to move for their habeas corpus; which he did on the ground that the high commissioners were not empowered to commit any of his majesty's subjects to prison. This being reckoned a heinous offence, he was himself committed, at Bancroft's instigation, (whether by the king's personal warrant, or that of the council-board, does not appear) and lay in gaol to the day of his death . . . ."

[16] Hallam, *op. cit., supra*, n. 15, at 316, makes the following observation with regard to the duty of cooperation imposed upon English juries: "There is no room for wonder at any verdict that could be returned by a jury, when we consider what means the government possessed of securing it. The sheriff returned a pannel, either

that it was this willingness on the part of the courts of England to make "short shrift" of unpopular and uncooperative groups that led, first, to the colonization of this country, later, to the war that won its independence, and, finally to the Bill of Rights.[17]

When the Founders of this Nation drew up our Constitution, they were uneasily aware of this English practice, both as it had prevailed in that country and as it had been experienced in the colonies prior to the Revolution. Particularly fresh in their minds was the treatment that had been accorded the lawyers who had sought to defend John Peter Zenger against a charge of seditious libel before a royal court in New York in 1735.[18] These two

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according to express directions, of which we have proofs, or to what he judged himself of the crown's intention and interest. If a verdict had gone against the prosecution in a matter of moment, the jurors must have laid their account with appearing before the star-chamber; lucky, if they should escape, on humble retractation, with sharp words, instead of enormous fines and indefinite imprisonment."

[17] Judge Catron expressed the same point in *Vanzant* v. *Waddel*, *supra:* "The idea of a people through their representatives, making laws whereby are swept away the life, liberty and property of *one* or a *few* citizens, by which neither the representatives nor their other constituents are willing to be bound, is too odious to be tolerated in any government where freedom has a name. Such abuses resulted in the adoption of Magna Charta in England, securing the subject against odious exceptions, which is, and for centuries has been the foundation of English liberty. Its infraction was a leading cause why we separated from that country, and its value as a fundamental rule for the protection of the citizen against legislative usurpation, was the reason of its adoption as part of our constitution." 2 Yerger, at 270–271.

[18] See the Trial of John Peter Zenger, 17 Howell's State Trials 675. Zenger, a newspaper publisher, had seen fit to criticize the government and was being tried for printing "many things derogatory of the dignity of his majesty's government, reflecting upon the legislature, upon the most considerable persons in the most distinguished stations in the province, and tending to raise seditions and tumults among the people thereof." *Id.*, at 678.

lawyers had been summarily disbarred by the judges presiding at that trial for "having presumed, (notwithstanding they were forewarned by the Court of their displeasure, if they should do it) to sign, and having actually signed, and put into court, Exceptions, in the name of John Peter Zenger; thereby denying the legality of the judges their commissions . . . ." [19] It is to the lasting credit and renown of the colonial bar that Andrew Hamilton, a lawyer of Philadelphia, defied the hostility of the judges, defended and brought about the acquittal of Zenger.[20]

Unlike the majority today, however, the Founders were singularly unimpressed by the long history of such English practices. They drew up a Constitution with provisions that were intended to preclude for all time in this country the practice of making "short shrift" of anyone—whether he be lawyer, doctor, plumber or thief. Thus, it was provided that in this country, the basic "law of the land" must include, among others, freedom from bills of attainder, from *ex post facto* laws and from compulsory self-incrimination, and rights to trial by jury after indictment by grand jury and to assistance of counsel.[21] To make certain that these rights and freedoms would be accorded equally to everyone, it was also provided: "*No person* shall . . . be deprived of life, liberty, or property, without due process of law." [22] (Emphasis supplied.)

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[19] *Id.*, at 686–687. The judges there preferred the label of "contempt" to that of "failure to co-operate."

[20] See Dictionary of American Biography, Vol. XX, at 648–649, for the story of Hamilton's successful defense of Zenger.

[21] Cf. *Chambers* v. *Florida,* 309 U. S. 227, 235–241, especially at 237, n. 10.

[22] That command, of course, originally applied only to the Federal Government. *Barron* v. *Baltimore,* 7 Pet. 243. But with the adoption in 1868 of the Fourteenth Amendment, the same command, together with the related requirement of equal protection of the laws, became binding upon the States.

The majority is holding, however, that lawyers are not entitled to the full sweep of due process protections because they had no such protections against judges or their fellow lawyers in England. But I see no reason why this generation of Americans should be deprived of a part of its Bill of Rights on the basis of medieval English practices that our Forefathers left England, fought a revolution and wrote a Constitution to get rid of.[23] This Court should say here with respect to due process and self-incrimination what it said with respect to the freedoms of speech and press in *Bridges* v. *California:* "[T]o assume that English common law in this field became ours is to deny the generally accepted historical belief that 'one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press.' " [24]

Instead of applying the reasoning of the *Bridges* case to protect the right of lawyers to avail themselves of the privilege against self-incrimination, the majority departs from that reasoning in an opinion that threatens also to restrict the freedoms of speech, press and association. For, in addition to the bare holding that a lawyer may not avail

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[23] The majority asserts that it is not only "the early beginning of the practice of judicial inquiry into attorney practices . . . [but also] the long life of that mode of procedure" that justifies its decision here. This argument—that constitutional rights are to be determined by long-standing practices rather than the words of the Constitution—is not, as the majority points out, a new one. It lay at the basis of two of this Court's more renowned decisions—*Dred Scott* v. *Sandford,* 19 How. 393, and *Plessy* v. *Ferguson,* 163 U. S. 537. But cf. *Brown* v. *Board of Education,* 347 U. S. 483. The notion that a violation of the plain language of the Constitution can gain legal stature by long-continued practice is not one I can subscribe to. A majority group, as de Tocqueville observed, too often "claims the right not only of making the laws, but of breaking the laws it has made." De Tocqueville, Democracy in America, Vol. 1, at 261.

[24] 314 U. S. 252, 264.

himself of the "law of the land" with respect to the privilege against self-incrimination, the opinion carries the plain implication that a lawyer is not to have the protection of the First Amendment with regard to his private beliefs and associations whenever his exercise of those freedoms might interfere with his duty to "co-operate" with a judge.[25] It is, of course, possible that the majority will allow this process to go no further—that it will not disturb the few remaining constitutional safeguards of the lawyer's independence. But I find no such promise in the majority's opinion. On the contrary, I find in that opinion a willingness to give overriding effect to the lawyer's duty of "co-operation," even to the destruction of constitutional safeguards, and I cannot know how many constitutional safeguards would be sacrificed to this doctrine. Could a lawyer who refused to "co-operate" now be subjected to an unlawful search in an attempt to find evidence that he is guilty of something that a judge might later find to constitute "shady practices"?[26] Could the court peremptorily confine a lawyer in jail for contempt until he agreed to "co-operate" with the court by foregoing his privilege against self-incrimination—or renouncing his freedom of speech?[27] Or can American courts now emu-

[25] This implication stems from the majority's reliance upon its opinions in the companion cases, *Konigsberg* v. *State Bar of California, ante,* p. 36, and *In re Anastaplo, ante,* p. 82. If, as the majority says, there is no constitutional difference between admission and disbarment proceedings, it seems clear that lawyers may now be called in by a State and forced to disclose their political associations on a penalty of disbarment if they refuse to do so.

[26] The same point was persuasively urged by Mr. Justice Floyd of the Florida Supreme Court in a concurring opinion where that court refused to adopt the rule adopted by the New York court in this case. See *Sheiner* v. *State,* 82 So. 2d 657, 664.

[27] As shown in notes 15 and 16, *supra,* the same arguments used to justify the decision in this case would also be applicable to the supposed case for it certainly cannot be denied that such a practice had the "sanction" of English history.

late the one-time practice of English courts of sending lawyers to jail for the "crime" of publicly advocating the repeal of laws that require people to incriminate themselves? [28] If the requirements of due process and equal protection of the laws are observed, we know that the answers to these questions would be, no. But who knows how short "short shrift" can get?

The majority says that some of the evil practices I have referred to do not exist today and that they would now be held unconstitutional. The Court does not mean, of course, that the people of this country have an "absolute" right not to be subjected to such practices.[29] It means rather that a majority of this Court, *as presently constituted,* thinks that such practices are not "justified on balance." But only 10 years ago, a different majority of this Court upheld summary imprisonment of the defense counsel in *Dennis* v. *United States,*[30] on a record which indicated that the primary reason for that imprisonment was the imputation to the lawyers of what the trial judge conceived of as the unpatriotic and treasonable designs of their clients.[31] Even more recently, a

[28] Hallam, *op. cit., supra,* n. 15, at 287, reports the following event in early seventeenth-century England: "The oath ex officio, binding the taker to answer all questions that should be put to him, inasmuch as it contravened the generous maxim of English law that no one is obliged to criminate himself, provoked very just animadversion. Morice, attorney of the court of wards, not only attacked its legality with arguments of no slight force, but introduced a bill to take it away. This was on the whole well received by the house; and sir Francis Knollys, the stanch enemy of episcopacy, though in high office, spoke in its favour. But the queen put a stop to the proceeding, and Morice lay some time in prison for his boldness."

[29] This much is made indisputably clear in the majority opinion in *Konigsberg* v. *State Bar of California, supra,* at 49–51.

[30] 341 U. S. 494.

[31] See *Sacher* v. *United States,* 343 U. S. 1, 19 (dissenting opinion). In my judgment the *Sacher* case is not altogether unlike the case of the lawyer Fuller discussed in n. 15, *supra.*

bare 5–4 majority of this Court prevented the temporary disbarment of a lawyer whose only "crime" lay in criticizing the manner in which the federal courts conduct trials for sedition.[32] And today, this Court is upholding the refusal of two States to admit lawyers to their respective Bars solely because those lawyers would not renounce their rights under the First Amendment.[33] The sad truth is that the majority is being unduly optimistic in thinking the practices I have mentioned do not exist today. They may have been disguised by description in different language but the practices themselves have not changed.

It seems to me that the majority takes a fundamentally unsound position when it endorses a practice based upon the artificial notion that rights and privileges can be stripped from a man in his capacity as a lawyer without affecting the rights and privileges of that man as a man. It is beyond dispute that one of the important ends served by the practice of law is that it provides a means of livelihood for the lawyer and those dependent upon him for support. That means of earning a livelihood is not one that has been conferred upon the lawyer as a gift from the State. Quite the contrary, it represents a substantial investment in time, money and energy on the part of the person who prepares himself to go into the legal profession. Moreover, even after a lawyer has been admitted to practice, a further substantial investment must be made to enable the lawyer to build up the sort of goodwill that lies at the root of any successful practice. Young lawyers must and do take on cases in which their ultimate fee is only a fraction of the real value of the work they

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[32] *In re Sawyer,* 360 U. S. 622. Cf. Trial of John Peter Zenger, *supra.*

[33] *Konigsberg* v. *State Bar of California,* decided today, *supra; In re Anastaplo,* decided today, *supra.* The pressures being brought upon Konigsberg and Anastaplo are subtler than those brought upon such people as Morice (see note 28), but they are no less real.

put into the case in order to build up this sort of goodwill. The lawyer's abilities, acquired through long and expensive education, and the goodwill attached to his practice, acquired in part through uncompensated services, are capital assets that belong to the lawyer—both as a lawyer and as a man, assuming that such a conceptualistic distinction can be drawn.

These assets should be no more subject to confiscation than his home or any other asset he may have acquired through his industry and initiative. If they are used in violation of an already-existing, clear requirement of the law which pronounces as the penalty for violation confiscation of the assets, and if the violation is established in a proceeding in which all the requirements of the "law of the land" are satisfied, that is one thing.[34] But to confiscate the earning capacity that represents a large part of a lawyer's lifetime achievements on the theory that no such asset exists is quite another. The theory that the practice of law is nothing more than a privilege conferred by the State which it can destroy whenever it

[34] Thus, I am in complete agreement with the majority that, on a constitutional level, "[i]t is certainly not beyond the realm of permissible state concerns to conclude that too much attention to the business of getting clients may be incompatible with a sufficient devotion to duties which a lawyer owes to the court, or that the 'payment of awards to persons bringing in legal business' is inconsistent with the personally disinterested position a lawyer should maintain." But that state concern in preventing "ambulance chasing" is certainly no greater than the state concern in preventing any other activity which it has seen fit to make a crime. Suspected "ambulance chasers" should be no more subject to the deprivation of due process and equal protection that stems from "procedures resulting in greater preventive certainty" than are suspected murderers. Indeed, it seems to me that if the question is to be decided on the basis of "state concern," there is no more justification for applying such summary procedures to "ambulance chasing" than for applying them to any other variety of crime.

can assert a "reasonable" justification for doing so seems to me to permit plain confiscation.

Even apart from the financial impact, the disbarment of a lawyer cannot help but have a tremendous effect upon that lawyer as a man. The dishonor occasioned by an official pronouncement that a man is no longer fit to follow his chosen profession cannot well be ignored. Such dishonor undoubtedly goes far toward destroying the reputation of the man upon whom it is heaped in the community in which he lives. And the suffering that results falls not only upon the disbarred lawyer but upon his family as well. Government certainly should not be allowed to do this to a man without according him the full benefit of the "law of the land," both constitutional and statutory.

In view of all this, I can see no justification for the notion that membership in the bar is a mere privilege conferred by the State and is therefore subject to withdrawal for the "breach" of whatever vague and indefinite "duties" the courts and other lawyers may see fit to impose on a case-by-case basis.[35] Nearly a century ago, an English judge observed, correctly I think, that "short of those heavy consequences which would attach to the greater and more heinous offences, I own I can conceive of no jurisdiction more serious than that by which a man may be deprived of his degree and status as a barrister, and which, in such a case—perhaps, after he has devoted the best years of his life to this arduous profession,—deprives him of his position as a member of that profession, and throws him back upon the world to commence a new career as best he may, stamped with dishonour and disgrace." [36]

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[35] Cf. *Barsky* v. *Board of Regents, supra,* at 459, 472–474 (dissenting opinions).

[36] *Hudson* v. *Slade,* 3 Foster and Finlason (Q. B.) 390, 411.

But that is precisely what is happening here on the basis of nothing more than petitioner's "failure to co-operate" with the courts by reliance upon his constitutional privilege against self-incrimination. A man who has devoted thirty-nine years of his life to the practice of law and who, so far as this record shows, has never failed to perform those services faithfully and honorably is being dismissed from the profession in disgrace and is having his means of livelihood taken away from him at a point in his life when it seems highly unlikely that he will be able to find an adequate alternative means to support himself.

Quite differently from the majority, I think that the legal profession not only can but should endure what the majority refers to as the "disrespect which would result from the publicity, delay, and possible ineffectiveness in their exposure and eradication that might follow could miscreants only be dealt with through *ordinary investigatory and prosecutorial processes.*" (Emphasis supplied.) Indeed, I cannot understand how any man in this country can assume that "publicity," "delay" and "ineffectiveness" brought on by observance of due process of law can ever be disrespectable. I am not at all certain, however, that the legal profession can survive in any form worthy of the respect we want it to have if its internal intergroup conflicts over professional ethics [37] are not rigidly confined by just those "ordinary investigatory and prosecutorial processes" which, though belittled by the majority today, are enshrined in the concepts of equal protection and due process. For if the legal profession can, with the aid of those members of

[37] The true nature of the underlying controversy in this case, as a controversy between economically competing groups of lawyers, is shown by the fact that four different associations of attorneys filed briefs as *amici curiae* in the present proceeding—two favorable to petitioner and two favorable to respondent.

the profession who have become judges, exclude any member it wishes even though such exclusion could not be accomplished within the limits of the same kind of due process that is accorded to other people, how is any lawyer going to be able to take a position or defend a cause that is likely to incur the displeasure of the judges or whatever group of his fellow lawyers happens to have authority over him? [38] The answer is that in many cases he is not going to be able to take such a position or to defend such a cause and the public will be deprived of just those legal services that, in the past, have given lawyers their most bona fide claim to greatness.

It may be that petitioner has been guilty of some violation of law which if legally proved would justify his disbarment. It is only fair to say, however, that there is not one shred of evidence in this record to show such a violation. And petitioner is entitled to every presumption of innocence until and unless such a violation has been charged and proved in a proceeding in which he, like other citizens, is accorded the protection of all of the safeguards guaranteed by the requirements of equal protection and due process of law. This belief that lawyers too are entitled to due process and equal protection of the laws will not, I hope, be regarded as too new or too novel.

The great importance of observing due process of law, though to some extent familiar to lawyers and laymen alike, is sometimes difficult for laymen to understand. Courts have often had to rely upon lawyers and their familiarity with the wisdom underlying these processes

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[38] The immense danger of departures from due process to lawyers who represent unpopular causes is dramatically illustrated in *Sacher* v. *United States*, *supra*. Cf. *United States ex rel. Goldsby* v. *Harpole*, 263 F. 2d 71, 82, for a discussion of another situation in which the independence of the lawyer may be crucial to his ability adequately to defend his client.

to explain the need for time-consuming procedures to impatient laymen. Such impatience is understandable when it comes from laymen—but it is regrettable to find it in lawyers. The respect for a rule of law administered through due process of law is the very hallmark of a lawyer—without it he cannot keep faith with his profession.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

The privilege against self-incrimination contained in the Fifth Amendment has an honorable history and should not be downgraded as it is today. Levi Lincoln, Attorney General, objected in the hearing of *Marbury* v. *Madison,* 1 Cranch 137, 144, to answering certain questions on the ground that the answers might tend to criminate him.[1] See Warren, The Supreme Court in United States History (1937), Vol. I, p. 237. The Court, then headed by Chief Justice Marshall, respected the privilege.[2] Neither he nor any Justice even intimated that it was improper for a lawyer to invoke his constitutional rights. They knew that the Fifth Amendment was designed to protect the

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[1] As reported in The Aurora for February 15, 1803, Levi Lincoln stated to the Court "[t]hat if the court should upon the questions being submitted in writing determine that he was bound to answer them, another difficulty would suggest itself upon the principles of evidence; he would suppose the case to assume its most serious form, if in the course of his official duty these commissions should have come into his hands, and that he might either by error or by intention have done wrong, it would not be expected that he should give evidence to criminate himself. This was an extreme case, and he used only to impress upon the court the nature of the principle in the strongest terms."

[2] The Court, as reported in 1 Cranch, at 144, said that the Attorney General was not obliged "to state any thing which would criminate himself."

innocent as well as the guilty. What the Court did that day reflected the attitude expressed by the Court in 1956 in *Slochower* v. *Board of Education,* 350 U. S. 551, 557–558, when we said, "The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. . . . The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances."

The lawyer in this case is in the same need of that protection as was the Attorney General in *Marbury* v. *Madison* and the professor in the *Slochower* case.

The American philosophy of the Fifth Amendment was dynamically stated by President Andrew Jackson who replied as follows to a House Committee investigating the spoils system:

> "[Y]ou request myself and the heads of the departments to become our own accusers, and to furnish the evidence to convict ourselves." H. R. Rep. No. 194, 24th Cong., 2d Sess., p. 31.

President Grant took long absences from Washington, D. C., for recreational purposes. A House resolution asked Grant to list all his executive acts, since his election, which had been "performed at a distance from the seat of government established by law," together with an explanation of the necessity "for such performance." Grant declined, stating that if the information was wanted for purposes of impeachment ". . . it is asked in derogation of an inherent natural right, recognized in this country by a constitutional guarantee which protects every citizen, the President as well as the humblest in the land, from being made a witness against himself." 4 Cong. Rec., Pt. 3, 44th Cong., 1st Sess., p. 2999; H. Jour., 44th Cong., 1st Sess., p. 917.

A faithful account of the Fifth Amendment was given by Simon H. Rifkind, formerly a federal judge in the Southern District of New York who served with distinction from 1941 to 1950. He said in an address on May 3, 1954: [3]

> "Far and wide, currency has been given to what I regard as the mischievous doctrine, the unconstitutional and historically false doctrine that the plea of the Fifth Amendment is an admission of guilt, an act of subversion, a badge of disloyalty.
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> "I confess that when I hear the words 'Fifth Amendment Communist' spoken, I experience a sense of revulsion. In that phrase I detect a denial of seven centuries of civilizing growth in our law, a repudiation of that high regard for human dignity which is the proud hallmark of our law. That phrase makes a mockery of a practice of every court in our land—a practice which is so well-accepted that we take it for granted: Has any of you ever seen a prosecutor call a defendant to the witness stand? Of course not; you are shocked, I hope, at the suggestion. A defendant takes the stand only of his own free will. Nor do we speak of 'Fifth Amendment burglars,' 'Fifth Amendment traffic violators,' or 'Fifth Amendment anti-trust law violators.' Nor, for that matter, would I speak of 'Fifth and Sixth Amendment Senators.' But I do seem to recall that when the actions of a Senator recently came under investigation, he hastened to insure that he would have the right to confront and cross-examine his accusers. He demanded that a statement of the charges be made available to him, and he insisted that he be allowed

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[3] Rifkind, Reflections on Civil Liberties (American Jewish Committee), pp. 12–13.

to compel the attendance of witnesses in his own behalf.

"This is not the time to go into the hoary history of the Fifth Amendment, but this much is clear: The privilege to remain silent was regarded by our ancestors as the inalienable right of a free man. To compel a man to accuse himself was regarded as a cruelty beneath the tolerance of civilized people, and it simply is not true as a matter of law that only the guilty are privileged to plead the Fifth Amendment. The innocent too have frequent occasion to seek its beneficent protection."

There is no exception in the Fifth Amendment for lawyers any more than there is for professors, Presidents, or other office holders.

I believe that the States are obligated by the Due Process Clause of the Fourteenth Amendment to accord the full reach of the privilege to a person who invokes it. See *Adamson* v. *California,* 332 U. S. 46, 68 (dissenting opinion); *Scott* v. *California,* 364 U. S. 471 (dissenting opinion)—a position which MR. JUSTICE BRENNAN today strengthens and reaffirms. In the disbarment proceedings, petitioner relied not only on the state constitution but on the Due Process Clause of the Fourteenth Amendment, contending that it forbade the State's making his silence the basis for his disbarment. I agree with that view. Moreover, apart from the Fifth Amendment, I do not think that a State may require self-immolation as a condition of retaining the license of an attorney. When a State uses petitioner's silence to brand him as one who has not fulfilled his "inherent duty and obligation . . . as a member of the legal profession," it adopts a procedure that does not meet the requirements of due process. Taking away a man's right to practice law is imposing a

penalty as severe as a criminal sanction, perhaps more so. The State should carry the burden of proving guilt. The short-cut sanctioned today allows proof of guilt to be "less than negligible." *Grunewald* v. *United States,* 353 U. S. 391, 424.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE joins, dissenting.

I would reverse because I think that the petitioner was protected by the immunity from compulsory self-incrimination guaranteed by the Fifth Amendment, which in my view is absorbed by the Fourteenth Amendment, and therefore is secured against impairment by the States.

In *Barron* v. *Baltimore,* 7 Pet. 243, decided in 1833, the Court held that it was without jurisdiction to review a judgment of the Maryland Court of Appeals which denied an owner compensation for his private property taken for public use. Chief Justice Marshall wrote that, contrary to the contention of the owner, "the provision in the fifth amendment to the constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the states." This, he said, was because the first eight Amendments "contain no expression indicating an intention to apply them to the state governments. This Court cannot so apply them." 7 Pet., pp. 250–251. For over a quarter of a century after the adoption of the Fourteenth Amendment in 1868, this holding was influential in many decisions of the Court which rejected arguments for the application to the States of one after another of the specific guarantees included in the Federal Bill of Rights. See *Knapp* v. *Schweitzer,* 357 U. S. 371, 378–379, note 5, where the cases are collected.

In 1897, however, the Court decided *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226. That case also challenged the constitutionality of a judgment of a State Supreme Court, that of Illinois, alleged to have sustained a taking of private property for public purposes without just compensation. But the property owner could now invoke the Fourteenth Amendment against the State. The Court held that the claim based on that Amendment was cognizable by the Court. On the merits, the first Mr. Justice Harlan wrote, "In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument." 166 U. S., p. 241. Thus the Court, in fact if not in terms, applied the Fifth Amendment's just-compensation requirement to the States, finding in the Fourteenth Amendment a basis which Chief Justice Marshall in *Barron* found lacking elsewhere in the Constitution.

But if suitors in state cases who invoked the protection of individual guarantees of the Bill of Rights were no longer to be turned away by the Court with Marshall's summary "This court cannot so apply them," neither was the Court to give encouragement that all specifics in the federal list would be applied as was the Just Compensation Clause. Although there were Justices as early as 1892, see *O'Neil* v. *Vermont,* 144 U. S. 323, 337, 366 (dissenting opinions), as there are Justices today, see dissent of MR. JUSTICE DOUGLAS herein and *Adamson* v. *California,* 332 U. S. 46, 68 (dissenting opinion), urging the view that the Fourteenth Amendment carried over intact the

first eight Amendments as limitations on the States, the course of decisions has not so far followed that view. Additional specific guarantees have, however, been applied to the States. For example, while as recently as 1922, *Prudential Ins. Co.* v. *Cheek,* 259 U. S. 530, 543, the Court had said that the Fourteenth Amendment did not make the protections of the First Amendment binding on the States, decisions since 1925 have extended against state power the full panoply of the First Amendment's protections for religion, speech, press, assembly, and petition. See, *e. g., Gitlow* v. *New York,* 268 U. S. 652, 666; *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Near* v. *Minnesota ex rel. Olson,* 283 U. S. 697, 707; *DeJonge* v. *Oregon,* 299 U. S. 353, 364; *Bridges* v. *California,* 314 U. S. 252, 277. The view occasionally expressed that the freedom of speech and the press may be secured by the Fourteenth Amendment less broadly than it is secured by the First, see *Beauharnais* v. *Illinois,* 343 U. S. 250, 288 (dissenting opinion); *Roth* v. *United States,* 354 U. S. 476, 505–506 (separate opinion); *Smith* v. *California,* 361 U. S. 147, 169 (separate opinion), has never persuaded even a substantial minority of the Court. Again, after saying in 1914 that "the Fourth Amendment is not directed to individual misconduct of [state] . . . officials. Its limitations reach the Federal Government and its agencies," *Weeks* v. *United States,* 232 U. S. 383, 398, the Court held in 1949 that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States . . . ." *Wolf* v. *Colorado,* 338 U. S. 25, 27–28; and see *Elkins* v. *United States,* 364 U. S. 206.

This application of specific guarantees to the States has been attended by denials that this is what in fact is being done. The insistence has been that the applica-

tion to the States of a safeguard embodied in the first eight Amendments is not made "because those rights are enumerated in the first eight Amendments, but because they are of such a nature that they are included in the conception of due process of law." *Twining* v. *New Jersey,* 211 U. S. 78, 99. In other words, due process is said to be infused with "an independent potency" not resting upon the Bill of Rights, *Adamson* v. *California,* 332 U. S. 46, 66 (concurring opinion). It is strange that the Court should not have been able to detect this characteristic in a single specific when it rejected the application to the States of virtually every one of them in the three decades following the adoption of the Fourteenth Amendment. Since "[f]ew phrases of the law are so elusive of exact apprehension as . . . [due process of law] . . . [and] . . . its full meaning should be gradually ascertained by the process of inclusion and exclusion in the course of the decisions of cases as they arise," *Twining* v. *New Jersey, supra,* at 99–100, this formulation has been a convenient device for leaving the Court free to select for application to the States some of the rights specifically mentioned in the first eight Amendments, and to reject others. But surely it blinks reality to pretend that the specific selected for application is not really being applied. Mr. Justice Cardozo more accurately and frankly described what happens when he said in *Palko* v. *Connecticut,* 302 U. S. 319, 326, that guarantees selected by the Court "have been taken over from the earlier articles of the federal bill of rights and brought within the Fourteenth Amendment by a *process of absorption.* . . ." (Italics supplied.)

Many have had difficulty in seeing what justifies the incorporation into the Fourteenth Amendment of the First and Fourth Amendments which would not similarly justify the incorporation of the other six. Even if I assume, however, that, at least as to some guarantees,

there are considerations of federalism—derived from our tradition of the autonomy of the States in the exercise of powers concerning the lives, liberty, and property of state citizens—which should overbear the weighty arguments in favor of their application to the States, I cannot follow the logic which applies a particular specific for some purposes and denies its application for others. If we accept the standards which justify the application of a specific, namely that it is "of the very essence of a scheme of ordered liberty," *Palko* v. *Connecticut, supra,* p. 325, or is included among "those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," *Hurtado* v. *California,* 110 U. S. 516, 535, or is among those personal immunities "so rooted in the traditions and conscience of our people as to be ranked as fundamental," *Snyder* v. *Massachusetts,* 291 U. S. 97, 105, surely only impermissible subjective judgments can explain stopping short of the incorporation of the full sweep of the specific being absorbed. For example, since the Fourteenth Amendment absorbs in capital cases the Sixth Amendment's requirement that an accused shall have the assistance of counsel for his defense, *Powell* v. *Alabama,* 287 U. S. 45, I cannot see how a different or greater interference with a State's system of administering justice is involved in applying the same guarantee in noncapital cases. Yet our decisions have limited the absorption of the guarantee to such noncapital cases as on their particular facts "render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair . . . ," *Uveges* v. *Pennsylvania,* 335 U. S. 437, 441; see also *Betts* v. *Brady,* 316 U. S. 455. But see *McNeal* v. *Culver,* 365 U. S. 109, 117 (concurring opinion). This makes of the process of absorption "a license to the judiciary to administer a watered-down, subjective version of the individual guarantees of the Bill of Rights when state cases come before

us," which, I said in *Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263, 275 (dissenting opinion), I believe to be indefensible.

The case before us presents, for me, another situation in which the application of the full sweep of a specific is denied, although the Court has held that its restraints are absorbed in the Fourteenth Amendment for some purposes. Only this Term we applied, admittedly not in terms but nevertheless in fact, the privilege against compulsory self-incrimination guaranteed by the Fifth Amendment to invalidate a state conviction obtained with the aid of a confession, however true, which was secured from the accused by duress or coercion. *Rogers* v. *Richmond,* 365 U. S. 534; and see *Bram* v. *United States,* 168 U. S. 532. And not too long ago we invalidated a state conviction for illegal possession of morphine based on evidence of two capsules which the accused had swallowed and then had been forced by the police to disgorge. *Rochin* v. *California,* 342 U. S. 165. But the Court today relies upon earlier statements that the immunity from compulsory self-incrimination is not secured by the Fourteenth Amendment against impairment by the States. These statements appear primarily in *Twining* v. *New Jersey, supra,* and *Adamson* v. *California, supra.* Those cases do not require the conclusion reached here. Neither involved the question here presented of the constitutionality of a penalty visited by a State upon a citizen for invoking the privilege. Both involved only the much narrower question whether comment upon a defendant's failure to take the stand in his own defense was constitutionally permissible.

However, all other reasons aside, a cloud has plainly been cast on the soundness of *Twining* and *Adamson* by our decisions absorbing the First and Fourth Amendments in the Fourteenth. There is no historic or logical reason for supposing that those Amendments secure more important individual rights. I need not rely only on

Mr. Justice Bradley's famed statement in *Boyd* v. *United States,* 116 U. S. 616, 632, that compulsory self-incrimination "is contrary to the principles of a free government. It is abhorrent to the instincts of an . . . American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom." I may also call to my support the more current appraisal in the same vein in *Ullmann* v. *United States,* 350 U. S. 422, 426–428. The privilege is rightly designated "one of the great landmarks in man's struggle to make himself civilized." Griswold, The Fifth Amendment Today, (1955) 7. But even without the support of these eminent authorities, I believe that the unanswerable case for absorption was stated by the first Mr. Justice Harlan in his dissent in *Twining, supra,* p. 114. Therefore, with him, "I cannot support any judgment declaring that immunity from self-incrimination is not . . . a part of the liberty guaranteed by the Fourteenth Amendment against hostile state action." *Id.,* at 126. The degree to which the privilege can be eroded unless deterred by the Fifth Amendment's restraints is forcefully brought home in this case by the New York Court of Appeals' departure from its former precedents. See Judge Fuld's dissent, 7 N. Y. 2d 488, 498, 166 N. E. 2d 672, 677.

I would hold that the full sweep of the Fifth Amendment privilege has been absorbed in the Fourteenth Amendment. In that view the protection it affords the individual, lawyer or not, against the State, has the same scope as that against the National Government, and, under our decision in *Slochower* v. *Board of Education,* 350 U. S. 551, the order under review should be reversed.

SMITH *v.* BUTLER ET AL., TRUSTEES.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD APPELLATE DISTRICT.

No. 313. Argued March 27–28, 1961.—Decided April 24, 1961.

In this case arising under the Federal Employers' Liability Act, it appeared after argument and due consideration that the course of litigation and the decisions in the Florida courts did not turn on the issue on the basis of which certiorari was granted. Accordingly, the writ is dismissed.

Reported below: 118 So. 2d 237.

William S. Frates argued the cause and filed a brief for petitioner.

Harold B. Wahl argued the cause for respondents. With him on the brief was *E. F. P. Brigham.*

PER CURIAM.

The petition for certiorari in this case raised solely a question regarding the bearing of the Railway Labor Act on the enforcement of the Federal Employers' Liability Act. The petition was granted. 364 U. S. 869. After full argument and due consideration, it became manifest that the course of litigation and the decisions in the Florida courts did not turn on the issue on the basis of which certiorari was granted. Accordingly, the writ is dismissed.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACK join, dissenting.

I cannot agree that, as the Court says, the petition for certiorari in this case "raised solely a question regarding the bearing of the Railway Labor Act on the enforcement of the Federal Employers' Liability Act." The issue actually tendered is the familiar one whether a reviewing

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court properly deprived an FELA claimant of a jury verdict on the ground that the evidence was insufficient to support the finding of the carrier's negligence. The Court relies upon "the course of litigation and the decisions in the Florida courts." My reading of what occurred in the Florida courts makes manifest to me that the issue under the Question Presented in the petition is as to the sufficiency of the proofs to establish negligence.

The petitioner was a flagman in the employ of Florida East Coast Railway. He brought this action under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, in the Circuit Court of Dade County, Florida. He alleged that he suffered injuries in the course of his employment while taking a "field test" which the carrier required him to take along its right of way and tracks in Florida. He alleged eight grounds of negligence but has abandoned six and we are concerned only with two, namely that the carrier violated the Federal Employers' Liability Act, "(a) In negligently and unlawfully requiring the plaintiff to participate in such a 'field test'; (b) In negligently allowing its servants, agents or supervisors to conduct such a 'field test.'" At the close of petitioner's case at the trial, the carrier made a motion to dismiss the claim alleged under allegations (a) and (b), on the ground that those allegations "pertain to the right to give a field test." Respondents contended that such a claim, if cognizable at all, was cognizable not under the Federal Employers' Liability Act but only as a grievance within the exclusive cognizance of the National Railroad Adjustment Board created under the Railway Labor Act, 45 U. S. C. § 153, First (i); see *Union Pacific R. Co.* v. *Price*, 360 U. S. 601. The trial judge denied the motion and ruled that the gravamen of the petitioner's claim was not that respondents could not require petitioner to take a test, but that, "knowing his physical condition," the carrier was negligent in requiring the petitioner to take

the particular test. The trial judge also denied the carrier's motion for a directed verdict grounded on the alleged insufficiency of the proofs to establish negligence. The jury returned a verdict for the petitioner. The Florida District Court of Appeal, Third District, reversed and remanded the case for a new trial. 104 So. 2d 868.

On remand counsel for both parties and the trial judge discussed at length what it was the Court of Appeal held. There was agreement that the opinion of the Court of Appeal was ambiguous. It might be read to ground the reversal on the finding by the Court of Appeal that the cause was pleaded and tried on a claim not actionable under the Federal Employers' Liability Act but, if at all, under the Railway Labor Act. This is suggested by the language in the opinion, "If the appellee were aggrieved, he had a remedy for such grievance under the Railway Labor Act." 104 So. 2d, at 869–870. On the other hand, the opinion might also be interpreted as grounding the reversal on the insufficiency of the evidence to prove negligence, because the petitioner, while assuming the right of the carrier to give the test, had failed to show that it was negligent in the circumstances proved for the carrier to require the petitioner to take the test. Support for this interpretation is in the statement of the opinion that "The appellee's entire case as reflected by this record conclusively indicates that it was premised upon the claim that appellant's conduct in requiring the appellee to take a field test was unlawful and that all of his injuries and damages resulted from such unlawful act." 104 So. 2d, at 870.

The trial judge finally concluded that the opinion of the Court of Appeal was to be read as resting the reversal upon the latter ground. The trial judge stated, "I think that I am inclined to agree with [petitioner's counsel] that they [the Court of Appeal] just didn't say requiring a field test was improper. They said, 'requiring the

appellee to participate in a field test,' and they had the field test that was conducted when they wrote this opinion, and if their opinion means anything to us at all, I think we have got to follow it to the extent of our interpretation of their words and what they meant." The trial judge ruled further that a cause of action for negligence on the part of the carrier in giving the particular test "would be included" in allegation (a) above quoted.

The record on remand thus plainly reveals that the trial judge agreed with petitioner's argument that allegations (a) and (b) of the complaint pleaded, and the parties had tried, a cause of action under the Federal Employers' Liability Act.

Counsel for the carrier admitted during the colloquy on the remand that if this was the cause of action pleaded and tried, the claim was actionable under the Federal Employers' Liability Act. Carrier's counsel went further. He said, "I think the proofs so far justify it, but if they want to travel on that issue, I think they could amend." Petitioner's counsel was willing to amend but insisted that the case had been pleaded and tried on that theory and that no amendment was necessary. No formal amendment was made, obviously because the trial judge ruled that the theory was embraced within allegation (a). However, petitioner's counsel desired to apply for review of the Court of Appeal's determination as rested, as the trial judge had interpreted its opinion, on the ground that the evidence was insufficient to present a jury question of negligence. But, since a new trial was ordered by the Court of Appeal, there could be no final judgment review of which might be sought until a judgment was entered on the retrial. In order to obtain such a judgment without retrying the case, petitioner's counsel proffered the trial record of the first trial as his only proof at the retrial. He expressly stated that his posi-

tion was that the trial record was sufficient "to prove that the railroad either knew or should have known that Bert Smith was physically unable to take that test and likely to be injured if he took it, and in spite of what the railroad knew or should have known, they gave him the test." The trial judge accepted the proffer over the carrier's objection, but ruled that he was bound by the Court of Appeal's holding that that record did not suffice to raise a jury question of negligence. "[U]nder the testimony that was adduced before on this point, that I would rule that there was no proper issue of evidence to submit to the jury of negligence on requiring him to take this particular field test under the testimony." The judge accordingly directed the entry of a judgment in favor of the carrier. Obviously the case went to the District Court of Appeal the second time with this gloss of the trial judge's interpretation of that Court's earlier opinion. Therefore, when the District Court of Appeal, *per curiam,* affirmed "upon the authority" of its previous opinion, 118 So. 2d 237, the affirmance sustained the trial judge's interpretation of the reversal as having rested, not on the ground that the Railway Labor Act precluded the petitioner's claim under the Federal Employers' Liability Act, but on the ground that the evidence of negligence was insufficient to support a recovery on the claim properly pleaded under the latter statute. The Supreme Court of Florida, in an unreported minute, denied petitioner's petition for certiorari. We granted his petition to this Court, 364 U. S. 869.

Against this background of "the course of litigation and the decisions in the Florida courts" the Question Presented, if plain English is to have its ordinary meaning, is whether the Florida Court of Appeal correctly determined that the evidence at the first trial was insufficient to raise a jury question of the alleged negligence of the

carrier in requiring the petitioner, knowing his physical condition, to take the field test. For the Question Presented is as follows:

> "Did the Florida Appellate Court err in holding that when a railroad employee sustains personal injuries while performing an alleged physical fitness field test ordered by the railroad that the provisions of the Railway Labor Act, 45 U. S. C., Section 151, *et seq.*, preclude him from claiming *that the giving of such a test under the facts and circumstances of this case was an act of negligence under the Federal Employers' Liability Act,* 45 U. S. C., Section 51, et seq.?" (Emphasis supplied.)

Although the members of the Court have disagreed whether we should grant review of these cases, when they are brought here all of us except my Brother FRANKFURTER believe that we have the duty to decide them on the merits. Viewing the issue presented for our review I have read the trial record. I need not rely solely on my own conclusion that the evidence plainly presented a jury question "whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury . . . for which damages are sought." *Rogers* v. *Missouri Pacific R. Co.,* 352 U. S. 500, 506. I may summon to my support the concession of the carrier's counsel that on that issue "the proofs so far justify it." I would reverse and remand the cause with direction to enter an order reinstating the judgment in favor of the petitioner.

MR. JUSTICE DOUGLAS joins this opinion except that he would remand for a new trial. He believes that the District Court of Appeal was correct in holding that the jury trial was not a fair one. See *Butler* v. *Smith,* 104 So. 2d 868.

LUSH *v.* COMMISSIONER OF EDUCATION OF NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 683. Decided April 24, 1961.

Appeal dismissed and certiorari denied.
Reported below: 7 N. Y. 2d 745, 162 N. E. 2d 738.

Francis G. Hessney for appellant.

Charles A. Brind for appellee.

Max G. Morris for Board of Education Central School District No. 1, intervenor-appellee.

PER CURIAM.

The motions to dismiss are granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

COMPLETE AUTO TRANSIT, INC., *v.* CARPENTIER, SECRETARY OF STATE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 750. Decided April 24, 1961.

Appeal dismissed and certiorari denied.

Reported below: 19 Ill. 2d 551, 169 N. E. 2d 78.

Larry A. Esckilsen and *Edmund M. Brady* for appellant.

William G. Clark, Attorney General of Illinois, and *Samuel H. Young* and *Raymond S. Sarnow,* Assistant Attorneys General, for appellee.

George S. Dixon for the National Automobile Transporters Association, as *amicus curiae.*

PER CURIAM.

The motion of the National Automobile Transporters Association for leave to file brief, as *amicus curiae,* is granted. The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYES ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN.

No. 681. Argued March 28, 1961.—Decided May 1, 1961.

As a condition of its approval of any merger of two or more railroads, § 5 (2) (f) of the Interstate Commerce Act provides that the Interstate Commerce Commission "shall require a fair and equitable arrangement to protect the interests of the railroad employees affected," including a requirement that, for at least the length of his prior service up to four years, such merger shall not result in any employee "being in a worse position with respect to" his employment. *Held:* This does not require that all employees remain in the employ of the surviving railroad for at least the length of their previous employment up to four years; it is satisfied by a requirement that discharged employees receive adequate compensation benefits. Pp. 169–179.

189 F. Supp. 942, affirmed.

William G. Mahoney argued the cause for appellants. With him on the brief were *Clarence M. Mulholland, Edward J. Hickey, Jr., James L. Highsaw, Jr., George E. Brand* and *George E. Brand, Jr.*

Solicitor General Cox argued the cause for appellees. With him on the brief were *Assistant Attorney General Loevinger, Ralph S. Spritzer, Richard A. Solomon* and *Robert W. Ginnane.*

Ralph L. McAfee argued the cause for the Erie-Lackawanna Railroad Co., appellee. With him on the brief were *John H. Pickering, Richard D. Rohr* and *Thomas D. Caine.*

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The dispute in this case commenced when the Delaware, Lackawanna & Western Railroad Co. and the Erie

Railroad Co. filed a joint application for approval by the Interstate Commerce Commission of a proposed merger, the surviving company to be known as the Erie-Lackawanna Railroad Co. Supervision by the Commission of railroad mergers is required by § 5 (2) of the Interstate Commerce Act, 54 Stat. 905, 49 U. S. C. § 5 (2), and the statute directs the Commission to authorize such transactions as it finds will be "consistent with the public interest." The Commission concluded in this case that the public interest would be served by a merger of the two applicants and that finding has not been questioned. The point in issue is whether the conditions attached to the merger for the protection of the employees of the two roads satisfy the congressional mandate embodied in § 5 (2)(f) of the Act, which provides in relevant part that:

> "As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. *In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment,* except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order." (Emphasis added.)

Before the Commission's hearing examiner, the railroads suggested that the "New Orleans conditions" be imposed in satisfaction of § 5 (2)(f). These conditions derive their name and substance from the Commission's decision in the *New Orleans Union Passenger Terminal Case*, 282 I. C. C. 271, and they provide compensation benefits for employees displaced or discharged as a result of a merger.[1] After the hearing had concluded, however, appellant Railway Labor Executives' Association (RLEA) filed a brief with the examiner claiming that compensatory conditions were not enough since, in its view, the second sentence of § 5 (2)(f) imposes a minimum requirement that no employee be discharged for at least the length of his prior service up to four years following consummation of the merger. The hearing examiner did not agree with the RLEA's reading of § 5 (2)(f) and recommended the New Orleans conditions to the Commission, a recommendation which the Commission unanimously adopted. 312 I. C. C. 185. Appellants then instituted proceedings in the United States District Court of Michigan, seeking to enjoin the Commission's order approving the merger. A temporary restraining order issued following testimony by a representative of the RLEA that irreparable injury to the employees would otherwise ensue. However, after hearing the case on its merits, the District Court dissolved the restraining order and dismissed appellants' complaint. 189 F. Supp.

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[1] Briefly, the New Orleans conditions prescribe the following: employees retained on the job but in a lower paying position get the difference between the two salaries for four years following the merger; discharged employees get their old salaries for four years, less whatever they make in other jobs, or they may elect a lump sum payment; transferred employees get certain moving expenses, and certain fringe benefits are insured; and any additional benefits that a given employee would have received under the Washington Job Protection Agreement, discussed in the text *infra*, are guaranteed.

942. Direct appeal to this Court followed and we noted probable jurisdiction. 365 U. S. 809.

Preliminarily, it must be noted that the adequacy of the New Orleans conditions is not an issue before this Court: Appellants did not challenge their sufficiency below, nor do they argue the point here.[2] Rather, appellants' sole contention is that no compensation plan is adequate unless it is based on the premise that all the employees currently on the payroll remain in the surviving railroad's employ for at least the length of their previous employment up to four years. Appellants do not say that every employee must remain in his present job, but they do insist that some job must remain open for each one. We think, however, that a review of the background of § 5 (2)(f) and its subsequent interpretation demonstrates the defects in appellants' position.

Section 5 (2)(f), as it now appears, was enacted as part of the Transportation Act of 1940. A broad synopsis of the occurrences which led to the enactment of those sections on railroad consolidation of which § 5 (2)(f) is a part is contained in the Appendix to this Court's opinion in *St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U. S. 298, 315, and it is unnecessary to reproduce that

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[2] Appellants do relate certain objections to the adequacy of the conditions but it seems clear that these objections, which were not introduced before the Commission or the court below except at the hearing for temporary injunctive relief, have been included in appellants' brief only as background material. If appellants wish to challenge directly the adequacy of the conditions, it seems clear that they may still proceed to do so pursuant to § 5 (9) of the Act.

In this connection, it should be noted that appellants have contended that the lower court erred when it refused to accept certain testimony concerning the adequacy of the conditions. The short answer to this is that the court did not refuse to accept appellants' proof; the court explicitly refrained from ruling on the matter when the offer was made and appellants never renewed their efforts. See R. 179.

material here except to note that: "The congressional purpose in the sweeping revision of § 5 of the Interstate Commerce Act in 1940, enacting § 5 (2)(a) in its present form, was to facilitate merger and consolidation in the national transportation system." *County of Marin* v. *United States,* 356 U. S. 412, 416. The relevant events, for present purposes, date from 1933, when Congress passed the Emergency Railroad Transportation Act, 48 Stat. 211. That Act contemplated extensive railroad consolidations and provided for employee protection pursuant thereto in the following language:

> "[N]or shall any employee in such service be deprived of employment such as he had during said month of May or be in a worse position with respect to his compensation for such employment, by reason of any action taken pursuant to the authority conferred by this title."

Shortly before the Emergency Act expired in 1936, a great majority of the Nation's railroads and brotherhoods entered into the Washington Job Protection Agreement,[3] an industry-wide collective bargaining agreement which also specified conditions for the protection of employees in the event of mergers. Unlike the Emergency Act, however, the Washington Agreement provided for compensatory protection rather than the "job freeze" previously prescribed. Subsequently, efforts commenced to re-evaluate the law relating to railroad consolidations and a "Committee of Six" was appointed by the President to study the matter. Those portions of the Committee's final report pertaining to employee protection urged codification of the Washington Agreement [4] and a bill drafted

[3] A discussion of this agreement and its terms is found in *United States* v. *Lowden,* 308 U. S. 225.

[4] See Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 2531 and H. R. 4862, 76th Cong., 1st Sess. 216–217, 275.

along those lines, S. 2009, was passed by the Senate in 1939. 84 Cong. Rec. 6158. The Senate bill contained language identical to that now found in the first sentence of § 5 (2)(f)—*i. e.*, the transaction should contain "fair and equitable" conditions.

A bill similar in this respect to S. 2009 was introduced in the House but, before it was sent to the Conference Committee, Representative Harrington inserted an amendment which added a second sentence to the one contained in the original version, this sentence stating that:

> "[N]o such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9882.

The bill came out of the Conference Committee without Representative Harrington's addendum and, dissatisfaction having been expressed by Representative Harrington and others, a motion to recommit was passed by the House. This motion required that the language of the original House bill be restored "but modified so that the sentence in section 8 which contains the provision known as the Harrington amendment" should speak as the second sentence of § 5 (2)(f) now does—*viz.*, "[the] transaction will not result in employees of said carrier . . . being in a worse position with regard to their employment." 86 Cong. Rec. 5886. This new phraseology was adopted by the Conference Committee, with the added limitation that such protection need extend no more than four years, and the bill passed without further relevant alteration. 86 Cong. Rec. 10193, 11766.

It would not be productive to relate in detail the various statements offered by members of the House to explain the significance of the events outlined above. It is enough to say that they were many, sometimes ambig-

uous and often conflicting. However, certain points can be made with confidence. First, it is clear that there were two alterations made in the substance of the original Harrington amendment: Not only was a four-year limitation imposed, but also general language of imprecise import was used in substitution for language clearly requiring "job freeze" such as appeared in the original amendment and the 1933 Act.[5] Secondly, the representatives whose floor statements are entitled to the greatest weight are those House members who had the last word on the bill—the House conferees who explained the final version of the statute to the House at large immediately prior to passage—rather than those Congressmen whose voices were heard in the early skirmishing but who did not participate in the final compromise.[6] Finally, although

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[5] As further evidence that Congress would have specified "job freeze" had it meant "job freeze" in the 1940 Act, compare the 1943 amendment to § 222 (f) of the Communications Act, 47 U. S. C. § 222 (f), where an employee protective arrangement was added by the following language:

"Each employee of any carrier which is a party to a consolidation or merger pursuant to this section who was employed by such carrier immediately preceding the approval of such consolidation or merger, and whose period of employment began on or before March 1, 1941, shall be employed by the carrier resulting from such consolidation or merger for a period of not less than four years from the date of the approval of such consolidation or merger, and during such period no such employee shall, without his consent, have his compensation reduced or be assigned to work which is inconsistent with his past training and experience in the telegraph industry." See also the remarks of Senator White, a proponent of this bill, at 89 Cong. Rec. 1195–1196.

[6] Appellants point out that several members of the conference committee opposed the motion to recommit. However, as appellants must concede, reliance on unexplained opposition to a proposal is untrustworthy at best. Witness the fact that all the House members on whose remarks appellants base their position (Representatives Warren, Harrington, and Thomas) voted *against* the final version of the bill.

it might be an overstatement to claim that their remarks are dispositive, the statements the House conferees gave in explanation of the final version clearly reveal an understanding that compensation, not "job freeze," was contemplated.[7] Appellants vigorously argue that the legislative history of § 5 (2)(f) supports their interpretation. However, were we to agree, it would be necessary to say that a substantial change in phraseology was made for no purpose and to disregard the statements of those

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[7] See the remarks of conference chairman Lea at 86 Cong. Rec. 10178, particularly that part of his explanation responding to questions put by Representatives Vorys and O'Connor, where it was said:

"Mr. VORYS of Ohio. Mr. Speaker, will the gentleman yield?

"Mr. LEA. I yield to the gentleman from Ohio.

"Mr. VORYS of Ohio. Would this 4-year rule have the effect of delaying a consolidation for 4 years, or would it mean that if a consolidation were made there would still be a 4-year period during which the man would be paid?

"Mr. LEA. No; this rule does not delay consolidation. It means from the effective date of the order of the Commission the benefits are available for 4 years. The order determines the date, and the protective benefits run 4 years from that date.

"Mr. VORYS of Ohio. That would be whether or not they were still employed?

"Mr. LEA. Yes.

"Mr. O'CONNOR. Mr. Speaker, will the gentleman yield?

"Mr. LEA. I yield to the gentleman from Montana.

"Mr. O'CONNOR. As I want to see those who might lose their jobs as a result of consolidation protected, I should like to have the gentleman's interpretation of the phrase that the employee will not be placed in a worse position with respect to his employment. Does 'worse position' as used mean that his compensation will be just the same for a period of 4 years, assuming that he were employed for 4 years, as it would if no consolidation were effected?

"Mr. LEA. I take that to be the correct interpretation of those words."

See also the statements of conference member Halleck at 86 Cong. Rec. 10187, and conference member Wolverton at 86 Cong. Rec. 10189. The Conference Report also lends itself to this interpretation. H. R. Rep. No. 2832, 76th Cong., 3d Sess., pp. 68–69.

House members most intimately connected with the final version of the statute.

The indications gleaned from the history of the statute are reinforced and confirmed by subsequent events. Immediately after the section was passed, interested parties—including the brotherhood appealing in this case—expressed the opinion that compensation protection for discharged employees was the intendment of § 5 (2)(f).[8] The Commission echoed this interpretation in its next annual report, I. C. C. 55th Ann. Rep. 60–61, and began imposing compensatory conditions, and only compensatory conditions, in proceedings involving § 5 transactions. See, *e. g., Cleveland & Pittsburgh R. Co. Purchase,* 244 I. C. C. 793 (1941). The Commission has consistently followed this practice to date in over 80 cases, with the full support of the intervening brotherhoods and the RLEA;[9] indeed, in one case where a

[8] In its official organ, appellant Brotherhood of Maintenance of Way Employes stated:

"Four Years' Full Pay

"2. The law provides that any employe who has been in the service of a railroad four years or more, and loses his job because of a merger or 'coordination', must be paid his full wages for four years. If he has been a railroad employe less than four years, he must be paid his full wages for a period as long as his previous service.

"No such protection and compensation have ever been guaranteed by law to the employes of any other industry, and the railroad workers secured these unprecedented benefits through the Brotherhood of Maintenance of Way Employes, in a cooperative movement with the other Standard Railroad Labor Organizations." 49 Journal 13–14 (Oct. 1940).

See also 57 The Railway Conductor 308 (Oct. 1940); 39 Railway Clerk 467, 488. It is clear that the District Court did not err in taking cognizance of these publications, particularly since appellants raised no objections below. Cf. *Texas & Pacific R. Co.* v. *Pottorff,* 291 U. S. 245, 254.

[9] A comprehensive list of the decided cases, with a description of the conditions imposed, is found in the Appendix to the Brief of

variant of the present dispute arose, the RLEA argued at length that § 5 (2)(f) did *not* impose a mandatory job freeze requirement—compensatory conditions would be satisfactory.[10] It is true that many of these prior transactions did not involve consolidations of the magnitude here presented. However, the relevance of this point is unclear since the statute makes no distinctions based on the type of transaction considered, and it is apparent that the underlying principle remains the same whether 100 or 1,000 employees are affected.[11]

Appellants' last point is that two cases in this Court have previously treated the present question favorably to their position. *Railway Labor Executives' Assn.* v. *United States,* 339 U. S. 142, and *Order of Railroad Telegraphers* v. *Chicago & North Western R. Co.,* 362 U. S. 330. However, neither the holding nor the language of these cases, in fact, supports appellants' claim. The *RLEA* case was not concerned with the types of protection to be afforded employees for the first four years following the merger; the only question was whether

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the United States in this case. It is noteworthy that this Court has recently affirmed a case in which the Commission imposed less comprehensive conditions than those in this case. *City of Nashville* v. *United States,* 355 U. S. 63.

[10] See Memorandum Brief of RLEA, Finance Docket No. 12460, filed in *Fort Worth & D. C. R. Co. Lease,* 247 I. C. C. 119.

[11] According to the findings of the hearing examiner in this case, 863 employees will be totally deprived of employment during the five-year period following the merger. Appellants argue that there is no need for these discharges since natural attrition will open up many more than 863 jobs during the same period. However, as the railroads point out, attrition does not work in a uniform or predictable manner and there is no indication that the elimination of surplus posts can be accomplished by the method appellants suggest; moreover, if attrition does open up suitable positions, the railroad is bound by the collective bargaining agreement to call back the discharged employees.

compensatory benefits could be extended beyond four years, and the Court held they could. Appellants point to passages in the opinion, 339 U. S., at 151–154, in which, they assert, the Court recognized that only *one* change—the four-year limitation—was blended into the Harrington amendment between origination and final approval. However, this contention ignores the plain recognition of the Court, revealed on page 152 of the opinion, that two changes occurred, one of which being the alteration in language pertinent to the resolution of this case. The *Railroad Telegraphers* case is equally inapposite. The question in that case concerned the power of a federal court to enjoin a strike over the railroad's refusal to bargain concerning a "job freeze" proposal in the collective bargaining contract, and there is no discussion of the present problem in the opinion of the Court.

In short, we are unwilling to overturn a long-standing administrative interpretation of a statute, acquiesced in by all interested parties for 20 years, when all the signposts of congressional intent, to the extent they are ascertainable, indicate that the administrative interpretation is correct. Consequently, the judgment of the District Court must be

Affirmed.

MR. JUSTICE DOUGLAS, dissenting.

This case is a minor episode in an important chapter of modern history. It concerns the impact of economic and technological changes on workers [1] and the manner in

[1] "In California, the Bank of America installed electronic computers in its mortgage-and-loan operation, and 100 employees are now doing the work of 300. In Cleveland, an electronically controlled concrete plant can in one hour produce 200 cubic yards of concrete in any of 1,500 mixing formulas, without a single worker performing manual labor at any point in the process.

"In a bakery in Chicago, one man operates a piece of equipment

which government will deal with it. The courts do not determine that policy; it is a legislative matter. But the judicial attitude has much to do with the manner in which legislative ambiguities will be resolved.

There are some who think that technological change will produce both our highest industrial and business activity and our greatest unemployment. Dr. Robert M. Hutchins recently stated the basic conflict between individual freedom and technology:

> "Individual freedom is associated with doubt, hesitancy, perplexity, trial and error. These technology

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that moves 20 tons of flour an hour, replacing 24 men who used to move 10 tons an hour. In the bread-baking department of this same plant, one half of the workers were supplanted by automation, and in the wrapping department, no less than 70 per cent of the workers formerly needed have been replaced by machines.

"In the textile industry, entire plants have moved out of New England towns to set up new automated factories in the South, using a comparative handful of workers and leaving great hardship and suffering behind. In the automobile industry, new electronically controlled assembly lines helped to cut total employment by 20 per cent between 1956 and 1958, and over 200,000 workers dropped out of the United Automobile Workers from mid-1957 to early 1959.

"In the shipping industry, huge containers are now packed and sealed at factories and loaded directly aboard special new compartmented ships, eliminating the need for thousands of longshoremen. In the transportation-equipment industry, production rose, but employment fell by a quarter of a million workers between January, 1956, and December, 1958. In the rubber industry, there was a drop of 25,000 workers. In the chemical industry, 36,000 workers were displaced by automation." Davidson, Our Biggest Strike Peril: Fear of Automation, Look Magazine, April 25, 1961, pp. 69, 75.

See also the remarks of Walter P. Reuther, President, United Automobile Workers of America, as quoted in Christian Science Monitor, Thursday, Apr. 27, 1961, p. 4, col. 2: "When a worker is replaced by a machine, or his skill is made obsolete, or his plant moves, the change may benefit society as a whole and his employer in particular; but that worker is in trouble."

> cannot countenance. Liberty under law presupposes the supremacy of politics. It presupposes the possibility, for example, that political deliberation might lead to the decision to postpone the introduction of a new machine. Technology, on the other hand, asserts that what we can do is worth doing; the things most worth doing are those we can do most efficiently . . . ." Two Faces of Federalism (1961), p. 22.

The measure of the conflict is seen only in a broad frame of reference. As Dr. Hutchins said:

> "Technology holds out the hope that men can actually achieve at last goals toward which they have been struggling since the dawn of history: freedom from want, disease, and drudgery, and the consequent opportunity to lead human lives. But a rich, healthy, workless world peopled by bio-mechanical links is an inhuman world. The prospects of humanity turn upon its ability to find the law that will direct technology to human uses." Two Faces of Federalism (1961), p. 24.

The Secretary of Labor, Arthur J. Goldberg, recently put the problem in simple terms: [2]

> "The issue being joined in our economy today—one that is present in some form in every major industrial negotiation—is simply stated: how can the necessity for continued increases in productivity,

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[2] Goldberg, Challenge of "Industrial Revolution II," N. Y. Times Magazine, Apr. 2, 1961, p. 11. And see A. H. Raskin's recent series in the New York Times. N. Y. Times, Thursday, Apr. 6, 1961, p. 1, cols. 2–3; N. Y. Times, Friday, Apr. 7, 1961, p. 1, cols. 2–3; N. Y. Times, Saturday, Apr. 8, 1961, p. 1, cols. 2–3; N. Y. Times, Sunday, Apr. 9, 1961, p. 1, cols. 2–3.

> based upon labor-saving techniques, be met without causing individual hardship and widespread unemployment?"

This case is a phase of that problem.

This is not the first instance of a controversy settled in Congress by adoption of ambiguous language and then transferred to the courts, each side claiming a victory in the legislative halls.[3]

The Senate passed a bill which required the Interstate Commerce Commission in approving a railroad merger to make "a fair and equitable arrangement to protect the interest of the employees affected."[4] The House Committee adopted the same language.[5] When the bill reached the floor of the House, Mr. Harrington suggested the following *proviso:*[6]

> "*Provided, however,* That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."

That amendment would have prohibited permanently the displacement of employees as a result of mergers. It was adopted by the House.[7] But in Conference that *proviso* was eliminated along with the merger provisions that gave rise to it.[8] The House recommitted the bill with instructions that the provisions relating to combinations and consolidations of carriers be included in the bill, and be amended to provide that the Commission

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[3] See Newman and Surrey, Legislation (1955), pp. 158–178.

[4] S. Rep. No. 433, 76th Cong., 1st Sess., p. 29.

[5] H. R. Rep. No. 1217, 76th Cong., 1st Sess., p. 12.

[6] 84 Cong. Rec., pt. 9, 76th Cong., 1st Sess., pp. 9882–9883.

[7] 84 Cong. Rec. 9887.

[8] H. R. Rep. No. 2016, 76th Cong., 3d Sess., p. 61.

must include in its orders authorizing mergers "terms and conditions providing that such transaction will not result in employees of said . . . carriers being in a worse position with respect to their employment." [9]

The Conference accepted this version, limiting the protective clause to four years. The Conference Report emphasizes that the change made in the Harrington proposal was in limiting its operation to four years.[10]

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[9] 86 Cong. Rec., pt. 6, 76th Cong., 3d Sess., p. 5886.

[10] "The conference agreement on the Harrington amendment includes a provision of the instruction which provides that the order of approval shall include terms and conditions providing that the transaction shall not result in the employees being in a worse position with respect to their employment. The conference agreement, however, qualifies this provision by confining its operation to a period of 4 years from the effective date of the order approving the transaction and providing further that the protection afforded to an employee shall not be required to continue for a longer period following the effective date of the order than the period for which such employee was in the employ of an affected carrier prior to the effective date of the order.

"In order words, the Harrington amendment made all employees of the affected carriers equal beneficiaries of its provisions regardless of the length of time they may have been employed prior to a consolidation. It also required the carrier to maintain the benefits of its provisions indefinitely and without any specified limitation by time or otherwise. Under the terms of the conference agreement the benefits to employees will be required to be paid for not longer than 4 years after the consolidation, and in no case for longer than the service of the employee for the affected carriers prior to the effective date of the order authorizing the consolidation." H. R. Rep. No. 2832, 76th Cong., 3d Sess., p. 69.

The Court refers to the "unexplained opposition" of Mr. Harrington to the final version of the bill. But the record offers a plausible explanation for his opposition. Mr. Harrington himself apparently had decided that the proposed amendment was objectionable because it failed to cover abandonments. 86 Cong. Rec., pt. 9, 76th Cong., 3d Sess., p. 10187. And see the remarks of Mr. Crosser, 86 Cong. Rec., pt. 9, 76th Cong., 3d Sess., p. 10192.

Mr. Lea, Chairman of the House Conferees, stated the same in the House: [11]

> "The substitute that we bring in here provides two additional things. First, there is a limitation on the operation of the Harrington amendment for 4 years from the effective date of the order of the Commission approving the consolidation. In other words, *the employees have the protection against unemployment for 4 years,* but the Commission is not required to give them benefits for any longer period. If the employees themselves make an agreement with the railroad company for a better or a longer period, that is a matter between the railroad men and the railroads, but this 4-year limitation is established by the pending conference agreement.
>
> "There is another limitation on the protective benefits afforded by the amendment. The benefit period shall not be required for a longer period than the prior employment of the employee before the consolidation occurred. In other words, under the original Harrington amendment, if a man was employed for 6 months, he would indefinitely be subject to the benefits of the amendment from the railroad company. We have changed that so the railroad company will not be required to maintain him in no worse condition as to his employment for any longer period than he worked before the consolidation occurred.
>
> "We believe that is a very fair and a very liberal provision for labor. We believe that railway labor substantially agrees in that viewpoint. We take nothing from labor by this agreement." (Italics added.)

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[11] 86 Cong. Rec., pt. 9, p. 10178.

Mr. Wolverton, another House Conferee, stated: [12]

> "It was recognized that the real intent of the sponsors was to save railroad *employees from being suddenly thrust out of employment* as the result of any consolidation or merger entered into." (Italics added.)

These are the statements [13] which, the Court says, "are entitled to the greatest weight" in interpreting the *proviso*. I do not think that these statements—nor any part of this legislative history—"clearly reveal an understanding that compensation, not 'job freeze,' was contemplated." Instead I find this legislative history—as the Court elsewhere seems to recognize—to be, at best, ambiguous. Compensatory relief will result in the employees' bearing the initial shock of the railroads' reduction in plant. The Commission and the railroads contend for a philosophy of firing first and picking up the social pieces later. The Court seizes on ambiguous materials to impute to Congress approval of that philosophy. I would resolve the ambiguity in favor of the employees. I would read the *proviso* as meaning that nothing less than four-year employment protection to every employee

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[12] *Id.*, p. 10189.

[13] The third House Conferee on whose remarks the Court seems to rely is Congressman Halleck. But he merely says that the *proviso* "follows the principle of the so-called Washington agreement." What that principle was he makes clear in his next sentence: "This language gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and, beyond that, writes it into law." *Id.*, p. 10187. The Court also relies on Congressman Lea's acquiescence in the assertions—more or less equivocal—of Congressmen Vorys and O'Connor. But, even assuming those assertions negative a guarantee of continuing employment, Congressman Lea's acquiescence hardly jibes fully with his more extended remarks on the same subject which I have quoted above.

would satisfy the Act, though not necessarily a four-year protection in his old job. In a realistic sense a man without a job is "in a worse position with respect to" his "employment," though he receives some compensation for doing nothing. Many men, at least, are not drones; and their continued activity is life itself. The toll which economic and technological changes will make on employees is so great that they, rather than the capital which they have created,[14] should be the beneficiaries of any doubts that overhang these legislative controversies when they are shifted to the courts.

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[14] Lincoln in his annual message to Congress, Dec. 3, 1861, stated: "Labor is prior to, and independent of, capital. Capital is only the fruit of labor, and could never have existed if labor had not first existed. Labor is the superior of capital, and deserves much the higher consideration." V Basler, The Collected Works of Abraham Lincoln (1953), p. 52.

KOLOVRAT ET AL. *v.* OREGON.

CERTIORARI TO THE SUPREME COURT OF OREGON.

No. 102. Argued March 30, 1961.—Decided May 1, 1961.

Two residents of Oregon died intestate, leaving personal property there and no heirs or next of kin except certain residents and nationals of Yugoslavia. Claiming that the Yugoslavian relatives were ineligible to inherit such property under an Oregon statute, the State sued in a state court to have the property declared escheated to the State. *Held:* An 1881 treaty between the United States and Serbia, which is now a part of Yugoslavia, entitles residents and citizens of Yugoslavia to inherit personal property located in Oregon on the same basis as American next of kin, and these rights have not been taken away or impaired by the monetary policies of Yugoslavia exercised in accordance with later agreements between that country and the United States. Pp. 188–198.

(a) Under the 1881 Treaty, with its "most favored nation" clause, these Yugoslavian relatives have the same right to inherit their American relatives' personal property as they would have if they were American citizens living in Oregon. Pp. 191–196.

(b) The International Monetary Fund Agreement of 1944, to which the United States and Yugoslavia are parties, and an Agreement of 1948 between the United States and Yugoslavia, coupled with the continued adherence of the United States to the 1881 Treaty, preclude any State from deciding that Yugoslavian foreign exchange laws meeting the standards of those Agreements can be the basis for defeating rights conferred by the 1881 Treaty. Pp. 196–198.

220 Ore. 448, 349 P. 2d 255, reversed.

Lawrence S. Lesser argued the cause for petitioners. With him on the brief was *Peter A. Schwabe.*

Catherine Zorn, Assistant Attorney General of Oregon, argued the cause for respondent. With her on the brief were *Robert Y. Thornton,* Attorney General, and *Arthur Garfield Higgs,* Assistant Attorney General.

Solicitor General Rankin, Assistant Attorney General Doub, Acting Assistant Attorney General Leonard and *Alan S. Rosenthal* filed briefs for the United States, as *amicus curiae,* urging reversal.

MR. JUSTICE BLACK delivered the opinion of the Court.

Joe Stoich and Muharem Zekich died in Oregon in December 1953 without having made wills to dispose of personal property they owned in that State. Their only heirs and next of kin, who but for being aliens could have inherited this Oregon property under Oregon law, were brothers, sisters, nieces and nephews who were all residents and nationals of Yugoslavia. But § 111.070 of the Oregon Revised Statutes rather severely limits the rights of aliens not living in the United States to "take" either real or personal property or its proceeds in Oregon "by succession or testamentary disposition." [1] And subsec-

[1] "(1) The right of an alien not residing within the United States or its territories to take either real or personal property or the proceeds thereof in this state by succession or testamentary disposition, upon the same terms and conditions as inhabitants and citizens of the United States, is dependent in each case:

"(a) Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen;

"(b) Upon the rights of citizens of the United States to receive by payment to them within the United States or its territories money originating from the estates of persons dying within such foreign country; and

"(c) Upon proof that such foreign heirs, distributees, devisees or legatees may receive the benefit, use or control of money or property from estates of persons dying in this state without confiscation, in whole or in part, by the governments of such foreign countries.

"(2) The burden is upon such nonresident alien to establish the fact of existence of the reciprocal rights set forth in subsection (1) of this section."

tion (3) of the same Oregon statute provides that where there are no next of kin except ineligible aliens and the deceased made no will, the property of the deceased shall be taken by the State as escheated property.

The State filed petitions under this provision in an Oregon Circuit Court to take for itself the personal property of both decedents,[2] alleging that there were no next of kin eligible to take under Ore. Rev. Stat. § 111.070. The answers filed by the Yugoslavian relatives and the San Francisco Consul General of that country (who are petitioners here) alleged that "in fact and in law reciprocal rights of inheritance as prescribed by ORS 111.070 did exist" between the United States and Yugoslavia when the decedents died and that the Yugoslavian relatives therefore were eligible to take under Oregon law. After hearings in which evidence was taken, the trial court found that the reciprocal right of inheritance required by § 111.070 (1)(a) did exist and that, both at the time the two deceased died and at the time of the trial, there existed "rights of citizens of the United States to receive payment to them within the United States . . . of moneys originating from the estates of persons dying within the country of Yugoslavia" as required by § 111.070 (1)(b). The State Supreme Court reversed, holding that petitioners had failed to prove "the ultimate fact" that there existed "as a *matter of law an unqualified and enforceable right to receive* as defined by ORS 111.070." [3] It found instead that such an unqualified right did not exist because the laws of Yugoslavia give discretion to Yugoslavian authorities to control foreign exchange payments in a way that might prevent Americans from receiving the full value of Yugoslavian inheritances. It was accordingly held that Oregon state law standing alone barred

[2] The Circuit Court consolidated the two cases and they have been treated as one since.

[3] 220 Ore. 448, 461, 349 P. 2d 255, 262.

these Yugoslavian nationals from inheriting their relatives' personal property in Oregon.

The state court went on to say that this holding disposes of petitioners' claims "[u]nless the area of alien succession over which the state of Oregon seeks to control through ORS 111.070, supra, has been preempted by some treaty agreement subsisting between Yugoslavia and the United States" at the time of the decedents' death. On this point the court said:

> "We are mindful that rights of succession to property under local law may be affected by an overriding federal policy when a treaty makes different or conflicting arrangements. In such event, the state policy must give way. *Clark v. Allen,* 331 US 503, 517 . . . ." 220 Ore. 448, 462, 349 P. 2d 255, 262–263.

Thus, recognizing quite properly that state policies as to the rights of aliens to inherit must give way under our Constitution's Supremacy Clause to "overriding" federal treaties and conflicting arrangements, the state court considered petitioners' contention, supported in this Court by the Government as *amicus curiae,* that petitioners were entitled to inherit this personal property because of an 1881 Treaty between the United States and Serbia, which country is now a part of Yugoslavia. The state court rejected this contention on the basis of its interpretation of the Treaty although it correctly recognized that the Treaty is still in effect between the United States and Yugoslavia.[4] The state court also rejected petitioners' contention that their claims could not be defeated solely because of the possible effect of the Yugoslavian Foreign

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[4] The Treaty is reported at 22 Stat. 963. Official recognition that it is still in effect can be found in the Settlement of Pecuniary Claims Against Yugoslavia Agreement between the United States and Yugoslavia of July 19, 1948, 62 Stat. 2658, T. I. A. S. 1803, Art. 5.

Exchange Laws and Regulations since those laws and regulations admittedly meet the requirements of the Bretton Woods Agreement of 1945,[5] to which both Yugoslavia and the United States are signatories. We granted certiorari because the cases involve important rights asserted in reliance upon federal treaty obligations. 364 U. S. 812.

For reasons to be stated, we hold that the 1881 Treaty does entitle petitioners to inherit personal property located in Oregon on the same basis as American next of kin and that these rights have not been taken away or impaired by the monetary policies of Yugoslavia exercised in accordance with later agreements between that country and the United States.

I.

The parts of the 1881 Treaty most relevant to our problem are set out below.[6] The very restrictive meaning

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[5] 60 Stat. 1401, T. I. A. S. 1501.

[6] "The United States of America and His Highness the Prince of Serbia, animated by the desire of facilitating and developing the commercial relations established between the two countries, have determined with this object to conclude a treaty . . . .

"ARTICLE I.

"There shall be reciprocally full and entire liberty of commerce and navigation between the citizens and subjects of the two high contracting powers, who shall be at liberty to establish themselves freely in each other's territory.

. . . . . .

"ARTICLE II.

"In all that concerns the right of acquiring, possessing or disposing of every kind of property, real or personal, citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant or shall grant in each of these states to the subjects of the most favored nation.

"Within these limits, and under the same conditions as the subjects of the most favored nation, they shall be at liberty to acquire and

given the Treaty by the Oregon Supreme Court is based chiefly on its interpretation of this language:

> "In all that concerns the right of acquiring, possessing or disposing of every kind of property . . . citizens of the United States in Serbia and Serbian subjects in the United States, shall enjoy the rights which the respective laws grant . . . in each of these states to the subjects of the most favored nation."

This, the State Supreme Court held, means that the Treaty confers a right upon a United States citizen to acquire or inherit property in Serbia only if he is "in Serbia" and upon a Yugoslavian citizen to acquire property in the United States only if he is "in the United States." The state court's conclusion, therefore, was that the Yugoslavian complainants, not being residents of the United States, had no right under the Treaty to inherit from their relatives who died leaving property in Oregon. This is one plausible meaning of the quoted language, but it could just as plausibly mean that "in Serbia" all citizens of the United States shall enjoy inheritance rights and "in the United States" all Serbian subjects shall enjoy inheritance rights, and this interpretation would not restrict almost to the vanishing point the American and Yugoslavian nationals who would be benefited by the clause. We cannot accept the state court's more restrictive interpretation when we view the Treaty in the light

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dispose of such property, whether by purchase, sale, donation, exchange, marriage contract, testament, inheritance, or in any other manner whatever, without being subject to any taxes, imposts or charges whatever, other or higher than those which are or shall be levied on natives or on the subjects of the most favored state.

"They shall likewise be at liberty to export freely the proceeds of the sale of their property, and their goods in general, without being subjected to pay any other or higher duties than those payable under similar circumstances by natives or by the subjects of the most favored state."

of its entire language and history. This Court has many times set its face against treaty interpretations that unduly restrict rights a treaty is adopted to protect.[7]

The 1881 Treaty clearly declares its basic purpose to bring about "reciprocally full and entire liberty of commerce and navigation" between the two signatory nations so that their citizens "shall be at liberty to establish themselves freely in each other's territory." Their citizens are also to be free to receive, hold and dispose of property by trading, donation, marriage, inheritance or any other manner "under the same conditions as the subjects of the most favored nation." Thus, both paragraphs of Art. II of the Treaty which have pertinence here contain a "most favored nation" clause with regard to "acquiring, possessing or disposing of every kind of property." This clause means that each signatory grants to the other the broadest rights and privileges which it accords to any other nation in other treaties it has made or will make. In this connection we are pointed to a treaty of this country made with Argentina before the 1881 Treaty with Serbia,[8] and treaties of Yugoslavia with Poland and Czechoslovakia,[9] all of which unambiguously provide for the broadest kind of reciprocal rights of inheritance for nationals of the signatories which would precisely protect

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[7] See, *e. g., Bacardi Corp.* v. *Domenech*, 311 U. S. 150, 163; *Jordan* v. *Tashiro*, 278 U. S. 123, 128–129.

[8] Treaty of Friendship, Commerce, and Navigation, Between the United States and the Argentine Confederation of 1853, 10 Stat. 1005, 1009, I Malloy 20. Article IX of this Treaty provides: "In whatever relates to . . . acquiring and disposing of property of every sort and denomination, either by sale, donation, exchange, testament, or in any other manner whatsoever, . . . the citizens of the two contracting parties shall reciprocally enjoy the same privileges, liberties, and rights, as native citizens . . . ."

[9] Yugoslav-Polish Treaty, 30 League of Nations Treaty Series 185; Yugoslav-Czechoslovakian Treaty, 85 League of Nations Treaty Series 455.

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the right of these Yugoslavian claimants to inherit property of their American relatives.

The rights conferred by the 1881 Treaty, broadly stated as they are, would fall far short of what individuals would hope or desire for their complete fulfillment if one who by work and frugality had accumulated property as his own could be denied the gratification of leaving his property to those he loved the most, simply because his loved ones were living in another country where he and they were born. Moreover, if these rights of "acquiring, possessing or disposing of every kind of property" were not to be afforded to merchants and businessmen conducting their trade from their own homeland, the Treaty's effectiveness in achieving its express purpose of "facilitating . . . commercial relations" would obviously be severely limited.[10] It is not in such a niggardly fashion that treaties designed to promote the freest kind of traffic, communications and associations among nations and their nationals should be interpreted, unless such an interpretation is required by the most compelling necessity. There is certainly no such compulsion in the 1881 Treaty's language or history.

While courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.[11] We have before us statements, in the form of diplomatic notes exchanged between the responsible agencies of the United States and of Yugoslavia, to the effect that the 1881 Treaty, now and always, has been construed as providing for inheritance by both countries' nationals without regard to the loca-

[10] Besides the obvious relevance of Art. II of the Treaty even when considered alone, Art. III specifically contemplates the interchange of "merchants, manufacturers and trades people" or "their clerks and agents."

[11] See, *e. g.*, *Factor* v. *Laubenheimer*, 290 U. S. 276, 294–295.

tion of the property to be passed or the domiciles of the nationals. And relevant diplomatic correspondence and instructions issued by our State Department show that the 1881 Treaty was one of a series of commercial agreements which were negotiated and concluded on the basis of the most expansive principles of reciprocity. The Government's purpose in entering into that series of treaties was in general to put the citizens of the United States and citizens of other treaty countries on a par with regard to trading, commerce and property rights.[12]

The Oregon Supreme Court apparently thought itself bound to decide this question of treaty construction against petitioners because of our decision in *Clark* v. *Allen,* 331 U. S. 503. We do not agree. In that case we held that a 1923 Treaty with Germany did not confer rights upon German nationals residing in Germany to inherit from American citizens. The German Treaty did contain some language which, when considered in isolation, could be thought to be sufficiently similar to the controlling provisions of the 1881 Treaty to suggest that these parts of the two treaties should be interpreted to have the same meaning.[13] But the differences between the two treaties are crucial. The German Treaty covered only disposal of property; the 1881 Treaty very broadly covers acquisition of property as well as disposal. The treaty before us, as we have pointed out, contains the highly significant "most favored nation" clause, long used to broaden the scope of rights protected by treaties;

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[12] See, *e. g.,* Report on Negotiations dated Nov. 30, 1850, printed as Senate Confidential Document No. 1, 31st Cong., 2d Sess., 5 Miller, Treaties and Other International Acts of the United States 861; D. S., 15 Instructions, Argentina, 19–26, 6 Miller, *supra,* 219.

[13] The language relied upon by the Oregon Supreme Court was: "Nationals of either High Contracting Party may have full power to dispose of their personal property of every kind within the territories of the other . . . ."

the German Treaty had no "most favored nation" clause. Moreover, the language of other treaties which was almost identical with the pertinent provision in the German Treaty had previously been given a very limited construction by this Court, a construction from which we were unwilling to depart in *Clark* v. *Allen*. Finally, the relevant history of the negotiations for, the interpretation of and the practices under the 1881 Treaty support petitioners' claims, but no such supporting history was brought to our attention with respect to the German Treaty.

We hold that under the 1881 Treaty, with its "most favored nation" clause, these Yugoslavian claimants have the same right to inherit their relatives' personal property as they would if they were American citizens living in Oregon; but, because of the grounds given for the Oregon Supreme Court's holding, we shall briefly consider whether this treaty right has in any way been abrogated or impaired by the monetary foreign exchange laws of Yugoslavia.

II.

Oregon law, its Supreme Court held, forbids inheritance of Oregon property by an alien living in a foreign country unless there clearly exists "as a matter of law an unqualified and enforceable right" for an American to receive payment in the United States of the proceeds of an inheritance of property in that foreign country. The state court held that the Yugoslavian foreign exchange laws in effect in 1953 left so much discretion in Yugoslavian authorities that it was possible for them to issue exchange regulations which might impair payment of legacies or inheritances abroad and for this reason Americans did not have the kind of "unqualified and enforceable right" to receive Yugoslavian inheritance funds in

the United States which would justify permitting Yugoslavians such as petitioners to receive inheritances of Oregon property under Oregon law. Petitioners and the United States urge that no such doubt or uncertainty is created by the Yugoslavian law, but contend that even so this Oregon state policy must give way to supervening United States-Yugoslavian arrangements. We agree with petitioners' latter contention.

The International Monetary Fund (Bretton Woods) Agreement of 1945, *supra,* to which Yugoslavia and the United States are signatories, comprehensively obligates participating countries to maintain only such monetary controls as are consistent with the terms of that Agreement. The Agreement's broad purpose, as shown by Art. IV, § 4, is "to promote exchange stability, to maintain orderly exchange arrangements with other members, and to avoid competitive exchange alterations." Article VI, § 3, forbids any participating country from exercising controls over international capital movements "in a manner which will restrict payments for current transactions or which will unduly delay transfers of funds in settlement of commitments . . . ." Article 8 of the Yugoslavian laws regulating payment transactions with other countries expressly recognizes the authority of "the provisions of agreements with foreign countries which are concerned with payments." [14] In addition to all of this, an Agreement of 1948 between our country and Yugoslavia [15] obligated Yugoslavia, in the words of the Senate Report on the Agreement, "to continue to grant most-favored-nation treatment to Americans in ownership and acquisition of assets in Yugoslavia . . . [and] Yugo-

[14] Law To Regulate Payments to and from Foreign Countries, Foreign Exchange Law, Official Gazette of the Federal People's Republic of Yugoslavia, Oct. 25, 1946, Belgrade, No. 86, Year II.

[15] See note 4, *supra.*

slavia is required, by article 10, to authorize persons in Yugoslavia to pay debts to United States nationals, firms, or agencies, and, so far as feasible, to permit dollar transfers for such purpose." [16]

These treaties and agreements show that this Nation has adopted programs deemed desirable in bringing about, so far as can be done, stability and uniformity in the difficult field of world monetary controls and exchange. These arrangements have not purported to achieve a sufficiently rigid valuation of moneys to guarantee that foreign exchange payments will at all times, at all places and under all circumstances be based on a "definitely ascertainable" valuation measured by the diverse currencies of the world. Doubtless these agreements may fall short of that goal. But our National Government's powers have been exercised so far as deemed desirable and feasible toward that end, and the power to make policy with regard to such matters is a national one from the compulsion of both necessity and our Constitution. After the proper governmental agencies have selected the policy of foreign exchange for the country as a whole, Oregon of course cannot refuse to give foreign nationals their treaty rights because of fear that valid international agreements might possibly not work completely to the satisfaction of state authorities. Our National Government's assent to these international agreements, coupled with its continuing adherence to the 1881 Treaty, precludes any State from deciding that Yugoslavian laws meeting the standards of those agreements can be the basis for defeating rights conferred by the 1881 Treaty.

The judgment of the Supreme Court of Oregon is reversed and the cause remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

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[16] S. Rep. No. 800, 81st Cong., 1st Sess., p. 4.

ALASKA *v.* ARCTIC MAID ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 106. Argued March 23, 1961.—Decided May 1, 1961.

Respondents use freezer ships for the taking and preservation of salmon along Alaska's shores. The salmon are caught in the waters off the coast of Alaska by boats which respondents own or have under contract and by independent fishermen who sell salmon to respondents. The salmon are frozen when received aboard the freezer ships, and eventually they are taken to the State of Washington, where they are canned. On the business of operating such freezer ships, Alaska levies a tax of 4% of the value of the salmon. *Held:*

1. As applied to salmon taken in Alaska's territorial waters, the tax is not invalid as a burden on interstate commerce in violation of Art. I, § 8 of the Constitution. Pp. 199–204.

2. Though this tax does not apply to salmon caught and frozen for canning in Alaska, it is not invalid as discriminatory, since Alaskan canneries pay a 6% tax on the value of salmon obtained for canning. Pp. 204–205.

277 F. 2d 120, reversed.

Gary Thurlow, Deputy Attorney General of Alaska, argued the cause for petitioner. With him on the briefs were *Ralph E. Moody,* Attorney General, and *Richard A. Bradley,* Assistant Attorney General.

Martin P. Detels, Jr. argued the cause and filed a brief for respondents.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

While Alaska was a Territory, the Territorial Legislature amended L. 1951, c. 116, its taxing statutes, to read, in relevant part, as follows:

"Section 1. BUSINESSES IN ALASKA FISHERIES REQUIRING LICENSES: AMOUNTS

THEREOF. Any person, firm or corporation prosecuting or attempting to prosecute any of the following lines of business in connection with Alaska's commercial fisheries shall first apply for and obtain, on the conditions hereinafter set forth, a license so to do on the basis of the following license taxes which are hereby levied:

. . . . . .

"(b) Freezer ships and other floating cold storages: An annual license tax equal to 4% of the value of the raw halibut, halibut livers and viscera, salmon and bottom fish, shellfish or other fishing resource bought or otherwise obtained for processing through freezing. The value of the raw material under this license shall be the actual price paid for same including indirect considerations such as fuel or supplies furnished by the processor or offsets to the cash value for gear furnished etc. Such value shall apply to the raw material herein mentioned which is procured in company owned or subsidized boats operated by employees of the processor or under lease or other arrangement."

Respondents [1] use freezer ships for the taking and preservation of salmon along Alaska's shores. These freezer ships use "catcher boats" which respondents own or have under contract and which catch salmon off Alaska. The freezer ships sometimes purchase salmon from independent fishermen.

Bristol Bay is a famous fishing ground for salmon. When operating in the Bristol Bay area, the freezer ships

[1] One of the respondents is a Washington corporation. Four remaining respondents are partnerships all of whose members are citizens of the United States and residents of either California or Washington. The Pacific Reefer Co. is the owner of the ship *Reefer II*, as to which a tax lien is asserted to exist by virtue of the activities of a previous owner. It too is a foreign corporation.

anchor more than three miles from the coast, because of the shallow waters in Bristol Bay. They serve as a base for their catcher boats that fish within the territorial waters. In other areas both the freezer ships and the catcher boats stay within the territorial waters.

When the catcher boats—which are shallow-draft and known as gillnetters—have a load or desire to discontinue fishing or when the open season ends, they return to the "mother" ship and unload. The salmon are usually dumped into quick-freezing brine tanks. At other times they are placed in freezing compartments and frozen by blasts of air. The freezer ships eventually return to Puget Sound in the State of Washington where the salmon are canned.

Alaska, when a Territory, brought these suits in the District Court of Alaska for taxes claimed to be due and owing under the foregoing Act. The District Court entered judgments for the plaintiff. 140 F. Supp. 190. It held that the taking of the fish was the taxable event, not the freezing of the fish.

On appeal the Court of Appeals held that respondents were taxable for fish caught by their catcher boats within territorial waters, even though the freezer ships remained outside the three-mile limit. In its view the catcher boats "operated by the freezer ship itself are but an extension of that ship's operations." It held, however, that respondents were not responsible for taxes on fish taken "by independent catcher boats but purchased by the freezer ships" outside territorial waters. There was a rehearing *en banc* and on the rehearing the Court of Appeals held that the tax incident was not taking fish but "the freezing and cold storage of fish aboard freezer ships." It held that the tax could not be levied even if the freezer ships received the salmon in territorial waters. It reasoned that the freezing and storage of the fish was an inseparable part of interstate commerce and could not be taxed

locally any more than the loading and unloading of interstate carriers. Cf. *Joseph* v. *Carter & Weekes Co.*, 330 U. S. 422; *Richfield Oil Corp.* v. *State Board*, 329 U. S. 69. Accordingly it reversed the District Court. 277 F. 2d 120. The case is here on a petition for certiorari which we granted because of the importance of the ruling to the new State of Alaska. 364 U. S. 811.

We put to one side the specialized cases such as *Richfield Oil Corp.* v. *State Board, supra,* which arise under the Export-Import Clause of the Constitution (Art. I, § 10, cl. 2), because none of the salmon involved in these cases was destined to a foreign country. We also consider irrelevant cases such as *Joseph* v. *Carter & Weekes Co., supra,* where a state tax was laid on the gross receipts of a stevedore who was loading and unloading vessels engaged in interstate commerce. A tax on an integral part of an interstate movement might be imposed by other States "with the net effect of prejudicing or unduly burdening commerce" as the Court said in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert,* 347 U. S. 157, 166.

We have no such problem here. This tax is one imposed on those "prosecuting or attempting to prosecute . . . lines of business in connection with Alaska's commercial fisheries." The business in question is the one specified in subsection (b): "Freezer ships and other floating cold storages." To be sure, the tax is computed on the "value" of the fish "bought or otherwise obtained for processing through freezing." That, however, is the measure of the tax, not the taxable event. The taxable event is "prosecuting" the "business" of "Freezer ships and other floating cold storages." Part of the business is, of course, transporting frozen fish interstate. Yet it is plain that a freezer ship is more—much more—than an interstate carrier. Part of its business is freezing fish. Yet these ships do more than freeze fish and transport them interstate. Taking the fish directly through their

own catcher boats or obtaining them from other fishermen is also a part of respondents' business. Without the taking or obtaining of the fish, the freezer ship would have no function to perform.

It is clear that Alaska has power to regulate and control activity within her territorial waters, at least in the absence of conflicting federal legislation. *Skiriotes* v. *Florida,* 313 U. S. 69, 75. That case involved a state law forbidding the use of certain equipment in taking sponges in waters two marine leagues from mean low tide off Florida's coast. We upheld Florida's power to regulate sponge fishing in that manner and in that area, as Congress had not adopted any inconsistent regulation. See also *Toomer* v. *Witsell,* 334 U. S. 385, 393. Alaska's jurisdiction to tax respondents' operations within her territorial waters—whether those activities are taking fish or purchasing fish taken by others—is equally clear. See *Wisconsin* v. *Penney Co.,* 311 U. S. 435, 444; *Ott* v. *Mississippi Barge Line,* 336 U. S. 169, 174.

If the fish were taken or purchased outside Alaska's territorial waters, all of respondents' business in the Bristol Bay area would be beyond Alaska's reach. But since some of the fish in all of the cases before us were taken in Alaska's waters or otherwise acquired there, respondents are engaged in business in Alaska when they operate their "freezer ships." For we know from this record that in this particular business taking and freezing are practically inseparable. Fish are highly perishable and cannot be kept fresh very long even in Alaska's latitude. The process of gathering fish either through the catcher boats that are part of respondents' fleet or through independent operators is a "local activity" (*Michigan-Wisconsin Pipe Line Co.* v. *Calvert, supra,* 166) in a vivid sense of the term. We see no reason why our cases involving the taking of shrimp (*Toomer* v. *Witsell, supra*) and the extraction of ore (*Oliver Iron Mining Co.* v. *Lord,* 262

U. S. 172) are not dispositive of this controversy. The *Oliver Iron* case is indeed a first cousin of the present case. Here, as there, the tax is an occupation tax. Here, as there, the market for the product obtained locally is interstate, the taking being a step in a process leading to an interstate market. In both the local product is promptly loaded for interstate shipment. But in each there is a preliminary local business being conducted—an occupation made up of a series of local activities which the State can constitutionally reach. Catching the fish or obtaining them in other ways from the local market is but an extension of the freezer ship's operations within Alaska's waters.

It is claimed that there was no tax on salmon caught and frozen in Alaska and destined for canning in Alaska and that therefore this law is discriminatory against freezer ships. Alaskan canneries, however, paid a six-percent tax on the value of salmon obtained for canning; [2] and local fish processors, which sell to the fresh-frozen consumer market, paid a one-percent tax.[3] The freezer ships do not compete with those who freeze fish for the retail market. The freezer ships take their catches south for canning. Their competitors are the Alaskan canners; and we know from the record that fish canned locally usually are not frozen.[4] When we look at the tax laid on local canners and those laid on "freezer ships," there is no discrimination in favor of the former and against the latter. For no matter how the tax on "freezer ships" is computed, it did not exceed the six-percent tax on the local canners. Hence cases such as *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 595–596, which hold invalid state laws that

[2] L. 1949, c. 82, § 1 (a), as amended, L. 1951, c. 113, § 1.

[3] L. 1949, c. 97, § 1 (a), as amended, L. 1951, c. 116, § 1.

[4] Fish are sometimes frozen for local canneries when the run is more than the canneries can take care of; but that freezing is merely an adjunct of the local canning industry.

prefer local sales over interstate sales, are inapposite. If there is a difference between the taxes imposed on these freezer ships and the taxes imposed on their competitors, they are not so "palpably disproportionate" (*Harvester Co.* v. *Evatt,* 329 U. S. 416, 422) as to run afoul of the Commerce Clause. No "iron rule of equality" between taxes laid by a State on different types of business is necessary. *Caskey Baking Co.* v. *Virginia,* 313 U. S. 117, 119–121; *Morf* v. *Bingaman,* 298 U. S. 407, 414; *Capitol Greyhound Lines* v. *Brice,* 339 U. S. 542, 546–547.

The judgment is reversed. Since we do not know how many fish, if any, were obtained outside Alaska's territorial waters,[5] we remand the cause to the Court of Appeals for proceedings in conformity with this opinion.

Reversed.

MR. JUSTICE HARLAN, dissenting.

It is with reluctance that I have reached the conclusion that this Alaska tax offends the Commerce Clause of the Federal Constitution. (Art. I, § 8, cl. 3.)

The Court of Appeals concluded that the taxable event under this statute is the process of freezing fish aboard ship. 277 F. 2d 120. This conclusion was based on the words of the statute (quoted at pp. 199–200 of the Court's opinion), the fact that obtaining fish for local sale or consumption is untaxed, and the fact that the present tax "applies whether or not the fish are caught by gillnetters owned by or under contract to appellants." *Id.,* 125–126. Accepting, as I do, this construction of the statute, I agree with the Court of Appeals that a *privilege* tax directed solely at shipboard freezing, preparatory to interstate shipment, exceeds the limitations the Commerce

[5] Alaska contends that its territorial waters in the Bristol Bay area reach beyond the usual three-mile limit. That is a claim on the merits of which we express no opinion.

Clause imposes upon the States, for in its requirement of a license such a tax asserts a power to deny what is a necessary local incident of the right to make interstate purchases. See *York Manufacturing Co.* v. *Colley,* 247 U. S. 21.*

As I understand the Court's opinion, it seeks to meet this objection by denying that the Alaskan tax is imposed on the privilege of freezing fish aboard ships. It says that the tax is rather upon the local taking or purchase of fish *by or for freezer boats.* But even on this view of the incidence of the tax, I could not agree that the present tax on obtaining fish by or for interstate freezer boats would be constitutional in the given circumstances, for I do not think that Alaska can place a higher tax on the obtaining and freezing of fish for interstate markets than it places on the obtaining and freezing of fish for local markets. See *Pennsylvania* v. *West Virginia,* 262 U. S. 553, 596, 597. As shown in the Court's opinion, under the Alaska scheme of taxation freezer boats, which operate solely in interstate commerce, must pay a tax for taking and freezing Alaskan fish for later canning in Washington which is four times that imposed on a local freezer whose product is sold to consumers in Alaska. A shore-based freezer who sells his frozen product to Alaskan canners pays no tax at all.

For these reasons I would affirm the judgment of the Court of Appeals.

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*I also regard the tax as invalid because it in effect charges a toll for the interstate transportation of Alaska's natural resources. See Brown, The Open Economy: Justice Frankfurter and the Position of the Judiciary, 67 Yale L. J. 219, 232–233.

ATCHLEY *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 95. Argued April 25, 1961.—Decided May 1, 1961.

Certiorari dismissed as not warranted on record.
Reported below: 53 Cal. 2d 160, 346 P. 2d 764.

Rosalie S. Asher argued the cause and filed briefs for petitioner.

Doris H. Maier, Deputy Attorney General of California, argued the cause for respondent. With her on the briefs was *Stanley Mosk,* Attorney General of California.

PER CURIAM.

After hearing oral argument and fully examining the record, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed.

ANDERSON *v.* ALABAMA.

CERTIORARI TO THE COURT OF APPEALS OF ALABAMA.

No. 326. Argued April 25–26, 1961.—Decided May 1, 1961.

270 Ala. 575, 120 So. 2d 414, reversed.

Jack Greenberg argued the cause for petitioner. With him on the briefs were *Peter A. Hall, Fred D. Gray, Orzell Billingsley* and *Thurgood Marshall.*

David W. Clark, Assistant Attorney General of Alabama, argued the cause for respondent. With him on the briefs was *MacDonald Gallion,* Attorney General.

PER CURIAM.

The judgment is reversed. *Pierre* v. *Louisiana,* 306 U. S. 354; *Cassell* v. *Texas,* 339 U. S. 282; *Hernandez* v. *Texas,* 347 U. S. 475.

CHAIFETZ *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 695. Decided May 1, 1961.

Certiorari granted and judgment reversed only as to Count IV of the indictment.

Reported below: 109 U. S. App. D. C. 349, 288 F. 2d 133.

Abraham Chaifetz and *I. William Stempil* for petitioner.

Solicitor General Cox, Assistant Attorney General Oberdorfer and *Meyer Rothwacks* for the United States.

PER CURIAM.

Upon consideration of the entire record and the suggestion of the Solicitor General, the petition for writ of certiorari is granted limited to that part of the judgment concerned with Count IV of the indictment and that part of the judgment is reversed and the cause remanded to the District Court with directions to vacate the conviction on that Count. In all other respects the petition for writ of certiorari is denied.

590532 O–61—18

SMITH *v.* SMITH.

APPEAL FROM THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA.

No. 802. Decided May 1, 1961.

Appeal dismissed since the judgment below is based on a nonfederal ground adequate to support it.

J. W. Maxwell for appellant.

Harold Henkel Smith for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for the reason that the judgment of the Circuit Court of Raleigh County, State of West Virginia, sought here to be reviewed, is based upon a nonfederal ground adequate to support it.

Per Curiam.

BINKS MANUFACTURING CO. *v.* RANSBURG ELECTRO-COATING CORP.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 501. Argued May 3–4, 1961.—Decided May 8, 1961.

Certiorari dismissed as not warranted on record.

Reported below: 281 F. 2d 252.

W. Donald McSweeney and *Charles F. Meroni* argued the cause for petitioner. With them on the briefs were *Otto R. Krause* and *John B. Robinson, Jr.*

Elbert R. Gilliom argued the cause for respondent. With him on the briefs were *James P. Hume* and *Harry T. Ice.*

Solicitor General Cox, Assistant Attorney General Loevinger and *Richard A. Solomon* filed a brief for the United States, as *amicus curiae.*

PER CURIAM.

After hearing oral argument and fully examining the record, we conclude that the totality of circumstances as the record makes them manifest did not warrant bringing the case here. Accordingly, the writ is dismissed.

CITY OF NEW ORLEANS *v.* BUSH ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 812. Decided May 8, 1961.

190 F. Supp. 861, affirmed.

Alvin J. Liska and *Gerald P. Fedoroff* for appellant.

Samuel I. Rosenberg for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

BOLOGNA *v.* MORRISSEY.

APPEAL FROM THE SUPREME COURT OF MISSISSIPPI.

No. 829. Decided May 8, 1961.

Appeal dismissed and certiorari denied.
Reported below: —— Miss. ——, 123 So. 2d 537.

Landman Teller for appellant.

Frank E. Everett, Jr. for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

JAMES *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 63. Argued November 17, 1960.—Decided May 15, 1961.

1. Embezzled money is taxable income of the embezzler in the year of the embezzlement under § 22 (a) of the Internal Revenue Code of 1939, which defines "gross income" as including "gains or profits and income derived from any source whatever," and under § 61 (a) of the Internal Revenue Code of 1954, which defines "gross income" as "all income from whatever source derived." *Commissioner* v. *Wilcox,* 327 U. S. 404, overruled. Pp. 213–222.
2. After this Court's decision in *Commissioner* v. *Wilcox, supra,* petitioner embezzled large sums of money during the years 1951 through 1954. He failed to report those amounts as gross income in his income tax returns for those years, and he was convicted of "willfully" attempting to evade the federal income tax due for each of the years 1951 through 1954, in violation of § 145 (b) of the Internal Revenue Code of 1939 and § 7201 of the Internal Revenue Code of 1954. *Held:* The judgment affirming the conviction is reversed and the cause is remanded with directions to dismiss the indictment. Pp. 214–215, 222.

273 F. 2d 5, reversed.

Richard E. Gorman argued the cause and filed a brief for petitioner.

Assistant Deputy Attorney General Heffron argued the cause for the United States. With him on the brief were *Solicitor General Rankin, Assistant Attorney General Rice* and *Meyer Rothwacks.*

MR. CHIEF JUSTICE WARREN announced the judgment of the Court and an opinion in which MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur.

The issue before us in this case is whether embezzled funds are to be included in the "gross income" of the embezzler in the year in which the funds are misappro-

priated under § 22 (a) of the Internal Revenue Code of 1939 [1] and § 61 (a) of the Internal Revenue Code of 1954.[2]

The facts are not in dispute. The petitioner is a union official who, with another person, embezzled in excess of $738,000 during the years 1951 through 1954 from his employer union and from an insurance company with which the union was doing business.[3] Petitioner failed to report these amounts in his gross income in those years and was convicted for willfully attempting to evade the federal income tax due for each of the years 1951 through 1954 in violation of § 145 (b) of the Internal Revenue Code of 1939 [4] and § 7201 of the Internal Rev-

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[1] § 22. Gross Income.

"(a) *General Definition.*—'Gross income' includes gains, profits, and income derived from salaries, wages, or compensation for personal service . . . of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. . . ." (26 U. S. C. (1952 ed.) § 22 (a).)

[2] § 61. Gross Income Defined.

"(a) *General Definition.*—Except as otherwise provided in this subtitle, gross income means all income from whatever source derived . . . ." (26 U. S. C. § 61 (a).)

[3] Petitioner has pleaded guilty to the offense of conspiracy to embezzle in the Court of Essex County, New Jersey.

[4] § 145. Penalties.

"(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect, account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000 or imprisoned for not more than five years, or both, together with the costs of prosecution." (26 U. S. C. (1952 ed.) § 145 (b).)

enue Code of 1954.[5] He was sentenced to a total of three years' imprisonment. The Court of Appeals affirmed. 273 F. 2d 5. Because of a conflict with this Court's decision in *Commissioner* v. *Wilcox,* 327 U. S. 404, a case whose relevant facts are concededly the same as those in the case now before us, we granted certiorari. 362 U. S. 974.

In *Wilcox,* the Court held that embezzled money does not constitute taxable income to the embezzler in the year of the embezzlement under § 22 (a) of the Internal Revenue Code of 1939. Six years later, this Court held, in *Rutkin* v. *United States,* 343 U. S. 130, that extorted money does constitute taxable income to the extortionist in the year that the money is received under § 22 (a) of the Internal Revenue Code of 1939. In *Rutkin,* the Court did not overrule *Wilcox,* but stated:

> "We do not reach in this case the factual situation involved in *Commissioner* v. *Wilcox,* 327 U. S. 404. We limit that case to its facts. There embezzled funds were held not to constitute taxable income to the embezzler under § 22 (a)." *Id.,* at 138.[6]

However, examination of the reasoning used in *Rutkin* leads us inescapably to the conclusion that *Wilcox* was thoroughly devitalized.

The basis for the *Wilcox* decision was "that a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) the absence of a definite,

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[5] § 7201. Attempt to Evade or Defeat Tax.

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution." (26 U. S. C. § 7201.)

[6] The dissenters in *Rutkin* stated that the Court had rejected the *Wilcox* interpretation of § 22 (a). *Id.,* at 140.

unconditional obligation to repay or return that which would otherwise constitute a gain. Without some bona fide legal or equitable claim, even though it be contingent or contested in nature, the taxpayer cannot be said to have received any gain or profit within the reach of § 22 (a)." *Commissioner* v. *Wilcox, supra,* at p. 408. Since Wilcox embezzled the money, held it "without any semblance of a bona fide claim of right," *ibid.,* and therefore "was at all times under an unqualified duty and obligation to repay the money to his employer," *ibid.,* the Court found that the money embezzled was not includible within "gross income." But, Rutkin's legal claim was no greater than that of Wilcox. It was specifically found "that petitioner had no basis for his claim . . . and that he obtained it by extortion." *Rutkin* v. *United States, supra,* at p. 135. Both Wilcox and Rutkin obtained the money by means of a criminal act; neither had a bona fide claim of right to the funds.[7] Nor was Rutkin's obligation to repay the extorted money to the victim any less than that of Wilcox. The victim of an extortion, like the victim of an embezzlement, has a right to restitution. Furthermore, it is inconsequential that an embezzler may lack title to the sums he appropriates while an extortionist may gain a voidable title. Questions of federal income taxation are not determined by such "attenuated subtleties." *Lucas* v. *Earl,* 281 U. S. 111, 114; *Corliss* v.

[7] The Government contends that the adoption in *Wilcox* of a claim of right test as a touchstone of taxability had no support in the prior cases of this Court; that the claim of right test was a doctrine invoked by the Court in aid of the concept of annual accounting, to determine *when,* not *whether,* receipts constituted income. See *North American Oil* v. *Burnet,* 286 U. S. 417; *United States* v. *Lewis,* 340 U. S. 590; *Healy* v. *Commissioner,* 345 U. S. 278. In view of our reasoning set forth below, we need not pass on this contention. The use to which we put the claim of right test here is only to demonstrate that, whatever its validity as a test of *whether* certain receipts constitute income, it calls for no distinction between *Wilcox* and *Rutkin.*

Bowers, 281 U. S. 376, 378. Thus, the fact that Rutkin secured the money with the consent of his victim, *Rutkin* v. *United States, supra,* at p. 138, is irrelevant. Likewise unimportant is the fact that the sufferer of an extortion is less likely to seek restitution than one whose funds are embezzled. What is important is that the right to recoupment exists in both situations.

Examination of the relevant cases in the courts of appeals lends credence to our conclusion that the *Wilcox* rationale was effectively vitiated by this Court's decision in *Rutkin.*[8] Although this case appears to be the first to arise that is "on all fours" with *Wilcox,* the lower federal courts, in deference to the undisturbed *Wilcox* holding, have earnestly endeavored to find distinguishing facts in the cases before them which would enable them to include sundry unlawful gains within "gross income." [9]

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[8] In *Marienfeld* v. *United States,* 214 F. 2d 632, the Eighth Circuit stated, "We find it difficult to reconcile the Wilcox case with the later opinion of the Supreme Court in Rutkin . . . ." *Id.,* at 636. The Second Circuit announced, in *United States* v. *Bruswitz,* 219 F. 2d 59, "It is difficult to perceive what, if anything, is left of the Wilcox holding after Rutkin . . . ." *Id.,* at 61. The Seventh Circuit's prior decision in *Macias* v. *Commissioner,* 255 F. 2d 23, observed, "If this reasoning [of *Rutkin*] had been employed in Wilcox, we see no escape from the conclusion that the decision in that case would have been different. In our view, the Court in Rutkin repudiated its holding in Wilcox; certainly it repudiated the reasoning by which the result was reached in that case." *Id.,* at 26 .

[9] For example, *Kann* v. *Commissioner,* 210 F. 2d 247, was differentiated on the following grounds: the taxpayer was never indicted or convicted of embezzlement; there was no adequate proof that the victim did not forgive the misappropriation; the taxpayer was financially able to both pay the income tax and make restitution; the taxpayer would have likely received most of the misappropriated money as dividends. In *Marienfeld* v. *United States, supra,* the court believed that the victim was not likely to repudiate. In *United States* v. *Wyss,* 239 F. 2d 658, the distinguishing factors were that the district judge had not found as a fact that the taxpayer embezzled the funds and the money had not as yet been reclaimed by the victim. See also

It had been a well-established principle, long before either *Rutkin* or *Wilcox,* that unlawful, as well as lawful, gains are comprehended within the term "gross income." Section II B of the Income Tax Act of 1913 provided that "the net income of a taxable person shall include gains, profits, and income . . . from . . . the transaction of any *lawful* business carried on for gain or profit, or gains or profits and income derived from any source whatever . . . ." (Emphasis supplied.) 38 Stat. 167. When the statute was amended in 1916, the one word "lawful" was omitted. This revealed, we think, the obvious intent of that Congress to tax income derived from both legal and illegal sources, to remove the incongruity of having the gains of the honest laborer taxed and the gains of the dishonest immune. *Rutkin* v. *United States, supra,* at p. 138; *United States* v. *Sullivan,* 274 U. S. 259, 263. Thereafter, the Court held that gains from illicit traffic in liquor are includible within "gross income." *Ibid.* See also *Johnson* v. *United States,* 318 U. S. 189; *United States* v. *Johnson,* 319 U. S. 503. And, the Court has pointed out, with approval, that there "has been a widespread and settled administrative and judicial recognition of the taxability of unlawful gains of many kinds," *Rutkin* v. *United States, supra,* at p. 137. These include protection payments made to racketeers, ransom payments paid to kidnappers, bribes, money derived from the sale of unlawful insurance policies, graft, black market gains, funds obtained from the operation of lotteries, income from race track bookmaking and illegal prize fight pictures. *Ibid.*

The starting point in all cases dealing with the question of the scope of what is included in "gross income" begins with the basic premise that the purpose of Congress was "to use the full measure of its taxing power." *Helvering*

Briggs v. *United States,* 214 F. 2d 699, 702; *Prokop* v. *Commissioner,* 254 F. 2d 544, 554–555. Cf. *J. J. Dix, Inc.,* v. *Commissioner,* 223 F. 2d 436.

v. *Clifford,* 309 U. S. 331, 334. And the Court has given a liberal construction to the broad phraseology of the "gross income" definition statutes in recognition of the intention of Congress to tax all gains except those specifically exempted. *Commissioner* v. *Jacobson,* 336 U. S. 28, 49; *Helvering* v. *Stockholms Enskilda Bank,* 293 U. S. 84, 87–91. The language of § 22 (a) of the 1939 Code, "gains or profits and income derived from any source whatever," and the more simplified language of § 61 (a) of the 1954 Code, "all income from whatever source derived," have been held to encompass all "accessions to wealth, clearly realized, and over which the taxpayers have complete dominion." *Commissioner* v. *Glenshaw Glass Co.,* 348 U. S. 426, 431. A gain "constitutes taxable income when its recipient has such control over it that, as a practical matter, he derives readily realizable economic value from it." *Rutkin* v. *United States, supra,* at p. 137. Under these broad principles, we believe that petitioner's contention, that all unlawful gains are taxable except those resulting from embezzlement, should fail.

When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition, express or implied, of an obligation to repay and without restriction as to their disposition, "he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." *North American Oil* v. *Burnet, supra,* at p. 424. In such case, the taxpayer has "actual command over the property taxed—the actual benefit for which the tax is paid," *Corliss* v. *Bowers, supra.* This standard brings wrongful appropriations within the broad sweep of "gross income"; it excludes loans. When a law-abiding taxpayer mistakenly receives income in one year, which receipt is assailed and found to be invalid in a subsequent

year, the taxpayer must nonetheless report the amount as "gross income" in the year received. *United States* v. *Lewis, supra; Healy* v. *Commissioner, supra.* We do not believe that Congress intended to treat a law-breaking taxpayer differently. Just as the honest taxpayer may deduct any amount repaid in the year in which the repayment is made, the Government points out that, "If, when, and to the extent that the victim recovers back the misappropriated funds, there is of course a reduction in the embezzler's income." Brief for the United States, p. 24.[10]

Petitioner contends that the *Wilcox* rule has been in existence since 1946; that if Congress had intended to change the rule, it would have done so; that there was a general revision of the income tax laws in 1954 without mention of the rule; that a bill to change it [11] was introduced in the Eighty-sixth Congress but was not acted upon; that, therefore, we may not change the rule now. But the fact that Congress has remained silent or has re-enacted a statute which we have construed, or that congressional attempts to amend a rule announced by this Court have failed, does not necessarily debar us from re-examining and correcting the Court's own errors. *Girouard* v. *United States,* 328 U. S. 61, 69–70; *Helvering* v. *Hallock,* 309 U. S. 106, 119–122. There may have been any number of reasons why Congress acted as it did. *Helvering* v. *Hallock, supra.* One of the reasons could well

[10] Petitioner urges upon us the case of *Alison* v. *United States,* 344 U. S. 167. But that case dealt with the right of the victim of an embezzlement to take a deduction, under § 23 (e) and (f) of the 1939 Code, in the year of the discovery of the embezzlement rather than the year in which the embezzlement occurred. The Court held only "that the special factual circumstances found by the District Courts in both these cases justify deductions under I. R. C., §§ 23 (e) and (f) and the long-standing Treasury Regulations applicable to embezzlement losses." *Id.,* at 170. The question of inclusion of embezzled funds in "gross income" was not presented in *Alison.*

[11] H. R. 8854, 86th Cong., 1st Sess.

be our subsequent decision in *Rutkin* which has been thought by many to have repudiated *Wilcox*. Particularly might this be true in light of the decisions of the Courts of Appeals which have been riding a narrow rail between the two cases and further distinguishing them to the disparagement of *Wilcox*. See notes 8 and 9, *supra*.

We believe that *Wilcox* was wrongly decided and we find nothing in congressional history since then to persuade us that Congress intended to legislate the rule. Thus, we believe that we should now correct the error and the confusion resulting from it, certainly if we do so in a manner that will not prejudice those who might have relied on it. Cf. *Helvering* v. *Hallock, supra,* at 119. We should not continue to confound confusion, particularly when the result would be to perpetuate the injustice of relieving embezzlers of the duty of paying income taxes on the money they enrich themselves with through theft while honest people pay their taxes on every conceivable type of income.

But, we are dealing here with a felony conviction under statutes which apply to any person who "willfully" fails to account for his tax or who "willfully" attempts to evade his obligation. In *Spies* v. *United States,* 317 U. S. 492, 499, the Court said that § 145 (b) of the 1939 Code embodied "the gravest of offenses against the revenues," and stated that willfulness must therefore include an evil motive and want of justification in view of all the circumstances. *Id.,* at 498. Willfulness "involves a specific intent which must be proven by independent evidence and which cannot be inferred from the mere understatement of income." *Holland* v. *United States,* 348 U. S. 121, 139.

We believe that the element of willfulness could not be proven in a criminal prosecution for failing to include embezzled funds in gross income in the year of misappropriation so long as the statute contained the gloss placed upon it by *Wilcox* at the time the alleged crime was

committed. Therefore, we feel that petitioner's conviction may not stand and that the indictment against him must be dismissed.

Since MR. JUSTICE HARLAN, MR. JUSTICE FRANKFURTER, and MR. JUSTICE CLARK agree with us concerning *Wilcox,* that case is overruled. MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, and MR. JUSTICE WHITTAKER believe that petitioner's conviction must be reversed and the case dismissed for the reasons stated in their opinions.

Accordingly, the judgment of the Court of Appeals is reversed and the case is remanded to the District Court with directions to dismiss the indictment.

It is so ordered.

MR. JUSTICE BLACK, whom MR. JUSTICE DOUGLAS joins, concurring in part and dissenting in part.

On February 25, 1946, fifteen years ago, this Court, after mature consideration, and in accordance with what at that time represented the most strongly supported judicial view, held, in an opinion written by Mr. Justice Murphy to which only one Justice dissented, that money secretly taken by an embezzler for his own use did not constitute a taxable gain to him under the federal income tax laws. *Commissioner* v. *Wilcox,* 327 U. S. 404. The Treasury Department promptly accepted this ruling in a bulletin declaring that the "mere act of embezzlement does not of itself result in taxable income," although properly urging that "taxable income may result to the embezzler, depending on the facts in the particular case." [1]

[1] G. C. M. No. 24945, 1946–2 Cum. Bull. 27, 28. This was precisely in accord with this Court's statement of the proper rule in the *Wilcox* opinion:

"Taxable income may arise, to be sure, from the use or in connection with the use of such [embezzled] property. . . . But apart from such factors the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of § 22 (a)." 327 U. S., at 408.

During the fifteen years since *Wilcox* was decided, both this Court and Congress, although urged to do so, have declined to change the *Wilcox* interpretation of statutory "income" with respect to embezzlement. In this case, however, a majority of the Court overrules *Wilcox*. Only three of the members of the Court who decided the *Wilcox* case are participating in this case—MR. JUSTICE FRANKFURTER, MR. JUSTICE DOUGLAS, and myself. MR. JUSTICE DOUGLAS and I dissent from the Court's action in "overruling" *Wilcox* and from the prospective way in which this is done. We think *Wilcox* was sound when written and is sound now.

I.

We dissent from the way the majority of the Court overrules *Wilcox*. If the statutory interpretation of "taxable income" in *Wilcox* is wrong, then James is guilty of violating the tax evasion statute for the trial court's judgment establishes that he embezzled funds and wilfully refrained from reporting them as income. It appears to us that District Courts are bound to be confused as to what they can do hereafter in tax-evasion cases involving "income" from embezzlements committed prior to this day. Three Justices vote to overrule *Wilcox* under what we believe to be a questionable formula, at least a new one in the annals of this Court, and say that although failure to report embezzled funds has, despite *Wilcox,* always been a crime under the statute, people who have violated this law in the past cannot be prosecuted but people who embezzle funds after this opinion is announced can be prosecuted for failing to report these funds as a "taxable gain." Three other Justices who vote to overrule *Wilcox* say that past embezzlers can be prosecuted for the crime of tax evasion although two of those Justices believe the Government must prove that the past embezzler did not commit his crime in reliance on *Wilcox.*

Thus, although it was not the law yesterday, it will be the law tomorrow that funds embezzled hereafter are taxable income; and although past embezzlers could not have been prosecuted yesterday, maybe they can and maybe they cannot be prosecuted tomorrow for the crime of tax evasion. (The question of the civil tax liability of past embezzlers is left equally unclear.) We do not challenge the wisdom of those of our Brethren who refuse to make the Court's new tax evasion crime applicable to past conduct. This would be good governmental policy even though the *ex post facto* provision of the Constitution has not ordinarily been thought to apply to judicial legislation. Our trouble with this aspect of the Court's action is that it seems to us to indicate that the Court has passed beyond the interpretation of the tax statute and proceeded substantially to amend it.

We realize that there is a doctrine with wide support to the effect that under some circumstances courts should make their decisions as to what the law is apply only prospectively.[2] Objections to such a judicial procedure, however, seem to us to have peculiar force in the field of criminal law. In the first place, a criminal statute that is so ambiguous in scope that an interpretation of it brings about totally unexpected results, thereby subjecting people to penalties and punishments for conduct which they could not know was criminal under existing law, raises serious questions of unconstitutional vagueness.[3] Moreover, for a court to interpret a criminal statute in such a way as to make punishment for past conduct under it so unfair and unjust that the interpretation should be given only prospective application seems to us to be the creation of a judicial crime that Congress might not want

[2] See, for example, *Great Northern R. Co.* v. *Sunburst Oil Co.*, 287 U. S. 358.

[3] See, for example, *United States* v. *L. Cohen Grocery Co.*, 255 U. S. 81.

to create. This country has never been sympathetic with judge-created crimes. Their rejection under our Constitution was said to have been "long since settled in public opinion" even as early as 1812 when the question first reached this Court in *United States* v. *Hudson & Goodwin,* 7 Cranch 32. In that case this Court emphatically declared that the federal courts have no common-law jurisdiction in criminal cases. They are not "vested with jurisdiction over any particular act done by an individual in supposed violation of the peace and dignity of the sovereign power." Rather, "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence." [4]

In our judgment one of the great inherent restraints upon this Court's departure from the field of interpretation to enter that of lawmaking has been the fact that its judgments could not be limited to prospective application. This Court and in fact all departments of the Government have always heretofore realized that prospective lawmaking is the function of Congress rather than of the courts. We continue to think that this function should be exercised only by Congress under our constitutional system.

II.

We think *Wilcox* was right when it was decided and is right now. It announced no new, novel doctrine. One need only look at the Government's briefs in this Court in the *Wilcox* case to see just how little past judicial support could then be mustered had the Government sought to send Wilcox to jail for his embezzlement under the guise of a tax evasion prosecution. The Government did cite many cases from many courts saying that under the federal income tax law gains are no less taxable because

[4] 7 Cranch, at 34. And see *United States* v. *Coolidge,* 1 Wheat. 415.

they have been acquired by illegal methods. This Court had properly held long before *Wilcox* that there is no "reason why the fact that a business is unlawful should exempt it from paying the taxes that if lawful it would have to pay." [5] We fully recognized the correctness of that holding in *Wilcox:*

> "Moral turpitude is not a touchstone of taxability. The question, rather, is whether the taxpayer in fact received a statutory gain, profit or benefit. That the taxpayer's motive may have been reprehensible or the mode of receipt illegal has no bearing upon the application of § 22 (a)." [6]

The Court today by implication attributes quite a different meaning or consequence to the *Wilcox* opinion. One opinion argues at length the "well-established principle . . . that unlawful, as well as lawful, gains are comprehended within the term 'gross income.'" *Wilcox* did not deny that; we do not deny that. This repeated theme of our Brethren is wholly irrelevant since the *Wilcox* holding in no way violates the sound principle of treating "gains" of honest and dishonest taxpayers alike. The whole basis of the *Wilcox* opinion was that an embezzlement is not in itself "gain" or "income" to the embezzler within the tax sense, for the obvious reason that the embezzled property still belongs, and is known to belong, to the rightful owner. It is thus a mistake to argue that petitioner's contention is "that all unlawful gains are taxable except those resulting from embezzlement."

As stated in *Wilcox,* that case was brought to us because of a conflict among the Circuits. The Ninth Circuit in *Wilcox* had held that embezzled funds were not any more "taxable income" to the embezzler than

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[5] *United States* v. *Sullivan,* 274 U. S. 259, 263.

[6] 327 U. S., at 408.

borrowed funds would have been.[7] The Fifth Circuit, in *McKnight* v. *Commissioner,* had decided the same thing.[8] The Eighth Circuit, however, had decided in *Kurrle* v. *Helvering* that embezzled funds were taxable income.[9] Comparison of the three opinions readily shows that the arguments of the Fifth and Ninth Circuits against taxability of such funds were much stronger than the arguments of the Eighth Circuit for such taxability. The whole picture can best be obtained from the court's opinion in *McKnight* v. *Commissioner,* written by Judge Sibley, one of the ablest circuit judges of his time. He recognized that the taxpayer could not rely upon the unlawfulness of his business to defeat taxation if he had made a "gain" in that business. He pointed out, however, that the ordinary embezzler "got no title, void or voidable, to what he took. He was still in possession as he was before, but with a changed purpose. He still had no right nor color of right. He claimed none." [10] Judge Sibley's opinion went on to point out that the "first takings [of an embezzler] are, indeed, nearly always with the intention of repaying, a sort of unauthorized borrowing. It must be conceded that no gain is realized by borrowing, because of the offsetting obligation." [11] Approaching the matter from a practical standpoint, Judge Sibley also explained that subjecting the embezzled funds to a tax would amount to allowing the United States "a preferential claim for part of the dishonest gain, to the direct loss and detriment of those to whom it ought to be restored." [12] He was not willing to put the owner of

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[7] *Wilcox* v. *Commissioner,* 148 F. 2d 933.

[8] 127 F. 2d 572.

[9] 126 F. 2d 723.

[10] 127 F. 2d, at 573.

[11] *Ibid.* The same reasoning can be found in our opinion in *Alison* v. *United States,* 344 U. S. 167, 169–170.

[12] 127 F. 2d, at 574.

funds that had been stolen in competition with the United States Treasury Department as to which one should have a preference to get those funds.

It seems to us that Judge Sibley's argument was then and is now unanswerable. The rightful owner who has entrusted his funds to an employee or agent has troubles enough when those funds are embezzled without having the Federal Government step in with its powerful claim that the embezzlement is a taxable event automatically subjecting part of those funds (still belonging to the owner) to the waiting hands of the Government's tax gatherer. We say part of the *owner's* funds because it is on the supposed "gain" from them that the embezzler is now held to be duty-bound to pay the tax and history probably records few instances of independently wealthy embezzlers who have had nonstolen assets available for payment of taxes.

There has been nothing shown to us on any of the occasions when we have considered this problem to indicate that Congress ever intended its income tax laws to be construed as imposing what is in effect a property or excise tax on the rightful owner's embezzled funds, for which the owner has already once paid income tax when he rightfully acquired them. In our view, the Court today does Congress a grave injustice by assuming that it has imposed this double tax burden upon the victim of an embezzlement merely because someone has stolen his money, particularly when Congress has refused requests that it do so. The owner whose funds have been embezzled has done nothing but entrust an agent with possession of his funds for limited purposes, as many of us have frequent occasion to do in the course of business or personal affairs. Ordinarily the owner is not, and has no reason to be, at all aware of an embezzlement until long after the first misuse occurs. If Congress ever did manifest an intention to select the mere fact of embezzlement

as the basis for imposing a double tax on the owner, we think a serious question of confiscation in violation of the Fifth Amendment would be raised. All of us know that with the strong lien provisions of the federal income tax law an owner of stolen funds would have a very rocky road to travel before he got back, without paying a good slice to the Federal Government, such funds as an embezzler who had not paid the tax might, perchance, not have dissipated. An illustration of what this could mean to a defrauded employer is shown in this very case by the employer's loss of some $700,000, upon which the Government claims a tax of $559,000.

It seems to be implied that one reason for overruling *Wilcox* is that a failure to hold embezzled funds taxable would somehow work havoc with the public revenue or discriminate against "honest" taxpayers and force them to pay more taxes. We believe it would be impossible to substantiate either claim. Embezzlers ordinarily are not rich people against whom judgments, even federal tax judgments can be enforced. Judging from the meager settlements that those defrauded were apparently compelled to make with the embezzlers in this very case, it is hard to imagine that the Treasury will be able to collect the more than $500,000 it claims. And certainly the *Wilcox* case does not seem to have been one in which the Government could have collected any great amount of tax. The employer's embezzled $11,000 there went up in gambling houses. The scarcity of cases involving alleged taxes due from embezzlers is another indication that the Government cannot expect to make up any treasury deficits with taxes collected from embezzlers and thieves, especially when the cost to the Government of investigations and court proceedings against suspected individuals is considered. And, as already indicated, to the extent that the Government could be successful in collecting some taxes from

embezzlers, it would most likely do so at the expense of the owner whose money had been stolen.

It follows that, except for the possible adverse effect on rightful owners, the only substantial result that one can foresee from today's holding is that the Federal Government will, under the guise of a tax evasion charge, prosecute people for a simple embezzlement. But the Constitution grants power to Congress to get revenue not to prosecute local crimes. And if there is any offense which under our dual system of government is a purely local one which the States should handle, it is embezzlement or theft. The Federal Government stands to lose much money by trying to take over prosecution of this type of local offense. It is very doubtful whether the further congestion of federal court dockets to try such local offenses is good for the Nation, the States or the people. Here the embezzler has already pleaded guilty to the crime of embezzlement in a state court, although the record does not show what punishment he has received. Were it not for the novel formula of applying the Court's new law prospectively, petitioner would have to serve three years in federal prison in addition to his state sentence. This graphically illustrates one of the great dangers of opening up the federal tax statutes, or any others, for use by federal prosecutors against defendants who not only can be but are tried for their crimes in local state courts and punished there. If the people of this country are to be subjected to such double jeopardy and double punishment, despite the constitutional command against double jeopardy, it seems to us it would be far wiser for this Court to wait and let Congress attempt to do it.

III.

The *Wilcox* case was decided fifteen years ago. Congress has met every year since then. All of us know that the House and Senate Committees responsible for our

tax laws keep a close watch on judicial rulings interpreting the Internal Revenue Code. Each committee has one or more experts at its constant disposal. It cannot possibly be denied that these committees and these experts are, and have been, fully familiar with the *Wilcox* holding. When Congress is dissatisfied with a tax decision of this Court, it can and frequently does act very quickly to overturn it.[13] On one occasion such an overruling enactment was passed by both the House and Senate and signed by the President all within one day after the decision was rendered by this Court.[14] In 1954 Congress, after extended study, completely overhauled and recodified the Internal Revenue Code. The *Wilcox* holding was left intact. In the Eighty-sixth Congress and in the present Eighty-seventh Congress bills have been introduced to subject embezzled funds to income taxation.[15] They have not been passed. This is not an instance when we can say that Congress may have neglected to change the law because it did not know what

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[13] *E. g., Commissioner* v. *Smith,* 324 U. S. 177 (compensation through exercise of stock option), led to § 218 of the Revenue Act of 1950, adding § 130A to the 1939 Code; *Commissioner* v. *Tower,* 327 U. S. 280; *Lusthaus* v. *Commissioner,* 327 U. S. 293; and *Commissioner* v. *Culbertson,* 337 U. S. 733 (family partnerships), led to § 340 of the Revenue Act of 1951, adding § 191 to the 1939 Code; *United States* v. *Silk,* 331 U. S. 704 ("employees" for purpose of Social Security employment tax), led to the Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438, amending several sections of the 1939 Code; *Commissioner* v. *Estate of Church,* 335 U. S. 632, and *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701 (estate tax), led to the Act of October 25, 1949, § 7, 63 Stat. 891, 894, amending § 811 (c) of the 1939 Code; *Wilmette Park Dist.* v. *Campbell,* 338 U. S. 411 (amusement tax), led to § 402 of the Revenue Act of 1951, adding § 1701 (d) to the 1939 Code; *Commissioner* v. *Korell,* 339 U. S. 619 (amortization of bond premium), led to § 217 of the Revenue Act of 1950, amending § 125 (b) (1) of the 1939 Code.

[14] 46 Stat. 1516; see 74 Cong. Rec. 7078–7079, 7198–7199.

[15] H. R. 8854, 86th Cong., 1st Sess.; H. R. 312, 87th Cong., 1st Sess.

was going on in the courts or because it was not asked to do so, as was the case in *Helvering* v. *Hallock*.[16] Nor is this a case in which subsequent affirmative congressional action manifested a view inconsistent with our prior decision, as was true in *Girouard* v. *United States*.[17] What we have here instead is a case in which Congress has not passed bills that have been introduced to make embezzled funds taxable and thereby make failure to report them as income a federal crime. For this Court to hold under such circumstances that the inherent ambiguity of legislative inaction gives the Court license to repudiate the long-standing interpretation of the income tax statute and thereby bring additional conduct within the tax evasion criminal statute seems to us to be flagrantly violative of the almost universally accepted axiom that criminal statutes are narrowly and strictly construed. Our Brethren cite no precedent in which this or any other court in the English-speaking world has so deliberately overruled a long-standing prior interpretation of a statute in order to create a crime which up to that time did not exist.

This Court as well as Congress was fully apprised of the various criticisms made in some Courts of Appeals opinions and elsewhere against the *Wilcox* holding, yet it has likewise until today steadfastly refused to overrule that holding during these fifteen years. This has been in the face of the fact that the Government expressly urged that we do so in 1955, nine years after *Wilcox* was decided

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[16] "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities. Congress may not have had its attention directed to an undesirable decision; *and there is no indication that as to the* St. Louis Trust *cases it had,* even by any bill that found its way into a committee pigeon-hole." 309 U. S. 106, 119–120. (Emphasis supplied.)

[17] "Thus the affirmative action taken by Congress in 1942 negatives any inference that otherwise might be drawn from its silence when it reenacted the oath in 1940." 328 U. S. 61, 70.

and three years after the decision in *Rutkin* v. *United States,* 343 U. S. 130. On that occasion the Court of Appeals for the Second Circuit, speaking through Judge Frank for himself and Judge Medina, had held in the case of *J. J. Dix, Inc.,* v. *Commissioner* that embezzled funds were not taxable as income, relying wholly on the *Wilcox* decision.[18] Judge Hincks dissented, saying that if the facts of *Dix* were not enough to distinguish it from *Wilcox* he would not follow *Wilcox.* In urging us to grant certiorari, the Government said that the case presented a recurring problem in the administration of the income tax laws. One of the arguments the Government presented for overruling *Wilcox,* strange as it may seem, was that "[s]everal prosecutions have recently been authorized and are now pending in various District Courts, even though the disputed income in those cases apparently came from embezzlements or closely analogous crimes." [19] And the next to the last sentence of its petition was: "In short, the question whether the proceeds of embezzlement, unlike other illegal income, are to enjoy a preferred tax-exempt status, will continue to perplex the lower courts until it is settled by this Court." [20] We denied certiorari.[21] There is surely less reason to repudiate and "devitalize" *Wilcox* now, six years after the Court, as composed at that time, refused to overrule it.

Of course the rule of *stare decisis* is not and should not be an inexorable one. This is particularly true with reference to constitutional decisions involving determinations beyond the power of Congress to change, but Congress can and does change statutory interpretations. It

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[18] 223 F. 2d 436.

[19] Petition for certiorari, *Commissioner* v. *Estate of Dix,* No. 363, October Term, 1955, p. 14, n. 6.

[20] *Id.,* at 15.

[21] 350 U. S. 894.

is perfectly proper and right that it should do so when it believes that this Court's interpretation of a statute embodies a policy that Congress is against. But Congress has not taken favorable action on bills introduced to overturn our *Wilcox* holding even after we declined the Government's request to reverse the identical holding in *Dix,* the latter having occurred three years after the decision in *Rutkin* which our Brethren now say may have misled Congress into thinking that we had repudiated the *Wilcox* holding.

It seems to us that we gave the doctrine of *stare decisis* its proper scope in our treatment of this Court's decision in *Federal Baseball Club* v. *National League of Professional Baseball Clubs,* 259 U. S. 200. In that case this Court had held for reasons given that professional baseball was not covered by the antitrust acts. Congress was asked through the years to change the law in this respect but declined to do so. In *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356, we followed the holding of that case without re-examination of the underlying issues "so far as that decision determines that Congress had no intention of including the business of baseball within the scope of the federal antitrust laws." Later we were asked to extend the *Federal Baseball* case and to hold that the business of boxing could not without congressional action be brought within the antitrust laws. We emphatically declined to do so in *United States* v. *International Boxing Club,* 348 U. S. 236, nor did we overrule *Toolson* in that case, despite strong arguments that the reasoning of the Court in the first baseball case was equally applicable to the business of boxing. We said about the proposed exemption of boxing from the antitrust laws that "[t]heir remedy, if they are entitled to one, lies in further resort to Congress." [22] That case and that statement fit this case precisely. In fact, as we are about to explain, a

[22] 348 U. S., at 244.

far more meaningful distinction can be made between embezzlement and extortion for purposes of this case than it was possible to make between baseball and boxing for purposes of that case, as MR. JUSTICE FRANKFURTER'S dissenting opinion in that case demonstrates.

If the Government wants to prosecute the local crime of embezzlement, ostensibly because of "tax evasion," it seems clear to us that it should take its request to Congress which has power to pass on it and which has, to date, refused to do what the Government asks us to do in this case.

IV.

Our Brethren advance as a reason for overruling *Wilcox* the 1952 decision in *Rutkin* v. *United States,* which was decided three years before we denied certiorari in the *Dix* case. They say that "the reasoning used in *Rutkin* leads us inescapably to the conclusion that *Wilcox* was thoroughly devitalized." This follows, to some extent, the statement in the Government's brief that "*Wilcox* and *Rutkin* cannot be reconciled on the basis of asserted technical differences between the extortionist and the embezzler. . . . The proper course, we submit, . . . is to recognize that the *Wilcox* rationale was rejected in *Rutkin,* is unsound, and can no longer be regarded as having vitality. Embezzled funds represent taxable gains." [23]

There is no doubt that some of the reasoning in the *Rutkin* opinion rejected some of the reasoning in the *Wilcox* opinion. But this is true only with respect to the broad general standards formulated in the two cases, and such standards of course cannot be accepted as universal panaceas to be mechanically applied to solve all the concrete problems in cases like these. Moreover, the *Rutkin* opinion expressly purported not to overrule *Wilcox* and

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[23] Brief for the United States, pp. 32–33.

specifically said that *Wilcox* was still to govern cases fitting its facts, clearly meaning embezzlement cases.[24] And the Government had not asked in *Rutkin* that *Wilcox* be overruled. Its argument was that *Wilcox* was "inapplicable" to the facts in the *Rutkin* record. The Government's brief went on to emphasize that the record in *Wilcox* showed only the bare receipt of money wholly belonging to another, while Rutkin had received the money "as a result of a bilateral agreement" and, as the Court of Appeals had pointed out, "with a 'semblance of a *bona fide* claim of right', a conclusion fully substantiated by the testimony of both the petitioner and the Government witness Reinfeld." [25] The Government went on to distinguish *Rutkin* further by pointing out that there was "not the slightest hint in the record" that Rutkin ever had an obligation to repay the funds he took.

After this Court was persuaded by the Government in *Rutkin* to accept its distinctions between *Rutkin* and *Wilcox,* it seems rather odd to have the Government now contend that the two cases are irreconcilable. While we disagreed, we can understand why the majority in *Rut-*

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[24] "We do not reach in this case the factual situation involved in *Commissioner* v. *Wilcox,* 327 U. S. 404. We limit that case to its facts. There embezzled funds were held not to constitute taxable income to the embezzler under § 22 (a). The issue here is whether money extorted from a victim with his consent induced solely by harassing demands and threats of violence is included in the definition of gross income under § 22 (a)." 343 U. S., at 138.

[25] Brief for the United States in Opposition to Petition for Certiorari, *Rutkin* v. *United States,* 343 U. S. 130, pp. 13–14. The full sentence in the Court of Appeals opinion from which the Government quoted was: "So he [Rutkin] did receive the money with a '*semblance* of a bona fide claim of right' as the embezzler had not in Commissioner of Internal Revenue v. Wilcox, supra, 327 U. S. at page 408, 66 S. Ct. at page 549." *United States* v. *Rutkin,* 189 F. 2d 431, 435.

kin drew the distinctions it did. Although the victim of either embezzlement or extortion ordinarily has a legal right to restitution, the extortion victim, like a blackmail victim, can in a sense be charged with complicity in bringing about the taxable event in that he knowingly surrendered the funds to the extortionist, sometimes in payment of an actual obligation. Unlike the victim of an ordinary theft, he generally knows who has taken the property from him and he consents to the taking though under duress; and unlike most victims of embezzlement, he is able to report the taking to law enforcement officers during the taxable year and his failure to do so might be considered a kind of continuing consent to the extortionist's dominion over the property. The longer he acquiesces the less likely it becomes that the extortion victim ever will demand restitution; [26] but once the victim of an embezzlement finds out that his property has been stolen, he most likely will immediately make efforts to get it back. Thus, although we still think *Rutkin* was wrongly decided for the reasons expressed in the dissenting opinion in that case, we can understand the argument for application of a sort of *caveat emptor* rule to persons who submit to blackmail or extortion, since it is far from certain that they will ever expose themselves by seeking repayment of what they paid out. The distinctions between crimes like embezzlement and crimes like blackmail and extortion, therefore, are not merely

[26] This factual distinction was clearly emphasized in the Court's opinion in *Rutkin:* "[Rutkin] induced Reinfeld to consent to pay the money by creating a fear in Reinfeld that harm otherwise would come to him and to his family. Reinfeld thereupon delivered his own money to petitioner. Petitioner's control over the cash so received was such that, *in the absence of Reinfeld's unlikely repudiation of the transaction and demand for the money's return,* petitioner could enjoy its use as fully as though his title to it were unassailable." *Rutkin* v. *United States,* 343 U. S. 130, 136–137. (Emphasis supplied.)

technical, legalistic "attenuated subtleties" for purposes of this decision, but are differences based upon practicalities such as often underlie the distinctions that have been developed in our law.

In departing from both the *Wilcox* and *Rutkin* decisions today, our Brethren offer no persuasive reasons to prove that their judgment in overruling *Wilcox* is better than that of the Justices who decided that case. It contributes nothing new to the analysis of this problem to say repeatedly that the dishonest man must be subject to taxation just as the honest. As already said, Chief Justice Stone and the others sitting with him on the *Wilcox* Court fully accepted that general principle and we do still. Applying it here, we would say the embezzler should be treated just like the law-abiding, honest borrower who has obtained the owner's consent to his use of the money.[27] It

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[27] The analogy between the borrower and the embezzler was lucidly analyzed by Judge Sibley in *McKnight* v. *Commissioner,* 127 F. 2d 572, 573–574.

The several cases relied on by the Court do not, in our judgment, justify imposing a tax upon embezzled money. *Corliss* v. *Bowers,* 281 U. S. 376, involved income accumulating in a trust fund belonging to the taxpayer and over which he retained control. *North American Oil Consolidated* v. *Burnet,* 286 U. S. 417; *United States* v. *Lewis,* 340 U. S. 590; and *Healy* v. *Commissioner,* 345 U. S. 278, were cases in which the taxpayer had asserted a bona fide, though mistaken, claim of right. In *North American Oil,* the taxpayer not only had a bona fide claim to the money taxed, but there had been an adjudication that he was entitled to it, and there was only the tenuous possibility that a competing claimant might later upset that adjudication. The *Lewis* and *Healy* cases involved a tax on payments made and received as a result of mutual mistake, and it was held that the administration of the tax laws on an annual basis need not be upset for the convenience of those who caused the mistaken payments to be made and reported as income. By contrast, the victims do not cause embezzlements, and the Government is not misled or inconvenienced under *Wilcox* because the embezzler is always fully aware that the embezzled funds are not rightfully his and presumably will not report otherwise.

would be unthinkable to tax the borrower on his "gain" of the borrowed funds and thereby substantially impair the lender's chance of ever recovering the debt. The injury that the Government would inflict on the lender by making the borrower less able to repay the loan surely would not be adequately compensated by telling the lender that he can take a tax deduction for the loss, and it is equally small comfort to the embezzlement victim for the Government, after taking part of his property as a tax on the embezzler, to tell the victim that he can take a deduction for his loss if he has any income against which to offset the deduction. There is, of course, one outstanding distinction between a borrower and an embezzler, and that is that the embezzler uses the funds without the owner's consent. This distinction can be of no importance for purposes of taxability of the funds, however, because as a matter of common sense it suggests that there is, if anything, less reason to tax the embezzler than the borrower. But if this distinction is to be the reason why the embezzlement must be taxed just as "the gains of the honest laborer," then the use of this slogan in this case is laid bare as no more than a means of imposing a second punishment for the crime of embezzlement without regard to revenue considerations, the effect on the rightful owner, or the proper role of this Court when asked to overrule a criminal statutory precedent. The double jeopardy implications would seem obvious,[28]

[28] See the dissenting opinion in *Bartkus* v. *Illinois*, 359 U. S. 121, 150. It is interesting to note that on July 22, 1959, shortly after the *Bartkus* decision, Illinois, in order to avoid the danger of prosecuting men in both state and federal courts for the same crime, passed a statute making conviction or acquittal in a federal prosecution a defense to a state prosecution for the same criminal act. Illinois Laws, 1959, p. 1893, § 1; 38 Ill. Ann. Stat. (Cum. Supp. 1960) § 601.1. Thus, while Illinois is moving away from such double prosecutions, this Court is moving even further than *Bartkus* in the direction of authorizing such prosecutions.

and discussion of the serious inadvisability for other reasons of thus injecting the Federal Government into local law enforcement can be found in the dissenting opinion in *Rutkin*.

We regret very much that it seems to be implied that the writer of the *Rutkin* opinion and those who agreed to it intended to overrule *Wilcox* when it is manifest that the language the Court used in *Rutkin* was meant to leave precisely the opposite impression. We are sure that our Brethren at that time did not intend to mislead the public, and it would be hard to imagine why they said what they did in the *Rutkin* opinion had they not specifically considered and rejected the possibility of overruling *Wilcox* then and there. We think it is unjustifiable to say nine years after *Rutkin* that it "devitalized" or "repudiated" the *Wilcox* holding when the *Rutkin* opinion said explicitly that *Wilcox* is still the rule as to embezzlement. Congress has seen fit to let both decisions stand, and we think the present Court should do the same.

V.

Even if we were to join with our Brethren in accepting the Government's present contention that *Wilcox* and *Rutkin* cannot both stand, we would disagree as to which of the two decisions should now be repudiated. This is true not only because we would feel less inhibition about narrowing rather than broadening the reach of a previously construed criminal statute. Regardless of such considerations, our conviction that the *Rutkin* case was wrongly decided in this Court remains undiminished and has been further substantiated by the subsequent events in that controversy, which show all the more clearly the deplorable consequences that can result when federal courts subject people who violate state criminal laws to

a double or treble prosecution for the state crime under the guise of attempted enforcement of federal tax laws.[29]

For the foregoing reasons, as well as the reasons stated in MR. JUSTICE WHITTAKER'S opinion, we would reaffirm our holding in *Commissioner* v. *Wilcox,* reverse this judgment and direct that the case be dismissed.

MR. JUSTICE CLARK, concurring in part and dissenting in part as to the opinion of THE CHIEF JUSTICE.

Although I join in the specific overruling of *Commissioner* v. *Wilcox,* 327 U. S. 404 (1946), in THE CHIEF JUSTICE'S opinion, I would affirm this conviction on either of two grounds. I believe that the Court not only devitalized *Wilcox,* by limiting it to its facts in *Rutkin* v. *United States,* 343 U. S. 130 (1952), but that in effect the Court overruled that case *sub silentio* in *Commissioner* v. *Glenshaw Glass Co.,* 348 U. S. 426 (1955). Even if that not be true, in my view the proof shows conclusively that petitioner, in willfully failing to correctly report his income, placed no bona fide reliance on *Wilcox.*

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins, concurring in part and dissenting in part as to the opinion of THE CHIEF JUSTICE.

I fully agree with so much of THE CHIEF JUSTICE'S opinion as dispatches *Wilcox* to a final demise. But as to the disposition of this case, I think that rather than an outright reversal, which his opinion proposes, the reversal should be for a new trial.

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[29] The subsequent history of the Rutkin-Reinfeld controversy can, in part, be read in *United States* v. *Rutkin,* 208 F. 2d 647, especially Judge Kalodner's dissenting opinion, at 655; *United States* v. *Rutkin,* 212 F. 2d 641, especially at 644; and *Rutkin* v. *Reinfeld,* 122 F. Supp. 265, reversed, 229 F. 2d 248.

I share the view that it would be inequitable to sustain this conviction when by virtue of the *Rutkin-Wilcox* dilemma it might reasonably have been thought by one in petitioner's position that no tax was due in respect of embezzled moneys. For as is pointed out, *Rutkin* did not expressly overrule *Wilcox,* but instead merely confined it "to its facts." Having now concluded that *Wilcox* was wrongly decided originally, the problem in this case thus becomes one of how to overrule *Wilcox* "in a manner that will not prejudice those who might have relied on it." *Ante,* p. 221.

It is argued, in reliance on *Spies* v. *United States,* 317 U. S. 492, and *Holland* v. *United States,* 348 U. S. 121, that so long as *Wilcox* remained on the books the element of "willfulness" required in prosecutions of this kind [1] "could not be proven," and hence, that the conviction of this petitioner fails without more. This would mean, I take it, that no future prosecution or past conviction involving tax derelictions of this nature, occurring during the *Wilcox* period, may be brought or allowed to stand. I cannot agree to such a disposition, which, in my view, is warranted by neither principle nor authority and would carry mischievous implications for the future.

The *Spies* and *Holland* cases, which are said to support outright reversal, stand for no more than that where, as here, a criminal tax statute makes "willfulness" an element of the offense, the Government must prove an "evil motive and want of justification in view of all the financial circumstances" on the part of the defendant, in failing to do what was required of him. While I agree that in the present case this made germane on the issue of willfulness the petitioner's reliance or nonreliance on the

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[1] The relevant statutes are set forth in footnotes 1–2, 4–5 of THE CHIEF JUSTICE'S opinion. *Ante,* pp. 214–215.

continued vitality of the *Wilcox* doctrine,[2] I can find nothing in *Spies* or *Holland* which justifies the view that the mere existence of *Wilcox* suffices alone to vitiate petitioner's conviction *as a matter of law.* If, as appears to have been the case, there was erroneous failure to take that factor into account at the trial on the issue of willfulness, the most that should happen is that petitioner should be given a new trial. This indeed is what *Spies* and *Holland* affirmatively indicate as the right solution of the problem this case presents. In *Spies,* it was said (at pp. 499–500):

> ". . . By way of illustration, and not by way of limitation, we would think affirmative willful attempt may be inferred from conduct such as keeping a double set of books, making false entries or alterations, or false invoices or documents, destruction of books or records, concealment of assets or covering up sources of income, handling of one's affairs to avoid making the records usual in transactions of the kind, and any conduct, the likely effect of which would be to mislead or to conceal. If the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime.
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> "In this case there are several items of evidence apart from the default in filing the return and paying the tax which the Government claims will support an inference of willful attempt to evade or

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[2] Compare American Law Institute, Model Penal Code, tentative draft No. 4, § 2.04:

"(1) Ignorance or mistake as to a matter of fact or law is a defense if:

"(a) the ignorance or mistake negatives the purpose, knowledge, belief, recklessness or negligence required to establish a material element of the offense . . . ."

> defeat the tax. These go to establish that petitioner insisted that certain income be paid to him in cash, transferred it to his own bank by armored car, deposited it, not in his own name but in the names of others of his family, and kept inadequate and misleading records. Petitioner claims other motives animated him in these matters. We intimate no opinion. Such inferences are for the jury. If on proper submission the jury found these acts, taken togther with willful failure to file a return and willful failure to pay the tax, to constitute a willful attempt to evade or defeat the tax, we would consider conviction of a felony sustainable." To the same effect, see *Holland, supra,* at p. 139.

In the case at hand, the evidence of devious financial arrangements might well support the inference that petitioner's purpose was not only to commit the embezzlement but also to secrete and immunize his gains from what he considered to be his tax liabilities in respect of those gains. The District Court, as the trier of the facts (there having been no jury), found that petitioner's acts were "willful and were done in a knowing and conscious attempt to evade and defeat" his tax obligations. But since it does not appear that petitioner's possible reliance on the *Wilcox* doctrine was considered below, *Spies* and *Holland* make it appropriate for us to send the case back for a new trial. They do not support foreclosing the Government from even undertaking to prove that the petitioner's conduct was "willful" in this respect.

An outright reversal is equally unsound on principle. I take it that our decisions in the tax and any other field for that matter *relate back* to the actual transactions with which they are concerned, and that that is only the normal concomitant of the fact that we do not sit as an administrative agency making rulings for the future, but rather adjudicate actual controversies as

to rights and liabilities under the laws of the United States. There can be, I think, two justifications for barring a prosecution of this petitioner in the unusual circumstances presented here: (1) that by reason of *Rutkin* having formally left intact the *Wilcox* doctrine, petitioner did not have due warning of his possible criminal liability; and (2) that the Court, in making new "law" in *Rutkin,* should, like the legislature, not impose criminal liability *ex post facto.*

As to the first consideration, where the defendant is charged in a case like this with having "willfully" violated the law, I believe that both reason and authority require no more than that the trier of fact be instructed that it must take into account in determining the defendant's "evil motive and want of justification," *Spies* v. *United States,* 317 U. S., at 498, his possible reliance on *Wilcox,* which not until now has this Court explicitly stated was wrongly decided. As far as fairness to this petitioner is concerned, I do not see why that is not amply accorded by the disposition which *Spies* itself exemplifies. See p. 243, *supra.* On the other hand, if the trier of fact, properly instructed, finds that the petitioner did not act in bona fide reliance on *Wilcox,* but deliberately refused to report income and pay taxes thereon knowing of his obligation to do so and not relying on any exception in the circumstances, I do not see why even the strictest definition of the element of "willfulness" would not have been satisfied. Willfulness goes to motive, and the quality of a particular defendant's motive would not seem to be affected by the fact that another taxpayer similarly situated had a different motive.

An altogether analogous situation was presented in *United States* v. *Murdock,* 290 U. S. 389. In that case the respondent had been convicted of willfully failing to supply information to the Bureau of Internal Revenue in that he relied on the possibility of state prosecution as

justifying his invoking the federal privilege against self-incrimination. The Court said in that case:

> ". . . He whose conduct is defined as criminal is one who '*willfully*' fails to pay the tax, to make a return, to keep the required records, or to supply the needed information. Congress did not intend that a person, by reason of a bona fide misunderstanding as to his liability for the tax, . . . should become a criminal by his mere failure to measure up to the prescribed standard of conduct. . . .
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> "It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief. Not until this Court pronounced judgment in *United States* v. *Murdock,* 284 U. S. 141, had it been definitely settled that one under examination in a federal tribunal could not refuse to answer on account of probable incrimination under state law. The question was involved, but not decided, in *Ballman* v. *Fagin,* 200 U. S. 186, 195, and specifically reserved in *Vajtauer* v. *Comm'r of Immigration,* 273 U. S. 103, 113. The trial court could not, therefore, properly tell the jury the defendant's assertion of the privilege was so unreasonable and ill founded as to exhibit bad faith and establish willful wrongdoing. This was the effect of the instructions given. We think the Circuit Court of Appeals correctly upheld *the respondent's right to have the question of absence of evil motive submitted to the jury . . . .*" (Emphasis supplied.)

It would seem that precisely the same disposition is in order in this case. Nor do I think that distinctions in terms of the nature of the defendant's legal misapprehension, its degree, its justifiability, or its source are either warranted or would be manageable as a basis for deciding future cases.

Coming now to the other possible rationale for barring the prosecution of this petitioner, it might be argued that petitioner at the time he failed to make his return was not under any misapprehension as to the law, but indeed that at the time and under the decisions of this Court his view of the law was entirely correct. The argument not only seems to beg the question, but raises further questions as to the civil liability of one situated in the circumstances of this petitioner. Petitioner's obligation here derived not from the decisions of this or any other court, but from the Act of Congress imposing the tax. It is hard to see what further point is being made, once it is conceded that petitioner, if he was misled by the decisions of this Court, is entitled to plead in defense that misconception. Only in the most metaphorical sense has the law changed: the decisions of this Court have changed, and the decisions of a court interpreting the acts of a legislature have never been subject to the same limitations which are imposed on legislatures themselves, United States Constitution, Art. I, §§ 9, 10, forbidding them to make any *ex post facto* law [3] and in the case of States to impair the obli-

[3] Aside from problems of warning and specific intent, the policy of the prohibition against *ex post facto* legislation would seem to rest on the apprehension that the legislature, in imposing penalties on past conduct, even though the conduct could properly have been made criminal and even though the defendant who engaged in that conduct in the past believed he was doing wrong (as for instance when the penalty is increased retroactively on an existing crime), may be acting with a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons. That this policy is inapplicable to decisions of the courts seems obvious: their opportunity for discrimination is more limited than the legislature's, in that they can only act in construing existing law in actual litigation. Given the divergent pulls of flexibility and precedent in our case law system, it is disquieting to think what perplexities and what subtleties of distinction would be created in applying this policy, which so properly limits legislative action, to the decisions of the courts.

gation of a contract. *Ross* v. *Oregon,* 227 U. S. 150; *New Orleans Waterworks Co.* v. *Louisiana Sugar Refining Co.,* 125 U. S. 18.

The proper disposition of this case, in my view, is to treat as plain error, Fed. Rules Crim. Proc. 52 (b), the failure of the trial court as trier of fact to consider whatever misapprehension may have existed in the mind of the petitioner as to the applicable law, in determining whether the Government had proved that petitioner's conduct had been willful as required by the statute. On that basis I would send the case back for a new trial.

MR. JUSTICE WHITTAKER, whom MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS join, concurring in part and dissenting in part.

The starting point of any inquiry as to what constitutes taxable income must be the Sixteenth Amendment, which grants Congress the power "to lay and collect taxes on incomes, from whatever source derived . . . ." It has long been settled that Congress' broad statutory definitions of taxable income were intended "to use the full measure of [the Sixteenth Amendment's] taxing power." *Helvering* v. *Clifford,* 309 U. S. 331, 334; *Douglas* v. *Willcuts,* 296 U. S. 1, 9. Equally well settled is the principle that the Sixteenth Amendment "is to be taken as written and is not to be extended beyond the meaning clearly indicated by the language used." *Edwards* v. *Cuba R. Co.,* 268 U. S. 628, 631.[1] The language of the Sixteenth Amendment, as well as our prior controlling decisions,

[1] "A proper regard for its genesis, as well as its very clear language, requires also that [the Sixteenth] Amendment shall not be extended by loose construction . . . . Congress cannot by any definition [of income] it may adopt conclude the matter, since it cannot by legislation alter the Constitution, from which alone it derives its power to legislate, and within whose limitations alone that power can be lawfully exercised." *Eisner* v. *Macomber,* 252 U. S. 189, 206.

compels me to conclude that the question now before us—whether an embezzler receives taxable income at the time of his unlawful taking—must be answered negatively. Since the prevailing opinion reaches an opposite conclusion, I must respectfully dissent from that holding, although I concur in the Court's judgment reversing petitioner's conviction. I am convinced that *Commissioner* v. *Wilcox,* 327 U. S. 404, which is today overruled, was correctly decided on the basis of every controlling principle used in defining taxable income since the Sixteenth Amendment's adoption.

THE CHIEF JUSTICE'S opinion, although it correctly recites *Wilcox's* holding that "embezzled money does not constitute taxable income to the embezzler *in the year of the embezzlement*" (emphasis added), fails to explain or to answer the true basis of that holding. *Wilcox* did not hold that embezzled funds may never constitute taxable income to the embezzler. To the contrary, it expressly recognized that an embezzler may realize a taxable gain to the full extent of the amount taken, if and when it ever becomes *his.* The applicable test of taxable income, *i. e.,* the "presence of a claim of right to the alleged gain," of which *Wilcox* spoke, was but a correlative statement of the factor upon which the decision placed its whole emphasis throughout, namely, the "absence of a definite, unconditional obligation to repay or return [the money]." 327 U. S., at 408. In holding that this test was not met at the time of the embezzlement, the *Wilcox* opinion repeatedly stressed that the embezzler had no "bona fide legal or equitable claim" to the embezzled funds, *ibid.;* that the victim never "condoned or forgave the taking of the money and still holds him liable to restore it," *id.,* at 406; and that the "debtor-creditor relationship was definite and unconditional." *Id.,* at 409. These statements all express the same basic fact—the fact which is emphasized most strongly in the opinion's conclusion explaining

why the embezzler had not yet received taxable income: "Sanctioning a tax under the circumstances before us would serve only to give the United States an unjustified preference as to part of the money which *rightfully and completely belongs to the taxpayer's employer.*" *Id.*, at 410. (Emphasis added.)

However, *Wilcox* plainly stated that "if the unconditional indebtedness is cancelled or retired, taxable income may adhere, under certain circumstances, to the taxpayer." 327 U. S., at 408. More specifically, it recognized that had the embezzler's victim "condoned or forgiven any part of the [indebtedness], the [embezzler] might have been subject to tax liability to that extent," *id.*, at 410, *i. e.*, in the tax year of such forgiveness.

These statements reflect an understanding of, and regard for, substantive tax law concepts solidly entrenched in our prior decisions. Since our landmark case of *United States* v. *Kirby Lumber Co.*, 284 U. S. 1, it has been settled that, upon a discharge of indebtedness by an event other than full repayment, the debtor realizes a taxable gain in the year of discharge to the extent of the indebtedness thus extinguished. Such gains are commonly referred to as ones realized through "bargain cancellations" of indebtedness, and it was in this area, and indeed, in *Kirby Lumber Co.* itself, that the "accession" theory or "economic gain" concept of taxable income, upon which THE CHIEF JUSTICE'S opinion today mistakenly relies, found its genesis. In that case, the taxpayer, a corporation, had reduced a portion of its debt, with a corresponding gain in assets, by purchasing its bonds in the open market at considerably less than their issue price. Mr. Justice Holmes, who wrote the Court's opinion, found it unnecessary to state the elementary principle that, so long as the bonds remained a fully enforceable debt obligation of the taxpayer, there could be no taxable gain. However, when the taxpayer retired the debt by purchasing

the bonds for less than their face value, it "made a clear [taxable] gain" and "realized within the year an accession to income" in the amount of its bargain. 284 U. S., at 3.

This doctrine has since been reaffirmed and strengthened by us, see, *e. g., Helvering* v. *American Chicle Co.,* 291 U. S. 426; *Commissioner* v. *Jacobson,* 336 U. S. 28, and by the lower federal courts in numerous decisions involving a variety of "bargain cancellations" of indebtedness, as by a creditor's release condoning or forgiving the indebtedness in whole or in part,[2] or by the running of a Statute of Limitations barring the legal enforceability of the obligation.[3] In none of these cases has it been suggested that a taxable gain might be realized by the debtor at any time *prior* to the effective date of discharge, and as *Wilcox* recognized, there is no rational basis on which to justify such a rule where the debt arises through embezzlement.

An embezzler, like a common thief, acquires not a semblance of right, title, or interest in his plunder, and whether he spends it or not, he is indebted to his victim in the full amount taken as surely as if he had left a signed promissory note at the scene of the crime. Of no consequence from any standpoint is the absence of such formalities as (in the words of the prevailing opinion) "the consensual recognition, express or implied, of an obligation to repay." The law readily implies whatever "consensual recognition" is needed for the rightful owner to assert an immediately ripe and enforceable obligation of

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[2] See, *e. g., Spear Box Co.* v. *Commissioner,* 182 F. 2d 844 (C. A. 2d Cir.); *Helvering* v. *Jane Holding Corp.,* 109 F. 2d 933 (C. A. 8th Cir.); *Pacific Magnesium, Inc.,* v. *Westover,* 86 F. Supp. 644 (D. C. S. D. Cal.).

[3] See, *e. g., Schweppe* v. *Commissioner,* 168 F. 2d 284 (C. A. 9th Cir.); *North American Coal Corp.* v. *Commissioner,* 97 F. 2d 325 (C. A. 6th Cir.); *Securities Co.* v. *United States,* 85 F. Supp. 532 (D. C. S. D. N. Y.).

repayment against the wrongful taker. These principles are not "attenuated subtleties" but are among the clearest and most easily applied rules of our law. They exist to protect the rights of the innocent victim, and we should accord them full recognition and respect.

The fact that an embezzler's victim may have less chance of success than other creditors in seeking repayment from his debtor is not a valid reason for us further to diminish his prospects by adopting a rule that would allow the Commissioner of Internal Revenue to assert and enforce a prior federal tax lien against that which "rightfully and completely belongs" to the victim. *Commissioner* v. *Wilcox, supra,* at 410. THE CHIEF JUSTICE'S opinion quite understandably expresses much concern for "honest taxpayers," but it attempts neither to deny nor justify the manifest injury that its holding will inflict on those honest taxpayers, victimized by embezzlers, who will find their claims for recovery subordinated to federal tax liens. Statutory provisions, by which we are bound, clearly and unequivocally accord priority to federal tax liens over the claims of others, including "judgment creditors." [4]

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[4] 26 U. S. C. §§ 6321–6323, 6331; Bankruptcy Act, § 64 (a), 11 U. S. C. § 104 (a). Moreover, R. S. § 3466 (1875), now codified in 31 U. S. C. § 191, pertaining to state insolvency proceedings against debtors, commands that "the debts due to the United States shall be first satisfied." We long ago established that the term "debts" in this statute includes delinquent federal taxes. *Price* v. *United States,* 269 U. S. 492, 499–500. And even though the tax claim of the Government may be only a general lien, with notice thereof not yet filed in the proper local office pursuant to 26 U. S. C. § 6323, we have held that it must be accorded priority over the claims of all prior general lienholders, under R. S. § 3466, 31 U. S. C. § 191. *United States* v. *City of New Britain,* 347 U. S. 81, 84–85; *United States* v. *Gilbert Associates,* 345 U. S. 361, 366; *United States* v. *Texas,* 314 U. S. 480, 488. See Mertens, Law of Federal Income Taxation, § 12.103, note 67; *id.,* §§ 54.10–54.56.

However, if it later happens that the debtor-creditor relationship between the embezzler and his victim is discharged by something other than full repayment, such as by the running of a Statute of Limitations against the victim's claim, or by a release given for less than the full amount owed, the embezzler at that time, but not before, will have made a clear taxable gain and realized "an accession to income" which he will be required under full penalty of the law to report in his federal income tax return for that year. No honest taxpayer could be harmed by this rule.

The inherent soundness of this rule could not be more clearly demonstrated than as applied to the facts of the case before us. Petitioner, a labor union official, concededly embezzled sums totaling more than $738,000 from the union's funds, over a period extending from 1951 to 1954. When the shortages were discovered in 1956, the union at once filed civil actions against petitioner to compel repayment. For reasons which need not be detailed here, petitioner effected a settlement agreement with the union on July 30, 1958, whereby, in exchange for releases fully discharging his indebtedness, he repaid to the union the sum of $13,568.50. Accordingly, at least so far as the present record discloses, petitioner clearly realized a taxable gain in the year the releases were executed, to the extent of the difference between the amount taken and the sum restored. However, the Government brought the present action against him, not for his failure to report this gain in his 1958 return, but for his failure to report that he had incurred "income" from—actually indebtedness to—the union in each of the years 1951 through 1954. It is true that the Government brought a criminal evasion prosecution rather than a civil deficiency proceeding against petitioner, but this can in no way alter the substantive tax law rules which alone are determinative of liability in either case.

There can be no doubt that until the releases were executed in 1958, petitioner and the union stood in an absolute and unconditional debtor-creditor relationship, and, under all of our relevant decisions, no taxable event could have occurred until the indebtedness was discharged for less than full repayment. Application of the normal rule in such cases will not hinder the efficient and orderly administration of the tax laws, any more than it does in other situations involving "bargain cancellations" of indebtedness. More importantly, it will enhance the creditor's position by assuring that prior federal tax liens will not attach to the subject of the debt when he seeks to recover it.

Notwithstanding all of this, THE CHIEF JUSTICE'S opinion concludes that there is no difference between embezzled funds and "gains" from other "illegal sources," and it points to the fact that Congress, in its 1916 revision of the Income Tax Act, omitted the word "lawful" in describing businesses whose income was to be taxed. The opinion then cites *United States* v. *Sullivan,* 274 U. S. 259, in which it was held that, under the revised statute, gains from illicit traffic in liquor must be reported in gross income, since there is no "reason why the fact that a business is unlawful should exempt it from paying the taxes that *if lawful* it would have to pay." *Id.,* at 263. (Emphasis added.) That theory has been the primary basis for taxing "unlawful gains of many kinds" which the prevailing opinion today recites, such as black market profits, gambling proceeds, money derived from the sale of unlawful insurance policies, etc.[5] For, even *if lawful,* the gains from such activities would clearly

[5] See cases cited in *Rutkin* v. *United States,* 343 U. S. 130, 137, note 8. See also *United States* v. *Bruswitz,* 219 F. 2d 59 (C. A. 2d Cir.); *Steinberg* v. *United States,* 14 F. 2d 564 (C. A. 2d Cir.); *Barker* v. *United States,* 88 Ct. Cl. 468, 26 F. Supp. 1004; *Silberman* v. *Commissioner,* 44 B. T. A. 600.

not be exempted from taxation. However, as applied to embezzled funds, the holding in *Sullivan* contradicts, rather than supports, the Court's conclusion today. Obviously, embezzlement could never become "lawful" and still retain its character. If "lawful," it would constitute nothing more than a loan, or possibly a gift, to the "embezzler," neither of which would produce a taxable gain to him.

There is still another obvious and important distinction between embezzlement and the varieties of illegal activity listed by the prevailing opinion—one which clearly calls for a different tax treatment. Black marketeering, gambling, bribery, graft and like activities generally give rise to no legally enforceable right of restitution—to no debtor-creditor relationship which the law will recognize.[6] Condemned either by statute or public policy, or both, such transactions are void *ab initio*. Since any consideration which may have passed is not legally recoverable, its recipient has realized a taxable gain, an "accession to income," as clearly as if his "indebtedness" had been discharged by a full release or by the running of a Statute of Limitations. As we have already shown at length, quite the opposite is true when an embezzlement occurs; for then the victim acquires an immediately ripe and enforceable claim to repayment, and the embezzler assumes a legal debt equal to his acquisition.

To reach the result that it does today, THE CHIEF JUSTICE's opinion constructs the following theory for defining taxable income:

> "When a taxpayer acquires earnings, lawfully or unlawfully, without the consensual recognition,

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[6] Restatement, Contracts, § 598; 6 Corbin, Contracts, §§ 1373 *et seq.* (1951). That the rule applies even as to "unlawful insurance policies" is undoubted. Patterson, Essentials of Insurance Law (2d ed. 1957), § 43, at 186.

express or implied, of an obligation to repay and without restriction as to their disposition, 'he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent.' *North American Oil* v. *Burnet, supra,* at p. 424. In such case, the taxpayer has 'actual command over the property taxed—the actual benefit for which the tax is paid,' *Corliss* v. *Bowers, supra.* This standard brings wrongful appropriations within the broad sweep of 'gross income'; it excludes loans. When a law-abiding taxpayer mistakenly receives income in one year, which receipt is assailed and found to be invalid in a subsequent year, the taxpayer must nonetheless report the amount as 'gross income' in the year received. *United States* v. *Lewis, supra; Healy* v. *Commissioner, supra.*"

This novel formula finds no support in our prior decisions, least of all in those which are cited. *Corliss* v. *Bowers,* 281 U. S. 376, involved nothing more than an *inter vivos* trust created by the taxpayer to pay the income to his wife. Since he had reserved the power to alter or abolish the trust at will, its income was taxable to him under the express provisions of § 219 (g), (h) of the Revenue Act of 1924. *North American Oil* v. *Burnet,* 286 U. S. 417, is the case which introduced the principle since used to facilitate uniformity and certainty in annual tax accounting procedure, *i. e.,* that a taxpayer must report in gross income, in the year in which received, money or property acquired under a "claim of right"—a colorable claim of the right to *exclusive possession* of the money or property. Thus, in its complete form, the sentence in *North American Oil* from which the above-quoted fragment was extracted reads: "If a taxpayer receives *earnings under a claim of right* and without

restriction as to its [*sic*] disposition, he has received income which he is required to return, even though it may still be claimed that he is not entitled to retain the money, and even though he may still be adjudged liable to restore its equivalent." *Id.*, at 424. (Emphasis added.) But embezzled funds, like stolen property generally, are not "earnings" in any sense and are held without a vestige of a colorable claim of right; they constitute the principal of a debt. Of no significance whatever is the formality of "consensual recognition, express or implied" of an obligation to repay. By substituting this meaningless abstraction in place of the omitted portion of the *North American Oil* test of *when* a receipt constitutes taxable income, the prevailing opinion today goes far beyond overruling *Wilcox*—it reduces a substantial body of tax law into uncertainty and confusion. The above-cited case of *United States* v. *Lewis,* 340 U. S. 590, decided 19 years after *North American Oil,* demonstrates the truth of this. For there we said:

> "The 'claim of right' interpretation of the tax laws has long been used to give finality to [the accounting] period, and is now deeply rooted in the federal tax system. . . . We see no reason why the Court should depart from this well-settled interpretation merely because it results in an advantage or disadvantage to a taxpayer." 340 U. S., at 592.

The same principle was reiterated and applied in *Healy* v. *Commissioner,* 345 U. S. 278.

The supposed conflict between *Wilcox* and *Rutkin,* upon which THE CHIEF JUSTICE's opinion seeks to justify its repudiation of *Wilcox,*[7] has been adequately treated in

[7] I cannot agree with THE CHIEF JUSTICE's assertion that *Wilcox* has been "thoroughly devitalized" by *Rutkin.* See, *e. g.*, the recent case of *United States* v. *Peelle,* 159 F. Supp. 45 (D. C. E. D. N. Y., 1958). There the Government sought to enforce liens for federal income taxes claimed to be due on items of "income" aggregating

the opinion of MR. JUSTICE BLACK, and I agree with him that those cases were fully intended to be, and are, reconcilable, both on their controlling facts and applicable law. If the unnecessarily broad language used in the *Rutkin* opinion has misled any of the lower federal courts in their understanding of the principles underlying *Wilcox,* we should clarify their understanding at this time, and continue our adherence to "a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience." *Helvering* v. *Hallock,* 309 U. S. 106, 119.

$678,461.22, which the taxpayer had embezzled from his corporate employer during the years 1945 through 1949. The items in question consisted of customers' payments intended for the corporation, and had been embezzled by the taxpayer and kept by him in secret bank accounts. In 1951 and 1952, he discharged his indebtedness by making full restitution of the embezzled funds to the corporation. The corporation, which used the accrual method of accounting, paid deficiencies which the Government determined in its 1945–1949 income tax returns, based on its accrued right to receive the embezzled customers' payments in those years. Not satisfied with this, the Government took the position that the payments were taxable *twice* during the same years—once to the corporation when it accrued the right to receive them, and again to the embezzler when he diverted them into the secret bank accounts. Had this effort at double taxation succeeded, the Government's combined tax claims would have been far in excess of the amount being taxed.

In rejecting the Government's argument that the embezzler received taxable income at the time of the embezzlements, the District Court relied wholly upon the decision which the Court today overrules, *Commissioner* v. *Wilcox, supra.*

Syllabus.

SLAGLE ET AL. *v.* OHIO.

APPEALS FROM THE SUPREME COURT OF OHIO.

No. 105. Argued February 27–28, 1961.—Decided May 15, 1961.

Appellants appeared pursuant to subpoenas before the Ohio Un-American Activities Commission, a joint state legislative committee, which was investigating subversive activities in Ohio. Each appellant was sworn and examined and each objected to most of the questions propounded on the ground that an answer would compel him to be a witness against himself in violation of the Ohio Constitution and of the Fifth Amendment to the Federal Constitution. In most instances, the Commission apparently sustained or acquiesced in their objections, and appellants were not directed to answer; but in a few instances some of them were directed to answer one or more questions but flatly refused to do so, although they had both constructive and actual knowledge of an Ohio statute which forbade the use of the testimony of a witness before a legislative committee in any criminal proceeding against him. For refusing to answer certain questions, appellants were tried for contempt in a state court under an Ohio statute and were convicted on some counts. Their convictions were sustained by an intermediate Court of Appeals; their appeals to the State Supreme Court were dismissed; and they appealed to this Court. *Held:*

1. Since appellants failed to show that any timely insistence was made in the state courts that the state statute, as applied, is repugnant to the Federal Constitution, treaties or laws, the appeals are dismissed; but, since various constitutional claims were made below and renewed in this Court and at least one of them raises questions of public importance, certiorari is granted. P. 264.

2. The judgments against two of the appellants are reversed and those against the other appellants are reversed as to certain counts and affirmed by an equally divided Court as to other counts. Pp. 264–268.

(a) On the record in this case, to hold that these witnesses willfully and contumaciously refused to answer the questions to which they objected but which they were not directed to answer would deprive them of due process in violation of the Fourteenth Amendment. Pp. 264–267.

(b) The Court is equally divided as to appellants' contentions that (1) because the Ohio immunity statute does not afford immunity from federal prosecution, they could not lawfully be compelled to answer questions over their Fifth-Amendment objections to them, (2) the questions which they refused to answer were not pertinent to the inquiry, and (3) the Commission's investigation was without legislative purpose. Pp. 267–268.

170 Ohio St. 216, 163 N. E. 2d 177, affirmed in part, by an equally divided Court, and reversed in part.

Thelma C. Furry argued the cause and filed a brief for appellants.

Norman J. Putman argued the cause and filed a brief for appellee.

Mr. Justice Whittaker delivered the opinion of the Court.

Pursuing its statutory powers and duties to investigate subversive activities in Ohio,[1] the Ohio Un-American

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[1] Ohio Rev. Code § 103.34 provides:

"POWERS AND DUTIES.

"The un-American activities commission shall:

"(A) Investigate, study, and analyze:

"(1) All facts relating to the activities of persons, groups, and organizations whose membership includes persons who have as their objective or may be suspected of having as their objective the overthrow or reform of our constitutional governments by fraud, force, violence, or other unlawful means;

"(2) All facts concerning persons, groups, and organizations, known to be or suspected of being dominated by or giving allegiance to a foreign power or whose activities might adversely affect the contribution of this state to the national defense, the safety and security of this state, the functioning of any agency of the state or national government, or the industrial potential of this state;

"(3) The operation and effect of the laws of this state, of the several other states, and of the United States, which purport to outlaw and control the activities enumerated in this section and

Activities Commission scheduled a hearing to commence at the Stark County Courthouse on the morning of October 21, 1953, and subpoenaed these five appellants to appear and testify before it at that time and place. Each appeared with counsel, was sworn and examined. Though having both constructive and actual knowledge of Ohio's immunity statute,[2] each objected to most of the questions propounded [3] on the ground that an answer would compel him to be a witness against himself, in violation of the Ohio Constitution and of the Fifth Amendment to the United States Constitution.[4] Appellants were

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to recommend such additional legislation or revision of existing laws as may seem advisable and necessary;

"(B) Maintain a liaison with any agency of the federal, state, or local governments in devising and promoting means of disclosing those persons and groups who seek to alter or destroy the government of this state or of the United States by force, violence, intimidation, sabotage, or threats of the same.

"The commission has such additional right, duties, and powers as are necessary to enable it fully to exercise those specifically set forth in this section and to accomplish its lawful objectives and purposes."

[2] Ohio Rev. Code § 101.44 provides:

"Except a person who, in writing, requests permission to appear before a committee or subcommittee of the general assembly, or of either house thereof, or who, in writing, waives the rights, privileges, and immunities granted by this section, the testimony of a witness examined before a committee or subcommittee shall not be used as evidence in a criminal proceeding against such witness, nor shall a person be prosecuted or subjected to a penalty or forfeiture on account of a transaction, matter, or thing, concerning which he testifies, or produces evidence. This section does not exempt a witness from the penalties for perjury."

[3] Except for a few preliminary questions, each appellant objected to and declined to answer most of the questions propounded—Slagle, 97 of the next 129 questions; Bohus, 97 of the next 99 questions; Perry, 110 of the next 118 questions; Cooper, 76 of the next 103 questions; and Mladajan, 88 of the next 123 questions.

[4] In addition to various state grounds, each appellant based his objections to the questions on the Fifth Amendment, but Slagle also

not, in most instances, directed to answer, but in a few instances some of them (Perry, Cooper and Mladajan) were directed to answer the question, yet flatly refused to do so.[5]

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invoked the First and Fourteenth Amendments, Perry also invoked the First, Fourth, Ninth and Fourteenth Amendments, and appellant Cooper also invoked the Fourth and Ninth Amendments, to the United States Constitution.

[5] Appellant Slagle, too, was directed by the chairman to answer one question, but he thereupon answered it. He was not directed to answer any other question.

Appellant Bohus was not directed to answer any of the questions.

Appellant Perry was directed by the chairman to answer the question, "What is your husband's name?" but refused to answer and that refusal was made the subject of Count 1 of the indictment against her. She was also directed to answer the question, "What are your parents' names?" but refused to answer and that refusal was made the subject of Count 2 of the indictment. However, the trial court acquitted her on that count on the ground that the question was immaterial. She was not directed to answer any other question.

Appellant Cooper was directed to answer the following questions:

"Where did you reside prior to September, 1948?" (Count 1.)

"What was your name at the time you were born; what was the name given you on baptism?" (Count 2.)

"Did you ever live in the City of St. Louis, Missouri?" (Count 5.)

"What is your husband's name, Mrs. Cooper?" (Count 6.)

But she nevertheless refused to answer in each instance and those refusals were made the subjects of Counts 1, 2, 5 and 6, respectively, of the indictment against her. Although she refused, when directed, to answer another question, she was not indicted for that refusal. She was not directed to answer the questions on which Counts 3, 4, 7, 8, 9 and 10 of the indictment were based.

Appellant Mladajan was directed to answer the question, "Mrs. Mladajan, have you ever been in meetings at the Croatian Hall at any time except in your capacity as an employee?" but she refused to answer and that refusal was made the subject of Count 6 of the indictment against her. She was not directed to answer any other question.

Acting pursuant to Ohio Rev. Code § 103.35,[6] the members of the Commission who sat at the hearing authorized the chairman to cause contempt proceedings to be initiated against appellants under Ohio Rev. Code §§ 2705.02 to 2705.09,[7] and on December 24, 1953, each appellant was separately indicted in the court of common pleas of Stark County on 10 counts—each count charging willful failure, in violation of § 2705.02, to answer a question propounded by the Commission. Upon a joint trial to the court, each appellant was convicted and sentenced on some of the counts.[8] On consolidated appeals, the

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[6] Ohio Rev. Code § 103.35 provides, in relevant part, that "[i]n case of . . . the refusal of any person . . . to testify to any matters regarding which he may be lawfully interrogated . . . the chairman may be authorized by a majority of the members sitting at the time the alleged offense is committed, to cause a proceeding for contempt to be filed and prosecuted in the court of common pleas of any county under sections 2705.03 to 2705.09, inclusive, of the Revised Code. . . ."

[7] Ohio Rev. Code § 2705.02 provides, in pertinent part:

"A person guilty of any of the following acts may be punished as for a contempt:

. . . . . .

"(C) A failure . . . to answer as a witness, when lawfully required."

Ohio Rev. Code § 2705.05 provides:

"Upon the day fixed for the trial in a contempt proceeding the court shall investigate the charge, and hear any answer or testimony which the accused makes or offers.

"The court shall then determine whether the accused is guilty of the contempt charge. If it is found that he is guilty, he may be fined not more than five hundred dollars or imprisoned not more than ten days, or both."

[8] Appellant Slagle was convicted on Counts 3 to 10, inclusive; Bohus was convicted on Counts 1, 2, 3, 4, 5, 7, 8 and 9; Perry was convicted on Counts 1, 3, 4, 5, 7, 8 and 9; Cooper was convicted on Counts 1 to 9, inclusive; Mladajan was convicted on Counts 1 to 8, inclusive, and 10. Each was sentenced to imprisonment for 10 days

Stark County Court of Appeals affirmed,[9] the Supreme Court of Ohio, finding no debatable constitutional question presented, dismissed appellants' appeals to that court, 170 Ohio St. 216, 163 N. E. 2d 177, and, on appeals to this Court, we postponed further consideration of our jurisdiction to the hearing on the merits. 364 U. S. 811.

Appellants simply assert that we have jurisdiction over these appeals under 28 U. S. C. § 1257 (2). Despite the plain import of our postponing order, see Rule 16, par. 4, of this Court, they have entirely failed to show that any "timely insistence [was made] in the state courts that a state statute, as applied, is repugnant to the federal Constitution, treaties or laws." *Charleston Federal Savings & Loan Assn.* v. *Alderson,* 324 U. S. 182, 185. Accordingly, the appeals are dismissed. See *Raley* v. *Ohio,* 360 U. S. 423, 435. But since various federal constitutional claims were made below and are renewed here, 28 U. S. C. § 1257 (3), we consider the appeal papers as petitions for certiorari and, in view of the public importance of at least one of the questions presented, grant certiorari, 28 U. S. C. § 2103.

Appellants' principal contention here is that the judgments, finding them guilty of willful refusal to answer the Commission's questions although the Commission did not overrule their timely objections to the questions nor direct that they be answered, but appeared to sustain, or at least to acquiesce in, those objections, deprive appellants of due process in violation of the Fourteenth Amendment. In the peculiar factual situation presented, and limited to the questions which they were not directed

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on each count—the sentences on all counts, in each instance, to run concurrently—and was fined $500 on each count, but the fines, other than the first one, were remitted in each instance.

[9] The opinion of the Stark County Court of Appeals is not reported.

to answer, we have concluded that appellants are right in this contention.

Surely traditional notions of fair play contemplate that a person summoned to testify before any adjudicatory or investigatory body, including a legislative investigatory committee, may object to any question put to him upon any available ground, however tenuous. And the Ohio Commission, several times and in many ways, clearly gave appellants to understand that such was their right at this hearing. Exercising that right, if not actually accepting the Commission's invitation, appellants, except for a few preliminary questions, objected to most of the questions put to them, principally on the ground of the Fifth Amendment (but see note 4). With important exceptions to be noted, instead of overruling the objection or in any way directing the witness to answer the question, the Commission gave every indication that it sustained, or at least acquiesced in, the objection by immediately passing on to the next question. That process was scores of times repeated.

But, and lending emphasis to its normal acquiescence in the objections, the Commission, at times, adopted another and very different procedure. When the Commission's counsel advised the Commission that he considered a particular question to be competent and important and asked that the witness be directed to answer it, the chairman, in each such instance, directed the witness to answer the question. And in every such instance care was taken, either by the Commission's counsel or its chairman, to have the record show that at least a quorum of the Commission were then present and sitting. In that manner, as more fully shown in note 5, Slagle was directed to answer one question, and thereupon promptly answered it, but he was not directed to answer any other question; Bohus was not directed to answer any ques-

tion; Perry was thus directed to answer the two questions that were made the subjects of Counts 1 and 2 of her indictment (she was acquitted on Count 2), but was not directed to answer the questions upon which the other eight counts of her indictment were based; Cooper was thus directed to answer the four questions that were made the subjects of Counts 1, 2, 5 and 6 of her indictment, but was not directed to answer the questions upon which the other six counts of her indictment were based; and Mladajan was thus directed to answer the question that was made the subject of Count 6 of her indictment, but was not directed to answer the questions upon which the other nine counts of her indictment were based.

No particular form of words is necessary either to sustain or overrule an objection and thus either to excuse or require an answer to the question. All that is necessary is that the hearing tribunal make plain its disposition of the objection and whether or not an answer to the question is expected and required. If, as frequently happens, after an objection has been made, the hearing officer, addressing the examiner, merely says, "Pass on to your next question," it would indeed be plain that he had, at least temporarily, sustained or acquiesced in the objection and was not requiring an answer to be given. That is almost precisely what happened here. Though, upon these objections being made, the Commission did not formally direct its counsel to pass on to his next question, either the counsel or some member of the Commission did in fact immediately pass on to the next question. Those objections must therefore be regarded as sustained or acquiesced in by the Commission. To hold that these witnesses, in these circumstances, willfully and contumaciously refused to answer those questions would deeply offend traditional notions of fair play and deprive them of due process.

That "a clear disposition of the witness' objection is a prerequisite to prosecution for contempt is supported by long-standing tradition here and in other English-speaking nations. In this country the tradition has been uniformly recognized in the procedure of both state and federal courts." *Quinn* v. *United States,* 349 U. S. 155, 167–168, and cases cited. See also *Emspak* v. *United States,* 349 U. S. 190, 202; *Bart* v. *United States,* 349 U. S. 219, 223. "Because of the [Commission's] consistent failure to advise [appellants] of [its] position as to [their] objections, [appellants were] left to speculate about the risk of possible prosecution for contempt; [they were] not given a clear choice between standing on [their] objection[s] and compliance with a committee ruling." *Bart* v. *United States, supra,* at 223.

In these circumstances, to hold that these witnesses willfully and contumaciously refused to answer the questions to which they objected but which they were not directed to answer would deprive them of due process in violation of the Fourteenth Amendment.

As to appellants' remaining contentions, including, (1) that because the Ohio immunity statute (see note 2) does not afford immunity from federal prosecution, they could not lawfully be compelled to answer questions over their Fifth Amendment objections to them, (2) that the questions which they refused to answer were not pertinent to the inquiry, and (3) that the Commission's investigation was without legislative purpose, the Court is equally divided.

It follows that the judgments against Slagle and Bohus must be reversed; that the judgment against Perry must be reversed as to Counts 3, 4, 5, 7, 8 and 9, and affirmed, by an equally divided Court, as to Count 1; that the judgment against Cooper must be reversed as to Counts 3, 4, 7, 8 and 9, and affirmed, by an equally divided Court,

as to Counts 1, 2, 5 and 6; and that the judgment against Mladajan must be reversed as to Counts 1, 2, 3, 4, 5, 7, 8 and 10, and affirmed, by an equally divided Court, as to Count 6.

Appeals dismissed and certiorari granted.

On writs of certiorari, judgments reversed as to Slagle and Bohus; judgments reversed in part and affirmed, by an equally divided Court, in part as to Perry, Cooper and Mladajan.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of these cases.

LUDWIG *v.* AMERICAN GREETINGS CORP.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

No. 811. Decided May 15, 1961.

Appeal dismissed.

Reported below: 282 F. 2d 917; — F. 2d —.

Ian Bruce Hart and *Harry N. Kandel* for appellant.

Robert W. Poore and *James T. Lynn* for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

ALATEX CONSTRUCTION SERVICE, INC., ET AL. *v.* CRAWFORD.

APPEAL FROM THE COURT OF APPEAL OF LOUISIANA, FOURTH CIRCUIT.

No. 825. Decided May 15, 1961.

Appeal dismissed and certiorari denied.

Reported below: 120 So. 2d 845, 854, 855.

Howard W. Lenfant for Community Finance Service, Inc., appellant.

Conrad Meyer III for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

HARMON *v.* HARMON.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 842. Decided May 15, 1961.

Appeal dismissed and certiorari denied.

Reported below: 184 Cal. App. 2d 245, 7 Cal. Rptr. 279.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

SCHAENGOLD *v.* CITY OF CINCINNATI.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 846. Decided May 15, 1961.

Appeal dismissed and certiorari denied.

Melvin Edward Schaengold, appellant, *pro se.*

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

BOND *v.* GREEN, CORRECTIONAL SUPERINTENDENT.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

No. 1, Misc. Decided May 15, 1961.

Motion for leave to file petition for habeas corpus denied; certiorari granted; judgment vacated and case remanded.

Reported below: See 174 F. Supp. 368.

Petitioner *pro se.*

Mark McElroy, Attorney General of Ohio, and *William M. Vance,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to file petition for writ of habeas corpus is denied. Treating the papers submitted as a petition for writ of certiorari to the Supreme Court of Ohio, certiorari is granted. The judgment is vacated and the case is remanded for further consideration in the light of *Smith* v. *Bennett,* and *Marshall* v. *Bennett,* 365 U. S. 708.

MR. JUSTICE STEWART took no part in the consideration or disposition of this case.

H. K. PORTER CO., INC., ET AL. *v.* CENTRAL VERMONT RAILWAY, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT.

No. 257. Argued April 20, 1961.—Decided May 22, 1961.*

Asbestos is carried by Canadian railroads from Southern Quebec to points just over the border in Vermont, whence it is carried by American railroads to other points in the United States. Canadian and American railroads have joint through rates on such shipments to consignees in the Northeastern States which are substantially lower than the combination of separate or local rates that are available to consignees in the Southern States. The Interstate Commerce Commission found that the higher combination rates to the Southern States were "unjust and unreasonable" in violation of § 1 (5) of the Interstate Commerce Act and "unduly prejudicial" to southern consignees and "unduly preferential" to northern consignees in violation of § 3 (1), and it issued a cease and desist order pertaining to the "transportation within the United States." *Held:* The Commission did not exceed its jurisdiction, and the District Court should have considered the order on its merits. Pp. 273–275.

182 F. Supp. 516, reversed.

Richard A. Solomon argued the cause for the United States in No. 266. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Bicks, Acting Assistant Attorney General Kirkpatrick* and *Charles H. Weston.*

Robert W. Ginnane argued the cause for appellant in No. 258. With him on the briefs was *H. Neil Garson.*

E. B. Ussery and *John D. Carbine* submitted the cause on briefs for appellants in No. 257.

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*Together with No. 258, *Interstate Commerce Commission* v. *Central Vermont Railway, Inc., et al.,* and No. 266, *United States* v. *Central Vermont Railway, Inc., et al.,* also on appeals from the same Court.

J. Edgar McDonald argued the cause for appellees. With him on the brief were *J. Raymond Hoover, William H. Parsons, Horace H. Powers, John F. Reilly* and *William F. Zearfaus.*

MR. JUSTICE BLACK delivered the opinion of the Court.

The Interstate Commerce Act confers broad powers upon the Interstate Commerce Commission to regulate railroad transportation in the United States or to or from a foreign country, "but only insofar as such transportation . . . takes place within the United States." [1] In this case, here on appeal under 28 U. S. C. §§ 1253 and 2101 (b), a three-judge District Court set aside a Commission order on the ground that the Commission was attempting to regulate railroad transportation in Canada in excess of the Commission's jurisdiction.[2]

The Province of Quebec, Canada, is a principal source of asbestos for manufacturers of asbestos products in this country. It is transported by Canadian railroads through southern Canada to points in Vermont three to five miles south of the border and carried from there by the various appellee railroads to other points in the United States. Canadian and American carriers have joined in the publication of joint through rates available to consignees in "official territory" in the Northeastern States,[3] which rates are substantially lower than the combination of separate or local rates that are published and available as combination through rates for consignees in the Southern States. On the basis of these and other facts the Commission found after hearings that the higher

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[1] 49 U. S. C. § 1 (1)(a) and § 1 (2).

[2] 182 F. Supp. 516.

[3] "Official territory" is in general that area of the United States lying east of the Mississippi River and north of the Potomac and Ohio Rivers. See Class Rate Investigation, 1939, 262 I. C. C. 447, 457.

combination rates to complainants in the South were: (a) "unjust and unreasonable" and therefore in violation of § 1 (5) of the Act,[4] and (b) "unduly prejudicial" to the southern consignees and "unduly preferential" to the northern consignees enjoying the lower joint rates, and therefore in violation of § 3 (1).[5] The Commission then entered its order directing the railroads to cease and desist from continuing to practice the undue prejudice and preference it had found and to establish, post and maintain rates and practices which would thereafter "prevent and avoid" such prejudice and preference.[6]

The District Court's holding that the Commission was without jurisdiction was based on its assumption that the Commission's order attempted to control the Canadian part of the transportation. But the order did not run against any transportation except that taking place "within the United States." The order directed the defendant railroads, "according as they participate in the transportation within the United States," to take action within their power to cease their participation in a transportation practice that the Commission had found to be prejudicial in violation of § 3 (1). The affected transportation within this country was that "from a foreign country" over which § 1 (1) (a) specifically gives the Commission jurisdiction, and the order did nothing more than direct railroads engaged in that transportation to adjust

[4] 49 U. S. C. § 1 (5).

[5] 49 U. S. C. § 3 (1).

[6] Since the challenged order prescribed no "reasonable rates" to be observed, we have no occasion to consider the contention that the Commission was without jurisdiction to prescribe such rates. Nor did the Commission enter any final order that a complainant is entitled to an award of damages because it had been charged unlawful rates. Such an order, when and if made, can be challenged before a single judge under 49 U. S. C. § 16 (2). See *United States* v. *I. C. C.*, 337 U. S. 426, 442–443; *Pennsylvania R. Co.* v. *United States*, 363 U. S. 202, 205.

their transportation practices "within the United States" in such a way as to eliminate illegal discriminations. These railroads operating within the United States undoubtedly have complete power to stop these discriminations. Mere withdrawal by the American railroads from the preferential joint through-rate agreements would be an obvious way to do so, and an alternative method would be to lower the combination through rates to southern territory by reduction of the rates from the Vermont interchange points to the South.

It has long been settled that the Commission's power to forbid unlawful rate discriminations is in no way diminished because the rates are published as joint through rates or combination through rates.[7] This power likewise is not lost merely because the particular transportation by railroads carrying goods in this country happens to be a continuation of carriage from another country. Otherwise the Commission's mandate to protect shippers against all undue discriminations would be frustrated with respect to rates that in part include payment for transportation that takes place in a foreign country.[8]

It was error to set aside the Commission's order for lack of jurisdiction, and therefore the District Court's judgment is

Reversed.

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[7] See *United States* v. *Illinois Central R. Co.*, 263 U. S. 515, 527.

[8] Cf. Commissioner Eastman's concurring opinion in *Cyanamid and Crude Cyanide from Niagara Falls, Ontario,* 155 I. C. C. 488, 501–502.

ELI LILLY & CO. *v.* SAV-ON-DRUGS, INC., ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 203. Argued March 20–21, 1961.—Decided May 22, 1961.

Appellant, an Indiana corporation, maintains an office in New Jersey on premises leased in the name of its district manager and occupied by him and a secretary, with appellant's name on the door and in the lobby and with the telephone listed in appellant's name. Appellant also has 18 other salaried employees travelling throughout the State and promoting the sale of its pharmaceutical products, not to wholesalers, who buy them interstate, but to hospitals, physicians and retail drugstores, who buy them intrastate from wholesalers and sell them intrastate to consumers. *Held:* On the record in this case, appellant is doing business intrastate in New Jersey, and a state statute requiring it to obtain a certificate of authority to do business there, as a condition precedent to maintaining in a state court a suit not based on a particular interstate sale, does not violate the Commerce Clause of the Federal Constitution. Pp. 276–284.

31 N. J. 591, 158 A. 2d 528, affirmed.

Everett I. Willis argued the cause for appellant. With him on the briefs were *Joseph H. Stamler* and *Melvin P. Antell.*

Samuel M. Lane argued the cause for Sav-On-Drugs, Inc., appellee. With him on the brief were *Vincent P. Biunno* and *Claus Motulsky.*

David M. Satz, Jr., First Assistant Attorney General of New Jersey, argued the cause for the State of New Jersey, Intervenor-Appellee. With him on the briefs were *David D. Furman,* Attorney General, and *Elias Abelson* and *Murry Brochin,* Deputy Attorneys General.

MR. JUSTICE BLACK delivered the opinion of the Court.

The appellant Eli Lilly and Company, an Indiana corporation dealing in pharmaceutical products, brought this action in a New Jersey state court to enjoin the

appellee Sav-On-Drugs, Inc., a New Jersey corporation, from selling Lilly's products in New Jersey at prices lower than those fixed in minimum retail price contracts into which Lilly had entered with a number of New Jersey drug retailers. Sav-On had itself signed no such contract but, under the New Jersey Fair Trade Act, prices so established become obligatory upon nonsigning retailers who have notice that the manufacturer has made these contracts with other retailers.[1] Sav-On moved to dismiss this complaint under a New Jersey statute that denies a foreign corporation transacting business in the State the right to bring any action in New Jersey upon any contract made there unless and until it files with the New Jersey Secretary of State a copy of its charter together with a limited amount of information about its operations [2] and obtains from him a certificate authorizing it to do business in the State.[3]

Lilly opposed the motion to dismiss, urging that its business in New Jersey was entirely in interstate commerce and arguing, upon that ground, that the attempt to require it to file the necessary information and obtain a certificate for its New Jersey business was forbidden by the Commerce Clause of the Federal Constitution. Both parties offered evidence to the Court in the nature of affidavits as to the extent and kind of business done by Lilly with New Jersey companies and people. On this

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[1] N. J. Rev. Stat. 56:4–6. The legality of such arrangements insofar as the antitrust laws are concerned was provided for by the McGuire Act, 66 Stat. 632, 15 U. S. C. § 45 (a).

[2] The information required is: (1) the amount of the corporation's authorized capital stock; (2) the amount of stock actually issued by the corporation; (3) the character of the business which the corporation intends to transact in New Jersey; (4) the principal office of the corporation in New Jersey; and (5) the name and place of abode of an agent upon whom process against the corporation may be served. N. J. Rev. Stat. 14:15–3.

[3] N. J. Rev. Stat. 14:15–4.

evidence, the trial court made findings of fact and granted Sav-On's motion to dismiss, stating as its ground that "the conclusion is inescapable that the plaintiff [Lilly] was in fact doing business in this State at the time of the acts complained of and was required to, but did not, comply with the provisions of the Corporation Act." [4] On appeal to the Supreme Court of New Jersey, this constitutional attack was renewed and the State Attorney General was permitted to intervene as a party-defendant to defend the validity of the statute. The State Supreme Court then affirmed the judgment upholding the statute, relying entirely upon the opinion of the trial court.[5] We noted probable jurisdiction to consider Lilly's contention that the constitutional question was improperly decided by the state courts.[6]

The record shows that the New Jersey trade in Lilly's pharmaceutical products is carried on through both interstate and intrastate channels. Lilly manufactures these products and sells them in interstate commerce to certain selected New Jersey wholesalers. These wholesalers then sell the products in intrastate commerce to New Jersey hospitals, physicians and retail drug stores, and these retail stores in turn sell them, again in intrastate commerce, to the general public. It is well established that New Jersey cannot require Lilly to get a certificate of authority to do business in the State if its participation in this trade is limited to its wholly interstate sales to New Jersey wholesalers.[7] Under the authority of the so-called "drummer" cases, such as *Robbins* v. *Shelby*

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[4] 57 N. J. Super. 291, 302, 154 A. 2d 650, 656.

[5] 31 N. J. 591, 158 A. 2d 528.

[6] 364 U. S. 860.

[7] See, *e. g.*, *Crutcher* v. *Kentucky*, 141 U. S. 47; *International Textbook Co.* v. *Pigg*, 217 U. S. 91; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197.

County Taxing District,[8] Lilly is free to send salesmen into New Jersey to promote this interstate trade without interference from regulations imposed by the State. On the other hand, it is equally well settled that if Lilly is engaged in intrastate as well as interstate aspects of the New Jersey drug business, the State can require it to get a certificate of authority to do business.[9] In such a situation, Lilly could not escape state regulation merely because it is also engaged in interstate commerce. We must then look to the record to determine whether Lilly is engaged in intrastate commerce in New Jersey.

The findings of the trial court, based as they are upon uncontroverted evidence presented to it, show clearly that Lilly is conducting an intrastate as well as an interstate business in New Jersey:

> "The facts are these: Plaintiff maintains an office at 60 Park Place, Newark, New Jersey. Its name is on the door and on the tenant registry in the lobby of the building. (The September 1959 issue of the Newark Telephone Directory lists the plaintiff, both in the regular section and in the classified section under 'Pharmaceutical Products,' as having an office at 60 Park Place, Newark.) The lessor of the space is plaintiff's employee, Leonard L. Audino, who is district manager in charge of its marketing division for the district known as Newark. Plaintiff is not a party to the lease, but it reimburses Audino 'for all expenses incidental to the maintenance and operation of said office.' There is a secretary in the office,

[8] 120 U. S. 489. The *Robbins* case has been followed in a long line of subsequent decisions by this Court. A partial list of these cases is set out in *Memphis Steam Laundry* v. *Stone,* 342 U. S. 389, 392–393, n. 7.

[9] See, *e. g., Railway Express Co.* v. *Virginia,* 282 U. S. 440. Cf. *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, especially at 211–212.

> who is paid directly by the plaintiff on a salary basis. There are 18 'detailmen' under the supervision of Audino. These detailmen are paid on a salary basis by the plaintiff, but receive no commissions. Many, if not all of them, reside in the State of New Jersey. Whether plaintiff pays unemployment or other taxes to the State of New Jersey is not stated. It is the function of the detailmen to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products. Plaintiff contends that their work is 'promotional and informational only.' On an occasion, these detailmen, 'as a service to the retailer,' may receive an order for plaintiff's products for transmittal to a wholesaler. They examine the stocks and inventory of retailers and make recommendations to them relating to the supplying and merchandising of plaintiff's products. They also make available to retail druggists, free of charge, advertising and promotional material. When defendant opened its store in Carteret, plaintiff offered to provide, and did provide, announcements for mailing to the medical profession, without cost to defendant. The same thing occurred when defendant opened its Plainfield store." [10]

We agree with the trial court that "[t]o hold under the facts above recited that plaintiff [Lilly] is not doing business in New Jersey is to completely ignore reality." [11] Eighteen "detailmen," working out of a big office in Newark, New Jersey, with Lilly's name on the door and in the lobby of the building, and with Lilly's district manager and secretary in charge, have been regularly engaged

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[10] 57 N. J. Super., at 298–299, 154 A. 2d, at 654.

[11] *Id.*, at 300, 154 A. 2d, at 655.

in work for Lilly which relates directly to the intrastate aspects of the sale of Lilly's products. These eighteen "detailmen" have been traveling throughout the State of New Jersey promoting the sales of Lilly's products, not to the wholesalers, Lilly's interstate customers, but to the physicians, hospitals and retailers who buy those products in intrastate commerce from the wholesalers. To this end, they have provided these hospitals, physicians and retailers with up-to-date knowledge of Lilly's products and with free advertising and promotional material designed to encourage the general public to make more intrastate purchases of Lilly's products. And they sometimes even directly participate in the intrastate sales themselves by transmitting orders from the hospitals, physicians and drugstores they service to the New Jersey wholesalers.

This Court had a somewhat similar problem before it in *Cheney Brothers Co.* v. *Massachusetts*.[12] In that case, the Northwestern Consolidated Milling Company of Minnesota had been conducting business in Massachusetts in a manner quite similar to that being used by Lilly in New Jersey—a number of wholesalers were buying Northwestern's flour in interstate commerce and selling it to retail stores in Massachusetts in intrastate commerce. Northwestern had in Massachusetts, in addition to any force of drummers it may have had to promote its interstate sales to the wholesalers, a group of salesmen who traveled the State promoting the sale of flour by Massachusetts wholesalers to Massachusetts retailers. These salesmen also solicited orders from the retail dealers and turned them over to the nearest Massachusetts wholesaler. Despite this substantial connection with the intrastate business in Massachusetts, Northwestern contended that its business was wholly in interstate commerce—a

[12] 246 U. S. 147.

contention that this Court disposed of summarily in the following words: "Of course this is a domestic business,—inducing one local merchant to buy a particular class of goods from another." [13]

Lilly attempts to distinguish the holding in the *Cheney* case on the ground that here its detailmen are not engaged in a systematic solicitation of orders from the retailers. It is true that the record in the *Cheney* case shows a more regular solicitation of orders than does the record here. But that difference is not enough to distinguish the cases. For the record shows that Lilly here, no less than Northwestern there, engages in a "domestic business,—inducing," as the Court said of Northwestern, "one local merchant to buy a particular class of goods from another." The fact that the business of "inducing" intrastate sales, as engaged in by Lilly, is primarily a promotional and service business which does not include a systematic solicitation of orders goes only to the nature of the intrastate business Lilly is carrying on, not to the question of whether it is carrying on an intrastate business.

Lilly also contends that even if it is engaged in intrastate commerce in New Jersey and can by virtue of that fact be required to get a license to do business in that State, New Jersey cannot properly deny it access to the courts in this case because the suit is one arising out of the interstate aspects of its business. In this regard, Lilly relies upon such cases as *International Textbook Co.* v. *Pigg*,[14] holding that a State cannot condition the right of a foreign corporation to sue upon a contract for the interstate sale of goods. We do not think that those cases are applicable here, however, for the present suit is not of that kind. Here, Lilly is suing upon a contract entirely

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[13] *Id.*, at 155.

[14] 217 U. S. 91. See also *Furst* v. *Brewster*, 282 U. S. 493; *Sioux Remedy Co.* v. *Cope*, 235 U. S. 197.

separable from any particular interstate sale and the power of the State is consequently not limited by cases involving such contracts.

What we have said would be enough to dispose of this case were it not for the contention that the question whether Lilly is engaged in intrastate commerce in New Jersey is not properly before us. This contention is based upon Lilly's interpretation of the decision of the New Jersey court as resting upon the assumption that Lilly has been engaged in interstate commerce only. We cannot accept that contention because, in the first place, it rests upon a completely erroneous interpretation of the New Jersey court's opinion. That court was called upon to decide whether appellant was "transacting business" in New Jersey within the meaning of the statute which requires the registration of foreign corporations. In deciding that question, the court relied upon the facts set out in the affidavits with regard to the various local activities of Lilly as summarized in the findings quoted above. The only reasonable inference from these findings is that the trial court interpreted the phrase "transacting business" in the New Jersey statute to mean transacting local intrastate business and concluded from the facts it found that Lilly was transacting such business. This conclusion is reinforced by a subsequent New Jersey opinion that distinguishes the decision in this case on precisely that ground.[15]

But even if the opinion of the court below should, as is urged, be interpreted as resting upon the mistaken belief that appellant could be required to register, even though it transacted no business whatever in New Jersey except interstate business, we think it would still be necessary to affirm the decision of that court on the record presently before us. That record clearly shows that Lilly

[15] *United States Time Corp.* v. *Grand Union Co.*, 64 N. J. Super. 39, especially at 45–46, 165 A. 2d 310, 313–314.

was, as a matter of fact, engaged in local intrastate business in New Jersey through the employees it kept there to induce retailers, physicians and hospitals to buy Lilly's products from New Jersey wholesalers in intrastate commerce. So even if the state court had rested its conclusions on an improper ground, this Court could not, in view of the undisputed facts establishing its validity, declare a solemn act of the State of New Jersey unconstitutional. The record clearly supports the judgment of the New Jersey Supreme Court and that judgment must therefore be and is

Affirmed.

MR. JUSTICE HARLAN, concurring.

On the premise that New Jersey cannot impede an out-of-state seller's access to the state market,[1] the difficult issue presented in this case is how much more than shipping its goods into New Jersey Lilly may do within the State without subjecting itself to the requirements and sanctions of New Jersey's licensing laws. In joining the Court's opinion, I think some further observations appropriate.

It is clear that sending "drummers" into New Jersey seeking customers to whom Lilly's goods may be sold and shipped, *Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, and suing in the state courts to enforce contracts for sales from an out-of-state store of goods,

[1] Because I am of the view that Eli Lilly has engaged in "local business" in New Jersey, there is no need now to consider whether a wholly interstate business enjoys the same degree of immunity from state licensing provisions when the state requirement is regulatory as it does when the state requirement is purely a tax measure. Compare *California* v. *Thompson,* 313 U. S. 109, and *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, with *Nippert* v. *Richmond,* 327 U. S. 416, and *Spector Motor Service, Inc.,* v. *O'Connor,* 340 U. S. 602; and see Powell, Vagaries and Varieties in Constitutional Interpretation, 172–176, 186–187.

International Textbook v. *Pigg*, 217 U. S. 91, are both so intimately connected with Lilly's right to access to the local market, free of local controls, that they cannot be separated off as "local business" even if they are conducted wholly within New Jersey. However, I do not think that the systematic promotion of Lilly's products among local retailers and consumers who, as Lilly conducts its affairs, can only purchase them from a New Jersey wholesaler bears the same close relationship to the necessities of keeping the channels of interstate commerce state-unburdened. I believe that New Jersey can treat as "local business" such promotional activities, which are pointed at and result initially in local sales by Lilly's customers, and not in direct sales from its own out-of-state store of goods.[2] Three factors, particularly, persuade me to that view.

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[2] There can be no doubt that the "promotional and informational" activities of Lilly in New Jersey were specifically aimed at securing retail and consumer trade for its local wholesalers. One of the two affidavits submitted by Lilly in opposition to the motion below states:

"The primary purpose of said employees [stationed in New Jersey] is to acquaint retail pharmacists, physicians, and hospitals with the products of Eli Lilly and Company so that the said retail pharmacists, physicians, and hospitals will order Lilly products from local wholesale distributors."

The other such affidavit states:

"It is the function of said detail men [Lilly employees stationed in New Jersey] only to visit retail pharmacists, physicians and hospitals and to acquaint same with the various products of Eli Lilly and Company, with a view to encouraging the purchase and use of said retail products by such institutions and professional men. The work of the detail men is promotional and informational only. They do not accept orders under any circumstances for the purchase of Eli Lilly and Company products. Products of Eli Lilly and Company are sold to retailers in the State of New Jersey by wholesale distributors. On occasion, detail men of Eli Lilly and Company may, as a service to the retailer, receive an order for Eli Lilly and Company products only for the purpose of transmitting same to the

First: A licensing requirement, as applied in this situation, does not deny Lilly a significant opportunity to reach New Jersey customers. Appellant remains free, and is constitutionally entitled to remain free, to solicit purchases directly by New Jersey retailers and consumers or, alternatively, to rely on its wholesalers to develop the New Jersey market. Thus, Lilly is not in the position of the manufacturer with whose protection Mr. Justice Bradley was concerned when, in *Robbins* v. *Shelby County, supra,* at 494, he asked: "How is a manufacturer, or a merchant, of one state, to sell his goods in another state, without, in some way, obtaining orders therefor? Must he be compelled to send them at a venture, without knowing whether there is any demand for them?"

Second: Were Lilly, for a distinct consideration, to enter into an arrangement with its New Jersey wholesalers to promote or solicit business within the State for their account, I would suppose it scarcely doubtful that such an endeavor would constitute a local incident subject to the State's licensing power, even though the ultimate purpose and effect of the arrangement itself were also to enhance Lilly's own interstate business. I do not see why New Jersey must treat differently Lilly's present activities, which in fact redound both to the wholesalers' benefit, by lessening the need for promotional effort and expense on their part, and to Lilly's profit, in the form of increased orders from wholesalers. See *Cheney Brothers* v. *Massachusetts,* 246 U. S. 147; [3] cf. *Norton Co.* v.

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wholesaler. Orders so received and transmitted are then subject to acceptance or rejection by the wholesaler."

To the same effect are the findings of the state court which are set forth in this Court's opinion. *Ante,* p. 279.

[3] I recognize that the force of the *Cheney Brothers* case, at least in the field of state income taxation, has been impaired by the Act of September 14, 1959, Pub. L. 86–272, 73 Stat. 555, which was passed by

Department of Revenue, 340 U. S. 534, 536, 537–539. A different constitutional result is not indicated by the circumstance that no consideration, other than the purchase price for goods bought, is paid Lilly by the wholesalers and that the benefit to Lilly from such local service comes from the resulting increase in interstate sales. The essential point is that Lilly's New Jersey activities were "wholly separate from interstate commerce, involved no question of the delivery of property shipped in interstate commerce or of the right to complete an interstate commerce transaction, but concerned merely the doing of a local act after interstate commerce had completely terminated." *Browning* v. *Waycross,* 233 U. S. 16, 22–23.[4]

Third: I cannot agree that the effect of the decision in this case "is to repudiate the whole line of 'drummer' cases." We have not been referred to any case in which

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the Congress in response to our decision in *Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450. Even so, it should be observed that the statute, which immunizes from the reach of state income taxation a foreign concern's intrastate solicitation of orders "for the benefit of a prospective [interstate] customer," does not include within such immunity situations where the foreign seller maintains a local office for the purpose of such solicitation. See § 101 (c) of the statute and 105 Cong. Rec. 16469–16477. Lilly maintains an office in New Jersey in connection with its promotional activities. Reliance on the *Northwestern Cement* opinion's characterization of activities similar to those of Lilly as being "exclusively in furtherance of interstate commerce" seems to me to be stretching too far a casual reference which was quite unnecessary to the issue decided by the Court in that case.

[4] In the *Browning* case an agent of an out-of-state seller of lightning rods, who was engaged in installing lightning rods, purchased in interstate commerce, for the customers of such seller, was held subject to a state tax on the occupation of erecting lightning rods, despite the fact that the contract for the purchase of such rods obligated the seller to install the rods at its own expense. The Court observed that "it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to state control, into an interstate commerce business protected by the commerce clause." *Id.,* at p. 23.

an interstate seller has been granted an immunity from a state-license requirement where the seller has promoted or participated in transactions between a local vendor and a local purchaser involving goods already within the State. Cf. *Wagner* v. *City of Covington,* 251 U. S. 95. The only aspect of the present case that resembles the "drummer" cases is the fact that Lilly's promotion of local sales ultimately serves to increase its interstate sales. To treat this factor as bringing the present situation within the drummer cases would, in my view, be substantially to extend the reach of those cases. I am not prepared to subscribe to such an extension at the expense of state power to regulate the promotion of sales of goods owned and located within the State when the countervailing federal considerations are as thin as they seem to me to be here, and when the interstate seller remains free to enjoy the immunities of interstate commerce by simply restricting its promotion to those who may buy from its own out-of-state store of goods.

Finally, while I am less clear than the rest of the majority that the state courts based their decision on a finding of "local business," I do not believe that any doubt on that score forecloses us from now sustaining the State on that ground where, as here, the facts leading to that conclusion are not in dispute. See *Nashville, C. & St. L. R. Co.* v. *Browning,* 310 U. S. 362.[5]

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE FRANKFURTER, MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART concur, dissenting.

The Court, with all deference, blends in this opinion three distinct lines of decisions which until today have

[5] I do not regard such cases as *Sprout* v. *South Bend,* 277 U. S. 163, and *Leloup* v. *Port of Mobile,* 127 U. S. 640, as controlling contrary authority in light of the opinion of the New Jersey Superior

been considered separate. They do indeed present different problems one from the other. I refer to our decisions concerning the power of a State (1) to tax an interstate enterprise, (2) to subject it to local suits, and (3) to license it.

(1) If New Jersey sought to collect from appellant a tax apportioned to some local business activity which it carries on in *that State,* I would see no constitutional objection to it. *Northwestern Cement Co.* v. *Minnesota,* 358 U. S. 450. Such an apportioned tax imposed by New Jersey would have relation "to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred." *Wisconsin* v. *Penney Co.,* 311 U. S. 435, 444.

(2) If appellant were sued in New Jersey, I think its connections with that State have been sufficient to make it subject to the jurisdiction of the state courts (*International Shoe Co.* v. *Washington,* 326 U. S. 310), at least as to suits which reveal a "substantial connection" with the State. *McGee* v. *International Life Ins. Co.,* 355 U. S. 220. Cf. *Hanson* v. *Denckla,* 357 U. S. 235, 250–255.

(3) The present case falls in neither of those two categories. New Jersey demands that appellant obtain from it a certificate authorizing it to do business in the State, absent which she denies appellant access to her courts. The case thus presents the strikingly different issue—whether an interstate business can be subjected to a licensing system.

I put to one side cases such as *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, and *Rice* v. *Santa Fe Elevator*

Court which suggests that the state statute may apply only to constitutionally licensable local business. In this regard see the Superior Court's later opinion in *United States Time Corp.* v. *Grand Union Co.,* 64 N. J. Super. 39, 165 A. 2d 310.

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Corp., 331 U. S. 218, where the issue was whether a company doing business in the State was exempt from a regulation of this kind because Congress had subjected it to a licensing system. I also put to one side *Railway Express Co.* v. *Virginia,* 282 U. S. 440, where a company, doing an intrastate* as well as an interstate express business, was required to obtain a certificate authorizing it to conduct an intrastate business. The question here is whether a State can require a license for the doing of an interstate business. The power to license the exercise of a federal right, like the power to tax it, is "the power to control or suppress its enjoyment." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 112. Soliciting interstate business has up to this day been on the same basis as doing an interstate business, so far as the protection of the Commerce Clause is concerned. It has usually been argued that soliciting interstate business is a "local activity" that can be licensed by a State or on which a State may lay a privilege tax. That was the argument in *Nippert* v. *Richmond,* 327 U. S. 416, 420; *Memphis Steam Laundry* v. *Stone,* 342 U. S. 389, 392. We rejected it, pointing out that in the long line of cases beginning with *Robbins* v. *Shelby County,* 120 U. S. 489, "this Court has held that a tax imposed upon the solicitation of interstate business is a tax upon interstate commerce itself." 342 U. S., at 392–393.

What appellant's employees do in New Jersey is certainly no more than what a "drummer" for an interstate house does. The record shows that petitioner's employees engage in the following activities in New Jersey:

> "It is the function of the detailmen to visit retail pharmacists, physicians and hospitals in order to acquaint them with the products of the plaintiff with a view to encouraging the use of these products.

*In that case, the express company picked up and delivered articles within Virginia as well as shipped other articles into and out of the State.

> Plaintiff contends that their work is 'promotional and informational only.' On an occasion, these detailmen, 'as a service to the retailer,' may receive an order for plaintiff's products for transmittal to a wholesaler. They examine the stocks and inventory of retailers and make recommendations to them relating to the supplying and merchandising of plaintiff's products. They also make available to retail druggists, free of charge, advertising and promotional material. When defendant opened its store in Carteret, plaintiff offered to provide, and did provide, announcements for mailing to the medical profession, without cost to defendant. The same thing occurred when defendant opened its Plainfield store."

In *Robbins* v. *Shelby County, supra,* p. 491, the "drummer" who failed to take out a license from the State was doing the following:

> "Sabine Robbins . . . a citizen and resident of Cincinnati, Ohio, . . . was engaged in the business of drumming in the Taxing District of Shelby County, Tenn.; *i. e.,* soliciting trade by the use of samples for the house or firm for which he worked as a drummer, said firm being the firm of 'Rose, Robbins & Co.,' doing business in Cincinnati, and all the members of said firm being citizens and residents of Cincinnati, Ohio."

In this case, appellant's employees within the State were engaged solely in the "drumming up" of appellant's interstate trade. They did this, not by direct solicitation of the interstate buyers, but by contacts with the customers of the buyers. Such activities were said to be "exclusively in furtherance of interstate commerce" only two years ago in *Northwestern Cement Co.* v. *Minnesota, supra,* 452, 455. Yet today the Court finds these activities to be separable from appellant's interstate business;

appellant is "inducing" sales, not "soliciting" them. It is not a distinction I can accept.

We deal here with a general state regulatory measure. Under our precedents, access to state courts cannot be barred to "a foreign corporation merely coming into [the State] to contribute to or to conclude a unitary interstate transaction." *Union Brokerage Co.* v. *Jensen,* 322 U. S. 202, 211. Yet that is what New Jersey claims the power to do. We have struck down similar state requirements which barred access to state courts to recover the purchase price on an interstate contract, *International Textbook Co.* v. *Pigg,* 217 U. S. 91, to recover for the breach of an interstate contract of sale, *Dahnke-Walker Co.* v. *Bondurant,* 257 U. S. 282, and to attack as fraudulent the transfer of assets of a domestic debtor, *Buck Stove Co.* v. *Vickers,* 226 U. S. 205. Surely, the cause of action here asserted does not involve a state interest more compelling than the protection of domestic debtors or the stability of title to domestic lands.

The Court places special reliance on *Cheney Bros. Co.* v. *Massachusetts,* 246 U. S. 147, 155, where Massachusetts' imposition of an "excise tax" on the Northwestern Consolidated Milling Company was upheld. There the entire activity of the foreign corporation in the State was the direct solicitation of orders *for local wholesalers.* Here the *dominant* activity is nothing more than advertising and public relations. These are the minimum activities in which every "drummer" for an out-of-state concern engages.

To hold that New Jersey can license appellant in this case is to repudiate the whole line of "drummer" cases.

This case on its own may do little injury. But it provides the formula whereby a State can stand over the channels of interstate commerce in a way that promises to do great harm to the national market that heretofore the Commerce Clause has protected.

Syllabus.

LOUISIANA EX REL. GREMILLION, ATTORNEY GENERAL, ET AL. *v.* NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA.

No. 294. Argued April 26, 1961.—Decided May 22, 1961.

The State of Louisiana sued in a state court to enjoin the National Association for the Advancement of Colored People from doing business in the State because of its failure to comply with a state law requiring certain types of organizations to file annually with the Secretary of State lists of their officers and members. That suit was removed to a Federal District Court and appellees sued there for a judgment declaring unconstitutional that statute and another requiring each nontrading association to file annually an affidavit that none of the officers of any out-of-state association with which it is affiliated is a member of any Communist, Communist-front or subversive organization. The cases were consolidated, and, after a hearing on affidavits and oral argument, the District Court entered a *temporary* injunction that denied relief to the State and its officers and enjoined them from enforcing the two statutes in question. *Held:* The judgment is affirmed. Pp. 294–297.

(a) It is not consonant with due process to require a person to swear to a fact that he cannot be expected to know or alternatively to refrain from a wholly lawful activity. Pp. 294–295.

(b) The case is in a preliminary stage, and it is not now known what facts will be disclosed in further hearings before the injunction becomes final; but, if it be shown that disclosure of the Association's membership lists results in reprisals and hostility to members, such disclosure may not be required consistently with the First Amendment, made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *N. A. A. C. P.* v. *Alabama*, 357 U. S. 449; *Bates* v. *Little Rock*, 361 U. S. 516. Pp. 295–297.

181 F. Supp. 37, affirmed.

William P. Schuler, Assistant Attorney General of Louisiana, and *M. E. Culligan* argued the cause for appellants. With *Mr. Schuler* on the briefs were *Jack P. F.*

Gremillion, Attorney General, *Carroll Buck,* First Assistant Attorney General, and *George Ponder,* former First Assistant Attorney General.

Robert L. Carter argued the cause for appellees. With him on the brief was *A. P. Tureaud.*

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

One of the suits that is consolidated in this appeal was instituted in 1956 by the then Attorney General of Louisiana against appellee, the National Association for the Advancement of Colored People, in a Louisiana court and sought to enjoin it from doing business in the State. It was removed to the federal court.[1] Thereafter NAACP sued appellants in the federal court asking for a declaratory judgment that two laws of Louisiana were unconstitutional. A three-judge court was convened (28 U. S. C. § 2281) and the cases were consolidated. After a hearing (on affidavits) and oral argument, the court entered a *temporary* injunction that denied relief to appellants and enjoined them from enforcing the two laws in question. 181 F. Supp. 37. The case is here on appeal. 28 U. S. C. § 1253. We noted probable jurisdiction. 364 U. S. 869.

One of the two statutes of Louisiana in question prohibits any "non-trading" association from doing business in Louisiana if it is affiliated with any "foreign or out of state non-trading" association "any of the officers or members of the board of directors of which are members of Communist, Communist-front or subversive organizations, as cited by the House of Congress [*sic*] un-American Activities Committee, or the United States Attorney."[2] Every nontrading association affiliated with an

[1] See also *State* v. *N. A. A. C. P.*, 90 So. 2d 884.

[2] La. Rev. Stat., 1950, § 14:385 (1958 Supp.).

out-of-state association must file annually with Louisiana's Secretary of State an affidavit that "none of the officers" of the affiliate is "a member" of any such organization.[3] Penalties against the officers and members are provided for failure to file the affidavit and for false filings.

The NAACP is a New York corporation with some forty-eight directors, twenty vice-presidents, and ten chief executive officers. Only a few reside or work in Louisiana. The District Court commented that the statute "would require the impossible" of the Louisiana residents or workers. 181 F. Supp., at 40. We have received no serious reply to that criticism. Such a requirement in a law compounds the vices present in statutes struck down on account of vagueness. Cf. *Winters* v. *New York,* 333 U. S. 507. It is not consonant with due process to require a person to swear to a fact that he cannot be expected to know (cf. *Tot* v. *United States,* 319 U. S. 463) or alternatively to refrain from a wholly lawful activity.

The other statute[4] requires the principal officer of "each fraternal, patriotic, charitable, benevolent, literary, scientific, athletic, military, or social organization, or organization created for similar purposes" and operating in Louisiana to file with the Secretary of State annually "a full, complete and true list of the names and addresses of all of the members and officers" in the State. Members of organizations whose lists have not been filed are prohibited from holding or attending any meeting of the organization. Criminal penalties are attached both to officers and to members.

We are told that this law was passed in 1924 to curb the Ku Klux Klan, but that it was never enforced against any other organization until this litigation started; that when the State brought its suit some affiliates of NAACP

[3] La. Rev. Stat., 1950, § 14:386 (1958 Supp.).

[4] La. Rev. Stat., 1950, §§ 12:401–409.

in Louisiana filed membership lists; and that after those filings, members were subjected to economic reprisals. 181 F. Supp., at 39. The State denies that this law is presently being enforced only against NAACP; it also challenges the assertions that disclosure of membership in the NAACP results in reprisals. While hearings were held before the temporary injunction issued, the case is in a preliminary stage and we do not know what facts further hearings before the injunction becomes final may disclose. It is clear from our decisions that NAACP has standing to assert the constitutional rights of its members. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 459. We deal with a constitutional right, since freedom of association is included in the bundle of First Amendment rights made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Id.,* p. 460; *Bates* v. *Little Rock,* 361 U. S. 516, 523. And where it is shown, as it was in *N. A. A. C. P.* v. *Alabama, supra,* 462–463, that disclosure of membership lists results in reprisals against and hostility to the members, disclosure is not required. And see *Bates* v. *Little Rock, supra,* 523–524.

We are in an area where, as *Shelton* v. *Tucker,* 364 U. S. 479, emphasized, any regulation must be highly selective in order to survive challenge under the First Amendment. As we there stated: ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Id.,* 488.

The most frequent expressions of that view have been made in cases dealing with local ordinances regulating the distribution of literature. Broad comprehensive regulations of those First Amendment rights have been repeatedly struck down (*Lovell* v. *Griffin,* 303 U. S. 444; *Schneider* v. *State,* 308 U. S. 147; *Cantwell* v. *Connecti-*

cut, 310 U. S. 296), though the power to regulate the time, manner, and place of distribution was never doubted. As stated in *Schneider* v. *State, supra,* 160–161, the municipal authorities have the right to "regulate the conduct of those using the streets," to provide traffic regulations, to prevent "throwing literature broadcast in the streets," and the like. Yet, while public safety, peace, comfort, or convenience can be safeguarded by regulating the time and manner of solicitation (*Cantwell* v. *Connecticut, supra,* 306–307), those regulations need to be "narrowly drawn to prevent the supposed evil." *Id.,* 307. And see *Talley* v. *California,* 362 U. S. 60, 64.

Our latest application of this principle was in *Shelton* v. *Tucker, supra,* where we held that, while a State has the undoubted right to inquire into the fitness and competency of its teachers, a detailed disclosure of every conceivable kind of associational tie a teacher has had probed into relationships that "could have no possible bearing upon the teacher's occupational competence or fitness." *Id.,* 488.

At one extreme is criminal conduct which cannot have shelter in the First Amendment. At the other extreme are regulatory measures which, no matter how sophisticated, cannot be employed in purpose or in effect to stifle, penalize, or curb the exercise of First Amendment rights. These lines mark the area in which the present controversy lies, as the District Court rightly observed.

Affirmed.

MR. JUSTICE HARLAN and MR. JUSTICE STEWART concur in the result.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE CLARK joins, concurring in the judgment.

One of the important considerations that led to the enactment of the Norris-LaGuardia Act, 47 Stat. 70,

limiting the jurisdiction of the District Courts to grant injunctions in labor controversies, was that such injunctions were granted, usually by way of temporary relief, on the basis of affidavits. I am of the view that the issues that arise in controversies like the present one are likewise more securely adjudicated upon a foundation of oral testimony rather than affidavits. At all events, I am dubious about a fixed rule, such as that which is apparently in effect in the District Court for the Eastern District of Louisiana, barring oral testimony—subject to the usual safeguards of cross-examination—in proceedings for a temporary injunction. I assume that oral testimony will be available in a proceeding to make the temporary injunction permanent.

In this understanding I concur in the judgment of the Court.

COMMISSIONER OF INTERNAL REVENUE *v.* LESTER.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 376. Argued April 25, 1961.—Decided May 22, 1961.

Section 23 (u) of the Internal Revenue Code of 1939 permits a husband to deduct from his gross income for income tax purposes amounts includible under § 22 (k) in the gross income of his divorced wife, and § 22 (k) provides that periodic payments received by the wife after a decree of divorce in discharge of a legal obligation imposed upon the husband under a written instrument incident to such divorce shall be includible in the gross income of the wife, but that "This subsection shall not apply to that part of any such periodic payment *which the terms of the . . . written instrument fix,* in terms of . . . a portion of the payment, as a sum which is payable for the support of minor children of such husband." *Held:* In order to come within this exception to § 22 (k), the written agreement providing for the periodic payments to the wife must specifically designate the amounts or parts thereof allocable to the support of the children and must not leave such amounts to determination by inference or conjecture. Pp. 299–306.

279 F. 2d 354, affirmed.

C. Guy Tadlock argued the cause for petitioner. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Rice, Assistant Attorney General Oberdorfer, Melva M. Graney* and *Norman H. Wolfe.*

Louis Mandel argued the cause for respondent. With him on the brief was *Leonard J. Lefkort.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The sole question presented by this suit, in which the Government seeks to recover personal income tax deficiencies, involves the validity of respondent's deductions

from his gross income for the taxable years 1951 and 1952 of the whole of his periodic payments during those years to his divorced wife pursuant to a written agreement entered into by them and approved by the divorce court. The Commissioner claims that language in this agreement providing "[i]n the event that any of the [three] children of the parties hereto shall marry, become emancipated, or die, then the payments herein specified shall . . . be reduced in a sum equal to one-sixth of the payments which would thereafter otherwise accrue" sufficiently identifies one-half of the periodic payments as having been "payable for the support" of the taxpayer's minor children under § 22 (k) of the Internal Revenue Code of 1939 and, therefore, not deductible by him under § 23 (u) of the Code.[1] The Tax Court approved the Commissioner's disallowance, 32 T. C. 1156, but the Court of Appeals reversed, 279 F. 2d 354, holding that the agreement did not "fix" with requisite clarity any specific amount or portion of the periodic payments as payable for the support of the children and that all sums paid to the wife under the agreement were, therefore, deductible from

[1] Section 22 (k) of the Internal Revenue Code of 1939, 56 Stat. 816–817, provided in part that

". . . periodic payments . . . received [by the wife] subsequent to [a decree of divorce] . . . in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under . . . a written instrument incident to such divorce . . . shall be includible in the gross income of such wife . . . . This subsection shall not apply to that part of any such periodic payment *which the terms of the . . . written instrument fix,* in terms of . . . a portion of the payment, as a sum which is payable for the support of minor children of such husband." (Emphasis added.)

Section 23 (u), 56 Stat. 817, stated in pertinent part that there shall be allowed as a deduction

"[i]n the case of a husband described in section 22 (k), amounts includible under section 22 (k) in the gross income of his wife, payment of which is made within the husband's taxable year."

respondent's gross income under the alimony provision of § 23 (u). To resolve a conflict among the Courts of Appeals on the question,[2] we granted certiorari. 364 U. S. 890. We have concluded that the Congress intended that, to come within the exception portion of § 22 (k), the agreement providing for the periodic payments must specifically state the amounts or parts thereof allocable to the support of the children. Accordingly, we affirm the judgment of the Court of Appeals.

Prior to 1942, a taxpayer was generally not entitled to deduct from gross income amounts payable to a former spouse as alimony, *Douglas* v. *Willcuts,* 296 U. S. 1 (1935), except in situations in which the divorce decree, the settlement agreement and state law operated as a complete discharge of the liability for support. *Helvering* v. *Fitch,* 309 U. S. 149 (1940). The hearings, Senate debates and the Report of the Ways and Means Committee of the House all indicate that it was the intention of Congress, in enacting § 22 (k) and § 23 (u) of the Code, to eliminate the uncertain and inconsistent tax consequences resulting from the many variations in state law. "[T]he amendments are designed to remove the uncertainty as to the tax consequences of payments made to a divorced spouse . . . ." S. Rep. No. 673, Pt. 1, 77th Cong., 1st Sess. 32. They "will produce uniformity in the treatment of amounts paid . . . regardless of variance in the laws of different States . . . ." H. R. Rep. No. 2333, 77th Cong., 2d Sess. 72. In addition, Congress realized that the "increased surtax rates[3] would intensify" the

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[2] Both *Metcalf* v. *Commissioner,* 271 F. 2d 288 (C. A. 1st Cir. 1959), and *Eisinger* v. *Commissioner,* 250 F. 2d 303 (C. A. 9th Cir. 1957), have arrived at conclusions contrary to those of the court below.

[3] Sections 22 (k) and 23 (u) were enacted as part of the Revenue Act of 1942 which provided for greatly increased tax revenue to meet the expenses of World War II.

hardship on the husband who, in many cases, "would not have sufficient income left after paying alimony to meet his income tax obligations," H. R. Rep. No. 2333, 77th Cong., 2d Sess. 46, and perhaps also that, on the other hand, the wife, generally being in a lower income tax bracket than the husband, could more easily protect herself in the agreement and in the final analysis receive a larger net payment from the husband if he could deduct the gross payment from his income.

The first version of § 22 (k) was proposed by the Senate as an amendment to the Revenue Act of 1941. The sums going to child support were to be includible in the husband's gross income only if the amount thereof was "specifically designated as a sum payable for the support of minor children of the spouses." H. R. 5417, 77th Cong., 1st Sess., § 117. The proposed amendment thus drew a distinction between a case in which the amount for child support was "specifically designated" in the agreement, and one in which there was no such designation. In the latter event, "the whole of such amounts are includible in the income of the wife . . . ." S. Rep. No. 673, Pt. 1, 77th Cong., 1st Sess. 35. Action on the bill was deferred by the conference committee [4] and hearings on the measure were again held the following year. The subsequent Report of the Senate Finance Committee on § 22 (k) carried forward the term "specifically designated," used in the 1941 Report (No. 673), with this observation:

> "If, however, the periodic payments . . . are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such

[4] H. R. Rep. No. 1203, 77th Cong., 1st Sess. 11.

> amounts is includible in the income of the wife as provided in section 22 (k) . . . ." S. Rep. No. 1631, 77th Cong., 2d Sess. 86.

As finally enacted in 1942, the Congress used the word "fix" instead of the term "specifically designated," but the change was explained in the Senate hearings as "a little more streamlined language." Hearings before Senate Committee on Finance on H. R. 7378, 77th Cong., 2d Sess. 48. As the Office of the Legislative Counsel reported to the Senate Committee:

> "If an amount is specified in the decree of divorce attributable to the support of minor children, that amount is not income of the wife . . . . If, however, that amount paid the wife includes the support of children, *but no amount is specified for the support of the children,* the entire amount goes into the income of the wife . . . ." *Ibid.* (Italics supplied.)

This language leaves no room for doubt. The agreement must expressly specify or "fix" a sum certain or percentage of the payment for child support before any of the payment is excluded from the wife's income. The statutory requirement is strict and carefully worded. It does not say that "a sufficiently clear purpose" on the part of the parties is sufficient to shift the tax. It says that the "written instrument" must "fix" that "portion of the payment" which is to go to the support of the children. Otherwise, the wife must pay the tax on the whole payment. We are obliged to enforce this mandate of the Congress.

One of the basic precepts of the income tax law is that "[t]he income that is subject to a man's unfettered command and that he is free to enjoy at his own option may be taxed to him as his income, whether he sees fit to enjoy it or not." *Corliss* v. *Bowers,* 281 U. S. 376, 378 (1930).

Under the type of agreement here, the wife is free to spend the monies paid under the agreement as she sees fit. "The power to dispose of income is the equivalent of ownership of it." *Helvering* v. *Horst*, 311 U. S. 112, 118 (1940). Including the entire payments in the wife's gross income under such circumstances, therefore, comports with the underlying philosophy of the Code. And, as we have frequently stated, the Code must be given "as great an internal symmetry and consistency as its words permit." *United States* v. *Olympic Radio & Television*, 349 U. S. 232, 236 (1955).

It does not appear that the Congress was concerned with the perhaps restricted uses of unspecified child-support payments permitted the wife by state law when it made those sums includible within the wife's alimony income. Its concern was with a revenue measure and with the specificity, for income tax purposes, of the amount payable under the terms of the written agreement for support of the children. Therefore, in construing that revenue act, we too are unconcerned with the variant legal obligations, if any, which such an agreement, by construction of its nonspecific provisions under local rules, imposes upon the wife to use a certain portion of the payments solely for the support of the children. The Code merely affords the husband a deduction for any portion of such payment not specifically earmarked in the agreement as payable for the support of the children.

As we read § 22 (k), the Congress was in effect giving the husband and wife the power to shift a portion of the tax burden from the wife to the husband by the use of a simple provision in the settlement agreement which fixed the specific portion of the periodic payment made to the wife as payable for the support of the children. Here the agreement does not so specifically provide. On the contrary, it calls merely for the payment of certain monies to

the wife for the support of herself and the children. The Commissioner makes much of the fact that the agreement provides that as, if, and when any one of the children married, became emancipated or died the total payment would be reduced by one-sixth, saying that this provision did "fix" one-half (one-sixth multiplied by three, the number of children) of the total payment as payable for the support of the children. However, the agreement also pretermitted the entire payment in the event of the wife's remarriage and it is as consistent to say that this provision had just the opposite effect. It was just such uncertainty in tax consequences that the Congress intended to and, we believe, did eliminate when it said that the child-support payments should be "specifically designated" or, as the section finally directed, "fixed." It does not say that "a sufficiently clear purpose" on the part of the parties would satisfy. It says that the written instrument must "fix" that amount or "portion of the payment" which is to go to the support of the children.

The Commissioner contends that administrative interpretation has been consistently to the contrary. It appears, however, that there was such a contrariety of opinion among the Courts of Appeals that the Commissioner was obliged as late as 1959 to issue a Revenue Ruling which stated that the Service would follow the rationale of *Eisinger* v. *Commissioner,* 250 F. 2d 303 (C. A. 9th Cir. 1957),[5] but that *Weil* v. *Commissioner,* 240 F. 2d 584

[5] The court there approved the rule that "when the settlement agreement, read as a whole, discloses that the parties have earmarked or designated . . . the payments to be made, one part to be payable for alimony, and another part to be payable for the support of children, with sufficient certainty and specificity to readily determine which is which, without reference to contingencies which may never come into being, then the 'part of any periodic payment' has been fixed 'by the terms of the decree or written instrument' . . . ." 250 F. 2d, at 308.

(C. A. 2d Cir. 1957),[6] would be followed "in cases involving similar facts and circumstances." Rev. Rul. 59–93, 1959–1 Cum. Bull. 22, 23.

All of these considerations lead to the conclusion that if there is to be certainty in the tax consequences of such agreements the allocations to child support made therein must be "specifically designated" and not left to determination by inference or conjecture. We believe that the Congress has so demanded in § 22 (k). After all, the parties may for tax purposes act as their best interests dictate, provided, as that section requires, their action be clear and specific. Certainly the Congress has required no more and expects no less.

Affirmed.

MR. JUSTICE DOUGLAS, concurring.

While I join the opinion of the Court, I add a few words. In an early income tax case, Mr. Justice Holmes said "Men must turn square corners when they deal with the Government." *Rock Island, A. & L. R. Co.* v. *United States,* 254 U. S. 141, 143. The revenue laws have become so complicated and intricate that I think the Government in moving against the citizen should also turn square corners. The Act, 1939 I. R. C. § 22 (k), makes taxable to the husband that part of alimony payments "which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum" payable for support of minor children.

I agree with the Court that this agreement did not "fix" any such amount. To be sure, an amount payable in

[6] In that case the agreement provided for reductions only in the event the divorced wife remarried. The court stated that "[t]he fortuitous or incidental mention of a figure in a provision meant to be inoperative, unless some more or less probable future event occurs, will not suffice to shift the tax burden from the wife to the husband." 240 F. 2d, at 588.

support of minor children may be inferred from the *proviso* that one-sixth of the payment shall no longer be due, if the children marry, become emancipated, or die. But Congress in enacting this law realized that some portion of alimony taxable to the wife might be used for support of the children, as the opinion of the Court makes clear.

The present agreement makes no specific designation of the portion that is intended for the support of the children. It is not enough to say that the sum can be computed. Congress drew a clear line when it used the word "fix." Resort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer.

MONTANA *v.* KENNEDY, ATTORNEY GENERAL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 198. Argued March 22, 1961.—Decided May 22, 1961.

Petitioner's mother is a native-born citizen of the United States and his father is an Italian citizen who has never been naturalized. They were married in the United States, and their marital relationship has never been terminated. Petitioner was born in Italy in 1906, while his parents were residing there temporarily, and his mother brought him to the United States later in the same year. He has since resided continuously in the United States and has never been naturalized. *Held:* Petitioner is not a citizen of the United States. Pp. 309–315.

(a) R. S. § 2172, granting inherited citizenship to children born abroad of parents who "now are, or have been," citizens, applies only to children whose parents were citizens on or before April 14, 1802, when its predecessor became effective. When petitioner was born in 1906, R. S. § 1993 provided the sole source of inherited citizenship for foreign-born children, and it applied only to children whose *fathers* were citizens. Pp. 309–312.

(b) Section 5 of the Act of March 2, 1907, which provided that "a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of . . . resumption of American citizenship by the parent," is not applicable to petitioner, since mere marriage to an alien, without change of domicile, did not terminate the citizenship of an American woman either at the time of petitioner's birth or at the time of his mother's return to the United States, both of which occurred in 1906. Pp. 312–314.

(c) A different conclusion is not required by the testimony of petitioner's mother that she had been prevented from returning to the United States prior to petitioner's birth by the wrongful refusal of an American Consular Officer to issue her a passport because of her pregnant condition. Pp. 314–315.

278 F. 2d 68, affirmed.

Anna R. Lavin argued the cause and filed a brief for petitioner.

Charles Gordon argued the cause for respondent. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Wilkey, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

Having been ordered deported as an alien on grounds which are not contested, petitioner, claiming to be a citizen, brought the present declaratory judgment action under 8 U. S. C. § 1503 to determine his citizenship status.

Petitioner, whose mother is a native-born United States citizen and whose father is a citizen of Italy (their marriage having been in the United States), was born in Italy in 1906 while his parents were temporarily residing there, and entered the United States with his mother later the same year. He has continuously resided in the United States since that time and has never been naturalized. His claim of United States citizenship is based primarily upon two statutes: (1) Section 2172 of the Revised Statutes (1878 ed.);[1] and (2) Section 5 of an Act of 1907.[2] The Court of Appeals found that neither statute obtained as to one in the circumstances of this petitioner, 278 F. 2d 68. We granted certiorari to review that conclusion, 364 U. S. 861, in view of the apparent harshness of the result entailed. For reasons given hereafter, we agree with the Court of Appeals.

I.

In 1874 Congress re-enacted two statutes which seem to defy complete reconciliation. R. S. § 2172, a re-enact-

[1] See p. 310, *infra.*

[2] See pp. 312–313, *infra.*

ment of § 4 of an Act of April 14, 1802 (2 Stat. 155), provided that

> "children of *persons* who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof . . . ." (Emphasis added.)

R. S. § 1993, substantially a re-enactment of § 1 of an Act of February 10, 1855 (10 Stat. 604), provided that

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose *fathers* were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." (Emphasis added.)

Since R. S. § 2172 spoke broadly of children of citizen "persons"—perhaps citizen mothers as well as citizen fathers—while R. S. § 1993 spoke only of children of citizen "fathers" (and even then embraced only citizen fathers who had been United States residents), there is a conflict in the apparent reach of the simultaneously re-enacted provisions.

In this circumstance petitioner, claiming that "persons" in R. S. § 2172 included, in the disjunctive, both citizen fathers and mothers, contends that we are faced with deciding either that R. S. § 1993 simply *repeats,* with modifications, that part of R. S. § 2172 relating to "fathers," (leaving its provisions relating to "mothers" intact), or that it *repeals* that part of R. S. § 2172 relating to "mothers." He suggests that we make the former choice to avoid the admitted severity of deporting a fifty-five-year-old man who has resided in this country since he was an infant. The Government, on the other hand,

asserts that R. S. § 2172 should be read as embracing only children *both* of whose parents were American citizens. Whatever the force of these opposing contentions may be, other considerations unmistakably lead to the conclusion that petitioner's claim to citizenship under R. S. § 2172 must be rejected.

In 1854 Horace Binney, one of the country's leading lawyers and a recognized authority on the immigration laws, published an article entitled "The Alienigenae of the United States" [3] in which he argued that the words "who now are, or have been" in the 1802 predecessor of R. S. § 2172 had the effect of granting citizenship to the foreign-born children only of persons who were citizens of the United States *on or before* the effective date of the 1802 statute (April 14, 1802), in other words that the statute had no prospective application. Foreign-born children of persons who became American citizens between April 14, 1802 and 1854, were aliens, Mr. Binney argued. In 1855 Congress responded to the situation by enacting the predecessor (10 Stat. 604) of R. S. § 1993.[4] The provision had retroactive as well as prospective effect, but was clearly intended to apply only to children of citizen *fathers*.[5]

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[3] 2 American Law Register 193.

[4] That the enacting Congress accepted and acted upon the view that the Act of 1802 (later re-enacted as R. S. § 2172) had no effect as to parents who became citizens after 1802 is clear from the following statement of Congressman Cutting:

". . . the children of a man [U. S. citizen] who happened to be in the world on the 14th of April, 1802, born abroad, are American citizens, while the children of persons born on the 15th of April, 1802, are aliens to the country." Cong. Globe, 33d Cong., 1st Sess. 170 (1854).

[5] Congressman Cutting explained:

"In the reign of Victoria, in the year 1844, the English Parliament provided that the children of English mothers, though married to foreigners, should have the rights and privileges of English subjects,

The view of Mr. Binney and the 1855 Congress that the Act of 1802 had no application to the children of persons who were not citizens in 1802 has found acceptance in the decisions of this Court. See *United States* v. *Wong Kim Ark,* 169 U. S. 649, 673–674; *Weedin* v. *Chin Bow,* 274 U. S. 657, 663–664; see also *Mock Gum Ying* v. *Cahill,* 81 F. 2d 940. The commentators have agreed. See 2 Kent, Commentaries, at 53; 3 Hackworth, Digest of International Law, § 222; cf. *Matter of Owen,* 36 Op. Atty. Gen. 197, 200. Finally Congress has repeatedly stated and acted upon that premise. See, *e. g.,* H. R. Rep. No. 1110, 67th Cong., 2d Sess., at p. 3. Indeed when, in 1934, Congress finally granted citizenship rights to the foreign-born children of citizen mothers, 48 Stat. 797, it not only specifically made the provision prospective, but further made clear its view that this was a reversal of prior law. See H. R. Rep. No. 131, 73d Cong., 1st Sess., p. 2, and S. Rep. No. 865, 73d Cong., 2d Sess., p. 1.

Whatever may have been the reason for the 1874 re-enactment of the Act of 1802, as R. S. § 2172, we find nothing in that action which suggests a purpose to reverse the structure of inherited citizenship that Congress created in 1855 and recognized and reaffirmed until 1934. On this basis and in the light of our precedents, we hold that at the time of petitioner's birth in 1906, R. S. § 1993 provided the sole source of inherited citizenship status for foreign-born children of American parents. That statute cannot avail this petitioner, who is the foreign-born child of an alien father.

II.

Petitioner's second ground for claiming citizenship is founded upon § 5 of an Act of March 2, 1907 (34 Stat.

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though born out of allegiance. *I have not, in this bill, gone to that extent, as the House will have observed from the reading of it.*" (Emphasis added.) Cong. Globe, 33d Cong., 1st Sess. 170.

1229), which provided in relevant part "That a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of . . . resumption of American citizenship by the parent . . . ." [6] Petitioner's claim in this regard necessarily depends upon our finding (1) that his mother was an alien at the time of his birth, having lost her citizenship either when she married an alien or when she traveled abroad with her alien husband in 1906, and (2) that his mother resumed her citizenship on her return to the United States.

It is sufficient to dispose of the contention that we find that mere marriage to an alien, without change of domicile, did not terminate the citizenship of an American woman either at the time of petitioner's birth or his mother's return to the United States, both of which occurred in 1906.[7] This view, which is supported by the weight of authority,[8] is indeed not contested by petitioner, who instead asks this Court to construe § 5 of the 1907 Act so as to avoid the obvious paradox of giving preferred treatment to the children of a woman who has lost her citizenship over that afforded to the children of a

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[6] In the context of the section it is clear that the word "parent" refers both to fathers and mothers. Section 2 of the Act of May 24, 1934 (48 Stat. 797), on which petitioner alternatively relies, is in all respects here material a re-enactment of the above provision.

[7] By § 3 of the Act of March 2, 1907 (34 Stat. 1228), marriage to an alien *did* terminate the citizenship of an American woman.

[8] See, *e. g.*, *Comitis* v. *Parkerson*, 56 F. 556, 559–560 (C. C. E. D. La.), writ of error dismissed *sub nom. Comitiz* v. *Parkerson*, 163 U. S. 681; *Ruckgaber* v. *Moore*, 104 F. 947, 948–949 (C. C. E. D. N. Y.), affirmed, 114 F. 1020 (C. A. 2d Cir.); *Wallenburg* v. *Missouri Pacific R. Co.*, 159 F. 217, 219 (C. C. D. Neb.); *In re Fitzroy*, 4 F. 2d 541, 542 (D. C. D. Mass.); *In re Lynch*, 31 F. 2d 762 (D. C. S. D. Cal.); *Petition of Zogbaum*, 32 F. 2d 911, 912–913 (D. C. D. S. D.); *In re Wright*, 19 F. Supp. 224, 225 (D. C. E. D. Pa.); *Watkins* v. *Morgenthau*, 56 F. Supp. 529, 530–531 (D. C. E. D. Pa.).

woman who has never lost her citizenship.[9] Paradoxical though this may be, we have no power to "construe" away the unambiguous statutory requirement of § 5 that petitioner's mother must have lost her citizenship at the time of his birth.[10]

III.

Petitioner makes a further contention. It is urged that the Government should not be heard to say that petitioner was born outside the United States because of its own misconduct. Petitioner's mother testified that she had been prevented from leaving Italy prior to petitioner's birth by the refusal of an American Consular Officer to issue her a passport because of her pregnant condition. However, it is uncontested that the United States did not require a passport for a citizen to return to the country in 1906. Moreover, petitioner has presented no evidence of any Italian requirement of an American passport to leave Italy at that time. In this light the testimony by petitioner's mother as to what may have been only the consular official's well-meant advice—"I am sorry, Mrs., you cannot [return to the United States] in that condition"—falls far short of misconduct such

[9] Such a construction was espoused by Attorney General William D. Mitchell in 1933, 37 Op. Atty. Gen. 90, and is also indicated in two District Court cases. See *Petition of Black,* 64 F. Supp. 518; *Petition of Donsky,* 77 F. Supp. 832. But see *D'Alessio* v. *Lehman,* 183 F. Supp. 345, which takes a contrary view.

[10] Moreover, even if petitioner's mother had suffered a loss of citizenship which was later reacquired, petitioner's case would still not come within the statutory definition of "resumption of American citizenship." Congress gave explicit content to this requirement of § 5 of the Act of 1907, § 3 of the same Act providing:

"*At the termination of the marital relation* she may resume her American citizenship . . . ." (Emphasis added.) 34 Stat. 1228. Petitioner's mother has never terminated her marital relation with petitioner's alien father.

as might prevent the United States from relying on petitioner's foreign birth. In this situation, we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials.[11]

Affirmed.

MR. JUSTICE DOUGLAS dissents.

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[11] See, *e. g., Podea* v. *Acheson,* 179 F. 2d 306; *Lee You Fee* v. *Dulles,* 236 F. 2d 885, 887.

UNITED STATES *v.* E. I. DU PONT DE NEMOURS & CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS.

No. 55. Argued February 20–21, 1961.—Decided May 22, 1961.

In this civil antitrust proceeding, this Court held that acquisition by the du Pont Company of 23% of the common stock of General Motors Corporation had led to the insulation from free competition of most of the General Motors market in automobile finishes and fabrics and tended to create a monoply of a line of commerce, in violation of § 7 of the Clayton Act. Therefore, this Court reversed the District Court's judgment dismissing the complaint and remanded the case to that Court for a determination of the equitable relief necessary and appropriate in the public interest. 353 U. S. 586. After the taking of further evidence, pertaining mostly to the tax and market consequences to the shareholders of the two companies, the District Court declined to require du Pont to divest itself completely of the General Motors stock, as urged by the Government, and sought to satisfy the requirements of this Court's mandate by requiring du Pont to transfer its voting rights in most of the General Motors stock to certain of du Pont's shareholders, by enjoining the two companies from having any preferential or discriminatory trade relations with each other and by various other injunctive provisions designed to prevent du Pont from exercising any control over the management of General Motors. *Held:* This remedy is not adequate, and the District Court is directed to proceed expeditiously to enter a decree requiring du Pont to divest itself completely of the General Motors stock within not to exceed 10 years from the effective date of the decree. Pp. 318–335.

(a) When a violation of the antitrust laws has been proved, the initial responsibility to fashion an appropriate remedy lies with the District Court, and this Court accords due regard and respect to the conclusion of the District Court; but this Court has a duty to be sure that a decree is fashioned which will effectively redress the violations of the antitrust laws. Pp. 322–325.

(b) Since the decree in this case was fashioned by the District Court in obedience to the judgment sent to it by this Court after reversal of the District Court's judgment dismissing the Govern-

ment's complaint, this Court has plenary power to determine whether its own judgment was scrupulously and fully carried out. Pp. 325–326.

(c) In civil proceedings, courts are not authorized to punish antitrust violators, and relief must not be punitive; but courts are required to decree relief effective to redress the violations and restore competition, whatever the adverse effect of such a decree on private interests. Pp. 326–328.

(d) In this case, the proposed partial divestiture through the transfer of voting rights would not be an effective remedy; and, notwithstanding the adverse tax and market consequences which the District Court found would result, the Government is entitled to a decree directing complete divestiture—a remedy peculiarly appropriate in cases of stock acquisitions which violate § 7 of the Clayton Act. Pp. 326–333.

(e) The alternative, suggested belatedly by du Pont, that its General Motors stock be disenfranchised, would not provide effective relief, and it might have undesirable effects on the capital structure, management and control of General Motors. P. 333.

(f) The injunctive provisions of the District Court's decree would not adequately remove the objections to the effectiveness of its main provision for the transfer of voting rights, and the public is entitled to the surer, cleaner remedy of complete divestiture. Pp. 333–334.

(g) Once the Government has successfully borne the considerable burden of establishing a violation of the antitrust laws, all doubts as to the remedy are to be resolved in its favor. P. 334.

(h) The District Court's decree is vacated in its entirety, except as to the provisions enjoining du Pont itself from exercising voting rights in respect of its General Motors stock. Pp. 334–335.

(i) In order that this protracted litigation may be concluded as soon as possible, the District Court is directed to proceed expeditiously to formulate and enter a decree providing for the complete divestiture by du Pont of its General Motors stock, to commence within 90 days, and to be completed within not to exceed 10 years, of the effective date of the decree. P. 335.

177 F. Supp. 1, affirmed in part, vacated in part, and remanded for further proceedings.

John F. Davis argued the cause for the United States. With him on the briefs were former *Solicitor General*

Rankin, Solicitor General Cox, Acting Assistant Attorney General Bicks, Acting Assistant Attorney General Kirkpatrick, Philip Elman, Charles H. Weston and *Bill G. Andrews.*

Hugh B. Cox argued the cause for E. I. du Pont de Nemours & Co., appellee. With him on the brief were *John Lord O'Brian, Charles A. Horsky, Daniel M. Gribbon, Nestor S. Foley* and *Alvin Friedman.*

Robert L. Stern argued the cause for General Motors Corp., appellee. With him on the brief were *Leo F. Tierney, Bryson P. Burnham, Henry M. Hogan* and *Robert A. Nitschke.*

Wilkie Bushby argued the cause for Christiana Securities Co. et al., appellees. With him on the brief was *Philip C. Scott.*

Briefs of *amici curiae,* urging affirmance, were filed by *Andrew J. Dallstream* and *Manuel E. Cowen* for du Pont and General Motors shareholders, respectively, and by *Joseph M. Proskauer* and *Harold H. Levin* for Clara M. Blum et al.

Mr. Justice Brennan delivered the opinion of the Court.

The United States filed this action in 1949 in the District Court for the Northern District of Illinois. The complaint alleged that the ownership and use by appellee E. I. du Pont de Nemours & Co. of approximately 23 percent of the voting common stock of appellee General Motors Corporation was a violation of sections 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1, 2, and of section 7 of the Clayton Act, 15 U. S. C. § 18. After trial, the District Court dismissed the complaint. 126 F. Supp. 235 (D. C. N. D. Ill. 1954). On the Government's appeal, we reversed. We held that du Pont's acquisition of the 23 percent of General Motors stock had led to the insulation from free competition of

most of the General Motors market in automobile finishes and fabrics, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce, and, accordingly, that du Pont had violated § 7 of the Clayton Act. *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586 (1957).[1] We did not, however, determine what equitable relief was necessary in the public interest. Instead, we observed that "[t]he District Courts . . . are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt Co.* v. *United States*, 332 U. S. 392, 400–401," and remanded the cause to the District Court "for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute." 353 U. S., at 607–608.

On remand, the District Court invited the Government to submit a plan of relief which in its opinion would be effective to remedy the violation. The court also appointed two *amici curiae* to represent the interests of General Motors and du Pont shareholders, respectively, most of whom, of course, had not been made parties to this litigation. The Government submitted a proposed plan of relief. That plan included diverse forms of injunctive relief, but its principal feature was a requirement that within 10 years the du Pont company completely divest itself of its approximately 63 million General Motors shares. The Government proposed that about two-thirds of these shares be distributed *pro rata* to the generality of du Pont shareholders in the form of dividends over the 10-year period. The other one-third of du Pont's General Motors holdings—stock which

[1] Since a holding that the Clayton Act had been violated sufficed to dispose of the case, we did not decide whether du Pont had also violated the Sherman Act. See 353 U. S., at 588, note 5.

would have gone to appellees Christiana Securities Company and Delaware Realty and Investment Company, holding companies long identified with the du Pont family itself—were to go to a court-appointed trustee, to be sold gradually over the same 10-year period. Du Pont objected that the Government's plan of complete divestiture entailed harsh income-tax consequences for du Pont stockholders and, if adopted, would also threaten seriously to depress the market value of du Pont and General Motors stock. Du Pont therefore proposed its own plan designed to avoid these results. The salient feature of its plan was substitution for the Government's proposed complete divestiture of a plan for partial divestiture in the form of a so-called "pass through" of voting rights, whereby du Pont would retain all attributes of ownership of the General Motors stock, including the right to receive dividends and a share of assets on liquidation, except the right to vote. The vote was to be "passed through" to du Pont's shareholders proportionally to their holdings of du Pont's own shares, except that Christiana and Delaware would "pass through" the votes allocable to them to their own shareholders. The *amici curiae* also proposed plans of compliance, substantially equivalent to the du Pont plan. The *amicus* representing the generality of du Pont shareholders proposed in addition a program of so-called "take-downs," by which du Pont shareholders would be allowed to exchange their du Pont common stock for a new class of du Pont "Special Common," plus their *pro rata* share of du Pont-held General Motors common stock.

The District Court held several weeks of hearings. The evidence taken at the hearings, largely of expert witnesses, fills some 3,000 pages in the record before us, and, together with the numerous financial charts and tables received as exhibits, bears mainly not on the competition-restoring effect of the several proposals, but

rather on which proposal would have the more, and which the less, serious tax and market consequences for the owners of the du Pont and General Motors stock. The District Court concluded that although ". . . there is no need for the Court to resolve the conflict in the evidence as to how severe those consequences would be[, t]he Court is persuaded beyond any doubt that a judgment of the kind proposed by the Government would have very serious adverse consequences." 177 F. Supp. 1, 42 (D. C. N. D. Ill. 1959). The court for this reason rejected the Government's plan and adopted the du Pont proposal, with some significant modifications. The "pass through" of voting rights, for example, was so limited that neither Christiana, Delaware, nor their officers and directors (plus resident members of the latter's families), should be able to vote any of the du Pont-held General Motors stock; General Motors shares allocable to the two companies or to their officers and directors, or to the officers and directors of du Pont, or to resident members of the families of the officers and directors of the several companies, were to be sterilized, voted by no one. Du Pont, Christiana, and Delaware were forbidden to acquire any additional General Motors stock. Du Pont and General Motors might not have any preferential or discriminatory trade relations or contracts with each other. No officer or director of du Pont, Christiana, or Delaware might also serve as an officer or director of General Motors. Nor might du Pont, Christiana, or Delaware nominate or propose any person to be a General Motors officer or director, or seek in any way to influence the choice of persons to fill those posts. The Government objected that without a provision ordering complete divestiture the decree, although otherwise satisfactory, was inadequate to redress the antitrust violation, and filed its appeal here under § 2 of the Expediting Act, 15 U. S. C. § 29. We noted probable jurisdiction. 362 U. S. 986 (1960).

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A threshold question—and one which, although subsidiary, is most important—concerns the scope of our review of the District Court's discharge of the duty delegated by our judgment to formulate a decree. In our former opinion we alluded to the "large discretion" of the District Courts in matters of remedy in antitrust cases. Many opinions of the Court in such cases observe that "[t]he formulation of decrees is largely left to the discretion of the trial court . . . ," *Maryland & Virginia Milk Producers Assn.* v. *United States,* 362 U. S. 458, 473 (1960); "[i]n framing relief in antitrust cases, a range of discretion rests with the trial judge," *Besser Mfg. Co.* v. *United States,* 343 U. S. 444, 449 (1952); "[t]he determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court," *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 89 (1950); "[t]he framing of decrees should take place in the District rather than in Appellate Courts," *International Salt Co.* v. *United States,* 332 U. S. 392, 400 (1947). The Court has on occasion said that decrees will be upheld in the absence of a showing of an abuse of discretion. See, *e. g., Maryland & Virginia Milk Producers Assn.* v. *United States, supra,* p. 473; *United States* v. *W. T. Grant Co.,* 345 U. S. 629, 634 (1953); *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593 (1951);[2] *United States* v. *National Lead Co.,* 332 U. S. 319, 334–335 (1947); *United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 185 (1944).[3] These

[2] In this case, however, a majority of the Court substantially modified the District Court's decree, in spite of expressions of deference written into the principal opinion.

[3] In *Crescent Amusement* the Court relied in part on the fact that the district judge had initially found the violation of law. This circumstance was said to enhance the deference owed to the district judge's determination of the measures appropriate to eliminate the violation, 323 U. S., at 185. This factor is not present in the case before us.

expressions are not, however, to be understood to imply a narrow review here of the remedies fashioned by the District Courts in antitrust cases. On the contrary, our practice, particularly in cases of a direct appeal from the decree of a single judge, is to examine the District Court's action closely to satisfy ourselves that the relief is effective to redress the antitrust violation proved. "The relief granted by a trial court in an antitrust case and brought here on direct appeal, thus by-passing the usual appellate review, has always had the most careful scrutiny of this Court. Though the records are usually most voluminous and their review exceedingly burdensome, we have painstakingly undertaken it to make certain that justice has been done." *International Boxing Club* v. *United States,* 358 U. S. 242, 253 (1959); see also *id.,* at 263 (dissenting opinion). We have made it clear that a decree formulated by a District Court is not "subject only to reversal for gross abuse. Rather we have felt an obligation to intervene in this most significant phase of the case when we concluded there were inappropriate provisions in the decree." *United States* v. *United States Gypsum Co., supra,* p. 89.

In sum, we assign to the District Courts the responsibility *initially* to fashion the remedy, but recognize that while we accord due regard and respect to the conclusion of the District Court, we have a duty ourselves to be sure that a decree is fashioned which will effectively redress proved violations of the antitrust laws. The proper disposition of antitrust cases is obviously of great public importance, and their remedial phase, more often than not, is crucial. For the suit has been a futile exercise if the Government proves a violation but fails to secure a remedy adequate to redress it. "A public interest served by such civil suits is that they effectively pry open to competition a market that has been closed by defendants' illegal restraints. If this decree accomplishes

less than that, the Government has won a lawsuit and lost a cause." *International Salt Co.* v. *United States, supra,* p. 401.

Our practice reflects the situation created by the congressional authorization, under § 2 of the Expediting Act,[4] of a direct appeal to this Court from the judgment of relief fashioned by a single judge. Congress has deliberately taken away the shield of intermediate appellate review by a Court of Appeals, and left with us alone the responsibility of affording the parties a review of his determination.[5] This circumstance imposes a special burden upon us, for, as Mr. Justice Roberts said for the Court, ". . . it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reach-

[4] 32 Stat. 823, as amended, 15 U. S. C. § 29. The purpose of this statute was to expedite determination of antitrust cases by allowing the Attorney General to obtain a special Circuit (now District) Court of several judges by filing a certificate of public importance under § 1 of the Act, 32 Stat. 823, as amended, 15 U. S. C. § 28 (no such certificate was filed in this case), and by providing for direct appeal to the Supreme Court from the decree of the trial court, whether composed of one or several judges, such appeal to be within this Court's obligatory jurisdiction. Congress was moved by the "far-reaching importance of the cases arising under [the] antitrust laws . . . ." 36 Cong. Rec. 1679 (remarks of Senator Fairbanks, Feb. 4, 1903). See also H. R. Rep. No. 3020, 57th Cong., 2d Sess. 2 (1903).

[5] In one case this elimination of the normal review by the Court of Appeals almost prevented there being any review of the District Court at all. See *United States* v. *Aluminum Co. of America,* 320 U. S. 708 (1943) (noting the absence of a quorum in this Court to hear an Expediting Act appeal from a District Court). But Congress acted to keep such an important matter from going unreviewed, see H. R. Rep. No. 1317, 78th Cong., 2d Sess. (1944), and enacted a special statute, 58 Stat. 272, 15 U. S. C. § 29, pursuant to which this Court immediately certified the case to a Circuit Court of Appeals, 322 U. S. 716 (1944), which proceeded to decide the appeal. 148 F. 2d 416 (C. A. 2d Cir. 1945). See also *United States* v. *United States District Court,* 334 U. S. 258 (1948).

ing importance to the judgment of a single judge, without review of the relief granted or denied by him," *Hartford-Empire Co.* v. *United States,* 324 U. S. 570, 571 (1945), clarifying 323 U. S. 386 (1945).

These principles alone would require our close examination of the District Court's action. But the necessity for that examination in this case further appears in the light of additional considerations. First of all, the decree was fashioned in obedience to the judgment which we sent down to the District Court after our reversal of that court's dismissal of the Government's complaint. We have plenary power to determine whether our judgment was scrupulously and fully carried out. Chief Justice Taft, speaking for the Court, said in *Continental Ins. Co.* v. *United States,* 259 U. S. 156, 166 (1922), "We delegated to the District Court the duty of formulating a decree in compliance with the principles announced in our judgment of reversal, and that gives us plenary power where the compliance has been attempted and the decree in any proper way is brought to our attention to see that it follows our opinion." [6] Secondly, the record is concerned mainly with the alleged adverse tax and market effects of the Government's proposal for complete divestiture. But the primary focus of inquiry, as we shall show, is upon the question of the relief required effectively to eliminate the tendency of the acquisition condemned by § 7. For it will be remembered that the violation was not *actual* monopoly but only a *tendency* towards

[6] Government counsel at the trial advised the District Court that he had no authority to suggest modes of divestiture different from the plan presented by the Government to the District Court. Appellees suggest that the Government is thus estopped from urging other modes of divestiture on this appeal. But plainly, under the rule of *Continental Insurance,* no stipulation by the Government could circumscribe this Court's power to see that its mandate is carried out.

monopoly. The required relief therefore is a remedy which reasonably assures the elimination of that tendency. Does partial divestiture in the form of the "pass through" of voting power, together with the ancillary relief, give an effective remedy, or is complete divestiture necessary to assure effective relief? Little in the record or in the District Court's opinion is concerned with that crucial question. The findings of possible harsh consequences relied upon to justify rejection of complete divestiture are thus hardly of material assistance in reaching judgment on the central issue. If our examination persuades us that the remedy decreed leaves the public interest in the elimination of the tendency inadequately protected, we should be derelict in our duty if we did not correct the error.

Before we examine the adequacy of the relief allowed by the District Court, it is appropriate to review some general considerations concerning that most drastic, but most effective, of antitrust remedies—divestiture. The key to the whole question of an antitrust remedy is of course the discovery of measures effective to restore competition. Courts are not authorized in civil proceedings to punish antitrust violators, and relief must not be punitive. But courts are authorized, indeed required, to decree relief effective to redress the violations, whatever the adverse effect of such a decree on private interests. Divestiture is itself an equitable remedy designed to protect the public interest. In *United States* v. *Crescent Amusement Co., supra,* where we sustained divestiture provisions against an attack similar to that successfully made below, we said, at p. 189: "It is said that these provisions are inequitable and harsh income tax wise, that they exceed any reasonable requirement for the prevention of future violations, and that they are therefore punitive. . . . Those who violate the Act may not reap

the benefits of their violations and avoid an undoing of their unlawful project on the plea of hardship or inconvenience." [7]

If the Court concludes that other measures will not be effective to redress a violation, and that complete divestiture is a necessary element of effective relief, the Government cannot be denied the latter remedy because economic hardship, however severe, may result. Economic hardship can influence choice only as among two or more effective remedies. If the remedy chosen is not effective, it will not be saved because an effective remedy would entail harsh consequences. This proposition is not novel; it is deeply rooted in antitrust law and has never been successfully challenged.[8] The criteria were announced in one of the earliest cases. In *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185 (1911), we said:

> "In considering the subject . . . three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest

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[7] Bills were introduced in the Eighty-sixth Congress to ameliorate the income-tax consequences of gain on disposition of stock pursuant to orders enforcing the antitrust laws. See Hearings on S. 200 before the Senate Committee on Finance, 86th Cong., 1st Sess. (1959); Hearings on H. R. 8126 before the House Committee on Ways and Means, 86th Cong., 1st Sess. (1959); H. R. Rep. No. 1128, 86th Cong., 1st Sess. (1959).

[8] See, *e. g.*, *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189 (1944); *United States* v. *Corn Products Refining Co.*, 234 F. 964, 1018 (D. C. S. D. N. Y. 1916), appeal dismissed on motion of appellant, 249 U. S. 621 (1919); *United States* v. *E. I. du Pont de Nemours & Co.*, 188 F. 127, 153 (C. C. D. Del. 1911), modified, 273 F. 869 (D. C. D. Del. 1921); *In re Crown Zellerbach Corp.*, CCH Trade Reg. Rep. 1957–1958 ¶ 26,923, at p. 36,462 (F. T. C. 1958).

> of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning."

The Court concluded in that case that, despite the alleged hardship which would be involved, only dissolution of the combination would be effective, and therefore ordered dissolution. Plainly, if the relief is not effective, there is no occasion to consider the third criterion.

Thus, in this case, the adverse tax and market consequences which the District Court found would be concomitants of complete divestiture cannot save the remedy of partial divestiture through the "pass through" of voting rights if, though less harsh, partial divestiture is not an effective remedy. We do not think that the "pass through" is an effective remedy and believe that the Government is entitled to a decree directing complete divestiture.

It cannot be gainsaid that complete divestiture is peculiarly appropriate in cases of stock acquisitions which violate § 7.[9] That statute is specific and "narrowly

[9] We reject the Government's argument that the Federal Trade Commission and other administrative agencies charged with the duty of enforcing the statute are required by § 11 of the Clayton Act to order divestiture whenever they find a violation of § 7, and that therefore courts acting under § 15 must give the same relief. Even if the administrative agencies were so limited, a question which we do not decide, Congress would not be deemed to have restricted the broad remedial powers of courts of equity without explicit language doing so in terms, or some other strong indication of intent. *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329 (1944).

directed," [10] *Standard Oil Co.* v. *United States,* 337 U. S. 293, 312 (1949), and it outlaws a particular form of economic control—stock acquisitions which tend to create a monopoly of any line of commerce. The very words of § 7 suggest that an undoing of the acquisition is a natural remedy. Divestiture or dissolution has traditionally been the remedy for Sherman Act violations whose heart is intercorporate combination and control,[11] and it is rea-

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[10] The words were actually used of § 3 of the Clayton Act, but they are equally applicable to § 7.

[11] See *Northern Securities Co.* v. *United States,* 193 U. S. 197 (1904); *Standard Oil Co.* v. *United States,* 221 U. S. 1 (1911); *United States* v. *American Tobacco Co.,* 221 U. S. 106 (1911); *United States* v. *Union Pacific R. Co.,* 226 U. S. 61 (1912), modified, 226 U. S. 470 (1913); *United States* v. *Reading Co.,* 226 U. S. 324 (1912), modified, 228 U. S. 158 (1913); *United States* v. *Reading Co.,* 253 U. S. 26 (1920), modified after remand, *Continental Ins. Co.* v. *United States,* 259 U. S. 156 (1922); *United States* v. *Lehigh Valley R. Co.,* 254 U. S. 255 (1920); *United States* v. *Southern Pacific Co.,* 259 U. S. 214 (1922); *United States* v. *Crescent Amusement Co.,* 323 U. S. 173 (1944); *Hartford-Empire Co.* v. *United States,* 323 U. S. 386 (1945), clarified, 324 U. S. 570 (1945); *United States* v. *National Lead Co.,* 332 U. S. 319 (1947); *Schine Chain Theatres, Inc.,* v. *United States,* 334 U. S. 110 (1948); *United States* v. *Paramount Pictures, Inc.,* 334 U. S. 131 (1948); *Besser Mfg. Co.* v. *United States,* 343 U. S. 444 (1952); *International Boxing Club* v. *United States,* 358 U. S. 242 (1959); *United States* v. *E. I. du Pont de Nemours & Co.,* 188 F. 127 (C. C. D. Del. 1911), modified, 273 F. 869 (D. C. D. Del. 1921); *United States* v. *Lake Shore & M. S. R. Co.,* 203 F. 295 (D. C. S. D. Ohio 1912), modified, 281 F. 1007 (D. C. S. D. Ohio 1916); *United States* v. *International Harvester Co.,* 214 F. 987 (D. C. D. Minn. 1914), modification denied, 10 F. 2d 827 (D. C. D. Minn. 1926), aff'd, 274 U. S. 693 (1927); *United States* v. *Eastman Kodak Co.,* 226 F. 62 (D. C. W. D. N. Y. 1915), decree entered, 230 F. 522 (D. C. W. D. N. Y. 1916), appeal dismissed on motion of appellant, 255 U. S. 578 (1921); *United States* v. *Corn Products Refining Co.,* 234 F. 964 (D. C. S. D. N. Y. 1916), appeal dismissed on motion of appellant,

sonable to think immediately of the same remedy when § 7 of the Clayton Act, which particularizes the Sherman Act standard of illegality, is involved. Of the very few litigated [12] § 7 cases which have been reported, most decreed divestiture as a matter of course.[13] Divestiture

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249 U. S. 621 (1919); *United States* v. *Minnesota Mining & Mfg. Co.*, 92 F. Supp. 947 (D. C. D. Mass. 1950), modified, 96 F. Supp. 356 (D. C. D. Mass. 1951); *United States* v. *Imperial Chemical Indus., Ltd.*, 100 F. Supp. 504 (D. C. S. D. N. Y. 1951), decree entered, 105 F. Supp. 215 (D. C. S. D. N. Y. 1952).

In many of these cases the courts referred to "dissolution" or "divorcement" instead of "divestiture." These terms have traditionally been treated as to a large degree interchangeable, and we so regard them. See Hale and Hale, Market Power: Size and Shape Under the Sherman Act 370 (1958); Adams, Dissolution, Divorcement, Divestiture: the Pyrrhic Victories of Antitrust, 27 Ind. L. J. 1, note 1 (1951).

[12] Appellees rely on several Clayton Act consent decrees granting relief short of divestiture, but the circumstances surrounding such negotiated agreements are so different that they cannot be persuasively cited in a litigation context.

[13] See, *e. g.*, *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458 (1960); *Aluminum Co. of America* v. *Federal Trade Comm'n*, 284 F. 401 (C. A. 3d Cir. 1922), cert. denied, 261 U. S. 616 (1923), modification denied, 299 F. 361 (C. A. 3d Cir. 1924). *United States* v. *New England Fish Exchange*, 258 F. 732 (D. C. D. Mass. 1919), modification denied, 292 F. 511 (D. C. D. Mass. 1923), on which appellees place great reliance, is not a clear exception. It is true that defendants there were allowed to retain the assets (not the stock) of one of the eight corporations whose stock they had acquired in violation of § 7. But probably acquisition of only one of those corporations' stock would not have been illegal. The only clear exception in the courts is *American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (D. C. S. D. N. Y. 1957), aff'd on the defendant's appeal, 259 F. 2d 524 (C. A. 2d Cir. 1958). But the authority of that case is somewhat diminished by the fact that it was brought not by the Government but by a private plaintiff, and by the absence of any discussion in the opinion of the issue of divestiture *vel non*. See 152 F. Supp., at 400–401 and note 16.

has been called the most important of antitrust remedies.[14] It is simple, relatively easy to administer, and sure. It should always be in the forefront of a court's mind when a violation of § 7 has been found.

The divestiture only of voting rights does not seem to us to be a remedy adequate to promise elimination of the tendency of du Pont's acquisition offensive to § 7. Under the decree, two-thirds of du Pont's holdings of General Motors stock will be voted by du Pont shareholders—upwards of 40 million shares. Common sense tells us that under this arrangement there can be little assurance of the dissolution of the intercorporate community of interest which we found to violate the law. The du Pont shareholders will *ipso facto* also be General Motors voters. It will be in their interest to vote in such a way as to induce General Motors to favor du Pont, the very result which we found illegal on the first appeal. It may be true, as appellees insist, that these shareholders will not exercise as much influence on General Motors as did du Pont when it held and voted the shares as a block. And it is true that there is no showing in this record that the du Pont shareholders will combine to vote together, or that their information about General Motors' activities will be detailed enough to enable them to vote their shares as strategically as du Pont itself has done. But these arguments misconceive the nature of this proceeding. The burden is not on the Government to show *de novo* that a "pass through" of the General Motors vote, like du Pont's ownership of General Motors stock, would violate § 7. *United States* v. *Aluminum Co. of America,* 91 F. Supp. 333, 346 (D. C. S. D. N. Y. 1950). It need only appear that the decree entered leaves a substantial likelihood that the tendency towards monopoly of the acquisition condemned by § 7 has not

[14] See Hale and Hale, *op cit., supra,* note 11, at 370.

been satisfactorily eliminated. We are not required to assume, contrary to all human experience, that du Pont's shareholders will not vote in their own self-interest. Moreover, the General Motors management, which over the years has become accustomed to du Pont's special relationship,[15] would know that the relationship continues to a substantial degree, and might well act accordingly. The same is true of du Pont's competitors. They might not try so vigorously to break du Pont's hold on General Motors' business, as if complete divestiture were ordered. And finally, the influence of the du Pont company itself would not be completely dissipated. For under the decree du Pont would have the power to sell its General Motors shares; the District Court expressly held that "[t]here would be nothing in the decree to prevent such dispositions." 177 F. Supp., at 41. Such a sale would presumably restore the vote separated from the sold stock while du Pont owned it. This power to transfer the vote could conceivably be used to induce General Motors to favor du Pont products. In sum, the "pass through" of the vote does not promise elimination of the violation offensive to § 7. What was said of the Sherman Act in *United States* v. *Union Pacific R. Co.*, 226 U. S. 470, 477 (1913), applies here: "So far as is consistent with this purpose a court of equity dealing with such combinations should conserve the property interests involved, but never in such wise as to sacrifice the object and purpose of the statute. The decree of the courts must be faithfully executed and no form of dissolution be permitted that in substance or effect amounts to restoring the

[15] For the significance of such long habit, see *North American Co.* v. *Securities & Exchange Comm'n*, 327 U. S. 686, 693 (1946); *United States* v. *Imperial Chemical Indus., Ltd.*, 105 F. Supp. 215, 236–237 (D. C. S. D. N. Y. 1952); Douglas, Democracy and Finance 33 (1940).

combination which it was the purpose of the decree to terminate."

Du Pont replies, *inter alia,* that it would be willing for all of its General Motors stock to be disenfranchised, if that would satisfy the requirement for effective relief. This suggestion, not presented to the District Court, is distinctly an afterthought. If the suggestion is disenfranchisement only while du Pont retains the stock, it would not avoid the hazards inherent in du Pont's power to transfer the vote. If the suggestion is permanent loss of the vote, it would create a large and permanent separation of corporate ownership from control, which would not only run directly counter to accepted principles of corporate democracy, but also reduce substantially the number of voting General Motors shares, thereby making it easier for the owner of a block of shares far below an absolute majority to obtain working control, perhaps creating new antitrust problems for both General Motors and the Department of Justice in the future. And finally, we should be reluctant to effect such a drastic change in General Motors' capital structure, established under state corporation law.

Appellees argue further that the injunctive provisions of the decree supplementary to the "pass through" of voting rights adequately remove any objections to the effectiveness of the "pass through." Du Pont is enjoined, for example, from in any way influencing the choice of General Motors' officers and directors, and from entering into any preferential trade relations with General Motors. And, under ¶ IX of the decree, the Government may reapply in the future should this injunctive relief prove inadequate. Presumably this provision could be used to prevent the exercise of the power to transfer the vote. But the public interest should not in this case be required to depend upon the often cumbersome and

time-consuming injunctive remedy. Should a violation of one of the prohibitions be thought to occur, the Government would have the burden of initiating contempt proceedings and of proving by a preponderance of the evidence that a violation had indeed been committed.[16] Such a remedy would, judging from the history of this litigation, take years to obtain. Moreover, an injunction can hardly be detailed enough to cover in advance all the many fashions in which improper influence might manifest itself. And the policing of an injunction would probably involve the courts and the Government in regulation of private affairs more deeply than the administration of a simple order of divestiture.[17] We think the public is entitled to the surer, cleaner remedy of divestiture. The same result would follow even if we were in doubt. For it is well settled that once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor.[18]

We therefore direct complete divestiture. Since the District Court's decree was framed around the provision directing only partial divestiture, and since General Motors, Christiana, and Delaware acquiesced in its provisions only on that basis, we shall not pass upon the provisions for ancillary relief but shall vacate the decree

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[16] *United States* v. *Corn Products Refining Co.*, 234 F. 964, 1018 (D. C. S. D. N. Y. 1916), appeal dismissed on motion of appellant, 249 U. S. 621 (1919); 12 Ala. L. Rev. 214, 220–221 (1959); Note, 56 Col. L. Rev. 420, 430 (1956) ("contempt citations are a poor method of restoring competition . . ."); Berge, Some Problems in the Enforcement of the Antitrust Laws, 38 Mich. L. Rev. 462, 469 (1940).

[17] See Hale and Hale, *op. cit., supra,* note 11, at 379.

[18] *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707, 726 (1944); *Local 167, International Brotherhood of Teamsters* v. *United States,* 291 U. S. 293, 299 (1934). Cf. *William R. Warner & Co.* v. *Eli Lilly & Co.*, 265 U. S. 526, 532 (1924) (same principle applied to private litigation).

in its entirety except as to the provisions of ¶ VI enjoining du Pont itself from exercising voting rights in respect of its General Motors stock. In this way the District Court will be free to fashion a new decree consistent with this opinion at a new hearing at which all parties may be heard. General Motors, Christiana, and Delaware will thus be able to renew, for the District Court's decision in the first instance, any objections they may have to the power of the Court to grant relief against them.

We believe, however, that this already protracted litigation should be concluded as soon as possible. To that end we direct the District Court on receipt of our judgment to enter an order requiring du Pont to file within 60 days a proposed judgment providing for complete divestiture of its General Motors stock, to commence within 90 days, and to be completed within not to exceed 10 years, of the effective date of the District Court's judgment, and requiring the Government to file, within 30 days after service upon it of du Pont's proposed judgment, either proposed specific amendments to such du Pont judgment or a proposed alternate judgment of divestiture. The District Court shall give precedence to this cause on its calendar.

The judgment of the District Court, except to the extent ¶ VI is affirmed, is vacated and remanded for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this case.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE WHITTAKER and MR. JUSTICE STEWART join, dissenting.

In *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U. S. 586, the Court held that the acquisition and continued ownership by E. I. du Pont de Nemours & Co.

of twenty-three percent of the stock of the General Motors Corporation constituted a violation of § 7 of the Clayton Act.[1] The question now before us is the adequacy of the terms of the enforcement of that judgment by the United States District Court for the Northern District of Illinois, 177 F. Supp. 1. In order to determine whether the district judge satisfactorily discharged the duties assigned him, it is necessary to be clear about these underlying elements of the question for decision: (1) What did this Court hold and say in finding that du Pont had violated § 7? (2) What considerations guided the district judge in fashioning his decree? (3) What principles has this Court laid down for the formulation of decrees by District Courts, particularly under the antitrust laws, and for review of those decrees here?

I.

As the Court described it, the "primary issue" in the Government's suit against du Pont, General Motors, and related parties was "whether du Pont's commanding position as General Motors' supplier of automotive finishes and fabrics was achieved on competitive merit alone, or because its acquisition of the General Motors' stock, and the consequent close intercompany relationship, led to the insulation of most of the General Motors' market from free competition, with the resultant likelihood, at the time of suit, of the creation of a monopoly of a line of commerce." 353 U. S., at 588–589. The question was asked in the context of these facts.

The transaction out of which the case arose was the acquisition by du Pont, during the period 1917–1919, of

[1] 38 Stat. 731, 15 U. S. C. (1946 ed.) § 18. The suit was brought prior to the enactment in 1950 of amendments to the Act which, by their terms, are inapplicable to previous acquisitions. 64 Stat. 1125, 15 U. S. C. § 18.

a twenty-three percent stock interest in General Motors. That "colossus of the giant automobile industry" absorbed "upwards of two-fifths of the total sales of automotive vehicles in the Nation" over the period from 1938 to 1955. In 1955 it ranked first in sales and second in assets among all United States industrial corporations. Purchases of automotive fabrics and finishes by General Motors from du Pont ran into millions of dollars annually in the years immediately preceding the institution of the Government's suit in 1949. Du Pont supplied sixty-seven percent of General Motors' requirements for finishes in 1946 and sixty-eight percent in 1947. The figures for fabrics supplied to General Motors by du Pont in those years are fifty-two and three-tenths percent and thirty-eight and five-tenths percent respectively.

Du Pont's "commanding position as a General Motors supplier" was not achieved until after its acquisition of a substantial fraction of General Motors' stock. At the time of this purchase, du Pont was actively seeking markets for its nitrocellulose, artificial leather, celluloid, rubber-coated goods, and paints and varnishes used by automobile manufacturers. Leading du Pont executives in 1917 and 1918 indicated that the acquisition of General Motors stock was due in part to a belief that it would secure for du Pont an important market for its automotive products.

> "This background of the acquisition, particularly the plain implications of the contemporaneous documents, destroys any basis for a conclusion that the purchase was made 'solely for investment.' Moreover, immediately after the acquisition, du Pont's influence growing out of it was brought to bear within General Motors to achieve primacy for du Pont as General Motors' supplier of automotive fabrics and finishes." 353 U. S., at 602.

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A former du Pont official became a General Motors vice president and set about maximizing du Pont's share of the General Motors market. Lines of communications were established between the two companies and several du Pont products were actively promoted. Within a few years various du Pont manufactured items were filling the entire requirements of from four to seven of General Motors' eight operating divisions. The Fisher Body division, long controlled by the Fisher brothers under a voting trust even though General Motors owned a majority of its stock, followed an independent course for many years, but by 1947 and 1948 "resistance had collapsed" and its purchases from du Pont "compared favorably" with purchases by other General Motors divisions. Competitors came to receive higher percentages of General Motors business in later years, but it is "likely" that this trend stemmed "at least in part" from the needs of General Motors outstripping du Pont's capacity.

> "The fact that sticks out in this voluminous record is that the bulk of du Pont's production has always supplied the largest part of the requirements of the one customer in the automobile industry connected to du Pont by a stock interest. The inference is overwhelming that du Pont's commanding position was promoted by its stock interest and was not gained solely on competitive merit." 353 U. S., at 605.

This Court agreed with the trial court "that considerations of price, quality and service were not overlooked by either du Pont or General Motors." 353 U. S., at 606. However, it determined that neither this factor, nor "the fact that all concerned in high executive posts in both companies acted honorably and fairly, each in the honest conviction that his actions were in the best interests of his own company and without any design to overreach anyone, including du Pont's competitors," 353 U. S., at

607, outweighed the Government's claim for relief. This claim, as submitted to the District Court and dismissed by it, 126 F. Supp. 235, alleged violation not only of § 7 of the Clayton Act, but also of §§ 1 and 2 of the Sherman Act.[2] The latter provisions proscribe any contract, combination, or conspiracy in restraint of interstate or foreign trade, and monopolization of, or attempts, combinations, or conspiracies to monopolize, such trade. However, this Court put to one side without consideration the Government's appeal from the dismissal of its Sherman Act allegations.[3] It rested its decision solely on § 7, which reads in pertinent part:

> "[N]o corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.
>
> . . . . . .
>
> "This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. . . ."

The purpose of this provision was thus explained in the Court's opinion:

> "Section 7 is designed to arrest in its incipiency not only the substantial lessening of competition from the acquisition by one corporation of the whole or

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[2] 26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C. §§ 1, 2.

[3] See 353 U. S., at 588, n. 5.

> any part of the stock of a competing corporation, but also to arrest in their incipiency restraints or monopolies in a relevant market which, as a reasonable probability, appear at the time of suit likely to result from the acquisition by one corporation of all or any part of the stock of any other corporation. The section is violated whether or not actual restraints or monopolies, or the substantial lessening of competition, have occurred or are intended. . . ." 353 U. S., at 589.

Thus, a finding of conspiracy to restrain trade or attempt to monopolize was excluded from the Court's decision. Indeed, as already noted, the Court proceeded on the assumption that the executives involved in the dealings between du Pont and General Motors acted "honorably and fairly" and exercised their business judgment only to serve what they deemed the best interests of their own companies. This, however, did not bar finding that du Pont had become pre-eminent as a supplier of automotive fabrics and finishes to General Motors; that these products constituted a "line of commerce" within the meaning of the Clayton Act; that General Motors' share of the market for these products was substantial; and that competition for this share of the market was endangered by the financial relationship between the two concerns:

> "The statutory policy of fostering free competition is obviously furthered when no supplier has an advantage over his competitors from an acquisition of his customer's stock likely to have the effects condemned by the statute. We repeat, that the test of a violation of § 7 is whether, at the time of suit, there is a reasonable probability that the acquisition is likely to result in the condemned restraints. The conclusion upon this record is inescapable that such

likelihood was proved as to this acquisition. . . ." 353 U. S., at 607.

On the basis of the findings which led to this conclusion, the Court remanded the case to the District Court to determine the appropriate relief. The sole guidance given the Court for discharging the task committed to it was this:

> "The judgment must therefore be reversed and the cause remanded to the District Court for a determination, after further hearing, of the equitable relief necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute. The District Courts, in the framing of equitable decrees, are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' *International Salt Co.* v. *United States,* 332 U. S. 392, 400–401." 353 U. S., at 607–608.

This brings us to the course of the proceedings in the District Court.

II.

This Court's judgment was filed in the District Court on July 18, 1957. The first pretrial conference—held to appoint *amici curiae* to represent the interests of the stockholders of du Pont and General Motors and to consider the procedure to be followed in the subsequent hearings—took place on September 25, 1957. At the outset, the Government's spokesman explained that counsel for the Government and for du Pont had already held preliminary discussions with a view to arriving at a relief plan that both sides could recommend to the court. Du Pont, he said, had proposed disenfranchisement of its General Motors stock along with other restrictions on the du Pont-General Motors relationship. The Government, deeming these suggestions inadequate, had urged

that any judgment include divestiture of du Pont's shares of General Motors. Counsel for the Government invited du Pont's views on this proposal before recommending a specific program, but stated that if the court desired, or if counsel for du Pont thought further discussion would not be profitable, the Government was prepared to submit a plan within thirty days.

Counsel for du Pont indicated a preference for the submission of detailed plans by both sides at an early date. No previous antitrust case, he said, had involved interests of such magnitude or presented such complex problems of relief. The submission of detailed plans would place the issues before the court more readily than would discussion of divestiture or disenfranchisement in the abstract. The Court adopted this procedure with an appropriate time schedule for carrying it out.

The Government submitted its proposed decree on October 25, 1957. The plan called for divestiture by du Pont of its 63,000,000 shares of General Motors stock by equal annual distributions to its stockholders, as a dividend, over a period of ten years. Christiana Securities Company and Delaware Realty & Investment Company, major stockholders in du Pont, and the stockholders of Delaware were dealt with specially by provisions requiring the annual sale by a trustee, again over a ten-year period, of du Pont's General Motors stock allocable to them, as well as any General Motors stock which Christiana and Delaware owned outright. If, in the trustee's judgment, "reasonable market conditions" did not prevail during any given year, he was to be allowed to petition the court for an extension of time within the ten-year period. In addition, the right to vote the General Motors stock held by du Pont was to be vested in du Pont's stockholders, other than Christiana and Delaware and the stockholders of Delaware; du Pont, Christiana, and Delaware were to be enjoined from acquiring

stock in or exercising control over General Motors; du Pont, Christiana, and Delaware were to be prohibited to have any director or officer in common with General Motors, and vice versa; and General Motors and du Pont were to be ordered to terminate any agreement that provided for the purchase by General Motors of any specified percentage of its requirements of any du Pont manufactured product, or for the grant of exclusive patent rights, or for a grant by General Motors to du Pont of a preferential right to make or sell any chemical discovery of General Motors, or for the maintenance of any joint commercial enterprise by the two companies.

On motion of the *amici curiae,* the court directed that a ruling be obtained from the Commissioner of Internal Revenue as to the federal income tax consequences of the Government's plan. On May 9, 1958, the Commissioner announced his rulings. The annual dividends paid to du Pont stockholders in shares of General Motors stock would be taxable as ordinary income to the extent of du Pont's earnings and profits. The measure, for federal income tax purposes, of the dividend to individual stockholders would be the fair market value of the shares at the time of each annual distribution. In the case of taxpaying corporate stockholders, the measure would be the lesser of the fair market value of the shares or du Pont's tax basis for them, which is approximately $2.09 per share. The forced sale of the General Motors stock owned by or allocable to Christiana, Delaware, and the stockholders of Delaware, and deposited with the trustee, would result in a tax to those parties at the capital gains rate.

Du Pont's counterproposal was filed on May 14, 1958. Under its plan du Pont would retain its General Motors shares but be required to pass on to its stockholders the right to vote those shares. Christiana and Delaware would, in turn, be required to pass on the voting rights to the General Motors shares allocable to them to their own

stockholders. Du Pont would be enjoined from having as a director, officer, or employee anyone who was simultaneously an officer or employee of General Motors, and no director, officer, or employee of du Pont could serve as a director of General Motors without court approval. Du Pont would be denied the right to acquire any additional General Motors stock except through General Motors' distributions of stock or subscription rights to its stockholders.

On June 6, 1958, General Motors submitted its objections to the Government's proposal. It argued, *inter alia,* that a divestiture order would severely depress the market value of the stock of both General Motors and du Pont, with consequent serious loss and hardship to hundreds of thousands of innocent investors, among them thousands of small trusts and charitable institutions; that there would be a similar decline in the market values of other automotive and chemical stocks, with similar losses to the stockholders of those companies; that the tremendous volume of General Motors stock hanging over the market for ten years would hamper the efforts of General Motors and other automobile manufacturers to raise equity capital; and that all this would have a serious adverse effect on the entire stock market and on general business activity. General Motors comprehensively contended that the Government plan would not be "in the public interest" as required by the mandate of this Court.

The decrees proposed by the *amici curiae* were filed in August of 1958. These plans, like du Pont's, contained provisions for passing the vote on du Pont's General Motors shares on to the ultimate stockholders of du Pont, Christiana, and Delaware, except that officers and directors of the three companies, their spouses, and other people living in their households, as well as other speci-

fied persons, were to be totally disenfranchised. Both plans also prohibited common directors, officers, or employees between du Pont, Christiana, and Delaware, on the one hand, and General Motors on the other. Further, both plans placed restrictions on trade relations between du Pont and General Motors. *Amicus* Dallstream, representing the du Pont stockholders, proposed in addition a program termed a "takedown," by which du Pont would create a new class of stock, "du Pont Special Common," which would have no rights in du Pont's General Motors stock and which du Pont stockholders could obtain, along with their allocable portion of the General Motors shares owned by du Pont, at times suitable to them, in exchange for their present du Pont common. This proposal would have different, and in several respects more favorable, tax consequences than those of the Government's plan.[4]

In a memorandum filed on September 26, 1958, the Government, on the assumption that divestiture was required under the Clayton Act, suggested various ways in which its decree might be modified to ameliorate its harsh tax consequences. The Government stated that it would have no objections to the modifications discussed in the memorandum but it did not submit amendments to its original proposal.

On the same day, the Government filed a motion for a preliminary injunction, seeking to restrain du Pont, Christiana, and Delaware from exercising their voting rights in General Motors stock, to prevent du Pont, Christiana, and Delaware from having any director, officer, or employee in common with General Motors or nominating any such person to serve in General Motors,

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[4] For a discussion of *amicus* Dallstream's recommendations, see the opinion of the District Court, 177 F. Supp., at 9–10.

and to prohibit further acquisitions of General Motors stock by the three corporations. The Government urged that since all parties were in substantial agreement on these measures as the minimum appropriate relief, the court should adopt them without delay. The court denied the motion on November 3, 1958, on the ground that the Government had failed to show a likelihood of irreparable injury in the absence of immediate relief and that, with final determination of the case not far distant, it would be undesirable to begin deciding issues piecemeal at that late date.

After further preliminaries which need not be recounted, the trial of the issues on the appropriate relief commenced on February 16, 1959, and continued to a conclusion on April 9, 1959. The Government presented its evidence on twelve hearing days; the defendants and *amici* also presented evidence on twelve days; and the Government took four more hearing days for the presentation of rebuttal evidence. Briefs were filed and the case was submitted to the court in June 1959. The court's decision was announced on October 2, 1959.

The printed record of the proceedings below covers 3,340 pages. Of this, trial of the issues pertaining to the terms of the decree fills 2,380 pages. An additional 543 pages contain exhibits. In the course of the trial twenty-nine witnesses were called by the Government and thirty-two by the defendants and *amici*. The printed exhibits number 193 submitted by the Government, thirty-two by du Pont, thirty by General Motors, nine by Christiana and Delaware, and one by *amicus* Dallstream. The bulk of this mass of evidence bore principally upon disputes over the market and tax consequences of divestiture of du Pont's General Motors stock and upon the requirement of resort to this remedy for the effective enforcement of § 7.

On occasion the Government objected to the attention that was being focused on the details of its proposed decree. The Government insisted that its ultimate aim was not to further a specific plan but to obtain any reasonable order of divestiture. However, late in the trial the Government indicated that its original divestiture proposal stood before the court unamended in any detail.

"Mr. Reycraft (chief counsel for the Government): . . . .

. . . . . .

"I might also add that it is rather an obvious thought that the judgment which we did file was approved by not only the Assistant Attorney General but the Attorney General, and that *while I am authorized here to represent the Government, I have no authority to change the decisions they make.*

"The Court: *It is my understanding then that you are standing on the decree that you proposed before this hearing started?*

"Mr. Reycraft: *That is right, sir.*

. . . . . .

"Mr. Cox (counsel for du Pont): . . . .

". . . I understand Mr. Reycraft's position now to be that he stands on the judgment that was filed. But if the Government should come in on its brief with a brand new proposal sometime, may it please the Court, we may find ourselves in a position where we will have to come into Court and ask for some kind of an opportunity to have a look at that.

"The Court: That will depend entirely on the extent or the character of the deviation from the original proposal.

"Mr. Cox: I would assume that would be true.

"The Court: *From what Mr. Reycraft has said, I am assuming that that is the decree, with probably minor changes.*

"Mr. Reycraft: *I have nothing further, your Honor.*" [5] (Emphasis added throughout.)

Thus it appears that the Government stood on its original proposal, rather than on alternative suggestions.

And so one comes to consider how the court dealt with the issues presented by the parties.

III.

After disposing of two preliminary questions—ruling in favor of the amenability of General Motors, Christiana, and Delaware, as parties not condemned as violators of § 7, to the enforcing power of the court, and against the amenability to direct enforcement of holders of both du Pont and Delaware stock who were not parties to the suit—the court thus defined the central issue before it:

"Under the mandate of the Supreme Court it is the responsibility of this Court to frame a judgment which will eliminate the effects of du Pont's acquisition of stock of General Motors which are offensive to the statute. The effect of the acquisition which the Supreme Court found to be offensive to the statute was the 'reasonable probability' that the acquisition might result in restraint or monopolization of the market for automotive fabrics and finishes. 353 U. S. 586, 595, 607, 77 S. Ct. 872, 1 L. Ed. 2d 1057. Accordingly, the problem before this Court is one of devising a judgment that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist." 177 F. Supp., at 12–13.

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[5] Transcript of Proceedings, March 31, 1959.

In discharging its duty under this mandate, particularly since relevant circumstances might offer a choice between effective alternatives, the court deemed it appropriate not to exclude from consideration the vast multiform interests at stake—both the hundreds of thousands of truly innocent stockholders and the bearing on the national economy of the nature of the disposition of du Pont's General Motors holdings.

> "This does not mean that the private interests of the stockholders can outweigh the public interest in a judgment that will effectively dissipate the effects of the acquisition found to be unlawful. But it does mean that in the opinion of this Court the primary public purpose should be achieved so far as possible without inflicting unnecessary injury upon innocent stockholders in the various corporations involved. The purpose of the judgment should be remedial and not punitive. Hartford-Empire Co. v. United States, 323 U. S. 386, 409, 65 S. Ct. 373, 89 L. Ed. 322; United States v. National Lead Co., 332 U. S. 319, 67 S. Ct. 1634, 91 L. Ed. 2077. No harsh and oppressive consequences should be visited upon the stockholders unless it can be shown on the facts that these results are inescapable if a decree is to be framed that will comply with the mandate of the Supreme Court. The cases leave no doubt that these are considerations which the Court should weigh in the framing of its final judgment. United States v. American Tobacco Co., 221 U. S. 106, 185, 31 S. Ct. 632, 55 L. Ed. 663. Compare Timken Roller Bearing Co. v. United States, 341 U. S. 593, 604, 71 S. Ct. 971, 95 L. Ed. 1199." 177 F. Supp., at 13–14.

The Government's first major contention—that by the terms of the Clayton Act the court had no choice but

to order total divestiture—was rejected on the basis of an analysis of the statute and this Court's reaffirmation of the "large discretion" possessed by the District Courts "to model their judgments to fit the exigencies of the particular case." The court proceeded to a consideration of the evidence introduced by the parties. The first subject was the tax impact of the Government's proposed decree. Extensive expert evidence (much of which was derived from a statistical survey found by the court to have been soundly and objectively conducted) indicated that individual stockholders of du Pont would pay income taxes at a rate of fifty percent to sixty percent under the Government's plan, and that the taxes payable by such persons could amount to $1,000,000,000 if the value of the General Motors shares were $50 per share, and approximately $770,000,000 if $40 per share. The capital gains tax on the sale of the General Motors stock allocable to Christiana and Delaware would be perhaps as much as $200,000,000. The court determined that variations of the Government's plan would also result in vast tax levies. It found, for example, that if a single distribution were employed to dispose of the 63,000,000 General Motors shares, at an assumed market value of $45 per share the total tax cost would be $588,044,000.

A second economic consequence of the Government's divestiture scheme would be its impact on the market value of the securities involved. The Government relied on three types of evidence to show that its plan would have little influence on the market prices of General Motors and du Pont stock. The first type was expert testimony that there was a regular flow of investment money coming into the market. However, upon detailed review of the testimony of a dozen witnesses, the court concluded that "there was no convincing evidence in this category that any substantial portion of this invest-

ment money would be directed to buying General Motors stock at the true value of the stock, if the Government decree were in effect." 177 F. Supp., at 22.

The Government's second type of evidence relating to the market consequences of its decree was the statistical testimony of academic and professional analysts. The court noted that it was shown no charts or statistics relating to a situation "remotely approaching" the forced sale of 2,000,000 shares of General Motors stock each year for ten years, attended by additional sales of both General Motors and du Pont stock for tax and other purposes. Further, it found that one Government expert admitted he would defer to the judgment of investment bankers in the matter of the price for which the General Motors stock could be sold; another testified that in the past an increase in stock supply of twenty percent had been associated with price declines of between ten and fifteen percent; the testimony of another Government witness was based on inadequately drawn statistical tables, and his demeanor on the witness stand deprived his evidence of credibility; a fourth witness' opinions had no foundation in factual evidence.

The Government's third type of evidence related to securities offerings in the recent past. The court determined that the circumstances of these offerings—*i. e.*, their background, magnitude, timing, and duration—made them dissimilar to a divestiture of du Pont's interest in General Motors. In any event most of these offerings did have a depressing effect on the market value of the stock involved. None of this evidence, the court found, gave assurance that the Government proposal would not cause serious loss on the sale of General Motors and du Pont stock during the divestiture period.

The defendants countered the Government's case with a variety of evidence. Two experienced underwriters testified that the Government's ten-year divesti-

ture plan would result in a decline in the value of General Motors stock of from twenty percent to thirty percent; that heavy tax sales of du Pont would lower its price at least twenty-five percent; that distribution of General Motors stock in lieu of cash dividends would be even worse from this standpoint; that even an extension of the divestiture period to twenty years would not prevent declines in the neighborhood of fifteen percent; that a further loss estimated at from $1.50 to $2 per share sold in underwriting expense would be incurred by Christiana and Delaware; and, finally, that the trustee could never make the sales during the divestiture period anyway, since he could not realize a price, in the words of the Government's proposed final judgment, "sufficiently high to reflect the fair value and true worth of the stock."

Several trust management executives testified that because of the tax consequences of the Government's decree and the difficulties of allocating equitably the General Motors shares received as dividends by the trusts, they, and presumably others in their position throughout the country, would be forced to make mass sales of du Pont stock. Executives of several insurance companies and an investment trust company predicted declines in the value of General Motors stock and expressed an intention to buy it for their concerns only at considerably reduced prices. Many witnesses concurred in the view that the Government's decree would render future financing by General Motors highly uneconomic and very difficult to accomplish.

The court then appraised the evidence bearing on possible voting control of General Motors, under a decree of less than total divestiture, by corporations or individuals affiliated with du Pont. It determined that the Government's broadest grouping—individuals who were stockholders of Delaware, additional individuals named du Pont, and certain corporations in which both groups

(sixty-five persons in all) own stock or on whose boards they sit—would, under the du Pont plan's "pass-through" of voting rights, aggregate the vote of about eight percent of the total vote of General Motors. It was unclear to the court either that this combination had a reasonable basis in fact or that, even if it did represent a cohesive block of votes, it was a large enough block to exercise any real control over General Motors. However, the court deemed it unnecessary to resolve these questions, since it intended to frame a decree to guarantee that concerted action by these stockholders would be precluded.

On the basis of its appraisal of the evidence, the court reached its essential conclusions. The first question was what provision to make with respect to du Pont's 63,000,000 shares of General Motors. It determined that a careful and detailed plan for a "pass-through" of the votes of these shares to du Pont's stockholders and an injunction to prevent du Pont and General Motors from sharing common officers, directors, and employees were necessary. The court then considered whether title to the stock, stripped of these vital incidents of ownership, must also be taken from du Pont, "in order to remove and to guard against the probability of restraint or monopolization of trade which was the consequence the Supreme Court found to be offensive to the statute." 177 F. Supp., at 40. "There is no evidence," it concluded, "on which the Court could make such a finding." 177 F. Supp., at 40.

> "In essence, therefore, what would be left in du Pont would be the most sterile kind of an investment. The Court notes in this connection that Section 7 of the Clayton Act expressly excludes from its operation 'corporations purchasing such stock solely for investment and not using the same by voting or otherwise' to bring about anti-competitive effects. There would thus appear to be a recognition on the

part of Congress that the holding of stock does not in all instances carry with it the power to bring about consequences offensive to the statute. The Court recognizes that the Supreme Court has held that in the past du Pont has not held its stock in General Motors solely for investment. This Court is of the opinion, however, that the divestiture and ancillary injunctive provisions referred to hereafter will be effective to assure that hereafter General Motors stock will be held by du Pont solely for investment.

. . . . . .

"In the circumstances, therefore, the Court finds that there is nothing in the record made in the hearing on relief or in the record in the trial in chief which would support, even by inference, the conclusion that du Pont's possession of the bare legal title to General Motors stock, stripped of its right to vote and of its right to representation on the Board of General Motors, would create any possibility that the stock would have any influence on the practices and policies of General Motors or could be used in any way that would be inconsistent with the mandate of the Supreme Court." 177 F. Supp., at 41.

What was on the other side of the ledger? The evidence indicated that divestiture of legal title would visit upon thousands of innocent investors adverse tax and market consequences, always severe even if varying in detail depending on the variation of the Government's plan. The court concluded that any plan for divestiture of legal title to du Pont's interest in General Motors would either impair the value of the property interests involved or impose severe tax consequences on du Pont's stockholders. Moreover, any plan that produced as a by-product the accumulation of vast amounts of cash by du Pont would have the undesirable result

of enhancing greatly du Pont's economic power and position. All this led the court to hold that total divestiture, while unnecessary to remove the anticompetitive consequences of du Pont's ownership of the General Motors stock, would impose unfair injury on the stockholders of those companies.

The court dealt with the Government's two objections to its result. The fear that block voting of the passed-through votes on the General Motors shares by investors who were related by blood or business interest would leave control of General Motors in the hands of du Pont's close associates was met by precluding the stockholders of Christiana and Delaware, as well as other specified persons, from voting their allocable shares of du Pont's General Motors stock. The objection that retention by du Pont of any financial stake in General Motors, even on behalf of its stockholders, would provide incentive to intercorporate favoritism between the two, while deemed merely a "naked suggestion," was answered by providing specific relief against preferential trade relations between du Pont and General Motors. In light of the proof and of these precautionary prohibitions, the court concluded that to order divestiture of du Pont's title to the General Motors stock would "constitute a serious abuse of discretion." 177 F. Supp., at 49.[6]

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[6] A summary of the detailed provisions of the decree carrying out the direction and purposes of the court's opinion follows.

Du Pont, Christiana, and Delaware were enjoined from acquiring additional General Motors stock except as stock or rights might be distributed to them as stockholders by General Motors.

Du Pont, Christiana, and Delaware, on the one hand, and General Motors, on the other, were prohibited to have common officers, directors, or employees. The former three were also restrained from nominating any person to be an officer or director of General Motors.

Du Pont and General Motors were compelled to terminate, for as long as du Pont, Christiana, or Delaware own any General Motors stock, any agreement between them which (1) requires General

IV.

The questions presented by this appeal must be considered in the setting of the proceedings, summarized above, that led to the District Court's conclusions in formulating its decree. Since the Court rejects the Gov-

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Motors to purchase from du Pont a specified percentage of its requirements of any product (with certain time provisos), or (2) grants to either concern exclusive patent rights, or grants to du Pont preferential rights to make or sell any chemical discovery of General Motors.

Du Pont, Christiana, and Delaware were restrained, for the same period, from entering into any joint business venture with General Motors and from knowingly holding stock in any business enterprise in which General Motors holds stock. The same restrictions were applied to General Motors.

Du Pont was enjoined, again for the stock-holding period, from dealing with General Motors with respect to du Pont products on terms more favorable than those on which it is willing to deal with General Motors' competitors. The same restriction was placed upon General Motors in its dealings with du Pont.

Du Pont, Christiana, and Delaware, and their directors and officers, and the members of the families of their directors and officers who reside in the same household with them, were enjoined from exercising their voting rights in General Motors stock owned by them or allocable to them under the decree, and from attempting to influence anyone voting General Motors stock.

The vote on the General Motors shares owned by du Pont was ordered "passed through" to the stockholders of du Pont (subject to the prohibitions of the preceding paragraph), and the notification and proxy machinery necessary to effectuate this provision was outlined. Provision was made for the appointment of a monitor of these voting procedures.

A procedure was established whereby du Pont and Christiana might sell or otherwise dispose of their General Motors stock.

Two separate provisions preserved the right of any party to apply to the court for modification of the decree in the event of a change of circumstances (such as the advent of legislative tax relief) and for further orders necessary for carrying out the judgment.

Du Pont, Christiana, and Delaware were directed to obtain from

ernment's claim that total divestiture is statutorily required upon a finding of a violation of § 7 of the Clayton Act, I need say no more about it.

If a District Court is not subject to any statutory requirement to order divestiture in a § 7 case, is it left without guidance or direction in fashioning an appropriate decree as a court of equity? Of course not. There is a body of authority, both procedural and substantive, by which it is to be guided. It is, however, well to remember that the wise admonition that general principles do not decide concrete cases has sharp applicability to equity decrees. Any apparently applicable policy or rule, abstractly stated, must be related to the specific circumstances of a particular case in which it is invoked and applied. Care must be taken to consider phrases used in relation to the particular facts of the cases relied on.

One principle has comprehensive application. It is that courts of equity, as this Court advised the District Court in remanding the case to it to fashion the appropriate relief, "are clothed 'with large discretion to model their judgments to fit the exigencies of the particular case.' " 353 U. S., at 607–608. This is a commonplace,[7] but one of compelling importance. To forget it is to forget equity's special function and historic significance. The transcendence of this doctrine derives from the recog-

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their officers and directors, and their families, written consents to be bound by the voting restrictions of the judgment.

For the purpose of securing compliance with the judgment, the Department of Justice was authorized to conduct reasonable inspections of the records and interviews with the employees of du Pont, Christiana, and Delaware and to apply to the court for similar privileges as to General Motors upon a showing of good cause.

[7] See, *e. g.*, *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185; *International Salt Co.* v. *United States*, 332 U. S. 392, 400–401; *Besser Mfg. Co.* v. *United States*, 343 U. S. 444, 449–450; *International Boxing Club* v. *United States*, 358 U. S. 242, 253.

nition that without it the effort to dispense equal justice under law would all too often be frustrated. The landmark sentences of *Hecht Co.* v. *Bowles,* 321 U. S. 321, 329–330, express the principles that must guide the chancellor:

> "We are dealing here with the requirements of equity practice with a background of several hundred years of history. . . . The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. The qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs as well as between competing private claims. . . ."

If, indeed, equity's characteristic flexibility is deeply rooted in history, the administration of justice makes greater demands upon it now than ever before. As business transactions become increasingly complex, they multiply and complicate the issues presented to courts even in litigation of ordinary dimensions. How much more is this true of a suit of the magnitude and reach of the one before us, with inevitable impact far beyond the interests of the immediate parties. In such a case we need to be specially mindful that the purpose of equity jurisdiction is to adapt familiar principles of law to intricate, elusive, and unfamiliar facts. As one member of this Court recently put it: "Equity decrees are not like the packaged goods this machine age produces. They are uniform only in that they seek to do equity in a given case." *United Steelworkers of America* v. *United States,* 361 U. S. 39, 62, 71 (dissenting opinion).[8]

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[8] In addition, see, for example, McClintock, Equity (2d ed. 1948), § 30:

"A court of equity may frame its decree so as to protect to the greatest extent possible the conflicting interests of the parties; to

The District Court was duty bound to exercise discretion—which means to weigh contending considerations and conflicting evidence as a matter of judgment—in framing a decree to meet the needs of the case. It could not escape exercising discretion—that is, exercising its judgment within an area of allowable choice—which this Court committed to it. Discretion precludes whimsy or caprice. Discretion means the judicial discretion of a court of equity. Where precedent or judicial tradition has established limitations on the chancellor's range of choice, he must respect them. What limitations confined the court below? Consideration of the relevant authorities on the formulation of antitrust decrees becomes necessary.

First, what was open to consideration in the District Court? Its overriding concern had to be for the protection of the public interest. It was its duty to hear all the evidence bearing on that question and in any conflict with private interests decisively to resolve doubts in favor of the general welfare. The account of the District Court's procedures, and of the considerations on which it reached its reflective conclusions, in Parts II and III of this opinion establishes, I submit, that it fully conformed to this essential requirement. Although it considered the Government's case on the likelihood of block voting of the votes of the General Motors shares passed through to Delaware and Christiana of doubtful

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accomplish this it may require the performance of conditions, may experiment to determine how best to accomplish its purpose, and may use either the negative or the positive form of decree."

Pomeroy, Equity Jurisprudence (5th ed. 1941), § 109:

"Equitable remedies . . . are distinguished by their flexibility, their unlimited variety, their adaptability to circumstances, and the natural rules which govern their use. There is in fact no limit to their variety and application; the court of equity has the power of devising its remedy and shaping it so as to fit the changing circumstances of every case and the complex relations of all the parties."

strength, it sterilized those shares to prevent their being voted at all. Again, although it found no proof in the record to support the Government's "naked suggestion" concerning the probability of future preferential trade relations between General Motors and du Pont, it constructed a set of prohibitions against such dealing between the two enterprises. As already noted, the court fashioned its decree in deference to its conception of its "primary duty" to devise a judgment "that will effectively guard against the probability of restraint or monopolization which the Supreme Court found to exist." 177 F. Supp., at 13.

Did the District Court fail in its duty because it deemed relevant for consideration as one factor in striking the balance involved in its conclusion the consequences of divestiture to thousands upon thousands of blameless stockholders and other so-called private interests? The decisions of this Court gave full warrant to the District Court that it did not exceed its discretionary powers in doing so. The weighty words of *United States* v. *American Tobacco Co.*, 221 U. S. 106, 185, are apposite:

> "In considering the subject . . . three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition either by way of stock ownership or otherwise of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning. . . ."

And in *Standard Oil Co.* v. *United States,* 221 U. S. 1, 78, the Court admonished that "the fact must not be

overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." The importance of these considerations was reiterated in *Continental Ins. Co.* v. *United States,* 259 U. S. 156, with the Government actively championing their propriety, and suggesting that "'it seemed wise not to amputate any more than was necessary to secure the great policy of the Sherman law.'" 259 U. S., at 169. In *United States* v. *United Shoe Machinery Co.,* 247 U. S. 32, 46, the Court labeled dissolution a remedy "extreme, even in its mildest demands" and counseled "If there be need for this the difficulties of achievement should not deter; but the difficulties may admonish against the need . . . ." This holds for divestiture.[9]

This Court's decisions leave no doubt that it was proper for the District Court to attend to the likelihood of danger to the public welfare that might arise from the serious adverse market consequences of divestiture and to the likelihood of extensive loss to innocent investors through both market decline and tax levy. It is apparent that the Department of Justice recognized the relevance of the tax impact. In a statement on proposed legislation to alleviate the tax burden of divestiture decrees, Robert A. Bicks, then Acting Assistant Attorney General in charge of the Antitrust Division of the Justice Department, said:

> "Bear in mind, the 1890 Sherman and the 1914 Clayton Acts, the basic antitrust statutes, became law before the income tax was a reality. And the land-

[9] See also *United States* v. *Terminal R. Assn.,* 224 U. S. 383; *United States* v. *American Can Co.,* 234 F. 1019; *United States* v. *Great Lakes Towing Co.,* 208 F. 733, 217 F. 656.

> mark antitrust cases—dissolving illegal trusts and monopolies via divestiture—were largely a product of an era marked by no income tax or much lower tax rates. Indeed, there is real basis for concluding that some bench-mark antitrust divestiture cases . . . might well not have been decreed had today's tax rates prevailed." Bicks, Statement on H. R. 7361 and H. R. 8126 before the House Committee on Ways and Means, July 20, 1959, 4 Antitrust Bulletin 557 (1959).

It is obvious from the context of these remarks that their immediate objective was to smooth the way toward obtaining divestiture in this very case.[10]

In a case such as *du Pont,* in which the challenged transaction occurred approximately thirty years prior to the initiation of suit, the force of these considerations is greatly enhanced. The relationship between General Motors and du Pont stood uncondemned by the Government through successive administrations throughout that period. This is not remotely to hint any form of estoppel against resort to divestiture as relief for the illegality, however belatedly established, were it otherwise the required means for correction of past misconduct or its future avoidance. I do maintain that, as this Court has recognized, it was altogether proper for the District Court—even incumbent upon it—to take "account of what was done during that time—the many millions of dollars spent, the developments made, and the

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[10] The Bicks statement itself makes repeated reference to the pending *du Pont* case. See 4 Antitrust Bulletin, at 561, n. 7, 562, n. 8, 567, n. 13. And the Committee Report and Hearings recur again and again to the serious tax problem engendered by the case. See H. R. Rep. No. 1128, 86th Cong., 1st Sess.; Hearings on H. R. 8126 before the House Committee on Ways and Means, 86th Cong., 1st Sess.; Hearings on S. 200 before the Senate Committee on Finance, 86th Cong., 1st Sess.

enterprises undertaken, the investments by the public that have been invited and are not to be ignored." *United States* v. *United States Steel Corp.*, 251 U. S. 417, 453.

In short, the factors that influenced the District Court were fit considerations for judicial scrutiny. But we still have to inquire what criteria were open to the District Court for appraising the relevant variables and how that court's determinations are to be reviewed by this Court.

The very foundation for judgment in reviewing a District Court's decree in a case like this is the inherent nature of its task in adjudicating claims arising under the antitrust laws. The sweeping generality of the antitrust laws differentiates them from ordinary statutes. "As a charter of freedom," wrote Mr. Chief Justice Hughes for the Court, "the [Sherman] Act has a generality and adaptability comparable to that found to be desirable in constitutional provisions." *Appalachian Coals, Inc.*, v. *United States*, 288 U. S. 344, 359–360. This is no less true of the Clayton Act's prohibition "where the effect . . . may be to substantially lessen competition." Correspondingly broad is the area within which a District Court must move to fit the remedy to the range of the outlawry. Far-reaching responsibility is vested in the court charged with fashioning a decree and the decree it fashions must be judged on review in light of this responsibility.

> "In the anti-trust field the courts have been accorded, by common consent, an authority they have in no other branch of enacted law. . . . They would not have been given, or allowed to keep, such authority in the anti-trust field, and they would not so freely have altered from time to time the interpretation of its substantive provisions, if courts were in the habit of proceeding with the surgical ruthlessness that

might commend itself to those seeking absolute assurance that there will be workable competition, and to those aiming at immediate realization of the social, political, and economic advantages of dispersal of power." *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 348 (a decision affirmed by this Court without opinion, 347 U. S. 521).

Partly on the basis of these views, the Attorney General's National Committee to Study the Antitrust Laws recommended that divestiture "not be decreed as a penalty," that it "not be invoked where less drastic remedies will accomplish the purpose of the litigation," and that possible disruption of industry and markets as well as effect on the public, investors, customers, and employees be taken into account. Report of the Attorney General's National Committee to Study the Antitrust Laws (1955), pp. 355–356. This statement fairly reflects the views of this Court, to the effect that a decree must not "impose penalties in the guise of preventing future violations," *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 409; that the least harsh of available measures should be adopted when the Court is satisfied that they will be effective, *e. g., Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 603 (concurring opinion); and that injunctive relief may well be an adequate sanction against continued wrongdoing, *id.,* at 604 (concurring opinion), and *Standard Oil Co.* v. *United States,* 221 U. S. 1, 77. Add to this that we have recognized a sound basis in reason for distinguishing palpably illegal activity from conduct that was arguably permissible, and for dealing with the latter less severely than the former. See *Federal Trade Comm'n* v. *National Lead Co.,* 352 U. S. 419, 429; *United States* v. *United States Gypsum Co.,* 340 U. S. 76, 89–90.

The principles thus pronounced by this Court were duly heeded by the District Court. The salient feature of its attitude was its disposition to favor the Government's claims on behalf of the public interest. It even rejected the defendants' argument, based on *National Lead* and *Gypsum, supra,*[11] that it should take into account that the question whether the acquisition violated the law was, to say the least, reasonably in doubt, and that therefore no blame should be imputed to the officers and directors of the defendants. "The Court . . . approaches the problem on the assumption that the appropriate relief is that which is necessary to eliminate the effects of the acquisition offensive to the statute, notwithstanding that the acquisition might reasonably have been believed to be permissible when made." 177 F. Supp., at 14.

The Government urges, however, that divestiture is, if not the required relief, at least the normal and ordinary relief in stock acquisition cases. The contention is that, as the safest remedy, *i. e.,* the surest of anticompetitive results, divestiture is, and has been considered to be, the preferred relief for all save a few exceptional cases. Support for this view is drawn from a long line of cases in which divestiture has been decreed. The contention calls for detailed scrutiny.

The objectives of divestiture were thus stated in *Schine Chain Theatres, Inc.,* v. *United States,* 334 U. S. 110, 128–129:

> "Divestiture or dissolution must take account of the present and future conditions in the particular industry as well as past violations. It serves several functions: (1) It puts an end to the combination or conspiracy when that is itself the violation. (2) It

[11] And see *United States* v. *United Shoe Machinery Corp.,* 110 F. Supp. 295, 348.

> deprives the antitrust defendants of the benefits of their conspiracy. (3) It is designed to break up or render impotent the monopoly power which violates the Act. . . ." [12]

This tripartite formulation summarizes the considerations that have guided this Court's rulings on divestiture. In *Standard Oil Co.* v. *United States,* 221 U. S. 1, the source of modern antitrust law, the defendants were charged with combination and conspiracy to restrain trade in and monopolize interstate and foreign commerce in petroleum products, in violation of §§ 1 and 2 of the Sherman Act. The lower court found both provisions offended by a combination of seven individual defendants and thirty-eight corporate defendants to lodge in the Standard Oil Co. of New Jersey substantial stock ownership of and control over many subsidiary corporations in the petroleum industry and to cause Standard Oil to manage their affairs so as to throttle competition, findings sustained here. Coming to the problem of remedy, while acknowledging that "ordinarily" injunctive relief would be adequate to restrain repetition of the illegal activity, the Court found that the situation presented by the Standard Oil aggrandizement called for stiffer measures: "But in a case like this, where the condition which has been brought about in violation of the statute, *in and of itself,* is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies." 221 U. S., at 77. (Emphasis added.) Recognition of this need—that inter-

[12] For a similar statement see *United States* v. *Minnesota Mining & Mfg. Co.,* 96 F. Supp. 356, 357.

"In general the object of the remedies under the anti-trust laws is to prevent the continuance of wrongful conduct, and to deprive the wrongdoers of the fruits of their unlawful conduct, and to prevent the creation anew of restraint forbidden by law. . . ."

corporate connections call for severance when persistence of the relationship in itself would constitute a violation of the antitrust laws—has been steadfastly adhered to. "Dissolution of the combination will be ordered where the creation of the combination is itself the violation." *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 189. It has been the controlling factor in the majority of the divestiture decrees in the intervening years, since most situations before the Court have similarly demanded this relief.[13]

The second element of the *Schine* rationale—depriving antitrust defendants "of the benefits of their conspiracy"—is equally well established. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, was a Sherman Act suit in which certain motion picture exhibitors were found to have used their combined buying power to obtain terms more favorable than those received by their independent competitors in licensing films, whereby independents were driven from the field and a monopoly in theater operation developed in many towns. Each corporate exhibitor was required to divest itself of its interest in any other corporate defendant or its affiliates.

> "Those who violate the Act may not reap the benefits of their violations and avoid an undoing of their

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[13] In the *Crescent* case, 323 U. S., at 189, the Court placed in this category *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Standard Oil Co.* v. *United States*, 221 U. S. 1; *United States* v. *American Tobacco Co.*, 221 U. S. 106; *United States* v. *Union Pacific R. Co.*, 226 U. S. 61; *United States* v. *Reading Co.*, 253 U. S. 26; *United States* v. *Lehigh Valley R. Co.*, 254 U. S. 255; and *United States* v. *Southern Pacific Co.*, 259 U. S. 214. Our survey of these cases sustains this classification. To this list may be added *International Boxing Club* v. *United States*, 358 U. S. 242, in which the Court accepted the District Court's finding that " 'The great evil' " in the case " 'was the combination that Wirtz and Norris caused and created by joining up with Madison Square Garden.' " 358 U. S., at 256.

> unlawful project on the plea of hardship or inconvenience. That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy." 323 U. S., at 189.[14]

The third *Schine* objective of divestiture was "to break up or render impotent the monopoly power which violates the Act." The role of divestiture in meeting this need was spelled out in the *Crescent* case:

> "Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, there will be tempting opportunity for these exhibitors to continue to act in combination against the independents. The proclivity in the past to use that affiliation for an unlawful end warrants effective assurance that no such opportunity will be available in the future. . . ." 323 U. S., at 189–190.

These, then, are the justifiable bases for compelling divestiture. They explain and define the authorities on which the Government relies. Do they, or any of them, invalidate the District Court's refusal to decree divestiture in the circumstances of this case and justify this Court in overruling that court's exercise of discretion in finding divestiture uncalled for?

The notion that the very existence of an interest by du Pont in the stock of General Motors constitutes a violation of the Act need not detain us. It cannot be questioned that, as the Court's opinion on the merits in this case makes clear, the violation condemned is the effect of the stockholding on competition, not the

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[14] See additionally, *International Boxing Club* v. *United States*, 358 U. S. 242, 253.

stockholding as such.[15] To be sure, this illegal tendency to lessen competition may be ended by terminating any intercorporate relationship. But just as surely the unlawfulness of the tendentious stockholding may be ended by preventing its harmful consequences.

Nor is divestiture required as a means of depriving the defendant of the fruits of its violation. While du Pont's interest in General Motors might serve as a tool for the accomplishment of antitrust violations, it is certainly not the fruit of any such violation. The fruit—the benefit—of a violation of § 7 is the unfair competitive position of one corporation through its stock interest in another. Effective termination of this competitive advantage was precisely the design of the elaborate injunctive provisions devised by the District Court.

The final desideratum—vitiating a monopoly power—is not literally applicable to the du Pont situation, since the District Court dismissed the monopoly charge under the Sherman Act and this Court refused to review the dismissal. 353 U. S., at 588, n. 5. But even if this criterion were carried over into a Clayton Act setting to enforce the desirability of avoiding every potentiality of monopoly power, there is no compulsion to decree divestiture. Such

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[15] This construction of the statute had long been settled. See *International Shoe Co.* v. *Federal Trade Comm'n,* 280 U. S. 291, 297–298.

"Section 7 of the Clayton Act, as its terms and the nature of the remedy prescribed plainly suggest, was intended for the protection of the public against the evils which were supposed to flow from the undue lessening of competition. . . .

. . . . . .

"Mere acquisition by one corporation of the stock of a competitor, even though it result in some lessening of competition, is not forbidden; the act deals only with such acquisitions as probably will result in lessening competition to a substantial degree . . . that is to say, to such a degree as will injuriously affect the public. . . ."

argumentative power does not preclude restraints, by injunctive relief, that render it "impotent," to use the language of the *Schine* case. Nor is there in the record before us any basis in fact for the fears that have evoked the application of this principle in previous divestiture cases. There is no finding in this case, as there were in *Crescent* and *Schine,* of a deliberate conspiracy aimed at the destruction of competition. We cannot point in this case, as we have on occasion in the past, to any blatantly anti-competitive scheme. See, *e. g., United States* v. *Reading Co.,* 253 U. S. 26, 59. Instead we have only the finding that "there is a reasonable probability that the acquisition is likely to result in the condemned restraints," 353 U. S., at 607, *i. e.,* to restrain commerce. Moreover, the Court explicitly ruled executive misconduct out of the case—"without any design to overreach anyone, including du Pont's competitors." 353 U. S., at 607.

Even in the *Crescent* case, the Court voiced its concern for the future only by way of support for its conclusion that the District Court's severance of the defendants could not be reversed for abuse of discretion. 323 U. S., at 190. The Court sustained, rather than overturned, the lower court's judgment. To infer that the Court would have found an abuse of discretion had the District Court in *Crescent* limited itself to a decree of injunctive relief is an unwarranted assumption. But the Government in effect draws such an inference for the purpose of this case, even though the facts of du Pont's violation do not faintly resemble the offense of the movie exhibitors in *Crescent.* When the powerful interests of James J. Hill and J. Pierpont Morgan coalesce to place in one controlling parent the stock of the Great Northern and Northern Pacific Railways, *Northern Securities Co.* v. *United States,* 193 U. S. 197; when the Standard Oil Co. or the American Tobacco Co. obtain monopoly positions in their vast industrial empires, see *Standard Oil Co.* v.

United States, 221 U. S. 1, and *United States* v. *American Tobacco Co.,* 221 U. S. 106; when the rail carriers controlling the means of transportation of anthracite coal combine to destroy a potential competitor, *United States* v. *Reading Co.,* 226 U. S. 324, the facts demand the major surgery of divestiture—destruction of the offending combinations. But to hold that the treatment of these conscious conspiracies to restrain trade and to achieve monopoly power is compelling precedent for determining the relief necessary and appropriate to remedy the only wrong judicially found by this Court under § 7, is to treat situations flagrantly different as though they were the same. Surely there is merit to the notion of shaping the punishment to fit the crime, even beyond the precincts of the Mikado's palace.

The grounds thus canvassed furnish the relevant considerations for this Court's review of the District Court's decree. The obvious must be restated. We do not sit to draft antitrust decrees *de novo.* This is a court of appeal, not a trial court. We do not see the witnesses, sift the evidence in detail, or appraise the course of extended argument, session after session, day after day. (A review of Part III of this opinion abundantly shows the extent to which the District Court's appraisal of the credibility of witnesses, analysis of expert testimony, and reconciliation of the claims of counsel entered into the painstaking process that led to the court's views on complicated issues and ultimately to the formulation of its decree.) In short, this Court does not partake of the procedure and is not charged with the responsibility demanded of the court entrusted with the task of devising the details of a decree appropriate for the governance of a vastly complicated situation arising out of unique circumstances. By its nature, this Court, as an appellate tribunal, lacks the means—the procedural facilities—to evolve a decree in a case like this. For these reasons this

Court sent this case back to the District Court, quoting in part (353 U. S., at 608), without specific limitation, the comprehensively general guidelines of an earlier case:

> "The framing of decrees should take place in the District rather than in Appellate Courts. They are invested with large discretion to model their judgments to fit the exigencies of the particular case." *International Salt Co.* v. *United States,* 332 U. S. 392, 400–401.[16]

To tell a trial judge that he has discretion in certain matters is to tell him that there is a range of choices available to him. It is to tell him that the responsibility is his, and that he will not be reversed except for straying outside the permissible range of choice, *i. e.,* for abuse of discretion. See, *e. g., United States* v. *Crescent Amusement Co.,* 323 U. S. 173, 189; *Timken Roller Bearing Co.* v. *United States,* 341 U. S. 593, 600–601. In sustaining the judgment in *Lorain Journal Co.* v. *United States,* 342 U. S. 143, 156, the Court stated its standard for upholding the trial court's decree as simply that *"The decree is reasonably consistent with the requirements of the case and remains within the control of the court below."* (Emphasis in the original.) Certainly we ought not to reverse the carefully wrought results of a conscientious trial judge without a showing amounting almost to a demonstration that he exceeded the fair limits of judicial choice which this Court explicitly reposed in him.[17]

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[16] To the same effect, see *Associated Press* v. *United States,* 326 U. S. 1; *Lorain Journal Co.* v. *United States,* 342 U. S. 143; *International Boxing Club* v. *United States,* 358 U. S. 242; *Maryland & Virginia Milk Producers Assn.* v. *United States,* 362 U. S. 458.

[17] The Court should not allow itself to be led to a contrary conclusion by the language of *United States* v. *United States Gypsum Co.,* 340 U. S. 76, or *Hartford-Empire Co.* v. *United States,* 324 U. S. 570. The *Gypsum* case says only that the District Court's

When a district judge has failed to accord parties an adequate hearing or has been otherwise wanting in the administration of fair procedure, there is the best of reasons for this Court to secure for them the full measure of judicial consideration which they are owed but failed to receive. But when, as in this case, the comprehensiveness of the hearing, the full consideration of the issues, both through evidence and argument, the evident diligence and searching competence of the judge—reflected throughout the long hearing—and his care in expounding the reasons for his judgment demonstrate a deep awareness of the duty with which this Court charged him without any restrictions on his task except that he was entrusted "with large discretion," reversal of the lower court's result can be justified only by a showing of patent misconception of

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conclusions should not be subject to reversal merely for *gross* abuse of discretion, and that this Court must intervene when the provisions of the decree are "inappropriate." I could not agree more, either with these views or with those expressed in the remarks that formed their preface:

"The determination of the scope of the decree to accomplish its purpose is peculiarly the responsibility of the trial court. Its opportunity to know the record and to appraise the need for prohibitions or affirmative actions normally exceeds that of any reviewing court." 340 U. S., at 89.

In *Hartford-Empire* the opinion of the Court says "it is unthinkable that Congress has entrusted the enforcement of a statute of such far-reaching importance to the judgment of a single judge, without review of the relief granted or denied by him." 324 U. S., at 571. These words, if given the reading they seem most readily to bear, are certainly unobjectionable, for our power to review the antitrust relief determinations of trial judges is not in doubt. If this language is to be read to authorize *de novo* consideration here of all the details of a lower court's decree, then it marks a real aberration in this branch of the law. Whatever respect such a view might once have deserved, it deserves none now, for our recent decisions have uniformly adopted the principle of appellate deference to trial court discretion. See cases cited in notes 7 and 16, *supra*.

governing law or want of conscientious regard for "the exigencies of the particular case." When judged by the relevant decisions and pronouncements of this Court, such legal defects or inadequacies are impressively disproved by this record.

It may be suggested that however faithfully the trial court abided by the other teachings of this Court, it forgot one, namely, "that relief, to be effective, must go beyond the narrow limits of the proven violation." *United States* v. *United States Gypsum Co.*, 340 U. S. 76, 90. See *International Salt Co.* v. *United States*, 332 U. S. 392, 400. This principle is important but it carries no warrant for reversal in this case. It has already been pointed out that the District Court specifically applied this principle in significant provisions of its decree. This Court found a danger of restraint of trade only in the market for automobile fabrics and finishes. The District Court nevertheless extended the injunctive provisions of its decree to all trade relations between du Pont and General Motors, regardless of the products involved. This Court proceeded on the assumption that the officers and directors of the companies had acted honorably and in the best interests of their respective corporations. Yet the District Court, responsive to the Government's urging, though without substantial evidence in the record, chose to sterilize the voting power not only of du Pont's officers and directors, but also of a major block of its large shareholders, the shareholders of Christiana and Delaware. In fact, the District Court exceeded the Government's requests in several substantial respects. This is true with respect to the injunction against cooperative and preferential business practices between du Pont and General Motors,[18] the prohibition against interlocking corporate person-

[18] Compare the Government's proposed Article IX with Section V of the final judgment.

nel,[19] and the detail of the retention of jurisdiction and reopening clauses.[20]

Moreover, the principle of extending relief beyond the narrow limits of the violation has an important limiting corollary. The trial court is not authorized to order relief which it is without findings to support. "A full exploration of facts is usually necessary in order properly to draw such a decree." *Associated Press* v. *United States,* 326 U. S. 1, 22. This Court has unhesitatingly reversed remedial action by the lower courts, both for and against the Government, when wanting in supporting findings. See *Hartford-Empire Co.* v. *United States,* 323 U. S. 386, 418; *Schine Chain Theatres, Inc.,* v. *United States,* 334 U. S. 110; *United States* v. *Paramount Pictures,* 334 U. S. 131, 170–174; *Hughes* v. *United States,* 342 U. S. 353, 357–358. But if findings on questions of fact, or mixed questions of law and fact, are essential to the formulation of a decree, it becomes virtually impossible to develop a basis for a divestiture order at this stage on this record. The District Court found that once all of du Pont's ties to General Motors, save its stock interest, were severed the record is barren of justification for an inference of reasonable probability of restraint of trade. Conversely, it found that the tax and market consequences of divestiture would be so onerous that, in the absence of any serious anticompetitive danger, it would have constituted an abuse of discretion to enter such a decree. These conclusions were based in significant measure on the firsthand factual analysis that only a trial judge is in a position to make. For the Court to require divestiture, thereby overturning a trial court judgment

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[19] Compare the Government's proposed Article X with Section IV of the final judgment.

[20] Compare the Government's proposed Article XIII with Sections IX and XII of the final judgment.

founded on an appraisal of voluminous conflicting evidence and opinion, is in effect to displace the trial court's function as a fact-finder.

The Government suggests that possibly, in "exceptional" cases, some remedy other than divestiture may suffice, but that this is not the "exceptional" case. If this is not an "exceptional" case, what would be? Is it really tenable to regard this an ordinary, a conventional, a run-of-the-mill case?

Du Pont began to acquire General Motors stock while World War I was still in progress. It owned that stock openly for three decades before this suit was instituted to challenge the validity of the acquisition. During that period the number of General Motors and du Pont stockholders expanded from a few thousand to many hundreds of thousands. The value of the General Motors stock greatly increased. The tax laws were substantially changed. The District Court has fashioned a closely knit network of provisions to prevent preferential dealings between General Motors and du Pont. So certain was it that divestiture would, on the basis of its findings, work great and unjustifiable loss on wholly innocent investors, that it considered a divestiture order beyond its discretionary power. The precedents of this Court to which the District Court could look for guidance in the discharge of its duty permitted, at the least, the inferences (1) that the framing of the decree lay within its discretion, (2) that within the scope of that discretion it was free to consider all relevant consequences, both public and private, of the plans proposed, (3) that it was under no compulsion to order divestiture, (4) that there was ample reason to avoid a harsh remedy if it were to conclude that a less severe one would be effective, (5) that both the facts and the formulated reasoning of prior divestiture cases made them distinguishable from the

du Pont problem, and (6) that unless the District Court abused its discretion by disregarding this Court's guides for its decision, its judgment would stand on review. In the face of all this, it is indeed "exceptional" for this Court to upset the lower court's judgment that its decree met the needs established in the proceeding before it.

The essential appeal of the Government's position lies in its excitation of fear of any intercorporate relationship between two such colossi as du Pont and General Motors. It is easy to calm this fear by a requirement of divestiture. Insofar as the Court yields to that fear, it is strange, indeed, that this was not obvious to the Court when it found the illegality for which it directed the District Court to evolve a corrective remedy. Not a single consideration now advanced by the Court for directing divestiture was not available when the case was originally here. For not one of these considerations is based on evidence elicited at the hearing before the District Court, directed by this Court, for determining the relief. Such a limitation on the discretionary decree-fashioning power, upon full hearing in the District Court, certainly could not have been in this Court's mind when it remitted that function to the District Court, otherwise it would have spoken its mind and not left it all to the "large discretion" of the court. In any event it requires prophetic confidence to conclude that that decree is so obviously inadequate as to require reversal before it can be tried in practice. Neither the record when the case was first here nor the facts adduced at the hearing on molding the decree give warrant for this Court to set aside the trial court's finding on the improbability of future restraint of trade in view of the safeguarding terms of the decree. If the Court were to allow the District Court's maturely considered scheme for protecting the dominant public interest

with less than "surgical ruthlessness" to proceed, time might show that the relief granted by the District Court was well based, and that this Court's willingness to give it a try properly averted reasonably founded fear of serious economic dislocation.

Reversal by way of commanding divestiture is a "judgment from speculation," carrying with it irreversible consequences, whereas the District Court's decree leaves the door open for "judgment from experience," *Tanner* v. *Little,* 240 U. S. 369, 386, under its clauses retaining jurisdiction to modify the judgment in the light of changed circumstances. Resort to such safety valve clauses is an established practice in review of antitrust remedies, for they allow the courts to act on the basis of informed hindsight rather than treacherous conjecture. In *International Salt Co.* v. *United States,* 332 U. S. 392, 401, the Court enunciated this principle in language pertinent here:

> "The District Court has retained jurisdiction, by the terms of its judgment, for the purpose of 'enabling any of the parties . . . to apply to the court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this judgment' and 'for the amendment, modifications or termination of any of the provisions . . . .' We think it would not be good judicial administration to strike paragraph VI from the judgment to meet a hypothetical situation when the District Court has purposely left the way open to remedy any such situations if and when the need arises. The factual basis of the claim for modification should appear in evidentiary form before the District Court rather than in the argumentative form in which it is before us. . . ."

The wisdom of this policy is reflected in many of our decisions.[21] Why should it not guide the Court's decision in this case? The Government's presentation boils down to an unsubstantiated assertion that *any* tie between du Pont and General Motors gravely jeopardizes the play of competitive forces. When we are asked to assume this, we are asked to assume that even after a decree fashioned with the circumspection with which this was, a "reasonable probability" exists that the defendants will, in a wholly undefined way, combine to violate the antitrust laws. We are asked, in essence, to enter Alice's Wonderland where proof is unnecessary and the governing rule of law is "Sentence first, verdict after."

The District Court here concluded that the relief it devised would dispel all potential restraints upon free competition as effectively as would divestiture, while divestiture was likely to cause serious economic disturbance unwarranted by a need for that remedy. Neither in its procedures nor in its consideration of the data presented to it did the court fail to discharge the obligations placed upon it by the decisions of this Court and by the only instruction—to exercise "large discretion"—given it by the Court in this case. In no way did the District Court abuse the discretion entrusted to it. Its judgment should therefore be affirmed.

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[21] See *Associated Press* v. *United States*, 326 U. S. 1, 22–23; *Timken Roller Bearing Co.* v. *United States*, 341 U. S. 593, 604 (opinion of Mr. Justice Reed); *Lorain Journal Co.* v. *United States*, 342 U. S. 143, 157; *Maryland & Virginia Milk Producers Assn.* v. *United States*, 362 U. S. 458, 473.

UNITED STATES *v.* CONSOLIDATED EDISON CO. OF NEW YORK, INC.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 357. Argued April 24, 1961.—
Decided May 22, 1961.

Respondent corporation keeps its books and computes its income taxes on the calendar-year accrual basis of accounting. In each of the years 1946 through 1950, it paid under protest the entire amount of taxes assessed against its real estate, in order to avoid interest, penalties and the seizure and sale of its property. It admitted liability for 85% of such taxes, denied liability for the remaining 15%, and promptly instituted court proceedings for refund of the 15%. In 1951, the court proceedings resulted in a final determination that respondent was liable for 95% of the entire amount, and 5% of the amount it had paid was refunded to it. *Held:*

1. For income tax purposes, $10 of each $15 of respondent's contested tax liability accrued, not in the year of the remittance, but in 1951 when the state court entered its final order determining that liability. P. 392.

2. The $5 of each $15 of contested tax liability for which respondent was held not liable and which was refunded to it was not income to respondent in 1951. P. 392.

279 F. 2d 152, affirmed.

John B. Jones, Jr. argued the cause for the United States. On the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Rice, Acting Assistant Attorney General Sellers, Ralph S. Spritzer, Harry Baum* and *Grant W. Wiprud.*

James K. Polk argued the cause for respondent. With him on the briefs were *Richard Joyce Smith, Julius M. Jacobs* and *Harold F. Noneman.*

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Respondent brought this action in the United States District Court for the Southern District of New York to recover a claimed overpayment of federal income taxes for the year 1951. It keeps its books and files its returns on a calendar-year accrual basis. The case turns on the correct determination of the proper year of accrual and deduction of certain contested real estate taxes. Specifically, the question is whether the contested part of a real estate tax *accrued* (1) in the year it was assessed and, for the purpose—and as the only mode recognized by the local law—of avoiding seizure and sale of the property for the contested tax while the contest was pending, was "paid" by the taxpayer, or (2) in the year the contest was finally determined.

The District Court, following the holding of the Court of Claims in *Consolidated Edison Co.* v. *United States,* 133 Ct. Cl. 376, 135 F. Supp. 881, that such a "payment" of the tax "accrues the item even though payment is made under protest and even though litigation is started within the taxable year to obtain repayment," 133 Ct. Cl., at 383–384, 135 F. Supp., at 885, held, without opinion, that the contested part of the tax accrued in the year of the "payment." On appeal, the Court of Appeals, by a divided court, held that the contested part of the tax accrued in the year the contest was finally determined, and reversed the judgment. 279 F. 2d 152. It reasoned that inasmuch as respondent was "keeping its books on the accrual basis," the contested part of the tax accrued "only when all events [had] occurred which determine[d] the fact and amount of the tax liability." *Id.,* at 155. To resolve the conflict between the decision below and *Consolidated Edison Co.* v. *United States, supra,* we granted certiorari. 364 U. S. 890.

During the years involved—1946 through 1950—respondent owned numerous tracts of real estate in New York City which were subject to annual local property taxes. Under the New York law, the City Council annually fixes the tax rate, and the City Tax Commission annually fixes the property valuations. Thus the amount of the tax on each tract is determined by multiplying the valuation by the tax rate. The tax rate is not contestable, but a timely application (commonly called a "protest") may be made to the City Tax Commission to correct an erroneous valuation. Among other things, the protest must state the amount which the taxpayer "consider[s] was the full value of the property on January 25 [of the current] year" thus to establish the amount of the tax that is not contested. Upon exhaustion of this administrative procedure, a review of the Commission's determination may be had by a judicial proceeding, commonly called a certiorari proceeding, in the State Supreme Court, which is the taxpayer's sole and exclusive remedy. But the institution of such a suit does not stay or suspend the maturity of the tax bill, the accrual of 7% interest on it, nor the seizure and sale of the property to satisfy the tax lien. Thus, to obtain review, the taxpayer must either "pay" the tax or suffer the interest penalty and run the risk of seizure and sale of its property.[1]

Though taxes for each of five years on hundreds of tracts are involved and the aggregate amount is very substantial, the parties very commendably stipulated in the District Court that the facts are sufficiently reflected, for the purposes of this suit, in the following simplified example:

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[1] The procedures allowed by the laws of New York for the contest of real property taxes are more fully set forth in *Consolidated Edison Co.* v. *United States,* 133 Ct. Cl. 376, 378, 135 F. Supp. 881, 882.

In each of the years 1946 through 1950, respondent was notified of a tentative valuation which, at the established tax rate, would produce a tax of $100. Respondent then timely filed a *bona fide* protest (in respect of many, but not nearly all, of its tracts) stating a valuation which, at the established tax rate, would produce a tax of $85, and asking that the balance of the proposed valuation be stricken as excessive. After hearing, the Commission rejected the protest, and an assessment in the amount of $100 was made. Thereupon respondent, under protest and for the honestly stated purpose of avoiding the interest penalty and the seizure and sale of its property while it was contesting the Commission's valuation by certiorari proceedings in the state court, remitted to the city cash in an amount equal to the tax of $100, and immediately thereafter commenced a certiorari proceeding in the proper court, in which it again admitted liability for a tax in the amount of $85, but denied all liability for any tax in excess of that amount. In December 1951, the court, upon the consent of the parties to the action, entered its order in (each of) the certiorari proceedings fixing respondent's tax liability at $95, and thereupon the city forthwith returned $5 to respondent.

Although it was then engaged in a contest with the Commissioner in the Court of Claims over an identical question, namely, the proper income tax treatment to be accorded the $15 for each of the years 1938, 1939 and 1941—which issue was decided by the Court of Claims in December 1955 in favor of the Government, *Consolidated Edison Co.* v. *United States, supra*—respondent, in terms of the illustrative example, accrued on its books and deducted on its federal income tax returns, for each of the years 1946 through 1950, the full $100; and in its return for the year 1951—in which year the real estate tax liability was determined to be $95—respondent failed

to deduct the $10 from, and included the $5 in, its gross income for that year.[2]

Believing that this treatment of the $15 in 1951 was erroneous and resulted in its paying a lesser amount of federal income taxes in each of the years 1946 through 1950, and more in the year 1951, than it should have paid,[3] respondent filed in February 1955 its claim for refund of so much of its 1951 income taxes as resulted (1) from its failure to deduct the $10 of real estate tax that was determined, in that year, to be valid, and (2) from its inclusion in gross income of the $5 returned to it in that year. Upon rejection of that claim, respondent timely brought this action in the District Court to recover the refund claimed, and obtained the result already stated.

It is settled that each "taxable year" must be treated as a separate unit, and all items of gross income and deduction must be reflected in terms of their posture at the close of such year. *Burnet* v. *Sanford & Brooks Co.*,

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[2] Respondent asserts that this treatment of the $15 in its 1951 federal income tax return was made under compulsion of the Commissioner's erroneous G. C. M. 25298, issued directly to it in 1947 (1947–2 Cum. Bull. 39), saying, "a contested tax liability accrues not later than time of payment, notwithstanding continuation of contest. The accrual basis of accounting relates to the deductibility of unpaid items," and that the Commissioner insisted upon that treatment, despite his modification thereof in *Mim.* 6444 (1949–2 Cum. Bull. 11), saying in pertinent part, that "payment of [a] contested tax liability as a prerequisite for appeal is not deductible under G. C. M. 25298."

[3] The economic consequences to the parties arise from the fact that corporate income tax rates (normal plus surtax) were increased from 38% in 1946 to 50¾% in 1951, and, in this particular instance, more revenue would be produced by taking the deduction in 1946–1950 than in 1951. The taxpayer recognizes that, if its position be sustained, the Commissioner will have one year after entry of final judgment herein to reaudit the taxpayer's 1946–1950 returns and to assess deficiencies based upon deduction of the $15 in those years, in accordance with the provisions of §§ 1311–1315 of the Internal Revenue Code of 1954.

282 U. S. 359; *Heiner* v. *Mellon,* 304 U. S. 271; *Guaranty Trust Co.* v. *Commissioner,* 303 U. S. 493; *Security Mills Co.* v. *Commissioner,* 321 U. S. 281. And the parties agree that, under the applicable federal statutes,[4] neither the Government nor an accrual-basis taxpayer may cause an item to be deducted in a year other than the one in which it accrued. *United States* v. *Anderson,* 269 U. S. 422; *Security Mills Co.* v. *Commissioner, supra; United States* v. *Olympic Radio & Television,* 349 U. S. 232. They also agree that the "touchstone" for determining the year in which an item of deduction accrues is the "all events" test established by this Court in *United States* v. *Anderson, supra,*[5] and since reaffirmed by this Court on numerous occasions, so that it is now a fundamental principle of tax accounting. See, *e. g., Lucas* v. *American Code Co.,* 280 U. S. 445; *Brown* v. *Helvering,* 291 U. S. 193; *Dixie Pine Co.* v. *Commissioner,* 320 U. S. 516; *Security Mills Co.* v. *Commissioner, supra.*[6] The parties

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[4] The applicable statutes are §§ 23 (c), 41, 42, 43 and 48 of the Internal Revenue Code of 1939 (26 U. S. C. (1952 ed.), §§ 23 (c), 41, 42, 43, 48). These provisions are the same as their counterparts in prior Revenue Acts and in the Internal Revenue Code of 1954. Inasmuch as those statutes are not really in contest in this case, it would serve no useful purpose even to abstract them here.

[5] In the *Anderson* case, this Court declared the so-called "all events" test as follows: "In a technical legal sense it may be argued that a tax does not accrue until it has been assessed and becomes due; but it is also true that in advance of the assessment of a tax, all the events may occur which fix the amount of the tax and determine the liability of the taxpayer to pay it. In this respect, for purposes of accounting and of ascertaining true income for a given acccounting period, the munitions tax here in question did not stand on any different footing than other accrued expenses appearing on appellee's books. In the economic and bookkeeping sense with which the statute and Treasury decision were concerned, the taxes had accrued." 269 U. S., at 441.

[6] In the *Dixie Pine* case, this Court reaffirmed the "all events" test as follows: "It has long been held that in order truly to reflect the

also recognize that this Court amplified, or as the Government says "added a refinement to," the "all events" test by its holding, in *Dixie Pine Co.* v. *Commissioner, supra,* that an accrual-basis taxpayer could not, while "contesting liability in the courts," deduct "the amount of the tax, on the theory that the state's exaction constituted a fixed and certain liability," but "must, in the circumstances, await the event of the state court litigation and might claim a deduction only for the taxable year in which its liability for the tax was finally adjudicated." 320 U. S., at 519. That principle was specifically reaffirmed in *Security Mills Co.* v. *Commissioner, supra.*[7]

That $85 of the $100 assessment was admitted to be owing and was intended to be paid and satisfied by the remittance, and thus accrued in the year of the remittance, is not in dispute. Respondent's good faith, in contesting $15 of the assessment, is not in dispute, for the Government expressly "disavow[s] any suggestion that the respondent . . . filed its claims against the City of New York in bad faith, . . . calculatingly inflated those claims, or . . . failed to prosecute them with diligence."

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income of a given year, all the events must occur in that year which fix the amount and the fact of the taxpayer's liability for items of indebtedness deducted though not paid; and this cannot be the case where the liability is contingent and is contested by the taxpayer." 320 U. S., at 519.

In the *Security Mills* case, this Court reaffirmed that test as follows: "It is settled by many decisions that a taxpayer may not accrue an expense the amount of which is unsettled or the liability for which is contingent, and this principle is fully applicable to a tax, liability for which the taxpayer denies, and payment whereof he is contesting." 321 U. S., at 284.

[7] In the *Security Mills* case, after saying "that a taxpayer may not accrue an expense the amount of which is unsettled or the liability for which is contingent," the Court concluded that "[s]ince [the taxpayer] denied liability for, and failed to pay, the tax during the taxable year 1935, it was not in a position in its tax accounting to treat the [tax] claim as an accrued liability." 321 U. S., at 284.

Nor is it questioned that accrual of such taxes in the proper year accords with "good accounting" principles.

But concordance of the views of the parties ends at this point. The Government contends that the remittance by respondent to the city, in each of the years in question, of cash in an amount equal to the whole of the assessed tax admitted liability for, and was intended to and did constitute "payment" and "satisfaction" of, both the disputed and undisputed parts of the assessment; and that when "the taxpayer pays the item and thereby discharges its liability, the expense has been incurred and there is no longer any contingency which would prevent its accrual." Respondent, on the other hand, insists that its remittance to the city was not intended to and did not admit liability for, nor constitute "payment" and "satisfaction" of, the contested $15 of the assessment, but was, in effect, a mere deposit, in the nature of a cash bond, required of respondent, in a practical sense, by the local law as the only available mode of avoiding the risk of seizure and sale of the property for the contested tax while its validity was being diligently contested in the only way allowed by the laws of the State.

Thus the very narrow issue here is whether the remittance admitted liability for, and constituted "payment" and "satisfaction" of, the contested part of the assessment and thereby rendered it accruable in the year of the remittance. Like the Court of Appeals, we think the respondent is right in its contention, and that $10 of the contested $15 of the tax accrued when liability in that amount was finally determined by the New York court in 1951, and that the $5, for which respondent was by that judgment held not liable, and which was returned to it by the city, was not income to respondent in 1951.

Although the Government attempts to distinguish the *Anderson, Dixie Pine* and *Security Mills* cases on the ground that "payment" of the contested taxes had not

been made in those cases, it primarily relies on the decisions of the Court of Claims in *Chestnut Securities Co.* v. *United States,* 104 Ct. Cl. 489, 62 F. Supp. 574, and *Consolidated Edison Co.* v. *United States,* 133 Ct. Cl. 376, 135 F. Supp. 881.

The *Chestnut Securities* case turned on the question whether certain judicially contested state income taxes (for the years 1936–1938) accrued when they were paid in 1940, as claimed by the accrual-basis taxpayer, or when the final judgment upholding their validity was rendered in 1942, as contended by the Government. Squarely contrary to its contention here, the Government, relying on *Security Mills Co.* v. *Commissioner, supra,* there contended that "since the [taxpayer's] accounts were kept and its tax returns made on the accrual basis, it could not take its deduction for the taxes . . . paid to the State . . . until the year 1942, when its suit for their return was finally decided adversely to it." On the facts of that case, the Court of Claims held that "the Government [was] wrong" in that contention. Although, in full consonance with the *Security Mills* case, the Court of Claims said "[o]ne is not entitled to accrue a debt or other liability which is asserted against him but which he disputes and litigates, until the litigation is concluded," it went on to say "[b]ut if a liability is asserted against him and he pays it, though under protest, and though he promptly begins litigation to get the money back, the status of the liability is that it has been discharged by payment. It is hardly conceivable that a liability asserted against him, which he has discharged by payment, has not yet 'accrued' within the meaning of the tax laws and the terminology of accounting. Accrual, from the debtor's standpoint, precedes payment, and does not survive it." 104 Ct. Cl., at 494–495, 62 F. Supp., at 576. And after pointing to this Court's use of the phrase

"and failed to pay" in its holding in the *Security Mills* case that "Since [the taxpayer] denied liability for, and failed to pay, the tax during the taxable year 1935, it was not in a position in its tax accounting to treat the Government's claim as an accrued liability," the Court of Claims concluded: "In the instant case the taxpayer denied liability, but paid. We think it thereby 'accrued' the taxes and interest, if accrual is requisite at all, in the case of the debtor, when actual payment has occurred." 104 Ct. Cl., at 495, 62 F. Supp., at 576.

The *Consolidated Edison* case involved the same parties, facts and questions as the present case, though in respect to earlier tax years. Although recognizing that this Court's opinions in *Security Mills Co.* v. *Commissioner, supra,* and *Dixie Pine Co.* v. *Commissioner, supra,* had "settled" the law to be "that a taxpayer may not accrue an expense when he is denying liability and refusing and contesting its payment," the Court of Claims rejected, as "not necessarily true," the taxpayer's argument "that there must therefore be an admission or absence of denial of liability before an item may be accrued and that the payment of the liability within the taxable year has no effect on its accrual since payment was made under protest and litigation was immediately started to obtain a repayment" (133 Ct. Cl., at 382, 135 F. Supp., at 884); and, purporting to follow, but seemingly departing from, its decision in the *Chestnut Securities* case, the Court concluded "that payment of an item *which is otherwise accruable in the taxable year* accrues the item even though payment is made under protest and even though litigation is started within the taxable year to obtain repayment." 133 Ct. Cl., at 383–384, 135 F. Supp., at 885. (Emphasis added.) On that conclusion the Court rendered judgment for the Government.

Just what the Court meant by the phrase we have italicized was not explained, but it is evident that if the tax item was "otherwise accruable in the taxable year," payment—whether of a character that would constitute an admission of the asserted liability or a mere deposit to enable contest of the liability—certainly would not render the item non-accruable; and if, in the absence of payment, the item was "otherwise accruable in the taxable year," payment would be immaterial, or at least unnecessary, to the question of accruability. It thus appears that the Court's judgment was contrary to its rule in that case, for, although it regarded the remittance as "payment" of the asserted tax liability, admittedly the contested part of the tax was not "*otherwise* accruable in the taxable year."

Disagreeing with the conclusion of the Court of Claims in the *Consolidated Edison* case, the Court of Appeals concluded, we think correctly, that the question of accruability of the tax—apart from the issue respecting "payment" and "satisfaction"—was governed by the "all events" test established by this Court in *United States* v. *Anderson, supra* (see note 5), as amplified and affirmed in *Dixie Pine Co.* v. *Commissioner, supra,* and reaffirmed as amplified in *Security Mills Co.* v. *Commissioner, supra.* See notes 6 and 7.

As to whether respondent's remittance of the full $100 to the city, in the circumstances of this case, constituted an admission of liability for, and a "payment" and "satisfaction" of, the contested $15 of the assessment, the Court of Appeals recognized that this Court's opinions in the *Anderson, Dixie Pine* and *Security Mills* cases refer to the fact that "payment" of the taxes sought to be deducted in those cases had not been made by the taxpayers, but it thought, and we agree, that those references were made only for the sake of complete accuracy to an important but, so far as those cases were concerned, a

collateral matter, and not to the determinative considerations of those cases, which were the "all events" test as they state it.

"Payment" is not a talismanic word. It may have many meanings depending on the sense and context in which it is used. As correctly observed by the Court of Appeals, "A payment may constitute a capital expenditure, an exchange of assets, a prepaid expense, *a deposit,* or a current expense," and "[w]hen the exact nature of the payment is not immediately ascertainable because it depends on some future event, such as the outcome of litigation, its treatment for income tax purposes must await that event." 279 F. 2d, at 156. (Emphasis added.)

Of course, an unconditional "payment" made by a taxpayer in apparent "satisfaction" of an asserted matured tax liability is, without more, plain and persuasive evidence, at least against the taxpayer, that "all the events [have] occur[red] which fix the amount of the tax and determine the liability of the taxpayer to pay it," *United States* v. *Anderson, supra,* at 441, and that the item so paid and satisfied has accrued.

But where, as stipulated by the parties in this case, the remittance or "payment" did not admit, but specifically denied, liability for, and was not intended to satisfy, the contested $15 of the assessment, but was, in effect, a mere deposit, "in the nature of a cash bond for the payment of [so much, if any, of the contested] taxes [as might] thereafter [be] found to be due" (*Rosenman* v. *United States,* 323 U. S. 658, 662, and see *Lewyt Corp.* v. *Commissioner,* 215 F. 2d 518, 523 (C. A. 2d Cir.)), and was made for the sole purpose of staying—there being no other way to stay—an otherwise possible seizure and sale of the property for the contested tax while its validity was being honestly and diligently contested in the only way allowed by the law of the State, it will not do to

say that the taxpayer has made an unconditional "payment" in apparent "satisfaction" of the contested part of an asserted matured tax liability, and thereby rendered it immediately accruable.

We therefore conclude that $10 of the contested $15 tax liability accrued not in the year of the remittance, but in 1951 when the New York court entered its final order determining that liability; and that the $5, for which respondent was held not liable by that judgment and which was returned to it by the city, was not income to respondent in 1951.

Affirmed.

BELL ET AL. *v.* UNITED STATES.

CERTIORARI TO THE COURT OF CLAIMS.

No. 92. Argued January 11, 1961.—Decided May 22, 1961.

Petitioners were enlisted men in the United States Army who were captured during the hostilities in Korea in 1950 and 1951. In the prison camps to which they were taken they consorted, fraternized and cooperated with their captors and behaved with utter disloyalty to their comrades and to their country. After the Korean Armistice in the summer of 1953, they refused repatriation and went to Communist China. They were dishonorably discharged from the Army in 1954. In 1955 they returned to the United States and filed claims for accrued pay and allowances, which were denied administratively. They then sued in the Court of Claims for pay and allowances from the time of their capture to the date of their discharge from the Army. *Held:* Under 37 U. S. C. § 242 and the Missing Persons Act, petitioners were entitled to the pay and allowances that accrued during their detention as prisoners of war; but no opinion is expressed as to their rights to pay for the period between the Korean Armistice and their administrative discharge, since that question was not separately raised or argued in this Court. Pp. 394–416.

(a) Refusal to pay petitioners cannot be justified under § 9A of the Act of 1939, which made it unlawful to pay from appropriated funds compensation to any employee of the Federal Government who was a member of any organization which advocates the overthrow of the Government, since that statute was repealed more than a year before the Army relied upon it in refusing to pay petitioners. Pp. 398–400.

(b) Refusal to pay petitioners cannot be sustained on the principle of contract law that one who willfully commits a material breach of a contract can recover nothing under it, since common-law rules governing private contracts have no place in the area of military pay, which is governed entirely by statute. Pp. 401–404.

(c) Under the plain language of 37 U. S. C. § 242 and the Missing Persons Act, a serviceman captured by the enemy and thus unable to perform his normal duties is nonetheless entitled to his pay. Pp. 397–398, 404–405, 409–410.

(d) Refusal to pay petitioners cannot be justified under the Missing Persons Act, either on the ground that they were no longer "in the active service" or on the ground that they had been "officially determined absent from [their posts] of duty without authority," since there has never been any official administrative determination that petitioners were no longer in the active service or that they were absent from their posts of duty without authority during the period here in question. Pp. 404–414.

(e) No opinion is expressed as to petitioners' pay rights for the period between the Korean Armistice and their discharges from the Army, since that question was not separately raised or argued administratively, in the court below or in this Court. Pp. 414–415.

— Ct. Cl. —, 181 F. Supp. 668, reversed and remanded.

Robert E. Hannon argued the cause and filed a brief for petitioners.

Acting Assistant Attorney General Leonard argued the cause for the United States. On the brief were *Solicitor General Rankin, Assistant Attorney General Doub, Alan S. Rosenthal* and *David L. Rose.*

Mr. Justice Stewart delivered the opinion of the Court.

The petitioners were enlisted men in the United States Army who were captured during the hostilities in Korea in 1950 and 1951. In the prison camps to which they were taken they behaved with utter disloyalty to their comrades and to their country. After the Korean Armistice in the summer of 1953 they refused repatriation and went to Communist China. They were formally discharged from the Army in 1954. In 1955 they returned to the United States. Later that year they filed claims with the Department of the Army for accrued pay and allowances. When these claims were denied they brought the present action in the Court of Claims for pay and allowances from the time of their capture to the date of

their discharge from the Army.[1] The Court of Claims decided against them, stating that "[n]either the light of reason nor the logic of analysis of the undisputed facts of record can possibly justify the granting of a judgment favorable to these plaintiffs." 181 F. Supp. 668, 674. Judge Madden dissented.[2] We granted certiorari to consider a seemingly important statutory question with respect to military pay. 363 U. S. 837.

The Court of Claims made detailed findings of fact with respect to the petitioners' conduct as prisoners of war, based upon a stipulation filed by the parties.[3] These cir-

[1] Each of the petitioners was dishonorably discharged by administrative order of the Secretary of the Army on January 23, 1954. The validity of these administrative discharges is not in issue here, since the petitioners have made no claim for pay and allowances after that date. Compare memorandum to the Chief of Staff from the Judge Advocate General of February 3, 1954, J. A. G. A. 1954/1627, with Opinion Memorandum for the Secretary of Defense from the General Counsel of the Department of Defense of January 25, 1954. See Pasley, Sentence First—Verdict Afterwards: Dishonorable Discharges Without Trial by Court-Martial? 41 Cornell L. Q. 545; Note, Misconduct in the Prison Camp: A Survey of the Law and an Analysis of the Korean Cases, 56 Col. L. Rev. 709, 735.

[2] Judge Madden stated:

"It is noteworthy that after Congress abolished the historical power of courts-martial to forfeit accrued pay, the Army, apparently for the first time in history, forfeited the pay already accrued to these plaintiffs, not by the process of trial and sentence, which was forbidden by statute, but by the crude and primitive method of refusing to give them their money. Finding nothing in the law books to justify its refusal to pay these men, it threw the books away and just refused to pay them. It could have set before these confused young men a better example of government by law." 181 F. Supp., at 675.

[3] The petitioners did not stipulate that these facts were true, but did agree "that the facts hereinafter set forth shall, for the purposes of this case, be deemed to have been elicited from defendant's witnesses testifying under oath," and that "[t]he facts so elicited, and hereinafter set forth, have not been rebutted by plaintiffs or by

cumstances need not be set out in minute detail. They are adequately summarized in the opinion of the Court of Claims, as follows:

> "[D]uring the period of their confinement each of the three plaintiffs became monitors for the 'forced study groups,' the sessions of which the prisoners were compelled to attend. Armed guards attended these sessions. The programs included lectures picturing what were declared to be the bad aspects of life in the United States as contrasted with idyllic life under communism. As monitors, they procured and distributed propaganda literature, and threatened to turn in names of any prisoners who refused to read and discuss favorably these propaganda handouts.
>
> "Each of the plaintiffs made tape recordings which were used as broadcasts and over the camp public address system. Each of them wore Chinese uniforms and were permitted to attend meetings outside the camp. The details of the plaintiffs' consorting, fraternizing and cooperating with their captors and the devious ways in which they sought favors for themselves, thus causing hardship and suffering to the other prisoners, are set out in our findings . . . .
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> "Two of Bell's recordings were broadcast over the Peiping radio, stating among other things that on the orders of his platoon leader, his men had killed North Korean prisoners of war, and that President Truman was a warmonger. In written articles for the camp newspaper he alleged that American troops had committed atrocities and he personally had been ordered to kill women and children and not to take

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plaintiffs' witnesses, and plaintiffs, and each of them, hereby waive the right to testify or to call witnesses to testify in rebuttal of these facts."

prisoners of war, and that if given the opportunity he would run a tank over the President's body.

"Bell was paid money to write these articles. He also delivered lectures before his company and to the camp on American aggression. He appeared voluntarily in a motion picture and appeared in bi-monthly plays. He stated that if given a weapon he would fight against the United States. He sold food intended for the sick to other prisoners of war. By making reports to the Chinese, he caused one man to be bayonetted and others to be placed in solitary confinement.

"Cowart did many similar things, wrote propaganda articles accusing American soldiers of atrocities and of using germ warfare. He drew posters and cartoons for the enemy, acted in plays, walked and talked with the Chinese officers, guards and interpreters, lived part of the time at Chinese regimental headquarters, stated he hated America, desired to study in China and to return to the United States in five years to help in the overthrow of the government.

"Griggs did many similar things, attended enemy parties, visited Chinese headquarters frequently, referred to the Chinese as comrades, was accorded special privileges, made broadcasts, signed leaflets, wrote articles accusing the American soldiers of atrocities and declared the United States had used germ warfare."

As stated in their brief, the petitioners "do not admit to the alleged acts of dishonor contained in the Stipulation and the Findings of Fact, but rather demur to them on the grounds that such facts are irrelevant and immaterial in a civil action for military pay provided by statute." The statute upon which the petitioners rely

is an ancient one. It was first enacted in 1814 and has been re-enacted many times. It provides:

> "Every noncommissioned officer and private of the Regular Army, and every officer, noncommissioned officer, and private of any militia or volunteer corps in the service of the United States who is captured by the enemy, shall be entitled to receive during his captivity, notwithstanding the expiration of his term of service, the same pay, subsistence, and allowance to which he may be entitled while in the actual service of the United States; but this provision shall not be construed to entitle any prisoner of war of such militia corps to any pay or compensation after the date of his parole, except the traveling expenses allowed by law." 37 U. S. C. § 242.[4]

Although the plain language of this law appears to entitle the petitioners to their Army pay and allowances during their imprisonment in Korea, the Government has urged various grounds upon which we should hold that the provisions of the statute are inapplicable. We have concluded that none of the theories advanced by the Government can serve as a valid basis to circumvent the unambiguous financial obligation which the law imposes.

The Army's refusal to pay the petitioners was based upon an administrative determination that all prisoners of war who had declined repatriation after the Korean Armistice "advocate, or are members of an organization

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[4] The statute was originally enacted on March 30, 1814, as § 14 of "An Act for the better organizing, paying, and supplying the army of the United States." C. 37, § 14, 3 Stat. 113, 115. The provision next appeared as R. S. § 1288. In the 1952 edition of the Code, it appeared at 10 U. S. C. § 846. Title 10, at that time, dealt with the Army and the Air Force. In the 1958 edition of the Code, the provision was transferred to Title 37, c. 4, which covers basic pay and allowances of military personnel.

which advocates, the overthrow of the United States Government by force or violence." [5] In refusing to honor the petitioners' claims upon this ground, the Army was apparently relying upon a statute enacted in 1939 which made it unlawful to pay from funds appropriated by any Act of Congress the compensation of "any person employed in any capacity by any agency of the Federal Government" who was a member of "any political party or organization which advocates the overthrow of our constitu-

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[5] This position was set out in a letter from the Army Chief of Finance to the petitioners' lawyer, rejecting the petitioners' claims. The letter in its entirety read as follows:

"2 October 1956

. . . . . .

"Dear Mr. Brown:

"Further reference is made to your inquiries concerning the claims of Otho G. Bell, Lewie W. Griggs, and William A. Cowart.

"I have been advised that the following determinations have been made regarding the status of all United States Army Voluntary Non-Repatriates who elected not to accept repatriation to United States control under the terms of the Korean Armistice Agreement prior to 23 January 1954:

"a. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954, under the terms of the Korean Armistice Agreement have, as demonstrated by their refusal to elect repatriation to the United States and their records as prisoners of war, adopted, adhered to or supported the aims of Communism, one of which is the overthrow of all non-Communist governments, including the Government of the United States, by force or violence.

"b. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954 under the terms of the Korean Armistice Agreement now advocate, or are members of an organization which advocates, the overthrow of the United States Government by force or violence.

"c. That all Voluntary Non-Repatriates who refused to elect repatriation prior to 23 January 1954 under the terms of the Korean Armistice Agreement advocated, or were members of an organization which advocated, during the period from the date of their capture in Korea through the date of their Dishonorable Discharge from the

tional form of government in the United States." [6] That this statute was the basis of the Army's decision is evident not only in the language employed in rejecting the petitioners' demands, but also in the pleadings filed in the Court of Claims.[7] We need not, however, now decide the applicability of this statute to members of the Armed Forces, for the reason that the statute was repealed more than a year before the Army relied upon it in refusing to pay the petitioners.[8]

Army, the overthrow of the United States Government by force or violence.

"d. That such persons are not entitled to the payment of salary or wages for the period beginning with their respective dates of capture through the date they were given Dishonorable Discharges.

"The claims of Otho G. Bell, Lewie W. Griggs, and William A. Cowart may not, therefore, be favorably considered.

"Sincerely yours,

"[Signed] H. W. Crandall
"Major General, USA
"Chief of Finance"

[6] "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

"(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person." § 9A of the Act of August 2, 1939, 53 Stat. 1148.

[7] The "Second Affirmative Defense" read in part as follows:

"During the period for which they seek to recover pay and allowances herein, plaintiffs advocated the overthrow of the Government of the United States or were members of a political party or organization which so advocated. Therefore, plaintiffs are not entitled to recover under the provisions of Section 9A of the Act of August 2, 1939 (53 Stat. 1148), as amended . . . ."

[8] August 9, 1955, c. 690, § 4 (2), 69 Stat. 625.

Although this was the only ground ever advanced for the administrative denial of the petitioners' claims, the Government's brief in this Court, for understandable reasons, does not even mention this repealed statute. Instead, the Government now relies upon other grounds to avoid the provisions of 37 U. S. C. § 242. It says that the petitioners violated their obligation of faithful service,[9] and points to the principle of contract law that "one who wilfully commits a material breach of a contract can recover nothing under it. 4 Williston, *Contracts* (1936 ed.) § 1022, pp. 2823–4; 5 Williston, *Contracts* (1936 ed.) § 1477; 5 Corbin, *Contracts* (1951 ed.) § 1127, pp. 564–5, see also *Restatement Contracts,* § 357 (1)(a)."

In accord with this principle, the Government argues that in the Missing Persons Act,[10] a statute first enacted in 1942,[11] Congress provided a statutory basis for denying the petitioners' claims. We do not so construe that statute.

Preliminarily, it is to be observed that common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon statutory right. In the Armed Forces, as everywhere else, there are good men and rascals, courageous men and cowards, honest men and cheats. If a soldier's conduct falls below a specified level he is subject to discipline, and his punishment may include the forfeiture of future but not of accrued pay.[12] But a soldier

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[9] "I, ..., do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice." 10 U. S. C. § 501.

[10] 50 U. S. C. App. § 1001 *et seq.*

[11] 56 Stat. 143.

[12] See Article 57, Uniform Code of Military Justice, 10 U. S. C. § 857.

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who has not received such a punishment from a duly constituted court-martial is entitled to the statutory pay and allowances of his grade and status, however ignoble a soldier he may be.[13]

This basic principle has always been recognized. It has been reflected throughout our history in numerous court decisions and in the opinions of Attorneys General and Judge Advocates General. "Enlistment is a contract; but it is one of those contracts which changes the status; and, where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. . . . By enlistment the citizen becomes a soldier. His relations to the State and the public are changed. He acquires a new status, with correlative rights and duties; and although he may violate his contract obligations, his status as a soldier is unchanged." *In re Grimley,* 137 U. S. 147, 151, 152.

Almost a hundred years ago Attorney General Hoar rendered an opinion to the Secretary of War regarding the right to pay of a Major Herod, who had been "charged with murder, arrested, tried by a court-martial, and sentenced to be hung." The Attorney General stated:

> "It was not expressly a part of the sentence that Herod should forfeit his pay from the date of his arrest, and I know of no statute imposing a forfeiture of pay from the date of arrest in a case like

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[13] Unless he is absent without leave or a deserter, *United States* v. *Landers,* 92 U. S. 77; *Dodge* v. *United States,* 33 Ct. Cl. 28; Dig. Op. JAG Army 265 (1868); Dig. Op. JAG Army 850 (1912); JAGA 1952/5875, 2 Dig. Op. SENT. & PUN. § 35.7; JAGA 1953/1074, 3 Dig. Op. PAY § 21.15; Davis, Military Laws of the United States, p. 371, n. 2 (1897); Winthrop, Military Law and Precedents, pp. 645–646 (2d ed. 1920). But see Comment, Mil. L. Rev., July (1960) (DA Pam 27–100–9, 1 Jul 60), p. 151. And see generally U. S. Army Special Text 27–157, Military Affairs (1955), pp. 1605–1612.

> this of Herod's. The sentence that he be hung necessarily implied a dismissal from the service, but not, as it seems to me, the forfeiture of back pay. I can find no authority for the opinion of the Comptroller that, as Herod was withdrawn from actual military service by his arrest made on account of a crime committed by him, on the general principle that pay follows services, he should not be paid for the time he was under arrest. The monthly pay of officers of the Army is prescribed by statute, and so long as a person is an officer of the Army he is entitled to receive the pay belonging to the office, unless he has forfeited it in accordance with the provisions of law, whether he has actually performed military service or not." 13 Op. Atty. Gen. 103, 104.

A similar opinion was rendered by Attorney General Alphonso Taft a few years later. He rejected the theory of the Second Comptroller of the Treasury that "[i]f the man, by his misconduct and necessary withdrawal from service, does not perform his part of the contract, the Government cannot be held to the fulfillment of its part thereof." The Attorney General said:

> "The Comptroller has, I think, misconceived the true basis of the right to [military] pay . . . . In the naval, as in the military service, the right to compensation does not depend upon, nor is it controlled by, 'general principles of law'; it rests upon, and is governed by, certain statutory provisions or regulations made in pursuance thereof, which specially apply to such service. These fix the pay to which officers and men belonging to the Navy are entitled; and the rule to be deduced therefrom is that both officers and men become entitled to the pay thus fixed so long as they remain in the Navy, whether they *actually* perform service or not, unless their right

thereto is forfeited or lost in some one of the modes prescribed in the provisions or regulations adverted to." 15 Op. Atty. Gen. 175, 176.

This principle has received consistent recognition in the Court of Claims. "It would, we think, be an anomalous proceeding to permit resort to the courts to ascertain whether, under all the various provisions with respect to pay and allowances of officers and men of the Army, Navy, and Marine Corps, investigations should obtain to determine as a matter of fact whether the soldier involved had by conscientious service earned what the statutes allow him." *White* v. *United States,* 72 Ct. Cl. 459, 468. "[T]he mere fact that an officer or soldier is under charges does not deprive him of his pay and allowances, . . . such forfeiture can only be imposed by the sentence of a lawful court-martial." *Walsh* v. *United States,* 43 Ct. Cl. 225, 231.[14]

The statute upon which the petitioners rely applies this same principle to a specialized situation. A serviceman captured by the enemy and thus unable to perform his normal duties is nonetheless entitled to his pay. The rule has commanded unquestioned adherence throughout our history, as two cases will suffice to illustrate.

In 1807 a sailor named John Straughan was a member of the crew of the American frigate *Chesapeake.* After that vessel's ill-starred engagement with the British man-of-war *Leopard* off Hampton Roads, Straughan was taken

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[14] See *Conrad* v. *United States,* 32 Ct. Cl. 139; *Carrington* v. *United States,* 46 Ct. Cl. 279. See also Dig. Op. JAG Army 265 (1868); Dig. Op. JAG Army 850 (1912). The rule cuts both ways, as the case of *Ward* v. *United States,* 158 F. 2d 499, illustrates. There the plaintiff, a yeoman in the Navy, had actually performed the duties of a land title attorney. He sued to recover the reasonable value of his services, less what he had received as a yeoman. The Court of Appeals approved a dismissal of the complaint, with the comment that "[h]is rating fixed his status and his pay." 158 F. 2d, at 502.

aboard the *Leopard* and impressed into service in the British Navy. There he served for five years and nine days before he finally was repatriated. Years later his widow sued for his pay and rations as a member of the United States Navy during the period he had been held by the British. The Court of Claims ruled that, even though we had not been at war in 1807, the *Chesapeake* had nevertheless been "taken by an enemy," and that Straughan's widow was entitled to the United States Navy pay and allowances that had accrued while he was serving with the British. *Straughan* v. *United States,* 1 Ct. Cl. 324.[15]

In October, 1863, a lieutenant in the Union Army named Henry Jones was taken prisoner by Confederate guerrillas near Elk Run, Virginia. Jones was confined in Libby Prison until March 1, 1865, when he was exchanged and returned to the Union lines. Upon his return he found that he had been administratively dismissed from the service in November, 1863, because he had been in disobedience of orders at the time of his capture. When the Army for that reason refused his demand for pay and allowances, he filed suit in the Court of Claims. The court entered judgment in his favor, stating that "[t]he contrary would be to hold that an executive department could annul and defy an act of Congress at its pleasure." *Jones* v. *United States,* 4 Ct. Cl. 197, 203.

It is against this background that we turn to the Government's contention that the Missing Persons Act authorized the Army to refuse to pay the petitioners their statutory pay and allowances in this case. The provisions of the Act which the Government deems pertinent

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[15] The case was decided under a statute specifically applicable to naval personnel, originally enacted in 1800, 2 Stat. 45, now 37 U. S. C. § 244. See n. 32, *infra.*

are set out in the margin.[16] Originally enacted in 1942 as temporary legislation,[17] the Act was amended and reenacted several times,[18] and finally was made permanent in 1957.[19] So far as relevant here, this legislation provides that any person in active service in the Army "who is officially determined to be absent in a status of . . . captured by a hostile force" is entitled to pay and allowances; that "[t]here shall be no entitlement to pay

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[16] "§ 1001. Definitions.

"For the purpose of this Act [sections 1001–1012 and 1013–1016 of this Appendix]—

. . . . . .

"(b) the term 'active service' means active service in the Army, Navy, Marine Corps, and Coast Guard of the United States, including active Federal service performed by personnel of the retired and reserve components of these forces, the Coast and Geodetic Survey, the Public Health Service, and active Federal service performed by the civilian officers and employees defined in paragraph (a)(3) above; . . ." 50 U. S. C. App. § 1001.

"§ 1002. Missing interned or captive persons. (a) Continuance of pay and allowances.

"Any person who is in the active service . . . and who is officially determined to be absent in a status of missing, missing in action, interned in a foreign country, captured by a hostile force, beleaguered by a hostile force, or besieged by a hostile force shall, for the period he is officially carried or determined to be in any such status, be entitled to receive or to have credited to his account the same . . . pay [and allowances] . . . to which he was entitled at the beginning of such period of absence or may become entitled thereafter . . . and entitlement to pay and allowances shall terminate upon the date of receipt by the department concerned of evidence that the person is dead or upon the date of death prescribed or determined under provisions of section 5 of this Act [section 1005 of this Appendix]. Such entitlement to pay and allowances shall not terminate upon the expiration of a term of service during absence and, in case of death during absence, shall not terminate earlier than the dates herein prescribed. There shall be no entitlement to pay and allowances for any period during which such person may be officially determined absent from his post of duty without authority and he shall be

[*Notes 17–19 are on p. 407*]

and allowances for any period during which such person may be officially determined absent from his post of duty without authority"; that the Secretary of the Army or his designated subordinate shall have authority to make all determinations necessary in the administration of the Act, and for purposes of the Act determinations so made as to any status dealt with by the Act shall be conclusive.

We are asked first to hold that "[s]ince the Missing Persons Act is later in time, is comprehensive in scope, and includes within its provisions the whole subject mat-

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indebted to the Government for any payments from amounts credited to his account for such period. . . ." 50 U. S. C. App. § 1002.

"§ 1009. Determinations by department heads or designees; conclusiveness relative to status of personnel, payments, or death.

"(a) The head of the department concerned, or such subordinate as he may designate, shall have authority to make all determinations necessary in the administration of this Act [sections 1001–1012 and 1013–1016 of this Appendix], and for the purposes of this Act [said sections] determinations so made shall be conclusive as to death or finding of death, as to any other status dealt with by this Act [said sections], and as to any essential date including that upon which evidence or information is received in such department or by the head thereof. . . . Determinations are authorized to be made by the head of the department concerned, or by such subordinate as he may designate, of entitlement of any person, under provisions of this Act [sections 1001–1012 and 1013–1016 of this Appendix], to pay and allowances, including credits and charges in his account, and all such determinations shall be conclusive: . . . When circumstances warrant reconsideration of any determination authorized to be made by this Act [said sections] the head of the department concerned, or such subordinate as he may designate, may change or modify a previous determination. . . ." 50 U. S. C. App. § 1009.

[17] Act of March 7, 1942, 56 Stat. 143.

[18] Act of December 24, 1942, 56 Stat. 1092; Act of July 1, 1944, 58 Stat. 679; § 4 (e) of Selective Service Act of 1948, 62 Stat. 608; Act of July 3, 1952, 66 Stat. 330, 331; Act of April 4, 1953, 67 Stat. 20–21; Act of January 30, 1954, 68 Stat. 7; Act of June 30, 1955, 69 Stat. 238; Act of July 20, 1956, 70 Stat. 595; Act of August 7, 1957, 71 Stat. 341.

[19] Act of August 29, 1957, 71 Stat. 491.

ter of R.S. 1288 [the statute upon which the petitioners rely], any inconsistency or repugnancy between the two statutes should be resolved in favor of the Missing Persons Act." This step having been taken, we are asked to decide that the petitioners, because of their behavior after their capture, were no longer in the "active service in the Army . . . of the United States," and that they were therefore not covered by the Act. It is also suggested, alternatively, that the Secretary of the Army might have determined that each of the petitioners after capture was "absent from his post of duty without authority," and, therefore, not entitled to pay and allowances under the Act. We can find no support for these contentions in the language of the statute, in its legislative history, or in the Secretary's administrative determination.

The Missing Persons Act was a response to unprecedented personnel problems experienced by the Armed Forces in the early months after our entry into the Second World War. Originally proposed by the Navy Department, the legislation was amended on the floor of the House to cover the other services. As the Committee Reports make clear, the primary purpose of the legislation was to alleviate financial hardship suffered by the dependents of servicemen reported as missing.[20]

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[20] "In general, the purposes of this bill are to provide authorization for the continued payment or credit in the accounts, of the pay and allowances of missing persons for 1 year following the date of commencement of absence from their posts of duty or until such persons have been officially declared dead [In December, 1942, the statute was amended so as to permit a department head to continue personnel in a missing status for an indefinite period. 56 Stat. 1092.]; the continued payment for the same period of the allotments for the support of dependents and for the payment of insurance premiums, and for regular monthly payments to the dependents of missing persons, in the same manner in which allotments are paid, in those instances in which the missing persons had neglected to

To hold that the Missing Persons Act operated to repeal the statute upon which the petitioners rely would be a long step to take, for at least two reasons. In the first place, the record of the hearings of the Senate Committee on Naval Affairs clearly discloses that at the time the Missing Persons Act was being considered, the Committee was made fully aware of the 1814 statute, and manifested no inclination to disturb it.[21] Secondly, it is not entirely accurate to say, as does the Government, that the

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provide for their dependents through the medium of allotments, such payments to be deducted from the pay of the missing persons in the same manner in which allotments are paid.

. . . . . .

"The Navy Department advised the committee that many instances have occurred during recent months of personnel having been reported as missing, and in accordance with requests received from disbursing officers carrying the pay accounts, the allotments of such persons were discontinued. Because of stoppage of allotments and the withholding of pay of missing persons, dependents of personnel concerned have experienced great hardships in a large number of cases. The committee are advised that this situation is aggravated by the fact that, so long as a person is declared to be missing and has not been officially declared dead, the 6 months' death gratuity is not payable." H. R. Rep. No. 1680, 77th Cong., 2d Sess., pp. 3, 5.

[21] The Committee was advised by a representative of the Marine Corps as follows: "Section 1288, Revised Statutes (sec. 846, title 10, U. S. Code), provides that noncommissioned officers and privates shall be entitled to receive during their captivity by an enemy, notwithstanding the expiration of their terms of service, the same pay, subsistence, and allowances to which they may be entitled while in the actual service of the United States. This applies only to enlisted personnel, and I know of no such law affecting the pay and allowances of officers and nurses. The proposed legislation would also authorize the crediting, in the account of the individual concerned, of the same pay and allowances received at the time an individual is reported as missing or missing in action until his status is determined by competent authority." Hearings before the Senate Committee on Naval Affairs on H. R. 6446, 77th Cong., 2d Sess., pp. 13–14.

Missing Persons Act is "later in time." After the original passage of that Act in 1942, the statute upon which the petitioners rely was recodified in 1952 and again in 1958.[22]

But the question whether there was a repeal by implication is one that we need not determine here, for it is clear that under either statute the petitioners are entitled to the pay and allowances that accrued during their detention as prisoners of war. The Missing Persons Act unambiguously provides that any person "in the active service . . . officially determined to be absent in a status of . . . captured by a hostile force . . . [is] entitled to receive or to have credited to his account the same . . . pay [and allowances] to which he was entitled at the beginning of such period of absence . . . ." It affirmatively appears on this record that the petitioners were in the active service of the Army, that they were in fact captured by the enemy, and that they were later officially determined to be "absent in a status of . . . captured by a hostile force." The terms of the Missing Persons Act are therefore expressly applicable.

The argument that it was open to the Secretary of the Army to determine that the petitioners in the prison camps to which they were taken were thereafter not "in the active service" cannot survive even cursory analysis. In the Armed Forces the term "active service" has a precise meaning, a meaning not dependent upon individual conduct. 10 U. S. C. § 101.[23] Moreover, the verbal

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[22] See note 4.

[23] A House Committee Report concerning a proposed amendment to the Act sets forth a letter from the Secretary of the Army clearly showing his understanding that "active service" was employed in the statute as a technical phrase embodying a technical status: "Also, the proposal would amend section 2 of the Missing Persons Act to provide coverage for persons on training duty under certain conditions, in addition to persons on active service." H. R. Rep. No. 2535, 84th Cong., 2d Sess., p. 7. See also H. R. Rep. No. 204, 85th Cong., 1st Sess., p. 8; H. R. Rep. No. 888, 85th Cong., 1st Sess., p. 3; H. R. Rep. No. 2354, 84th Cong., 2d Sess., p. 3; S. Rep. No. 573, 85th

structure of the Act, re-enforced by common sense, clearly leads to the conclusion that "active service" refers to a person's status at the time he became missing. Nothing in the legislative history of the original statute or of its many re-enactments offers support for any other construction. That history simply reflects a continuing purpose to widen the classes of persons to whom the benefactions of the law were to be extended, from the time those persons became missing.[24]

Cong., 1st Sess., p. 4; S. Rep. No. 970, 85th Cong., 1st Sess., p. 7; S. Rep. No. 2552, 84th Cong., 2d Sess., p. 3.

[24] For example, when the statute was amended in 1957 to extend coverage to those in "full-time training duty, other full-time duty, or inactive duty training," an Army spokesman testifying before the House Subcommittee expressed the clear view that "active service" referred to the moment the person entered a missing status. "The purpose of that . . . is to insure that people who are in a nonpay status at the time they enter in a missing or missing-in-action status are covered. . . . Under the present wording of the bill it is conceivable that being in a nonpay status at the time that he enters into a missing status his survivors would not be entitled to any pay or allowances. This would insure that they would be entitled to the pay and allowances that he would have had, had he been on active duty at the time that he entered into a missing status." Hearings before Subcommittee No. 1 of the House Committee on Armed Services on H. R. 2404, 85th Cong., 1st Sess., p. 563.

In S. Rep. No. 970, 85th Cong., 1st Sess., the Committee on Armed Services stated: "Coverage would be extended to members of the Reserve components while they are performing full-time training duty, other full-time duty, and inactive duty training with or without pay. Members of the Reserve components entering a missing status while performing duty of the types enumerated would have credited to their pay accounts the same pay and allowances that they would receive if they were performing full-time active duty. Some reservists participate in training without pay, such as week-end proficiency flights in aircraft, and this amendment is intended to treat them as if they were on active duty when they entered a missing status." P. 3. Similar statements may be found in H. R. Rep. No. 2535, 84th Cong., 2d Sess., p. 3, and H. R. Rep. No. 204, 85th Cong., 1st Sess., p. 2. Certainly the thrust of these statements is a primary concern with status at the time the missing status is first entered.

The Government's alternative argument seems, as a matter of statutory construction, equally invalid. The legislative history discloses that the provision denying pay to a person officially determined to have been "absent from his post of duty without authority" was enacted to cover the case of a person found to have been "missing" in the first place only by reason of such unauthorized absence.[25] Moreover, desertion and absence without leave are technically defined offenses. 10 U. S. C. § 885, 10 U. S. C. § 886; see Manual for Courts-Martial, United States, p. 315 (1951). It is open to serious question whether the conduct of the petitioners after their capture could conceivably have been determined to be tantamount either to desertion or absence without leave. See Avins, Law of AWOL, p. 167 (1957); Snedeker, Military Justice under the Uniform Code, p. 562 (1953).

These are questions which we need not, however, pursue. We need not decide in this case that the Secretary of the Army was wholly without power under the statute to determine administratively that the petitioners after their capture were no longer in active service, or that they were absent from their posts of duty. Nor need we finally decide whether either such determination by the Secretary would have been valid as a matter of law. The simple fact is that no such administrative determination has ever been made. The only reason the Army ever advanced for refusing to pay the petitioners was its determination that they had "advocated, or were members of an organization which advocated, . . . the overthrow of the United States Government by force or violence." [26] That determination has now been totally abandoned. The Army has never even purported to determine that the

[25] See H. R. Rep. No. 1680, 77th Cong., 2d Sess., p. 5; Hearings before House Committee on Naval Affairs on H. R. 4405, 78th Cong., 2d Sess., p. 2316.

[26] See note 5, *supra*.

petitioners were not in active service or that they were absent from their posts of duty.[27] The Army cannot rely upon something that never happened, upon an administrative determination that was never made, even if it be assumed that such a determination would have been permissible under the statute and supported by the facts.[28]

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[27] Nor has the Army ever purported to determine that the petitioners were not in "captivity" or "in the actual service of the United States" within the meaning of 37 U. S. C. § 242.

[28] The record of a 1954 hearing before the House Armed Services Committee on a bill to extend the life of the Missing Persons Act indicates that some thought was being given at that time to the possibility of an administrative determination that the petitioners were absent from their posts of duty:

"Mr. Bates. General, what is the pay status of prisoners who have refused repatriation?

"General Powell. Those prisoners, sir, are carried in pay status. In negotiating the armistice we agreed that until this matter was settled they would be carried as prisoners of war.

"Mr. Kilday. When does that stop?

"Mr. Bates. Does that stop next week?

"General Powell. The method of stopping the pay and allowances, allotments and status of military personnel of those 21 prisoners is a matter to be decided by the Secretary of Defense for all services involved. He has announced no decision.

"Mr. Bates. Aren't they absent without leave?

"General Powell. No, sir.

"Mr. Bates. What is it?

"General Powell. In the armistice agreement, the United States agreed to carry them as prisoners of war until the matter was settled.

"Mr. Bates. I thought there was also an understanding that they would be considered a. w. o. l. as of a certain date?

"General Powell. That is a matter still to be decided by the Secretary of Defense.

"Mr. Bates. Or deserters, you know.

"General Powell. The Secretary of Defense is deciding for all services.

"The Chairman. Call the roll. It is not necessary to call the roll. There is no objection, is there?

"(Chorus of 'No.')

[*Note 28 continued on p. 414*]

See *Service* v. *Dulles,* 354 U. S. 363; *Vitarelli* v. *Seaton,* 359 U. S. 535. For these reasons we hold that the petitioners were entitled under the applicable statutes to the pay and allowances that accrued during their detention as prisoners of war.

Throughout these proceedings no distinction has been made between the petitioners' pay rights while they were prisoners and their rights after the Korean Armistice when they voluntarily declined repatriation and went to Communist China. Since both the Army and the Court of Claims denied the petitioners' claims entirely, no sepa-

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"Mr. Kilday. I would like it understood that they are going to be cut off as soon as you can.

"General Powell. Sir, the Secretary of Defense must make a decision, including phychological [*sic*] factors, individual rights, the law involved, and national policy.

"Mr. Vinson. That is right.

"General Powell. He has not as yet announced such a decision to us.

"Mr. Cunningham. Should the pay and allotments, benefits to the members of the family, ever be cut off?

"The Chairman. Sure.

"Mr. Van Zandt. Oh, yes.

"Mr. Cunningham. Why so? They are not to blame for this.

"Mr. Bishop. No, they are not.

"Mr. Vinson. Well, if a man is absent without leave—

"Mr. Cunningham. A man has children or wife and he is over there in Korea and decided to stay with the Communists. Why should the children be punished?

"The Chairman. Wait, one at a time. The reporter can't get it.

"Mr. Cunningham. I think it is a good question. The pay for the individual: he should never have that, and his citizenship. But here is a woman from Minnesota, goes over there and pleads with her son and went as far as Tokyo. Now that mother needs an allotment as that boy's dependent. Why should she be punished because the boy stayed over there? I think there are a lot of things to be considered; not just emotion.

"Mr. Kilday. That is inherent. When a man is court-martialed—

"The Chairman. Without objection, the bill is favorably reported." Hearings before House Committee on Armed Services on H. R. 7209, 83d Cong., 2d Sess., pp. 3071–3072.

rate consideration was given to the petitioners' status after their release as prisoners of war until the date of their administrative discharges. Nor did the petitioners in this Court address themselves to the question of the petitioners' rights to pay during that interval. Yet, it is evident that the petitioners' status during that period might be governed by considerations different from those which have been discussed. Other statutory provisions and regulations would come into play. Accordingly we express no view as to the petitioners' pay rights for the period between the Korean Armistice and their administrative discharges, leaving that question to be fully canvassed in the Court of Claims, to which in any event this case must be remanded for computation of the judgments.

The disclosure of grave misconduct by numbers of servicemen captured in Korea was a sad aftermath of the hostilities there. The consternation and self-searching which followed upon that disclosure are still fresh in the memories of many thoughtful Americans.[29] The problem is not a new one.[30] Whether the solution to it lies alone

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[29] See Report by the Secretary of Defense's Advisory Committee on Prisoners of War (1955).

[30] In 1333 John Culwin was charged with having sworn allegiance to his Scottish captors. 1 Hale, Historia Placitorum Coronæ 167–168 (1736). The earliest reported American case of prisoner of war misconduct appears to be *Respublica* v. *McCarty,* 2 Dall. 86 (Supreme Court of Pennsylvania, 1781). During the Civil War thousands of captives on each side defected to the enemy. See H. R. Rep. No. 45, 40th Cong., 3d Sess., pp. 229, 742–777 (1869); Report by the Secretary of Defense's Advisory Committee on Prisoners of War, p. 51 (1955). Two treason trials grew out of prisoner of war misconduct during World War II. *United States* v. *Provoo,* 124 F. Supp. 185, rev'd, 215 F. 2d 531, second indictment dismissed, 17 F. R. D 183, aff'd, 350 U. S. 857; *United States ex rel. Hirshberg* v. *Malanaphy,* 73 F. Supp. 990, rev'd, 168 F. 2d 503, rev'd *sub nom. United States ex rel. Hirshberg* v. *Cooke,* 336 U. S. 210. More than forty British prisoners of war were brought to trial for misconduct. See note, 56 Col. L. Rev. 709–721 (1956).

in subsequent prosecution and punishment is not for us to inquire.[31] Congress may someday provide that members of the Army who fail to live up to a specified code of conduct as prisoners of war shall forfeit their pay and allowances.[32] Today we hold only that the Army did not lawfully impose that sanction in this case.

The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

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[31] Upon their return to the United States in July 1955, the petitioners were confined by the United States Army in San Francisco, California, to await trial by general court-martial for violation of Article 104 of the Uniform Code of Military Justice. In November of that year they were released from confinement by virtue of writs of habeas corpus issued by a Federal District Court, on the authority of *Toth* v. *Quarles*, 350 U. S. 11. There have been several court-martial prosecutions growing out of alleged misconduct by Army prisoners of war in Korea. See *United States* v. *Dickenson*, 17 C. M. R. 438, aff'd, 6 U. S. C. M. A. 438, 20 C. M. R. 154; *United States* v. *Floyd*, 18 C. M. R. 362; *United States* v. *Batchelor*, 19 C. M. R. 452, aff'd, 7 U. S. C. M. A. 354, 22 C. M. R. 144; *United States* v. *Olson*, 20 C. M. R. 461, aff'd, 7 U. S. C. M. A. 460, 22 C. M. R. 250; *United States* v. *Gallagher*, 21 C. M. R. 435; *United States* v. *Bayes*, 22 C. M. R. 487; *United States* v. *Alley*, 8 U. S. C. M. A. 559, 25 C. M. R. 63; *United States* v. *Fleming*, 19 C. M. R. 438. See the discussion of these cases in Prugh, Justice for All RECAP–K'S, Army Combat Forces Journal, November 1955, p. 15; Note, 56 Col. L. Rev. 709.

[32] A statute relating to the right to pay of members of the United States Navy who are taken prisoner does appear to require a standard of conduct after capture:

"The pay and emoluments of the officers and men of any vessel of the United States taken by an enemy who shall appear, by the sentence of a court-martial or otherwise, to have done their utmost to preserve and defend their vessel, and, after the taking thereof, to have behaved themselves agreeably to the discipline of the Navy, shall go on and be paid to them until their exchange, discharge, or death." 37 U. S. C. § 244.

No reported case has been found holding that this standard of conduct was not met. Cf. *Straughan* v. *United States*, 1 Ct. Cl. 324, discussed in text, *supra*, p. 404.

BALDONADO *v.* CALIFORNIA.

CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 185. Argued May 8, 1961.—Decided May 22, 1961.*

The totality of circumstances disclosed by the records fails to support the substantial due process issues tendered in the petitions for certiorari, and the writs are dismissed.

Reported below: 53 Cal. 2d 803, 819, 824, 350 P. 2d 103, 112, 115.

A. L. Wirin argued the cause and filed briefs for petitioners in all three cases. *Burt M. Henson* argued the cause and appeared on the brief for petitioner in No. 186. *Arthur Warner* argued the cause and appeared on the brief for petitioner in No. 187.

William E. James, Assistant Attorney General of California, argued the cause for respondent in all three cases. With him on the briefs was *Stanley Mosk,* Attorney General. *Roy A. Gustafson* also appeared on the brief for respondent in No. 187.

Ben Margolis and *Charles B. Stewart, Jr.* filed a brief in No. 187 for certain California Chapters of the National Lawyers Guild, as *amici curiae,* urging reversal.

PER CURIAM.

After hearing oral argument and on due examination of the records, we conclude that the totality of circumstances disclosed fails to support the substantial due process issues tendered in the petitions for certiorari, and so we dismiss the writs.

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*Together with No. 186, *Moya* v. *California,* and No. 187, *Duncan* v. *California,* also on certiorari to the same Court.

590532 O–61—31

BUSHNELL *v.* ELLIS, CORRECTIONS DIRECTOR.

CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 561. Argued May 2, 1961.—Decided May 22, 1961.

Judgment reversed and cause remanded to Court of Criminal Appeals of Texas to grant petitioner a hearing on his petition for writ of habeas corpus.

Percy D. Williams, acting under appointment by the Court, 364 U. S. 917, argued the cause and filed a brief for petitioner.

B. H. Timmins, Jr., Assistant Attorney General of Texas, argued the cause for respondent. With him on the brief were *Will Wilson,* Attorney General, and *Linward Shivers,* Assistant Attorney General.

PER CURIAM.

The judgment of the Court of Criminal Appeals of Texas is reversed and the cause is remanded to that court with directions to grant petitioner a hearing upon his petition for a writ of habeas corpus. *Uveges* v. *Pennsylvania,* 335 U. S. 437; *Cash* v. *Culver,* 358 U. S. 633; *McNeal* v. *Culver,* 365 U. S. 109.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

MR. JUSTICE CLARK, with whom MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN join, dissenting.

This application for the issuance of a writ of habeas corpus was filed as an original action in the Court of Criminal Appeals of Texas. Neither the record, the briefs, nor argument of counsel indicates that such an action has ever been filed in a District Court of Texas as appears to be required by Texas procedure. See *Ex parte Rod-*

riguez, 169 Tex. Cr. R. —, 334 S. W. 2d 294 (1960); *Ex parte Fitzpatrick,* 167 Tex. Cr. R. 376, 320 S. W. 2d 683 (1959); *Ex parte Brooks,* 85 Tex. Cr. R. 397, 212 S. W. 956 (1919). The judgment of the Court of Criminal Appeals might, therefore, have been based upon an independent state ground. In this condition of the record, I would affirm the judgment without prejudice to the petitioner's filing in any appropriate Texas District Court an application for a writ of habeas corpus to test out the validity of his detention. See Vernon's Tex. Code Crim. Proc., Art. 119.

HERRIN TRANSPORTATION CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS.

No. 837. Decided May 22, 1961.

186 F. Supp. 777, affirmed.

Carl L. Phinney for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Robert W. Ginnane and *James Y. Piper* for the United States, and *Ewell H. Muse, Jr.* for Strickland Transportation Co., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

McGOWAN ET AL. *v.* MARYLAND.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 8. Argued December 8, 1960.—Decided May 29, 1961.

Appellants, employees of a large department store on a highway in Anne Arundel County, Md., were convicted and fined in a Maryland State Court for selling on Sunday a loose-leaf binder, a can of floor wax, a stapler, staples and a toy, in violation of Md. Ann. Code, Art. 27, § 521, which generally prohibits the sale on Sunday of all merchandise except the retail sale of tobacco products, confectioneries, milk, bread, fruit, gasoline, oils, greases, drugs, medicines, newspapers and periodicals. Recent amendments now except from the prohibition the retail sale in Anne Arundel County of all foodstuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs, and exempt entirely any retail establishment in that County which employs not more than one person other than the owner. There are many other Maryland laws which prohibit specific activities on Sundays or limit them to certain hours, places or conditions. *Held:* Art. 27, § 521 does not violate the Equal Protection or Due Process Clause of the Fourteenth Amendment or constitute a law respecting an establishment of religion, within the meaning of the First Amendment, which is made applicable to the States by the Fourteenth Amendment. Pp. 422–453.

1. Art. 27, § 521 does not violate the Equal Protection Clause of the Fourteenth Amendment. Pp. 425–428.

(a) On the record in this case, it cannot be said that the classifications made by the statute are without rational and substantial relation to the objects of the legislation, so as to exceed the wide discretion permitted the States in enacting laws which affect some groups of citizens differently from others. Pp. 425–427.

(b) Provisions of the statute which permit only certain Anne Arundel County retailers to sell merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches, amusement parks, etc., do not discriminate invidiously against retailers in other Maryland counties. P. 427.

(c) The Equal Protection Clause is not violated by Art. 27, § 509, which permits only certain merchants in Anne Arundel County (operators of bathing beaches, amusement parks, etc.)

to sell merchandise customarily sold at such places while forbidding its sale by other vendors, such as appellants' employer. Pp. 427–428.

2. Art. 27, § 509, which exempts retail sales of "merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, amusement parks, etc., is not so vague as to violate the Due Process Clause of the Fourteenth Amendment. Pp. 428–429.

3. Art. 27, § 521 is not a law respecting an establishment of religion, within the meaning of the First Amendment. Pp. 429–453.

(a) Since appellants allege only economic injury to themselves and do not allege any infringement of their own religious freedoms, they have no standing to raise the question whether the statute prohibits the free exercise of religion, contrary to the First Amendment. Pp. 429–430.

(b) Since appellants have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion, they have standing to complain that the statute is a law respecting an establishment of religion. Pp. 430–431.

(c) In the light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is concluded that, as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion, as those words are used in the Constitution of the United States. Pp. 431–444.

(d) The present purpose and effect of most of our Sunday Closing Laws is to provide a uniform day of rest for all citizens; and the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. Pp. 444–445.

(e) After engaging in the close scrutiny demanded of it when First Amendment liberties are at issue, this Court accepts the determination of the State Supreme Court that the present purpose and effect of the statute here involved is not to aid religion but to set aside a day of rest and recreation. Pp. 445–449.

(f) This Court rejects appellants' contention that the State has other means at its disposal to accomplish its secular purpose that would not even remotely or incidentally give state aid to religion Pp. 449–453.

220 Md. 117, 151 A. 2d 156, affirmed.

Harry Silbert argued the cause for appellants. With him on the brief were *A. Jerome Diener* and *Sidney Schlachman.*

John Martin Jones, Jr., Special Assistant Attorney General of Maryland, argued the cause for appellee. With him on the brief was *C. Ferdinand Sybert,* Attorney General.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The issues in this case concern the constitutional validity of Maryland criminal statutes,[1] commonly known as Sunday Closing Laws or Sunday Blue Laws. These statutes, with exceptions to be noted hereafter, generally proscribe all labor, business and other commercial activities on Sunday. The questions presented are whether the classifications within the statutes bring about a denial of equal protection of the law, whether the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate due process, and whether the statutes are laws respecting an establishment of religion or prohibiting the free exercise thereof.

Appellants are seven employees of a large discount department store located on a highway in Anne Arundel County, Maryland. They were indicted for the Sunday sale of a three-ring loose-leaf binder, a can of floor wax, a stapler and staples, and a toy submarine in violation of Md. Ann. Code, Art. 27, § 521. Generally, this section prohibited, throughout the State, the Sunday sale of all merchandise except the retail sale of tobacco products, confectioneries, milk, bread, fruits, gasoline, oils, greases,

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[1] These statutes, in their entirety, are found in Md. Ann. Code, 1957, Art. 27, §§ 492–534C; Art. 2B, §§ 28 (a), 90–106; Art. 66C, §§ 132 (d), 698 (d). Those sections specifically referred to hereafter may be found in an Appendix to this opinion, *post,* p. 453.

drugs and medicines, and newspapers and periodicals. Recently amended, this section also now excepts from the general prohibition the retail sale in Anne Arundel County of all foodstuffs, automobile and boating accessories, flowers, toilet goods, hospital supplies and souvenirs. It now further provides that any retail establishment in Anne Arundel County which does not employ more than one person other than the owner may operate on Sunday.

Although appellants were indicted only under § 521, in order properly to consider several of the broad constitutional contentions, we must examine the whole body of Maryland Sunday laws. Several sections of the Maryland statutes are particularly relevant to evaluation of the issues presented. Section 492 of Md. Ann. Code, Art. 27, forbids all persons from doing any work or bodily labor on Sunday and forbids permitting children or servants to work on that day or to engage in fishing, hunting and unlawful pastimes or recreations. The section excepts all works of necessity and charity. Section 522 of Md. Ann. Code, Art. 27, disallows the opening or use of any dancing saloon, opera house, bowling alley or barber shop on Sunday. However, in addition to the exceptions noted above, Md. Ann. Code, Art. 27, § 509, exempts, for Anne Arundel County, the Sunday operation of any bathing beach, bathhouse, dancing saloon and amusement park, and activities incident thereto and retail sales of merchandise customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses. Section 90 of Md. Ann. Code, Art. 2B, makes generally unlawful the sale of alcoholic beverages on Sunday. However, this section, and immediately succeeding ones, provide various immunities for the Sunday sale of different kinds of alcoholic beverages, at different hours during the day, by vendors holding different types of licenses, in different political divisions of the State—particularly

in Anne Arundel County. See Md. Ann. Code, Art. 2B, § 28 (a).

The remaining statutory sections concern a myriad of exceptions for various counties, districts of counties, cities and towns throughout the State. Among the activities allowed in certain areas on Sunday are such sports as football, baseball, golf, tennis, bowling, croquet, basketball, lacrosse, soccer, hockey, swimming, softball, boating, fishing, skating, horseback riding, stock car racing and pool or billiards. Other immunized activities permitted in some regions of the State include group singing or playing of musical instruments; the exhibition of motion pictures; dancing; the operation of recreation centers, picnic grounds, swimming pools, skating rinks and miniature golf courses. The taking of oysters and the hunting or killing of game is generally forbidden, but shooting conducted by organized rod and gun clubs is permitted in one county. In some of the subdivisions within the State, the exempted Sunday activities are sanctioned throughout the day; in others, they may not commence until early afternoon or evening; in many, the activities may only be conducted during the afternoon and late in the evening. Certain localities do not permit the allowed Sunday activity to be carried on within one hundred yards of any church where religious services are being held. Local ordinances and regulations concerning certain limited activities supplement the State's statutory scheme. In Anne Arundel County, for example, slot machines, pinball machines and bingo may be played on Sunday.

Among other things, appellants contended at the trial that the Maryland statutes under which they were charged were contrary to the Fourteenth Amendment for the reasons stated at the outset of this opinion. Appellants were convicted and each was fined five dollars and costs. The Maryland Court of Appeals affirmed, 220

Md. 117, 151 A. 2d 156; on appeal brought under 28 U. S. C. § 1257 (2), we noted probable jurisdiction. 362 U. S. 959.

I.

Appellants argue that the Maryland statutes violate the "Equal Protection" Clause of the Fourteenth Amendment on several counts. First, they contend that the classifications contained in the statutes concerning which commodities may or may not be sold on Sunday are without rational and substantial relation to the object of the legislation.[2] Specifically, appellants allege that the statutory exemptions for the Sunday sale of the merchandise mentioned above render arbitrary the statute under which they were convicted. Appellants further allege that § 521 is capricious because of the exemptions for the operation of the various amusements that have been listed and because slot machines, pin-ball machines, and bingo are legalized and are freely played on Sunday.

The standards under which this proposition is to be evaluated have been set forth many times by this Court. Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws

[2] Companion arguments made by appellants are that the exceptions to the Sunday sale's prohibition so undermine the alleged purpose of Sunday as a day of rest as to bear no rational relationship to it and thereby render the statutes violative of due process; that the distinctions drawn by the statutes are so unreasonable as to violate due process.

result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552; *Metropolitan Casualty Ins. Co.* v. *Brownell,* 294 U. S. 580; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61; *Atchison, T. & S. F. R. Co.* v. *Matthews,* 174 U. S. 96.[3]

It would seem that a legislature could reasonably find that the Sunday sale of the exempted commodities was necessary either for the health of the populace or for the enhancement of the recreational atmosphere of the day—that a family which takes a Sunday ride into the country will need gasoline for the automobile and may find pleasant a soft drink or fresh fruit; that those who go to the beach may wish ice cream or some other item normally sold there; that some people will prefer alcoholic beverages or games of chance to add to their relaxation; that newspapers and drug products should always be available to the public.

The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call for this legislative treatment. See *Salsburg* v. *Maryland,* 346 U. S. 545, 552–553; *Kotch*

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[3] More recently we declared:

"The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. *Tigner* v. *Texas,* 310 U. S. 141. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. *Semler* v. *Dental Examiners,* 294 U. S. 608. The legislature may select one phase of one field and apply a remedy there, neglecting the others. *A. F. of L.* v. *American Sash Co.,* 335 U. S. 538. The prohibition of the Equal Protection Clause goes no further than the *invidious discrimination.*" *Williamson* v. *Lee Optical,* 348 U. S. 483, 489. (Emphasis added.)

v. *Board of River Port Pilot Comm'rs, supra.* Likewise, the fact that these exemptions exist and deny some vendors and operators the day of rest and recreation contemplated by the legislature does not render the statutes violative of equal protection since there would appear to be many valid reasons for these exemptions, as stated above, and no evidence to dispel them.

Secondly, appellants contend that the statutory arrangement which permits only certain Anne Arundel County retailers to sell merchandise essential to, or customarily sold at, or incidental to, the operation of bathing beaches, amusement parks et cetera is contrary to the "Equal Protection" Clause because it discriminates unreasonably against retailers in other Maryland counties. But we have held that the Equal Protection Clause relates to equality between persons as such, rather than between areas and that territorial uniformity is not a constitutional prerequisite. With particular reference to the State of Maryland, we have noted that the prescription of different substantive offenses in different counties is generally a matter for legislative discretion. We find no invidious discrimination here. See *Salsburg* v. *Maryland, supra.*

Thirdly, appellants contend that this same statutory provision, Art. 27, § 509, violates the "Equal Protection" Clause because it permits only certain merchants within Anne Arundel County (operators of bathing beaches and amusement parks et cetera) to sell merchandise customarily sold at these places while forbidding its sale by other vendors of this merchandise, such as appellants' employer.[4] Here again, it would seem that a legislature

[4] Whether § 509 is to be read this way or is to be read to permit the sale of such merchandise by all vendors in Anne Arundel County is unclear. The Maryland Court of Appeals found it unnecessary to reach this question of state law. For purposes of this argument, we accept the construction of § 509 set forth by appellants.

could reasonably find that these commodities, necessary for the health and recreation of its citizens, should only be sold on Sunday by those vendors at the locations where the commodities are most likely to be immediately put to use. Such a determination would seem to serve the consuming public and at the same time secure Sunday rest for those employees, like appellants, of all other retail establishments. In addition, the enforcement problems which would accrue if large retail establishments, like appellants' employer, were permitted to remain open on Sunday but were restricted to the sale of the merchandise in question would be far greater than the problems accruing if only beach and amusement park vendors were exempted. Here again, there has been no indication of the unreasonableness of this differentiation. On the record before us, we cannot say that these statutes do not provide equal protection of the laws.

II.

Another question presented by appellants is whether Art. 27, § 509, which exempts the Sunday retail sale of "merchandise essential to, or customarily sold at, or incidental to, the operation of" bathing beaches, amusement parks et cetera in Anne Arundel County, is unconstitutionally vague. We believe that business people of ordinary intelligence in the position of appellants' employer would be able to know what exceptions are encompassed by the statute either as a matter of ordinary commercial knowledge or by simply making a reasonable investigation at a nearby bathing beach or amusement park within the county. See *United States* v. *Harriss,* 347 U. S. 612, 617–618. Under these circumstances, there is no necessity to guess at the statute's meaning in order to determine what conduct it makes criminal. *Connally* v. *General Construction Co.,* 269 U. S. 385, 391. Questions concerning proof that the items appellants sold were customarily

sold at, or incidental to the operation of, a bathing beach or amusement park were not raised in the Maryland Court of Appeals, nor are they raised here. Thus, we cannot consider the matter. *Whitney* v. *California,* 274 U. S. 357, 362–363.

III.

The final questions for decision are whether the Maryland Sunday Closing Laws conflict with the Federal Constitution's provisions for religious liberty. First, appellants contend here that the statutes applicable to Anne Arundel County violate the constitutional guarantee of freedom of religion in that the statutes' effect is to prohibit the free exercise of religion in contravention of the First Amendment, made applicable to the States by the Fourteenth Amendment.[5] But appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. In fact, the record is silent as to what appellants' religious beliefs are. Since the general rule is that "a litigant may only assert his own constitutional rights or immunities," *United States* v. *Raines,* 362 U. S. 17, 22, we hold that appellants have no standing to raise this contention.[6] *Tileston* v. *Ullman,* 318 U. S. 44, 46. Furthermore, since appellants do not specifically allege that the statutes infringe upon the religious beliefs of the department store's present or prospective patrons, we

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[5] *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639; *Everson* v. *Board of Education,* 330 U. S. 1, 5; *McCollum* v. *Board of Education,* 333 U. S. 203, 210.

[6] Mr. Justice Black is of the opinion that appellants do have standing to raise this contention. He believes that their claim is without merit for the reasons expressed in *Braunfeld* v. *Brown, post,* p. 599, at pp. 602–610, and *Gallagher* v. *Crown Kosher Super Market, post,* p. 617, at pp. 630–631.

have no occasion here to consider the standing question of *Pierce* v. *Society of Sisters,* 268 U. S. 510, 535–536. Those persons whose religious rights are allegedly impaired by the statutes are not without effective ways to assert these rights. Cf. *N. A. A. C. P.* v. *Alabama,* 357 U. S. 449, 459–460; *Barrows* v. *Jackson,* 346 U. S. 249, 257. Appellants present no weighty countervailing policies here to cause an exception to our general principles. See *United States* v. *Raines, supra.*

Secondly, appellants contend that the statutes violate the guarantee of separation of church and state in that the statutes are laws respecting an establishment of religion contrary to the First Amendment, made applicable to the States by the Fourteenth Amendment. If the purpose of the "establishment" clause was only to insure protection for the "free exercise" of religion, then what we have said above concerning appellants' standing to raise the "free exercise" contention would appear to be true here. However, the writings of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.[7] Thus, in *Everson* v. *Board of Education, supra,* the Court permitted a district taxpayer to challenge, on "establishment" grounds, a state statute which authorized district boards of education to reimburse parents for fares paid for the transportation of their children to both public and Catholic schools. Appellants here concededly have suffered direct economic injury, allegedly due to the imposition on them of the tenets of the Christian religion.[8] We find that, in these circum-

[7] Madison's Memorial and Remonstrance Against Religious Assessments, Par. 8, reprinted in the Appendix to Mr. Justice Rutledge's dissenting opinion in *Everson* v. *Board of Education, supra,* at p. 68.

[8] Cf. *Doremus* v. *Board of Education,* 342 U. S. 429, where complainants failed to show direct and particular economic detriment.

stances, these appellants have standing to complain that the statutes are laws respecting an establishment of religion.

The essence of appellants' "establishment" argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day. In substantiating their "establishment" argument, appellants rely on the wording of the present Maryland statutes, on earlier versions of the current Sunday laws and on prior judicial characterizations of these laws by the Maryland Court of Appeals. Although only the constitutionality of § 521, the section under which appellants have been convicted, is immediately before us in this litigation, inquiry into the history of Sunday Closing Laws in our country, in addition to an examination of the Maryland Sunday closing statutes in their entirety and of their history, is relevant to the decision of whether the Maryland Sunday law in question is one respecting an establishment of religion. There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character.

Sunday Closing Laws go far back into American history, having been brought to the colonies with a background of English legislation dating to the thirteenth century. In 1237, Henry III forbade the frequenting of markets on

Sunday; the Sunday showing of wools at the staple was banned by Edward III in 1354; in 1409, Henry IV prohibited the playing of unlawful games on Sunday; Henry VI proscribed Sunday fairs in churchyards in 1444 and, four years later, made unlawful all fairs and markets and all showings of any goods or merchandise; Edward VI disallowed Sunday bodily labor by several injunctions in the mid-sixteenth century; various Sunday sports and amusements were restricted in 1625 by Charles I. Lewis, A Critical History of Sunday Legislation, 82–108; Johnson and Yost, Separation of Church and State, 221. The law of the colonies to the time of the Revolution and the basis of the Sunday laws in the States was 29 Charles II, c. 7 (1677). It provided, in part:

> "For the better observation and keeping holy the Lord's day, commonly called Sunday: be it enacted . . . that all the laws enacted and in force concerning the observation of the day, *and repairing to the church thereon,* be carefully put in execution; and that all and every person and persons whatsoever shall upon every Lord's day apply themselves to the observation of the same, by exercising themselves thereon in the duties of piety and true religion, publicly and privately; and that no tradesman, artificer, workman, laborer, or other person whatsoever, *shall do or exercise any worldly labor or business or work* of their ordinary callings upon the Lord's day, or any part thereof (works of necessity and charity only excepted); . . . and that no person or persons whatsoever shall publicly cry, show forth, or expose for sale any wares, merchandise, fruit, herbs, goods, or chattels, whatsoever, upon the Lord's day, or any part thereof. . . ." (Emphasis added.) [9]

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[9] English statutes subsequent to this are cited and discussed in Lewis, *op. cit., supra,* pp. 111–142.

Observation of the above language, and of that of the prior mandates, reveals clearly that the English Sunday legislation was in aid of the established church.

The American colonial Sunday restrictions arose soon after settlement. Starting in 1650, the Plymouth Colony proscribed servile work, unnecessary travelling, sports, and the sale of alcoholic beverages on the Lord's day and enacted laws concerning church attendance. The Massachusetts Bay Colony and the Connecticut and New Haven Colonies enacted similar prohibitions, some even earlier in the seventeenth century. The religious orientation of the colonial statutes was equally apparent. For example, a 1629 Massachusetts Bay instruction began, "And to the end the Sabbath may be celebrated in a religious manner. . . ." A 1653 enactment spoke of Sunday activities "which things tend much to the dishonor of God, the reproach of religion, and the profanation of his holy Sabbath, the sanctification whereof is sometimes put for all duties immediately respecting the service of God. . . ." Lewis, *op. cit., supra,* at pp. 160–195, particularly at 167, 169.[10] These laws persevered after the Revolution and, at about the time of the First Amendment's adoption, each of the colonies had laws of some sort restricting Sunday labor. See note, 73 Harv. L. Rev. 729–730, 739–740; Johnson and Yost, *op. cit., supra,* at pp. 222–223.

But, despite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious

[10] A 1695 New York Sunday law provided:

"Whereas, the true and sincere worship of God according to his holy will and commandments, is often profaned and neglected by many of the inhabitants and sojourners in this province, who do not keep holy the Lord's day, but in a disorderly manner accustom themselves to travel, laboring, working, shooting, fishing, sporting, playing, horse-racing, frequenting of tippling houses and the using many other unlawful exercises and pastimes, upon the Lord's day, to the great scandal of the holy Christian faith, be it enacted, etc." *Id.,* at 200–201.

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arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor. In the middle 1700's, Blackstone wrote, "[T]he keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness." 4 Bl. Comm. 63. A 1788 English statute dealing with chimney sweeps, 28 Geo. III, c. 48, in addition to providing for their Sunday religious affairs, also regulated their hours of work. The preamble to a 1679 Rhode Island enactment stated that the reason for the ban on Sunday employment was that "persons being evill minded, have presumed to employ in servile labor, more than necessity requireth, their servants. . . ." 3 Records of the Colony of Rhode Island and Providence Plantations 31. The New York law of 1788 omitted the term "Lord's day" and substituted "the first day of the week commonly called Sunday." 2 Laws of N. Y. 1785–1788, 680. Similar changes marked the Maryland statutes, discussed below. With the advent of the First Amendment, the colonial provisions requiring church attendance were soon repealed. Note, 73 Harv. L. Rev., *supra,* at pp. 729–730.

More recently, further secular justifications have been advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come. In England, during the First World War, a committee investigating the health conditions of munitions workers reported that "if the maximum output is to be secured and maintained for any length of

time, a weekly period of rest must be allowed. . . . On economic and social grounds alike this weekly period of rest is best provided on Sunday." [11]

The proponents of Sunday closing legislation are no longer exclusively representatives of religious interests. Recent New Jersey Sunday legislation was supported by labor groups and trade associations, Note, 73 Harv. L. Rev. 730–731; modern English Sunday legislation was promoted by the National Federation of Grocers and supported by the National Chamber of Trade, the Drapers' Chamber of Trade, and the National Union of Shop Assistants. 308 Parliamentary Debates, Commons 2158–2159.

Throughout the years, state legislatures have modified, deleted from and added to their Sunday statutes. As evidenced by the New Jersey laws mentioned above, current changes are commonplace. Almost every State in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system. Note, 73 Harv. L. Rev. 732–733; Note, 12 Rutgers L. Rev. 506. Some of our States now enforce their Sunday legislation through Departments of Labor, *e. g.,* 6 S. C. Code Ann. (1952), § 64–5. Thus have Sunday laws evolved from the wholly religious sanctions that originally were enacted.

Moreover, litigation over Sunday closing laws is not novel. Scores of cases may be found in the state appellate courts relating to sundry phases of Sunday enactments.[12] Religious objections have been raised there on numerous occasions but sustained only once, in *Ex parte Newman,* 9 Cal. 502 (1858); and that decision was overruled three years later, in *Ex parte Andrews,* 18 Cal. 678. A substantial number of cases in varying postures bearing

[11] Ministry of Munitions, Health of Munition Workers Committee, Report on Sunday Labour, Memorandum No. 1 (1915), 5.

[12] See cases collected at 50 Am. Jur. 802 *et seq.;* 24 A. L. R. 2d 813 *et seq.;* 57 A. L. R. 2d 975 *et seq.*

on state Sunday legislation have reached this Court.[13] Although none raising the issues now presented have gained plenary hearing, language used in some of these cases further evidences the evolution of Sunday laws as temporal statutes. Mr. Justice Field wrote in *Soon Hing* v. *Crowley,* 113 U. S. 703, at p. 710:

> "Laws setting aside Sunday as a day of rest are upheld, not from any right of the government to legislate for the promotion of religious observances, but from its right to protect all persons from the physical and moral debasement which comes from uninterrupted labor. Such laws have always been deemed beneficent and merciful laws, especially to the poor and dependent, to the laborers in our factories and workshops and in the heated rooms of our cities; and their validity has been sustained by the highest courts of the States."

While a member of the California Supreme Court, Mr. Justice Field dissented in *Ex parte Newman, supra,* at pp. 519–520, 528, saying:

> "Its requirement is a cessation from labor. In its enactment, the Legislature has given the sanction of law to a rule of conduct, which the entire civilized world recognizes as essential to the physical and moral well-being of society. Upon no subject is there such a concurrence of opinion, among philosophers, moralists and statesmen of all nations, as on the necessity of periodical cessations from labor. One

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[13] See *Soon Hing* v. *Crowley,* 113 U. S. 703; *Hennington* v. *Georgia,* 163 U. S. 299; *Petit* v. *Minnesota,* 177 U. S. 164; *Friedman* v. *New York,* 341 U. S. 907; *McGee* v. *North Carolina,* 346 U. S. 802; *Gundaker Central Motors, Inc.,* v. *Gassert,* 354 U. S. 933; *Grochowiak* v. *Pennsylvania,* 358 U. S. 47; *Ullner* v. *Ohio,* 358 U. S. 131; *Kidd* v. *Ohio,* 358 U. S. 132.

> day in seven is the rule, founded in experience, and sustained by science. . . . The prohibition of secular business on Sunday is advocated on the ground that by it the general welfare is advanced, labor protected, and the moral and physical well-being of society promoted."

This was quoted with approval by Mr. Justice Harlan in *Hennington* v. *Georgia, supra,* who also stated:

> "It is none the less a civil regulation because the day on which the running of freight trains is prohibited is kept by many under a sense of religious duty. The legislature having, as will not be disputed, power to enact laws to promote the order and to secure the comfort, happiness and health of the people, it was within its discretion to fix the day when all labor, within the limits of the State, works of necessity and charity excepted, should cease." *Id.,* at 304.

And Mr. Chief Justice Fuller cited both of these passages in *Petit* v. *Minnesota, supra.*

Before turning to the Maryland legislation now here under attack, an investigation of what historical position Sunday Closing Laws have occupied with reference to the First Amendment should be undertaken, *Everson* v. *Board of Education, supra,* at p. 14.

This Court has considered the happenings surrounding the Virginia General Assembly's enactment of "An act for establishing religious freedom," 12 Hening's Statutes of Virginia 84, written by Thomas Jefferson and sponsored by James Madison, as best reflecting the long and intensive struggle for religious freedom in America, as particularly relevant in the search for the First Amendment's meaning. See the opinions in *Everson* v. *Board of Education, supra.* In 1776, nine years before the bill's

passage, Madison co-authored Virginia's Declaration of Rights which provided, *inter alia,* that "all men are equally entitled to the free exercise of religion, according to the dictates of conscience. . . ." 9 Hening's Statutes of Virginia 109, 111–112. Virginia had had Sunday legislation since early in the seventeenth century; in 1776, the laws penalizing "maintaining any opinions in matters of religion, *forbearing to repair to church,* or the exercising any mode of worship whatsoever" (emphasis added), were repealed, and all dissenters were freed from the taxes levied for the support of the established church. *Id.,* at 164. The Sunday labor prohibitions remained; apparently, they were not believed to be inconsistent with the newly enacted Declaration of Rights. Madison had sought also to have the Declaration expressly condemn the existing Virginia establishment.[14] This hope was finally realized when "A Bill for Establishing Religious Freedom" was passed in 1785. In this same year, Madison presented to Virginia legislators "A Bill for Punishing . . . Sabbath Breakers" which provided, in part:

> "If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary houshold offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings for every such offence, deeming every apprentice, servant, or slave so employed, and every day he shall be so employed as constituting a distinct offence." [15]

This became law the following year and remained during the time that Madison fought for the First Amendment in the Congress. It was the law of Virginia, and similar

[14] Brant, James Madison, The Virginia Revolutionist, 245–246.

[15] 2 The Papers of Thomas Jefferson 555.

laws were in force in other States, when Madison stated at the Virginia ratification convention:

> "Happily for the states, they enjoy the utmost freedom of religion. . . . Fortunately for this commonwealth, a majority of the people are decidedly against any exclusive establishment. I believe it to be so in the other states. . . . I can appeal to my uniform conduct on this subject, that I have warmly supported religious freedom." [16]

In 1799, Virginia pronounced "An act for establishing religious freedom" as "a true exposition of the principles of the bill of rights and constitution," and repealed all subsequently enacted legislation deemed inconsistent with it. 2 Shepherd, Statutes at Large of Virginia, 149. Virginia's statute banning Sunday labor stood.[17]

In *Reynolds* v. *United States,* 98 U. S. 145, the Court relied heavily on the history of the Virginia bill. That case concerned a Mormon's attack on a statute making bigamy a crime. The Court said:

> "In connection with the case we are now considering, it is a significant fact that on the 8th of December, 1788, after the passage of the act establishing religious freedom, and after the convention of Virginia had recommended as an amendment to the Constitution of the United States the declaration in a bill of rights that 'all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience,' the legislature

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[16] 3 Elliot's Debates (2d ed. 1836) 330.

[17] In *Judefind* v. *State,* 78 Md. 510, 515, 28 A. 405, 407 (1894), the Maryland Court of Appeals stated, "Article thirty-six of our Declaration of Rights guarantees religious liberty; but the members of the distinguished body that adopted that Constitution never supposed they were giving a death blow to Sunday laws by inserting that Article."

> of that State substantially enacted the statute of James I., death penalty included, because, as recited in the preamble, 'it hath been doubted whether bigamy or poligamy be punishable by the laws of this Commonwealth.' 12 Hening's Stat. 691. From that day to this we think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all of this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life." *Id.*, at 165.

In the case at bar, we find the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive.

But in order to dispose of the case before us, we must consider the standards by which the Maryland statutes are to be measured. Here, a brief review of the First Amendment's background proves helpful. The First Amendment states that "Congress shall make no law respecting an establishment of religion. . . ." U. S. Const., Amend. I. The Amendment was proposed by James Madison on June 8, 1789, in the House of Representatives. It then read, in part:

> "The civil rights of none shall be abridged on account of religious belief or worship, *nor shall any national religion be established,* nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." (Emphasis added.) I Annals of Congress 434.

We are told that Madison added the word "national" to meet the scruples of States which then had an established church. 1 Stokes, Church and State in the United

States, 541. After being referred to committee, it was considered by the House, on August 15, 1789, acting as a Committee of the Whole. Some assistance in determining the scope of the Amendment's proscription of establishment may be found in that debate.

In its report to the House, the committee, to which the subject of amendments to the Constitution had been submitted, recommended the insertion of the language, "no religion shall be established by law." I Annals of Congress 729. Mr. Gerry "said it would read better if it was, that no religious doctrine shall be established by law." *Id.*, at 730. Mr. Madison "said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. . . . He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform." *Id.*, at 730–731.

The Amendment, as it passed the House of Representatives nine days later, read, in part:

> "Congress shall make no law establishing religion. . . ." Records of the United States Senate, 1A–C2 (U. S. Nat. Archives).

It passed the Senate on September 9, 1789, reading, in part:

> "Congress shall make no law establishing articles of faith, or a mode of worship. . . ." *Ibid.*

An early commentator opined that the "real object of the amendment was . . . to prevent any national ecclesiastical establishment, which should give to an hierarchy the exclusive patronage of the national government." 3 Story, Commentaries on the Constitution of the United States, 728. But, the First Amendment, in its final form,

did not simply bar a congressional enactment *establishing a church;* it forbade all laws *respecting an establishment of religion.* Thus, this Court has given the Amendment a "broad interpretation . . . in the light of its history and the evils it was designed forever to suppress. . . ." *Everson* v. *Board of Education, supra,* at pp. 14–15. It has found that the First and Fourteenth Amendments afford protection against religious establishment far more extensive than merely to forbid a national or state church. Thus, in *McCollum* v. *Board of Education,* 333 U. S. 203, the Court held that the action of a board of education, permitting religious instruction during school hours in public school buildings and requiring those children who chose not to attend to remain in their classrooms, to be contrary to the "Establishment" Clause.

However, it is equally true that the "Establishment" Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the Congress or state legislatures conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judaeo–Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. *Davis* v. *Beason,* 133 U. S. 333; *Reynolds* v. *United States, supra.* The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

Thus, these broad principles have been set forth by this Court. Those cases dealing with the specific problems arising under the "Establishment" Clause which have reached this Court are few in number. The most extensive discussion of the "Establishment" Clause's latitude

is to be found in *Everson* v. *Board of Education, supra,* at pp. 15–16:

> "The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.' "

Under challenge was a statute authorizing repayment to parents of their children's transportation expenses to public and Catholic schools. The Court, speaking through MR. JUSTICE BLACK, recognized that "it is undoubtedly true that children are helped to get to church schools," and "[t]here is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State." *Id.,* at 17. But the Court found that the purpose and effect of the statute in question was general "public welfare leg-

islation," *id.*, at 16; that it was to protect all school children from the "very real hazards of traffic," *id.*, at 17; that the expenditure of public funds for school transportation, to religious schools or to any others, was like the expenditure of public funds to provide policemen to safeguard these same children or to provide "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," *id.*, at 17–18.[18]

In light of the evolution of our Sunday Closing Laws through the centuries, and of their more or less recent emphasis upon secular considerations, it is not difficult to discern that as presently written and administered, most of them, at least, are of a secular rather than of a religious character, and that presently they bear no relationship to establishment of religion as those words are used in the Constitution of the United States.

Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Nu-

[18] Mr. Justice Rutledge, joined by Mr. Justice Frankfurter, Mr. Justice Jackson and Mr. Justice Burton, filed a lengthy dissenting opinion in which the First Amendment's history was studied in detail. He defined the "establishment" problem as follows:

"Compulsory attendance upon religious exercises went out early in the process of separating church and state, together with forced observance of religious forms and ceremonies. Test oaths and religious qualification for office followed later. These things none devoted to our great tradition of religious liberty would think of bringing back. *Hence today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function.*" *Id.*, at 44. (Emphasis added.)

merous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, week-end diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State.

We now reach the Maryland statutes under review. The title of the major series of sections of the Maryland Code dealing with Sunday closing—Art. 27, §§ 492–534C—is "Sabbath Breaking"; § 492 proscribes work or bodily labor on the "Lord's day," and forbids persons to "profane the Lord's day" by gaming, fishing et cetera; § 522 refers to Sunday as the "Sabbath day." As has been mentioned above, many of the exempted Sunday activities in the various localities of the State may only be conducted during the afternoon and late evening; most Christian church services, of course, are held on Sunday morning and early Sunday evening. Finally, as previously noted, certain localities do not permit the allowed Sunday activities to be carried on within one hundred yards of any church where religious services are being held. This is the totality of the evidence of religious purpose which may be gleaned from the face of the present statute and from its operative effect.

The predecessors of the existing Maryland Sunday laws are undeniably religious in origin. The first Maryland statute dealing with Sunday activities, enacted in 1649, was entitled "An Act concerning Religion." 1 Archives of Maryland 244–247. It made it criminal to "profane the Sabbath or Lords day called Sunday by frequent swearing, drunkennes or by any uncivill or disorderly recreation, or by working on that day when absolute necessity doth not require it." *Id.*, at 245. A 1692 statute entitled "An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province," 13 Archives of Maryland 425–430, after first stating the importance of keeping the Lord's Day holy and sanctified and expressing concern with the breach of its observance throughout the State, then enacted a Sunday labor prohibition which was the obvious precursor of the present § 492.[19] There was a re-enactment in 1696 entitled "An Act for Sanctifying & keeping holy the Lord's Day Commonly called Sunday." 19 Archives of Maryland 418–420. By 1723, the Sabbath-breaking section of the statute assumed the present form of § 492, omitting the specific prohibition against Sunday swearing and the patently religiously motivated title. Bacon, Laws of Maryland (1723), c. XVI.

There are judicial statements in early Maryland decisions which tend to support appellants' position. In an 1834 case involving a contract calling for delivery on Sun-

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[19] "[N]o Person or Persons within this Province shall work or do any bodily Labour or Occupation upon any Lords Day commonly called Sunday, nor shall command or wilfully suffer or permitt any of his or their children Servants or Slaves to work or labour as aforesaid (the absolute works of necessity and mercy allways Excepted) Nor shall suffer or permitt any of his her or their Children Servants or Slaves or any other under their Authority to abuse or Prophane the Lords Day by drunkenness, Swearing Gaming, fowling fishing, hunting or any other Sports Pastimes or Recreations whatsoever." *Id.*, at 426.

day, the Maryland Court of Appeals remarked that "Ours is a christian community, and a day set apart as the day of rest, is the day consecrated by the resurrection of our Saviour, and embraces the twenty-four hours next ensuing the midnight of Saturday." *Kilgour* v. *Miles,* 6 Gill and Johnson 268, 274. This language was cited with approval in *Judefind* v. *State,* 78 Md. 510, 514, 28 A. 405, 406 (1894). It was also stated there:

> "It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religion—of all sects and denominations that observe that day—as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so. But it would scarcely be asked of a Court, in what professes to be a Christian land, to declare a law unconstitutional because it requires rest from bodily labor on Sunday, (except works of necessity and charity,) and *thereby* promotes the cause of Christianity. If the Christian religion is, incidentially or otherwise, benefited or fostered by having this day of rest, as it undoubtedly is, there is all the more reason for the enforcement of laws that help to preserve it. Whilst Courts have generally sustained Sunday laws as 'civil regulations,' their decisions will have no less weight if they are shown to be in accordance with divine law as well as human." *Id.,* at 515–516, 28 A., at 407.

But it should be noted that, throughout the *Judefind* decision, the Maryland court specifically rejected the contention that the laws interfered with religious liberty and stated that the laws' purpose was to provide the "advantages of having a weekly day of rest, 'from a mere physical and political standpoint.' " *Id.,* at 513, 28 A., at 406.

Considering the language and operative effect of the current statutes, we no longer find the blanket prohibition

against Sunday work or bodily labor. To the contrary, we find that § 521 of Art. 27, the section which appellants violated, permits the Sunday sale of tobaccos and sweets and a long list of sundry articles which we have enumerated above; we find that § 509 of Art. 27 permits the Sunday operation of bathing beaches, amusement parks and similar facilities; we find that Art. 2B, § 28, permits the Sunday sale of alcoholic beverages, products strictly forbidden by predecessor statutes; we are told that Anne Arundel County allows Sunday bingo and the Sunday playing of pinball machines and slot machines, activities generally condemned by prior Maryland Sunday legislation.[20] Certainly, these are not works of charity or necessity. Section 521's current stipulation that shops with only one employee may remain open on Sunday does not coincide with a religious purpose. These provisions, along with those which permit various sports and entertainments on Sunday, seem clearly to be fashioned for the purpose of providing a Sunday atmosphere of recreation, cheerfulness, repose and enjoyment. Coupled with the general proscription against other types of work, we believe that the air of the day is one of relaxation rather than one of religion.

The existing Maryland Sunday laws are not simply verbatim re-enactments of their religiously oriented antecedents. Only § 492 retains the appellation of "Lord's day" and even that section no longer makes recitation of religious purpose. It does talk in terms of "profan[ing] the Lord's day," but other sections permit the activities

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[20] A 1674 Maryland statute provided, in part:

"[T]hat noe ordinary Keeper shall from and after the publicacon hereof directly nor indirectly upon the Sabbath or Lords Day draw or sell any strong Liquors nor permit or suffer in or about their house or houses any tipling or gaming att Cards, Dice, ninepinn playing or other such unlawfull exercises whatsoever. . . ." 2 Archives of Maryland 414.

previously thought to be profane. Prior denunciation of Sunday drunkenness is now gone. Contemporary concern with these statutes is evidenced by the dozen changes made in 1959 and by the recent enactment of a majority of the exceptions.

Finally, the relevant pronouncements of the Maryland Court of Appeals dispel any argument that the statutes' announced purpose is religious. In *Hiller* v. *Maryland,* 124 Md. 385, 92 A. 842 (1914), the court had before it a Baltimore ordinance prohibiting Sunday baseball. The court said:

> "What the eminent chief judge said with respect to police enactments which deal with the protection of the public health, morals and safety apply with equal force to those which are concerned with the peace, order and quiet of the community on Sunday, for these social conditions are well recognized heads of the police power. Can the Court say that this ordinance has no real and substantial relation to the peace and order and quiet of Sunday, as a day of rest, in the City of Baltimore?" *Id.,* at 393, 92 A., at 844. See also *Levering* v. *Williams,* 134 Md. 48, 54–59, 106 A. 176, 178–179 (1919).

And the Maryland court declared in its decision in the instant case: "The legislative plan is plain. It is to compel a day of rest from work, permitting only activities which are necessary or recreational." *McGowan* v. *State, supra,* at p. 123, 151 A. 2d, at 159. After engaging in the close scrutiny demanded of us when First Amendment liberties are at issue, we accept the State Supreme Court's determination that the statutes' present purpose and effect is not to aid religion but to set aside a day of rest and recreation.

But this does not answer all of appellants' contentions. We are told that the State has other means at its disposal

to accomplish its secular purpose, other courses that would not even remotely or incidentally give state aid to religion. On this basis, we are asked to hold these statutes invalid on the ground that the State's power to regulate conduct in the public interest may only be executed in a way that does not unduly or unnecessarily infringe upon the religious provisions of the First Amendment. See *Cantwell* v. *Connecticut, supra,* at pp. 304–305. However relevant this argument may be, we believe that the factual basis on which it rests is not supportable. It is true that if the State's interest were simply to provide for its citizens a periodic respite from work, a regulation demanding that everyone rest one day in seven, leaving the choice of the day to the individual, would suffice.

However, the State's purpose is not merely to provide a one-day-in-seven work stoppage. In addition to this, the State seeks to set one day apart from all others as a day of rest, repose, recreation and tranquility—a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which there exists relative quiet and disassociation from the everyday intensity of commercial activities, a day on which people may visit friends and relatives who are not available during working days.[21]

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[21] This purpose has been articulated in various ways at different times. The parliamentary debates on the British Shops (Sunday Trading Restriction) Bill in 1936 are particularly instructive. The sponsor of the Bill stated:

"I realise also that the State to-day is interfering more and more with family life and more and more controlling the family liberty, and were this a Bill to restrict liberty, and above all to restrict the liberty of the family, I would not be responsible for introducing it. But I hope to show to the House that it is a Bill which is necessary to secure the family life and liberty of hundreds of thousands of our people. . . . They have the right to a holiday on Sunday, to be able to rest from work on that day and to go out into the parks or into the country on a summer day. That is the liberty for which

Obviously, a State is empowered to determine that a rest-one-day-in-seven statute would not accomplish this purpose; that it would not provide for a general cessation of activity, a special atmosphere of tranquility, a day which all members of the family or friends and relatives might spend together. Furthermore, it seems plain that the problems involved in enforcing such a provision would be exceedingly more difficult than those in enforcing a common-day-of-rest provision.

Moreover, it is common knowledge that the first day of the week has come to have special significance as a rest day in this country. People of all religions and

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they are asking, and that is the liberty which this Bill would give to them." 308 Parliamentary Debates, Commons 2157–2158.

Another member stated:

"As a family man let me say that my family life would be unduly disturbed if any member had his Sunday on a Tuesday. The value of a Sunday is that everybody in the family is at home on the same day. What is the use of talking about a six-day working week in which six members of a family would each have his day of rest on a different day of the week?" *Id.*, at 2198.

Reports of the International Labour Conferences are also revealing:

"Social custom requires that the same rest-day should as far as possible be accorded to the members of the same working family and to the working class community as a whole. It is a fact that originally religious motives determined the rest-day and that the tradition thus established has subsequently been maintained by law. It appears to be a universal rule that workers in the same area or in the same country have the same rest-day, and that the rest-day coincides with the day established by tradition or custom; and the International Labour Office proposes that this rule should be maintained." Rep. VII, International Labour Conference, 3d Sess. 1921, 127–128.

"A study of national standards shows that the most usual practice is to grant the weekly rest collectively on specified days of the week. This tendency to ensure that the weekly rest is taken at the same time by all workers on the day established by tradition or custom has an obvious social purpose, namely to enable the workers to take part in the life of the community and in the special forms of recreation which are available on certain days." Rep. VII (1), International Labour Conference, 39th Sess. 1956, 24.

people with no religion regard Sunday as a time for family activity, for visiting friends and relatives, for late sleeping, for passive and active entertainments, for dining out, and the like. "Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer. . . ." 308 Parliamentary Debates, Commons 2159. Sunday is a day apart from all others.[22] The cause is irrelevant; the fact exists. It would seem unrealistic for enforcement purposes and perhaps detrimental to the general welfare to require a State to choose a common day of rest other than that which most persons would select of their own accord. For these reasons, we hold that the Maryland statutes are not laws respecting an establishment of religion.

The distinctions between the statutes in the case before us and the state action in *McCollum* v. *Board of Education, supra,* the only case in this Court finding a violation of the "Establishment" Clause, lend further substantiation to our conclusion. In *McCollum,* state action permitted religious instruction in public school buildings during school hours and required students not attending the religious instruction to remain in their classrooms during that time. The Court found that this system had the effect of coercing the children to attend religious classes; no such coercion to attend church services is present in the situation at bar. In *McCollum,* the only alternative available to the nonattending students was to remain in their classrooms; the alternatives open to nonlaboring persons in the instant case are far more diverse. In *McCollum,* there was direct cooperation between state officials and religious ministers; no such direct participation exists under the Maryland laws. In *McCollum,* tax-supported buildings were used to aid religion; in the

[22] The Constitution itself provides for a Sunday exception in the calculation of the ten days for presidential veto. U. S. Const., Art. I, § 7.

instant case, no tax monies are being used in aid of religion.

Finally, we should make clear that this case deals only with the constitutionality of § 521 of the Maryland statute before us. We do not hold that Sunday legislation may not be a violation of the "Establishment" Clause if it can be demonstrated that its purpose—evidenced either on the face of the legislation, in conjunction with its legislative history, or in its operative effect—is to use the State's coercive power to aid religion.

Accordingly, the decision is

Affirmed.

[For opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE HARLAN, see *post,* p. 459.]

[For dissenting opinion of MR. JUSTICE DOUGLAS, see *post,* p. 561.]

APPENDIX TO OPINION OF THE COURT.

Md. Ann. Code, Art. 27.

"Sabbath Breaking.

"§ *492.—Working on Sunday; Permitting children or servants to game, fish, hunt, etc.*—No person whatsoever shall work or do any bodily labor on the Lord's day, commonly called Sunday; and no person having children or servants shall command, or wittingly or willingly suffer any of them to do any manner of work or labor on the Lord's day (works of necessity and charity always excepted), nor shall suffer or permit any children or servants to profane the Lord's day by gaming, fishing, fowling, hunting or unlawful pastime or recreation; and every person transgressing this section and being hereof convicted before a justice of the peace shall forfeit five dollars, to be applied to the use of the county."

"§ *509.—Beaches, amusement parks, picnic groves, etc., in Anne Arundel County.*—It shall be lawful to operate, work at, or be employed in the occupations of operating any bathing beach, bathhouse, amusement park, dancing saloon, the sale or selling of any novelties, souvenirs, accessories, or other merchandise essential to, or customarily sold at, or incidental to, the operation of the aforesaid occupations and businesses, at retail, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows and the hiring or renting of boats, tables, chairs, beach umbrellas, on the first day of the week, commonly called Sunday, within Anne Arundel County, and §§ 492, 521 and 522 of this article are repealed, in so far and to the extent that they prohibit the operating of and/or the working of or employment of persons in the operation of any bathing beach, bathhouse, amusement park, dancing saloon, the sale or selling at retail of any merchandise, essential to or customarily sold or incidental to the operation of the aforesaid occupations or businesses, picnic groves, amusements, games, amusement rides, amusement devices, entertainments, shows, and the hiring and renting of boats, tables, chairs, beach umbrellas, on the first day of the week, commonly called Sunday, in Anne Arundel County."

"§ *521.—Sale, etc., of merchandise on Sunday; exceptions.*

"(a) *Sunday sales of merchandise prohibited; excepted articles.*—No person in this State shall sell, dispose of, barter, or deal in, or give away any articles of merchandise on Sunday, except retailers, who may sell and deliver on said day tobacco, cigars, cigarettes, candy, sodas and soft drinks, ice, ice cream, ices and other confectionery, milk, bread, fruits, gasoline, oils and greases.

"(b) *Additional excepted articles in Anne Arundel County; certain establishments excepted.*—In Anne Arundel County, in addition to the articles of merchandise

hereinbefore mentioned, retailers may sell, barter, deal in, and deliver on Sunday the following articles of merchandise: butter, eggs, cream, soap and other detergents, disinfectants, vegetables, meats, and all other food or food stuffs prepared or intended for human consumption, automobile accessories and parts, boating and fishing accessories, artificial and natural flowers and shrubs, toilet goods, hospital supplies, thermometers, camera films, souvenirs, surgical instruments, rubber goods, paper goods, drugs, medicines, patent medicines, and all other articles used for the relief of pain or prescribed by a physician; provided, however, that nothing in this subtitle shall be construed to prevent the operation of any retail establishment on Sunday, the operation of which does not entail the employment of more than one person, not including the owner or proprietor.

"(c) *Penalty for violation; second and subsequent offenses; revocation of license.*—Any person violating any one of the provisions of this section shall be liable to indictment in any court in this State having criminal jurisdiction, and upon conviction thereof shall be fined a sum of not less than twenty nor more than fifty dollars, in the discretion of the court, for the first offense, and if convicted a second time for a violation of this section, the person or persons so offending shall be fined a sum not less than $50 nor more than $500, and be imprisoned for not less than 10 nor more than 30 days, in the discretion of the court, and his, her or their license, if any was issued, shall be declared null and void by the judge of said court; and it shall not be lawful for such person or persons to obtain another license for the period of twelve months from the time of such conviction, nor shall a license be obtained by any other person or persons to carry on said business on the premises or elsewhere, if the person, so as aforesaid convicted, has any interest whatever therein, or shall derive any profit whatever therefrom; and in case

of being convicted more than twice for a violation of this section, such person or persons on each occasion shall be imprisoned for not less than thirty nor more than sixty days, and fined a sum not less than double that imposed on such person or persons on the last preceding conviction; and his, her or their license, if any was issued, shall be declared null and void by the court, and no new license shall be issued to such person or persons for a period of two years from the time of such conviction, nor to anyone else to carry on said business wherein he or she is in anywise interested, as before provided for the second violation of the provisions of this section; all the fines to be imposed under this section shall be paid to the State.

"(d) *Apothecaries: sale of newspapers and periodicals.*—This section is not to apply to apothecaries and such apothecaries may sell on Sunday drugs, medicines, and patent medicines as on week days; and this section shall not apply to the sale of newspapers and periodicals.

"§ *522.—Keeping open or using dancing saloon, opera house, tenpin alley, barber saloon or ball alley on Sunday.*—It shall not be lawful to keep open or use any dancing saloon, opera house, tenpin alley, barber saloon or ball alley within this State on the Sabbath day, commonly called Sunday; and any person or persons, or body politic or corporate, who shall violate any provision of this section, or cause or knowingly permit the same to be violated by a person or persons in his, her or its employ shall be liable to indictment in any court of this State having criminal jurisdiction, and upon conviction thereof shall be fined a sum not less than fifty dollars nor more than one hundred dollars, in the discretion of the court, for the first offense; and if convicted a second time for a violation of this section, the person or persons, or body politic or corporate shall be fined a sum not less than one hundred nor more than five hundred dollars; and if a natural person shall be imprisoned, not less than ten nor

more than thirty days in the discretion of the court; and in the case of any conviction or convictions under this section subsequent to the second, such person or persons, body politic or corporate shall be fined on each occasion a sum at least double that imposed upon him, her, them or it on the last preceding conviction; and if a natural person, shall be imprisoned not less than thirty nor more than sixty days in the discretion of the court; all fines to be imposed under this section shall be paid to the State."

Md. Ann. Code, Art. 2B.

"§ *28.—Anne Arundel County.*

"(a) *Special Sunday licenses.*—(1) Notwithstanding any other provision of this article, no license for sale of alcoholic beverages issued by the board of license commissioners for Anne Arundel County (except 'special licenses' provided for in § 22 of this article) shall be deemed to nor shall it permit or authorize the holder thereof to sell any alcoholic beverages in Anne Arundel County after 2 A. M. on Sundays, except as hereinafter provided.

"(2) Any person holding a license for the sale of alcoholic beverages in Anne Arundel County (except persons holding any Class BP, WP, LP, or LT license, 'Package Goods—off sale license,' 'six day tavern license,' or 'special licenses') issued by the board of license commissioners for Anne Arundel County, shall, upon application made as for new licenses and approval thereof by the board of license commissioners for Anne Arundel County, as provided for by §§ 60 and 67 (c) of this article, be issued a license to be known as a 'special Sunday license,' upon payment of the fee therefor as provided herein.

"(3) Such 'special Sunday license' shall authorize the holder thereof to sell alcoholic beverages of the same kind, and subject to the same limitations as to hours, alcoholic content of the beverages to be sold thereunder, restric-

tions and provisions, as govern such other license for the sale of alcoholic beverages, issued to and held by the holder of such 'special Sunday license,' on each Sunday. No 'special Sunday license' shall be issued to any person who does not hold an alcoholic beverage license of some other class issued by the board of license commissioners for Anne Arundel County."

"§ *90—Sundays.*—(a) *Bar and counter sales.*—(1) No retail dealer holding a Class B or C license shall be permitted to sell any alcoholic beverage at a bar or counter on Sunday.

"(2) Provided, that in Anne Arundel County it shall be lawful to sell, vend, serve, deliver and/or consume any alcoholic beverages permitted by law to be sold in the first, second, third, fourth, fifth, seventh and eighth districts of Anne Arundel County at any bar or counter on any day on which the sale of alcoholic beverages is permitted by law.

"(b) *General restrictions.*—(1) In the jurisdictions in which this subsection is applicable, it shall be unlawful for anyone to sell or for any licensed dealer to deliver, give away or otherwise dispose of any alcoholic beverages on Sunday. Any person selling or any licensed dealer delivering, giving away or otherwise disposing of such beverages in such jurisdictions on Sunday shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not exceeding fifty dollars ($50.00) for the first offense and for each succeeding offense shall be fined not exceeding one hundred dollars ($100.00), or imprisoned in the county jail for not more than thirty (30) days, or be both fined and imprisoned, in the discretion of the court.

"(2) This subsection shall be applicable and have effect in Caroline, Carroll, Cecil, Dorchester, Garrett, Harford, Kent, Queen Anne's, Somerset, Talbot, Washington, Wicomico and Worcester counties, provided that it shall not apply to or affect special Class C licenses

issued under the provisions of this article, nor shall it apply to special Class C licenses issued in Washington County for temporary use."

Separate opinion of MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN joins.†

So deeply do the issues raised by these cases cut that it is not surprising that no one opinion can wholly express the views even of all the members of the Court who join in its result. Individual opinions in constitutional controversies have been the practice throughout the Court's history.* Such expression of differences in view or even in emphasis converging toward the same result makes for the clarity of candor and thereby enhances the authority of the judicial process.

For me considerations are determinative here which call for separate statement. The long history of Sunday legislation, so decisive if we are to view the statutes now

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†[NOTE: This opinion applies also to No. 36, *Two Guys From Harrison-Allentown, Inc.*, v. *McGinley, District Attorney, Lehigh County, Pennsylvania, et al., post,* p. 582; No. 67, *Braunfeld et al.* v. *Brown, Commissioner of Police of Philadelphia, et al., post,* p. 599; and No. 11, *Gallagher, Chief of Police of Springfield, Massachusetts, et al.* v. *Crown Kosher Super Market, Inc., et al., post,* p. 617.]

* "In pursuance of my practice in giving an opinion on all constitutional questions, I must present my views on this." Mr. Justice Johnson, concurring, in *Cherokee Nation* v. *Georgia,* 5 Pet. 1, 20. See Mr. Justice Story, dissenting, in *Briscoe* v. *Bank of the Commonwealth of Kentucky,* 11 Pet. 257, 329; Mr. Chief Justice Taney, dissenting, *Rhode Island* v. *Massachusetts,* 12 Pet. 657, 752. And see Mr. Justice Bradley, concurring, in the *Legal Tender Cases,* 12 Wall. 457, 554: "I . . . should feel that it was out of place to add anything further on the subject were it not for its great importance. On a constitutional question involving the powers of the government it is proper that every aspect of it, and every consideration bearing upon it, should be presented, and that no member of the court should hesitate to express his views."

attacked in a perspective wider than that which is furnished by our own necessarily limited outlook, cannot be conveyed by a partial recital of isolated instances or events. The importance of that history derives from its continuity and fullness—from the massive testimony which it bears to the evolution of statutes controlling Sunday labor and to the forces which have, during three hundred years of Anglo-American history at the least, changed those laws, transmuted them, made them the vehicle of mixed and complicated aspirations. Since I find in the history of these statutes insights controllingly relevant to the constitutional issues before us, I am constrained to set that history forth in detail. And I also deem it incumbent to state how I arrive at concurrence with THE CHIEF JUSTICE'S principal conclusions without drawing on *Everson* v. *Board of Education,* 330 U. S. 1.

I.

Because the long colonial struggle for disestablishment—the struggle to free all men, whatever their theological views, from state-compelled obligation to acknowledge and support state-favored faiths—made indisputably fundamental to our American culture the principle that the enforcement of religious belief as such is no legitimate concern of civil government, this Court has held that the Fourteenth Amendment embodies and applies against the States freedoms that are loosely indicated by the not rigidly precise but revealing phrase "separation of church and state." *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203. The general principles of church-state separation were found to be included in the Amendment's Due Process Clause in view of the meaning which the presuppositions of our society infuse into the concept of "liberty" protected by the clause. This is the source of the limitations imposed upon the States. To the extent that those limitations

are akin to the restrictions which the First Amendment places upon the action of the central government, it is because—as with the freedom of thought and speech of which Mr. Justice Cardozo spoke in *Palko* v. *Connecticut,* 302 U. S. 319—it is accurate to say concerning the principle that a government must neither establish nor suppress religious belief, that "With rare aberrations a pervasive recognition of that truth can be traced in our history, political and legal." *Id.,* at 327.

But the several opinions in *Everson* and *McCollum,* and in *Zorach* v. *Clauson,* 343 U. S. 306, make sufficiently clear that "separation" is not a self-defining concept. "[A]greement, in the abstract, that the First Amendment was designed to erect a 'wall of separation between church and State,' does not preclude a clash of views as to what the wall separates." *Illinois ex rel. McCollum* v. *Board of Education, supra,* at 213 (concurring opinion). By its nature, religion—in the comprehensive sense in which the Constitution uses that word—is an aspect of human thought and action which profoundly relates the life of man to the world in which he lives. Religious beliefs pervade, and religious institutions have traditionally regulated, virtually all human activity. It is a postulate of American life, reflected specifically in the First Amendment to the Constitution but not there alone, that those beliefs and institutions shall continue, as the needs and longings of the people shall inspire them, to exist, to function, to grow, to wither, and to exert with whatever innate strength they may contain their many influences upon men's conduct, free of the dictates and directions of the state. However, this freedom does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation. As the state's interest in the individual becomes more comprehensive, its concerns and the concerns of religion perforce overlap. State codes and the dictates of faith touch the same activities.

Both aim at human good, and in their respective views of what is good for man they may concur or they may conflict. No constitutional command which leaves religion free can avoid this quality of interplay.

Innumerable civil regulations enforce conduct which harmonizes with religious canons. State prohibitions of murder, theft and adultery reinforce commands of the decalogue. Nor do such regulations, in their coincidence with tenets of faith, always support equally the beliefs of all religious sects: witness the civil laws forbidding usury and enforcing monogamy. Because these laws serve ends which are within the appropriate scope of secular state interest, they may be enforced against those whose religious beliefs do not proscribe, and even sanction, the activity which the law condemns. *Reynolds* v. *United States,* 98 U. S. 145; *Davis* v. *Beason,* 133 U. S. 333; *Cleveland* v. *United States,* 329 U. S. 14.

This is not to say that governmental regulations which find support in their appropriateness to the achievement of secular, civil ends are invariably valid under the First or Fourteenth Amendment, whatever their effects in the sphere of religion. If the value to society of achieving the object of a particular regulation is demonstrably outweighed by the impediment to which the regulation subjects those whose religious practices are curtailed by it, or if the object sought by the regulation could with equal effect be achieved by alternative means which do not substantially impede those religious practices, the regulation cannot be sustained. *Cantwell* v. *Connecticut,* 310 U. S. 296. This was the ground upon which the Court struck down municipal license taxes as applied to religious colporteurs in *Follett* v. *Town of McCormick,* 321 U. S. 573; *Murdock* v. *Pennsylvania,* 319 U. S. 105, and *Jones* v. *Opelika,* 319 U. S. 103. In each of those cases it was believed that the State's need for revenue, which could be

satisfied by taxing any of a variety of sources, did not justify a levy imposed upon an activity which in the light of history could reasonably be viewed as sacramental. But see *Cox* v. *New Hampshire,* 312 U. S. 569, in which the Court, balancing the public benefits secured by a regulatory measure against the degree of impairment of individual conduct expressive of religious faith which it entailed, sustained the prohibition of an activity similarly regarded by its practicants as sacramental. And see *Prince* v. *Massachusetts*, 321 U. S. 158.

Within the discriminating phraseology of the First Amendment, distinction has been drawn between cases raising "establishment" and "free exercise" questions. Any attempt to formulate a bright-line distinction is bound to founder. In view of the competition among religious creeds, whatever "establishes" one sect disadvantages another, and vice versa. But it is possible historically, and therefore helpful analytically—no less for problems arising under the Fourteenth Amendment, illuminated as that Amendment is by our national experience, than for problems arising under the First—to isolate in general terms the two largely overlapping areas of concern reflected in the two constitutional phrases, "establishment" and "free exercise," [1] and which emerge more

[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Madison had proposed an amendment that "The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed." I Annals of Cong. 434. Commenting on a subsequent form of what was to become the First Amendment, he said that "he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience." *Id.,* at 730.

or less clearly from the background of events and impulses which gave those phrases birth.

In assuring the free exercise of religion, the Framers of the First Amendment were sensitive to the then recent history of those persecutions and impositions of civil disability with which sectarian majorities in virtually all of the Colonies had visited deviation in the matter of conscience.[2] This protection of unpopular creeds, however, was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith. The battle in Virginia, hardly four years won, where James Madison had led the forces of disestablishment in successful opposition to Patrick Henry's proposed Assessment Bill levying a general tax for the support of Christian teachers,[3] was a vital and compelling

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[2] See Cobb, The Rise of Religious Liberty in America (1902), *passim;* Sweet, The Story of Religion in America (rev. ed. 1939), 54, 76–77, 98–112, 129, 139–142; Sweet, Religion in Colonial America (1942), *passim;* I Channing, History of the United States (1933), 356–381, 470–474. And see Jefferson's Notes on Virginia, in II Writings of Thomas Jefferson (Memorial ed. 1903) 217–219. The Virginia Convention which ratified the Federal Constitution proposed as a needed amendment to it: "That religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men have an equal, natural, and unalienable right to the free exercise of religion, according to the dictates of conscience, and that no particular religious sect or society ought to be favored or established, by law, in preference to others." III Elliot's Debates (2d ed. 1836) 659. See also the amendment proposed by the North Carolina Convention which declined to ratify, IV *id.,* at 244, and the understanding of the Constitution expressed by Rhode Island, I *id.,* at 334, and New York, I *id.,* at 328. Cf. the amendment proposed by New Hampshire, I *id.,* at 326.

[3] See James, The Struggle for Religious Liberty in Virginia (1900); Eckenrode, Separation of Church and State in Virginia (1910); I Randall, Life of Thomas Jefferson (1858), 219–223; Cobb, The Rise of Religious Liberty in America (1902), 490–499; Sweet, The Story of Religion in America (rev. ed. 1939), 276–279.

memory in 1789. The lesson of that battle, in the words of Jefferson's Act for Establishing Religious Freedom, whose passage was its verbal embodiment,[4] was "that to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor, whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporal rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind . . . ." [5] What Virginia had long practiced, and what Madison, Jefferson and others fought to end, was the extension of civil government's support to religion in a manner which made the two in some degree interdependent, and thus threatened the freedom of each. The purpose of the Establishment Clause was to assure that the national legislature would not exert its power in the service of any purely religious end; that it would not, as Virginia and virtually all of the Colonies had done, make of religion, as religion, an object of legislation.

Of course, the immediate object of the First Amendment's prohibition was the established church as it had been known in England and in most of the Colonies. But with foresight those who drafted and adopted the words, "Congress shall make no law respecting an establishment of religion," did not limit the constitutional proscription to any particular, dated form of state-supported theological venture. The Establishment Clause withdrew from

[4] The history of the Virginia episode is treated extensively in the opinions in *Everson* v. *Board of Education,* 330 U. S. 1.

[5] 12 Hening, Statutes of Virginia (1823), 84, 85.

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the sphere of legitimate legislative concern and competence a specific, but comprehensive, area of human conduct: man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief. Congress may not make these matters, as such, the subject of legislation, nor, now, may any legislature in this country. Neither the National Government nor, under the Due Process Clause of the Fourteenth Amendment, a State may, by any device, support belief or the expression of belief for its own sake, whether from conviction of the truth of that belief, or from conviction that by the propagation of that belief the civil welfare of the State is served, or because a majority of its citizens, holding that belief, are offended when all do not hold it.

With regulations which have other objectives the Establishment Clause, and the fundamental separationist concept which it expresses, are not concerned. These regulations may fall afoul of the constitutional guarantee against infringement of the free exercise or observance of religion. Where they do, they must be set aside at the instance of those whose faith they prejudice. But once it is determined that a challenged statute is supportable as implementing other substantial interests than the promotion of belief, the guarantee prohibiting religious "establishment" is satisfied.

To ask what interest, what objective, legislation serves, of course, is not to psychoanalyze its legislators, but to examine the necessary effects of what they have enacted. If the primary end achieved by a form of regulation is the affirmation or promotion of religious doctrine—primary, in the sense that all secular ends which it purportedly serves are derivative from, not wholly independent of, the advancement of religion—the regulation is beyond the power of the state. This was the case in *McCollum*. Or if a statute furthers both secular and religious ends

by means unnecessary to the effectuation of the secular ends alone—where the same secular ends could equally be attained by means which do not have consequences for promotion of religion—the statute cannot stand. A State may not endow a church although that church might inculcate in its parishioners moral concepts deemed to make them better citizens, because the very *raison d'être* of a church, as opposed to any other school of civilly serviceable morals, is the predication of religious doctrine. However, inasmuch as individuals are free, if they will, to build their own churches and worship in them, the State may guard its people's safety by extending fire and police protection to the churches so built. It was on the reasoning that parents are also at liberty to send their children to parochial schools which meet the reasonable educational standards of the State, *Pierce* v. *Society of Sisters,* 268 U. S. 510, that this Court held in the *Everson* case that expenditure of public funds to assure that children attending every kind of school enjoy the relative security of buses, rather than being left to walk or hitchhike, is not an unconstitutional "establishment," even though such an expenditure may cause some children to go to parochial schools who would not otherwise have gone. The close division of the Court in *Everson* serves to show what nice questions are involved in applying to particular governmental action the proposition, undeniable in the abstract, that not every regulation some of whose practical effects may facilitate the observance of a religion by its adherents affronts the requirement of church-state separation.

In an important sense, the constitutional prohibition of religious establishment is a provision of more comprehensive availability than the guarantee of free exercise, insofar as both give content to the prohibited fusion of church and state. The former may be invoked by the corporate operator of a seven-day department store whose

state-compelled Sunday closing injures it financially—or by the department store's employees, whatever their faith, who are convicted for violation of a Sunday statute—as well as by the Orthodox Jewish retailer or consumer who claims that the statute prejudices him in his ability to keep his faith. But it must not be forgotten that the question which the department store operator and employees may raise in their own behalf is narrower than that posed by the case of the Orthodox Jew.[6] Their "establishment" contention can prevail only if the absence of any substantial legislative purpose other than a religious one is made to appear. See *Selective Draft Law Cases*, 245 U. S. 366.

In the present cases the Sunday retail sellers and their employees and customers, in attacking statutes banning various activities on a day which most Christian creeds consecrate, do assert that these statutes have no other purpose. They urge, first, that the legislators' motives

[6] As appellant retailers and retail employees in the *McGowan* and *McGinley* cases have urged neither here nor below any question of infringement of their own rights of conscience, I agree with THE CHIEF JUSTICE that they have no standing to raise the "free exercise" issue. *United States* v. *Raines*, 362 U. S. 17. The Court need not determine at this time what averments or what proofs, in a proper case, would be required in order to raise such issues in their behalf. Unlike appellants in *Braunfeld* and appellees in *Gallagher*, they have not urged that their remaining shut on *any* day of the week for *any* reason causes Sunday closing to disadvantage them peculiarly. They assert a right to operate *seven* days a week—a right in which they claim an economic, not a conscientious interest. Nor, on this record, is it necessary to decide whether these Sunday retail sellers might have standing to complain of the disadvantage of their enforced Sunday closing to conscientious Sabbatarian customers or potential customers. Cf. *Barrows* v. *Jackson*, 346 U. S. 249; *Pierce* v. *Society of Sisters*, 268 U. S. 510. Nowhere below have they presented evidence that any such actual or hypothetical customer is thus disadvantaged.

were religious. But the private and unformulated influences which may work upon legislation are not open to judicial probing. "The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted." *McCray* v. *United States,* 195 U. S. 27, 56. "Inquiry into the hidden motives which may move [a legislature] to exercise a power constitutionally conferred upon it is beyond the competency of courts." *Sonzinsky* v. *United States,* 300 U. S. 506, 513–514. *Veazie Bank* v. *Fenno,* 8 Wall. 533; *Arizona* v. *California,* 283 U. S. 423; *Oklahoma ex rel. Phillips* v. *Guy F. Atkinson Co.,* 313 U. S. 508. These litigants also argue, however, that when the state statutory provisions are regarded in their legislative context religion is apparent on their face: they point to the use of the terms "Lord's day" and "Sabbath" and "desecration," to exceptions whose hours permit activities only at times on Sunday when religious services are customarily not held, to explicit prohibition of otherwise permitted activity in the vicinity of churches, to regulations which condition the allowance of conduct on its consistency with the "due observance" of the day. Of course, since these various provisions regarding exemption from the Sunday ban of certain recreational activities have no possible application to the litigants in the present cases, they are not themselves before the Court, and their constitutionality is not now in issue. But they are put forward as evidence of the purpose of the statutes which are attacked here, and as such we may properly look to them, and also to the history of the body of state Sunday regulations, which, it is urged, further demonstrates sectarian creedal purpose. As a basis for appraising these arguments that the statutes are religious legislation, and pre-

liminary to determining the claims of infringement of conscience raised in the *Gallagher* and *Braunfeld* cases, it is necessary to survey the long historical development and present-day position of civil Sunday regulation.

II.

For these purposes the span of centuries which saw the enunciation of the Fourth Commandment,[7] Constantine's edict proscribing labor on the venerable day of the Sun,[8] and the Sunday prohibitions of Carlovingian, Merovingian and Saxon rulers, and later of the English kings of the thirteenth and fourteenth centuries, may be passed over.[9] What is of concern here is the Sunday institution as it evolved in modern England, the American Colonies, and the States of the Union under the Constitution. The first significant English Sunday regulation, for this purpose, was the statute of Henry VI in 1448 which, after reciting "the abominable injuries and offences done to Almighty God, and to his Saints, . . . because of fairs and markets upon their high and principal feasts, . . . in which principal and festival days, for great earthly covetise, the people is more willingly vexed, and in bodily labour soiled, than in other . . . days, . . . as though they did nothing remember the horrible defiling of their souls in buying and selling, with many deceitful lies and false perjury, with drunkenness and strifes, and so spe-

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[7] See Exodus 20:8–11, 23:12, 31:12–17; Deuteronomy 5:12–15.

[8] Codex Justin., liber III, Tit. XII, 3. See II Schaff, History of the Christian Church (1867), 380, n. 1. Later edicts of the emperors were more unequivocally Christian in temper, *e. g.*, that of 386 A. D., Codex Theo., liber VIII, Tit. VIII, 3. See Pharr, The Theodosian Code (1952), 209.

[9] See Lewis, A Critical History of Sunday Legislation (1888), 1–90; Neale, Feasts and Fasts (1845), 86–137; Johnson and Yost, Separation of Church and State (1948), 219–221; XII Encyclopedia of Religion and Ethics (Hastings ed. 1921), 103–106; Savage, Sunday in Church History, in How Shall We Keep Sunday (1898), 27.

cially withdrawing themselves and their servants from divine service . . . ," ordained that all fairs and markets should cease to show forth goods or merchandise on Sundays, Good Friday, and the principal feast days.[10] A short-lived ordinance of Edward VI a century later, limiting the ban on bodily labor to Sundays and enumerated holy days, demonstrated in its preamble a similar sectarian purpose,[11] and in 1625 Charles I, announcing that "there is nothing more acceptable to God than the true and sincere service and worship of him . . . and that the holy keeping of the Lord's day is a principal part of the true service of God," prohibited all meetings of the people out of their parishes for sports and pastimes on Sunday, and all bear-baiting, bull-baiting, interludes, common plays, and other unlawful exercises and pastimes on that day.[12] Several years later the same king declared it reproachful of God and religion, and hence made it un-

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[10] 27 Henry VI, c. 5.

[11] 5 & 6 Edw. VI, c. 3. "Forasmuch as at all times men be not so mindful to laud and praise God, so ready to resort and hear God's holy word, and to come to the holy communion and other laudable rites, which are to be observed in every christian congregation, as their bounden duty doth require: . . . therefore to call men to remembrance of their duty, and to help their infirmity, it hath been wholsomly provided, that there should be some certain times and days appointed, wherein the christian should cease from all other kind of labours, and should apply themselves only and wholly unto the aforsaid holy works, properly pertaining unto true religion . . . ." Violations were to be punished by the censures of the church, administered by the bishops, archbishops and other persons having ecclesiastical jurisdiction. The purpose of this ordinance was apparently to restrict to a fixed and relatively limited number the days upon which labor should cease, the multiplication of saints' days having risen until they came to consume an alarming proportion of the year. It was repealed under Queen Mary.

[12] 1 Charles I, c. 1. This regulation, while prescribing civil penalties, preserved the concurrent jurisdiction of the ecclesiastical courts to punish Sabbath breaking.

lawful, for butchers to slaughter or carriers, drovers, waggoners, etc., to travel on the Lord's day; [13] then, in 1677,[14] "For the better Observation and keeping Holy the Lord's Day," the statute, 29 Charles II, c. 7, which is still the basic Sunday law of Britain, was enacted: "that all and every Person and Persons whatsoever, shall on every Lord's Day apply themselves to the Observation of the same, by exercising themselves thereon in the Duties of Piety and true Religion, publickly and privately; . . . and that no Tradesman, Artificer, Workman, Labourer or other Person whatsoever, shall do or exercise any worldly Labour, Business or Work of their ordinary Callings, upon the Lord's Day, or any part thereof (Works of Necessity and Charity only excepted;) . . . and that no Person or Persons whatsoever, shall publickly cry, shew forth, or expose to Sale, any Wares, Merchandizes, Fruit, Herbs, Goods or Chattels whatsoever, upon the Lord's Day . . . ." [15] In 1781, a

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[13] 3 Charles I, c. 2.

[14] For a survey of the extensive Sunday regulations promulgated under the Commonwealth, see Lewis, *op. cit., supra*, note 9, at 115–142.

[15] Work was punished by penalty of five shillings, selling by forfeiture of the goods. The ban against butchers and herders traveling on Sunday was repeated, under fine of twenty shillings. Dressing of meat in families and dressing or selling of meat in inns and victualling houses "for such as otherwise cannot be provided" was permitted, as was the crying or selling of milk before 9 a. m. and after 4 p. m. Later statutes made numerous other exceptions to the English Sunday ban: see, *e. g.*, 9 Anne, c. 23, § 20, exempting hackney coaches; the Sunday Entertainments Act, 1932, 22 & 23 Geo. V, c. 51, exempting motion pictures at the option of local authority and under stipulated conditions, and also making lawful certain musical entertainments, lectures and debates, and the operation of museums, galleries, zoological and botanical gardens, etc.; and the evolving regulation of Sunday baking, 34 Geo. III, c. 61; 1 & 2 Geo. IV, c. 50, § 11; 3 Geo. IV, L. & P., c. 106, § 16; 6 & 7 Wm. IV, c. 37, § 14; Baking Industry (Hours of Work) Act, 1954, 2 & 3 Eliz. II, c. 57,

statute, 21 Geo. III, c. 49, reciting that various public entertainments and explications of scriptural texts by incompetent persons tended "to the great encouragement of irreligion and profaneness," closed all rooms and houses in which public entertainment, amusement or debates, for an admission charge, were held.[16]

These Sunday laws were indisputably works of the English Establishment. Their prefatory language spoke their religious inspiration,[17] exceptions made from time to time were expressly limited to preserve inviolable the hours of the divine service,[18] and in their administration

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§ 12. The Sunday Observation Prosecution Act, 1871, 34 & 35 Vict., c. 87, provided that no prosecutions under the statute, 29 Charles II, c. 7, might be brought without the consent of a chief police officer, a stipendiary magistrate, or two justices of the peace.

[16] Common informer practice under this statute has since been abolished. Common Informers Act, 1951, 14 & 15 Geo. VI, c. 39.

[17] See *Fennell* v. *Ridler*, 5 B. & C. 406, 407–408 (1826): "The spirit of the act [of 29 Charles II] is to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion; and the act cannot be construed according to its spirit unless it is so construed as to check the career of worldly traffic. . . . Labour may be private and not meet the public eye, and so not offend against public decency, but it is equally labour, and equally interferes with a man's religious duties."

[18] The Book of Sports published by James I in 1618 and republished by Charles I in 1633 provided: "as for our good people's lawful recreation, our pleasure . . . is, that after the end of divine service our good people be not disturbed . . . from any lawful recreation, such as dancing, . . . leaping, vaulting, or any other such harmless recreation . . . .

"And likewise we bar from the benefit and liberty all such known recusants, either men or women, as will abstain from coming to church or divine service, being therefore unworthy of any lawful recreation after said service, that will not first come to church and serve God. Prohibiting in like sort the said recreations to any that, though conform in religion, are not present in the church at the service of God, before their going to the said recreations.

"Our pleasure, likewise is, that they to whom it belongeth in office, shall present and punish sharply all such, as in abuse of this our

a spirit of inquisitorial piety was evident.[19] But even in this period of religious predominance, notes of a secondary civil purpose could be heard. Apart from the counsel of those who had from the time of the Reformation insisted that the Fourth Commandment itself embodied a precept of social rather than sacramental significance,[20] claims

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liberty will use their exercises before the end of all divine services for that day." Lewis, *op. cit., supra,* note 9, at 106–107. See Govett, The King's Book of Sports (1890). See also the excepting proviso to the statute, 10 & 11 Wm. III, c. 24, § 14, respecting Billingsgate Market. Certain importation and selling of fish "before or after Divine Service on *Sundays*" is not to be deemed prohibited.

[19] Such a spirit may be seen in various royal proclamations enjoining strict enforcement of the Sunday laws, see Whitaker, The Eighteenth-Century English Sunday (1940), 56, 172–173, and in the language of charges to the grand juries encouraging their performance of their duties under the laws, see *id.*, at 53, 57–58. Private societies formed as self-appointed agents of administration of the Sunday laws were religious in orientation. See, *id.*, at 62, 69, 121–123, 195–197.

[20] The injunction to observe the Sabbath day in Deuteronomy 5:14 is that on that day ". . . thou shalt not do any work, thou, nor thy son, nor thy daughter, nor thy manservant, nor thy maidservant, nor thine ox, nor thine ass, nor any of thy cattle, nor thy stranger that is within thy gates; that thy manservant and thy maidservant may rest as well as thou." Among Christian explicators of the Old Testament a social inspiration was early ascribed to this language. See Milton, A Treatise on Christian Doctrine, book 2, c. 7, in V Prose Works of John Milton (Sumner trans. 1877) 67. Luther, in the Large Catechism, part I, Third Commandment, wrote: ". . . we keep holydays not for the sake of intelligent and learned Christians; for they have no need of it. We keep them, first, for the sake of bodily necessity. Nature teaches and demands that the mass of the people—servants and mechanics, who the whole week attend to their work and trades—retire for a day of rest and recreation." I Lenker, Luther's Catechetical Writings (1907), 60. See also Luther's Treatise on Good Works (1520), Third Commandment, XVII, in I Works of Martin Luther (1915), 241. Compare Calvin's Institutes: among the three reasons for Sabbath observance, the Lord "resolved to give a day of rest to servants and those who are under the authority of others, in order that they should have some

were asserted in the eighteenth century on behalf of Sunday rest, in part, in the service of health and welfare.[21] Blackstone wrote that ". . . besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day in a country professing Christianity, and the corruption of morals which usually follows its profanation, the keeping one day in the seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes, by the help of conversation and society, the manners of the lower classes, which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit; it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness; it imprints on the minds of the people that sense of their duty to God so necessary to make them good citizens, but which yet

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respite from toil." Calvin, Institutes of the Christian Religion (Battles trans. 1960), book II, c. 8, § 28, at p. 395. And see Early Writings of John Hooper, D. D. (Carr ed. 1843) 337: "Then likewise God by this commandment provideth for the temporal and civil life of man, and likewise for all things that be necessary and expedient for man in this life. If man, and beast that is man's servant, should without repose and rest always labour, they might never endure the travail of the earth. God therefore, as he that intendeth the conservation and wealth of man and the thing created to man's use, commandeth this rest and repose from labour, that his creatures may endure and serve as well their own necessary affairs and business, as preserve the youth and offspring of man and beast . . . ."

[21] In 1778 there appeared an essay by Vicesimus Knox, M. A., supporting state-enforced Sunday observance on grounds of health and custom as well as of religion. See Whitaker, The Eighteenth-Century English Sunday (1940), 148. It is reported that in 1728 the members of the Gloucester Company or Fraternity of Barbers had undertaken to enforce by fine a self-imposed prohibition of Sunday labor, apparently to assure that those who wanted a six-day work week would not be compelled by competition to labor on the whole seven. See *id.*, at 59–60.

would be worn out and defaced by an unremitted continuance of labor, without any stated times of recalling them to the worship of their Maker." [22] In 1788 the schedule to the act, 28 Geo. III, c. 48, obligated master chimney sweeps to have their apprentices washed at least once a week, providing that on Sunday the master should send the apprentice to worship, should allow him to have religious instruction, and should not allow him to wear his sweeping dress; the act also regulated the sweeps' hours of work. In 1832 a Commons Select Committee on the Observance of the Sabbath heard the testimony of a medical doctor as to the physically injurious effects of seven-day unremitted labor,[23] and although the report of the Committee reveals a primarily religious cast of mind, it discloses also a sensitivity to the plight of the journeyman bakers, seven thousand of whom had petitioned the House for one day's repose weekly, and to the wishes of shopkeepers and tradesmen forced by competition to work on Sunday, although "most desirous of a day of rest." [24] The Committee recommended the enactment of severer sanctions for Lord's day violations: "The objects to be attained by Legislation may be considered to be, first, a solemn and decent outward Observance of the Lord's-day, as that portion of the week which is set apart by Divine Command for Public Worship; and next, the securing to every member of the Community without any exception, and however low his station, the uninterrupted enjoyment of that Day of Rest which has been in Mercy provided for him, and the privilege of employing it, as well in

[22] IV Blackstone Commentaries (Lewis ed. 1897) *63. Compare the Report of the Committee on the Judiciary on the petition praying "the repeal of all laws . . . enforcing the observation of a day of the week as the Sabbath . . . ," Mass. Leg. Docs., H. Doc. No. 125 (1851), 9–10.

[23] Report from Select Committee on the Observance of the Sabbath Day, in 7 H. C., Sessional Papers (1831–1832), at pp. 116–117.

[24] *Id.*, at p. 6. See *id.*, at pp. 5–8.

the sacred Exercises for which it was ordained, as in the bodily relaxation which is necessary for his well-being, and which, though a secondary end, is nevertheless also of high importance." [25]

But, whatever the nature of the propulsions underlying state-enforced Sunday labor stoppage during these centuries before the twentieth, it is clear that its effect was the creation of an institution of Sunday as a day apart. The origins of the institution were religious, certainly, but through long-established usage it had become a part of the life of the English people.[26] It was a day of rest not merely in a physical, hygienic sense, but in the sense of a recurrent time in the cycle of human activity when the rhythms of existence changed, a day of particular associations which came to have their own autonomous value for life.[27] When that value was threatened by the pressures of the Industrial Revolution, agitation began for new

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[25] *Id.*, at pp. 9–10.

[26] See Trevelyan's comment quoted in the foreword to Skottowe, The Law Relating to Sunday (1936); Whitaker, Sunday in Tudor and Stuart Times (1933); Whitaker, The Eighteenth-Century English Sunday (1940), especially at 192, 199–201.

[27] Addison, writing in No. 112 of the Spectator, July 9, 1711: "I am always very well pleased with a country Sunday, and think, if keeping holy the seventh day were only a human institution, it would be the best method that could have been thought of for polishing and civilizing of mankind. It is certain, the country people would soon degenerate into a kind of savages and barbarians, were there not such frequent returns of a stated time, in which the whole village meet together with their best faces, and in their cleanest habits, to converse with one another upon different subjects, hear their duties explained to them, and join together in adoration of the supreme Being. Sunday clears away the rust of the whole week, not only as it refreshes in their minds the notions of religion, but as it puts both the sexes upon appearing in their most agreeable forms, and exerting all such qualities as are apt to give them a figure in the eye of the village." The Spectator (Am. ed. 1859), at 160. See the attempt to capture the peculiar atmosphere of Sunday in the opening lines to the second book of Crabbe's The Village (1783).

legislative action to preserve the traditional English Sunday.[28]

At the turn of the century, the Factory and Workshop Act, 1901, prohibited the Sunday employment of women and children in industrial establishments.[29] The Shops Act, 1912, in its institution of a five-and-a-half-day week for shop assistants, built upon the base of existing Sunday closing law.[30] When during the war the pressures of

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[28] In 1895 the late president of a grocers' association testifying on a proposed bill regulating the closing hours of shops urged that the Commons Committee recommend Sunday closing to the House; the many English grocers who wanted their Sunday off were alarmed at the threat of increased trade by competitors which would force their own opening on Sunday. Report from the Select Committee on Shops (Early Closing) Bill (Commons 1895) 158–159. The Report from the Select Committee of the House of Lords on the Sunday Closing (Shops) Bill [H. L.] (1905) did recommend Sunday closing legislation, which it found supported by all but one of the more than three hundred shopkeepers associations whose views were ascertained. The Committee's Report, at VI–VII, quotes the testimony of a witness (a clergyman, it may be noted), that ". . . the great need that impresses all of us busy workers in my part of London is the fact that because of the noise and rush we do want to safeguard the lives of our people by their having one day in seven. It is necessary for brain and for body, quite apart from the religious aspect of the question, for the moment, and by the stress at which we are all living down there Sunday has become practically like any other day. . . . The British population say that they would lose their custom in a great measure if they, in self-defence, did not open on Sunday. The feeling is very dominant that the result is that many of them have to work, whether they like it or not, seven days a week." (See also testimony to the same effect, *id.*, at 3–4, 17, 20, 30, 36, 40.)

[29] 1 Edw. VII, c. 22, § 34. Continued, as amended, in the Factories Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 67, § 77.

[30] 2 Geo. V, c. 3, §§ 1, 4, provides for a half-day closing and a half-day off for employees "On at least one week day in each week." (§ 1.) Other twentieth century legislation indicates recognition of the interweaving effects of the Sunday laws and other hours-of-labor legislation. The statute of 2 & 3 Eliz. II, c. 57, § 12, repealed the Sunday laws affecting the baking industry as part of a new program

national defense compelled continuous factory operation, a Committee of the Ministry of Munitions appointed to investigate industrial fatigue as this affected the health and efficiency of munitions workers, recommended to Parliament reinauguration of Sunday work stoppage:

> ". . . The problem of Sunday labour, although materially affected by various industrial questions and the established custom of Sunday rest, is—as regards Munitions Works—primarily a question of the extent to which workers actually require weekly or periodic rests if they are to maintain their health and energy over long periods. Intervals of rest are needed to overcome mental as well as physical fatigue. In this connection account has to be taken not only of the hours of labour (overtime, 12-hour shifts, 8-hour shifts), the environment of the work and the physical strain involved, but also the mental fatigue or boredom resulting from continuous attention to work. As one Manager put it, it is the monotony of the work which kills—the men get sick of it.
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> ". . . [I]f the maximum output is to be secured and maintained for any length of time, a weekly period of rest must be allowed. . . . On economic and social grounds alike this weekly period of rest is best provided on Sunday . . . ." [31]

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of hours regulation for that industry. The Sunday Entertainments Act, 1932, 22 & 23 Geo. V, c. 51, permitting Sunday cinema at local option, subjects the allowance of Sunday operation to the condition that no person may be employed therein who has worked on each of the six days next preceding, except in emergencies, in which case the employee must get his day's rest subsequently.

[31] Ministry of Munitions, Health of Munition Workers Committee, Report on Sunday Labour, Memorandum No. 1 [Cmd. 8132] (1915), 3, 5. The Committee had not been directed specifically to investigate

In 1936 the conflict between the economic pressures for seven-day commercial activity and the resistance to those pressures culminated in the Shops (Sunday Trading Restriction) Act of that year, which, with a complex pattern of exceptions, prohibited Sunday trading upon pain of penalties more severe, and hence better calculated to assure obedience, than the nominal fines which had obtained under the seventeenth century Lord's day ban.[32] The Parliamentary Debates on the 1936 Act are instructive. With extremely rare exceptions,[33] no intimation of religious purpose is to be discovered in them.[34] The opening speech by Mr. Loftus who introduced the bill is representative:

> ". . . [I]t is a Bill which is necessary to secure the family life and liberty of hundreds of thousands of our people. . . .
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the Sunday labor question, but in its inquiries generally into hours of labor, it discovered that "employers and workers were specially concerned at the present time with the problem of Sunday labour," and the Committee was "so impressed with the urgency and importance of this question," that it determined to submit a preliminary report on this subject alone. *Id.*, at 3.

[32] 26 Geo. V & 1 Edw. VIII, c. 53. See also the Retail Meat Dealers' Shops (Sunday Closing) Act, 1936, 26 Geo. V & 1 Edw. VIII, c. 30. These acts are continued in the Shops Act, 1950, 14 Geo. VI, c. 28, part IV.

[33] See 308 H. C. Deb. 2216 and 2223 (5th ser. 1935–1936) (suggesting that persons ought not be made to work on a day when they would want to attend religious services); *id.*, at 2211. The strongest Christian religious sentiment was demonstrated by an opponent of the bill, see 311, *id.*, at 497. Other opposing speakers waved the shibboleth of religious motive in an attempt to discredit the measure. See 308, *id.*, at 2190–2191; 311, *id.*, at 2097; but see 308, *id.*, at 2179–2182; 101 H. L. Deb. 262 (5th ser. 1935–1936) (two opponents admit absence of religious purpose or effect).

[34] This is especially significant in England where, of course, no constitutional compulsion exists to encourage Parliament to "make a record" concealing a clandestine sectarian aim.

". . . I will explain to the House that there are thousands of shopkeepers who hate opening on Sunday—they dislike the whole idea—but are forced to open because their neighbours open. They are forced to open not for the sake of the Sunday trading, but because if they let their customers get into the habit on Sunday of going to other shops they may lose their week-day custom. . . . They have the right to a holiday on Sunday, to be able to rest from work on that day and to go out into the parks or into the country on a summer day. That is the liberty for which they are asking, and that is the liberty which this Bill would give to them. As regards the support behind the Bill, it is promoted by the Early Closing Association, with 300 affiliated associations, and the National Federation of Grocers, representing 400,000 individual shops, and is supported by the National Chamber of Trade, the Drapers' Chamber of Trade, the National Federation of the Boot Trade, and as regards the employés—and this is important—it is supported by the National Union of Shop Assistants and by the National Union of Distributive Workers." [35]

Speakers asserted the necessity for maintaining "the traditional quality of the Sunday in this country." [36] One particularly staunch Labour supporter of the measure argued:

". . . Frankly, I am afraid of a seven-day week. I see it coming gradually, and a seven-day week

[35] 308 H. C. Deb. 2157–2159 (5th ser. 1935–1936). See also *id.*, at 2165–2167, 2174, 2183, 2186, 2207, 2211, 2213, 2223–2224; 101 H. L. Deb. 254–255, 266 (5th ser. 1935–1936).

[36] 308 H. C. Deb. 2209 (5th ser. 1935–1936). See also 311, *id.*, at 453–454, 490. Throughout the debates it is emphasized that the bill was "a Sunday Trading Restriction Bill and not . . . a Bill to have one day's rest in seven." 311, *id.*, at 456; see *id.*, at 2106. Yet it was not the sacred quality of the day that was meant.

> means six days' pay for seven days' work. I have worked seven days a week in my time and I say that, if I can help it, nobody else shall work seven days for six days' pay. It is clear that if one shopkeeper opens in a street, the whole street is bound to open and, if one street opens, the whole town must open automatically. . . . I am not speaking as a Sabbatarian. I stand for the six-day working week with one day's rest in seven but I do not want that day's rest arranged on the lines suggested by the hon. Member . . . who, apparently, wants to turn my Sunday into a Tuesday or a Wednesday. The argument is that all we need do is to say there shall be a six-day working week with one day's rest in seven, and that it does not matter whether the Sunday comes on a Friday or a Tuesday. As a family man let me say that my family life would be unduly disturbed if any member had his Sunday on a Tuesday. The value of a Sunday is that everybody in the family is at home on the same day. What is the use of talking about a six-day working week in which six members of a family would each have his day of rest on a different day of the week?" [37]

The bill was strongly supported by labor and trade groups [38] and passed by an overwhelming margin.[39]

Thus the English experience demonstrates the intimate relationship between civil Sunday regulation and the interest of a state in preserving to its people a recurrent time of mental and physical recuperation from the strains and pressures of their ordinary labors. It demonstrates also, of course, the intimate historical connection between the choice of Sunday as this time of rest and the doctrines

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[37] 308, *id.*, at 2197–2198.

[38] See 308, *id.*, at 2186, 2194–2195, 2206; 311, *id.*, at 2095.

[39] Although a private member's bill, the measure passed on the second reading in Commons by a 191-to-8 vote. 308, *id.*, at 2230.

of the Christian church. Long before the emergence of modern notions of government, religion had set Sunday apart. Through generations, the people were accustomed to it as a day when ordinary uses ceased. If it might once—or elsewhere—have been equally practicable to fulfill the same need of the workers and traders for periodic relaxation by the selection of some other cycle, it was no longer practicable in England. Some hypothetical man might do better with one-day-in-eight, or one-day-in-four, but the Englishman was used to one-day-in-seven. And that day was Sunday. Through associations fostered by tradition, that day had a character of its own which became in itself a cultural asset of importance: a release from the daily grind, a preserve of mental peace, an opportunity for self-disposition. Certainly, legislative fiat could have attempted to switch the day to Tuesday. But Parliament, naturally enough, concluded that such an attempt might prove as futile as the ephemeral decade of the French Republic of 1792.[40]

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[40] Even on the Continent the forces which in the latter half of the nineteenth century pressed for the amelioration of the working conditions of the laborer expressed themselves in part in Sunday legislation. Germany, Austria, the Swiss Federal Government, Denmark, Norway and Russia in the 1870's, 80's and 90's promulgated regulations prohibiting Sunday employment—in some cases only for women and children; in others, for all workers in enumerated industries—or closing factories or commercial establishments during part or all of the day. See Congrès International du Repos Hebdomadaire, Paris, 1889, Compte-Rendu (1890), 339–344; Congrès International du Repos du Dimanche, Bruxelles, 1897, Rapports et Compte Rendu (1898), 9–24, 139–159, 229–234; Congrès International du Repos du Dimanche, Paris, 1900, Rapports et Compte Rendu (1900), Rapports No. I, II, VII; Mackenzie, ed., The World's Rest-Day, An Account of the Thirteenth International Congress on the Lord's Day, Edinburgh, 1908 (1909), 168–187; Report of the Joint Special Committee to Revise, Consolidate and Arrange the General Laws . . . Relating to the Observance of the Lord's Day, Mass. Leg. Docs., H. Doc. No. 1160

III.

In England's American settlements, too, civil Sunday regulation early became an institution of importance in shaping the colonial pattern of life. Every Colony had a law prohibiting Sunday labor. These had been enacted

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(1907), Appendix, at 57–66. In the late 1880's a German plebiscite conducted by Bismarck showed strong popular support among both employers and employees for Sunday closing. See Congrès International du Repos Hebdomadaire, Paris, 1889, Compte-Rendu (1890), 360–364. The development of the European Sunday-closing movement is reflected in the proceedings of the various conventions of an institution which convened sometimes as the International Congress on Sunday rest, sometimes as the International Congress for weekly rest. See the reports cited, *supra;* see also, *e. g.*, Jackson, ed., Sunday Rest in the Twentieth Century, An Account of the International Sunday Rest Congress at St. Louis, 1904 (1905); Congresso Internazionale Pro Riposo Settimanale, Resoconto, Milano, 1906 (undated); Sunday, The World's Rest Day, Fourteenth International Lord's Day Congress, Oakland, California, 1915 (1916). At the first meeting of this group, in Geneva in 1876, the delegates displayed a primarily religious outlook, although much was also said of the physical and moral betterment of the worker through periodic rest. Congrès sur l'observation du Dimanche, Genève, 1876, Actes (1876), 120, 187–191, 353–367. A major objective of the Conference was to secure Sunday off for the railroad employees. When, after several intervening conventions, the International Congress met in Paris in 1889, it was under the presidency of Leon Say, and its temper was rather secular than clerical. It took the name of the Congrès International du Repos Hebdomadaire, and though it contained members both of conservative-religious and of socialist tendencies, the latter were more vocal and especially took the lead in formulating the Congress' program of state-enforced, rather than merely voluntary, industrial closing. See Congrès International du Repos Hebdomadaire, Paris 1889, Compte-Rendu (1890), 83–93, 103–108, 344–380. Yet the group resolved to demand not merely some one indiscriminate day of rest weekly, but *Sunday:* "1. Sunday rest is possible to varying degrees in every industry. 2. This is the day of rest which is most suitable both to the employer and to the worker, as well from the point of view of the individual as from that of the family, and because it is good that

in many instances prior to the last quarter of the seventeenth century, and they were continued in force throughout the period that preceded the adoption of the Federal

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the day of rest should be, as much as possible, the same for all." *Id.*, at 160 (translated from the French); see also *id.*, at 126, 167, 197. (Compare the Convention Concerning Weekly Rest in Commerce and Offices, 1957, Convention 106 of the General Conference of the International Labour Organization, Geneva, 1957, H. R. Doc. No. 432, 85th Cong., 2d Sess. 7–12, providing for a weekly day of rest which shall, where possible, "coincide with the day of the week established as a day of rest by the traditions or customs of the country or district." Art. 6, § 3. So far as possible, the traditions and customs of religious minorities are to be respected. Art. 6, § 4. Similarly, The International Labour Conference's Draft Convention Concerning the Application of the Weekly Rest in Industrial Undertakings, adopted at the Third Session of the General Conference in Geneva in 1921, establishes 24 consecutive hours of rest per seven days for industrial workers, to be fixed, wherever possible "so as to coincide with the days already established by the traditions or customs of the county or district." Art. 2. International Labour Conference, 3d Sess., Draft Conventions & Recommendations (1921), 30.)

At Chicago, four years later, both clerical and laborite perspectives were again represented; George E. McNeill, one of the pioneers of the American labor movement, spoke, and the representative of the Brotherhood of Railway Trainmen and other railroad workers' organizations, L. S. Coffin, supported Sunday rest. The Sunday Problem, Its Present Day Aspects, Papers Presented at the International Congress on Sunday Rest, Chicago, 1893 (1894), 43, 95. In 1897, at Brussels, the spirit was again predominantly secular; the Congress debated extensively the question whether governmental action to compel a day of rest was advisable, or whether the matter could best be handled by persuasion of individual employers; and the sense of the meeting strongly favored governmental intervention. Congrès International du Repos du Dimanche, Bruxelles 1897, Rapports et Compte Rendu (1898), 35–47, 161–171, 377–385, 387–393, 538–559. See also Congrès International du Repos du Dimanche, Paris, 1900, Rapports et Compte Rendu (1900). Later meetings of the Congress tended to be religion-oriented, although secular interests continued to find voice. See Jackson, ed., *op. cit., supra*, at 59–77, 85–96; Mackenzie, ed., *op. cit., supra*, at 187.

Constitution and the Bill of Rights.[41] This is not in itself, of course, indicative of the purpose of those laws, or of their consistency with the guarantee of religious freedom which the First Amendment, restraining the power of the central Government, secured. Most of the States were only partly disestablished in 1789.[42] Only in Virginia [43] and in Rhode Island, which had never had an establishment,[44] had the ideal of complete church-state separation been realized. Other States were fast approaching that ideal, however, and everywhere the spirit of liberty in religion was in the ascendant. Ratifying Conventions in New York, New Hampshire and North Carolina, as well as in Virginia and Rhode Island, proposed an anti-establishment amendment to the Constitution or signified that in their understanding the Constitution embodied such a safeguard.[45] All of these five States had Sunday laws at the time that their Conventions spoke. Indeed, in four of the five, their legislatures had reaffirmed the Sunday labor ban within five years or less immediately prior to that date.[46]

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[41] See Appendix I to this opinion, *post*, p. 543. Hereafter the colonial Sunday statutes will be cited by date and Colony.

[42] Cobb, The Rise of Religious Liberty in America (1902), 482–517; Sweet, The Story of Religion in America (rev. ed. 1939), 274–280.

[43] See James Madison's essay, "Monopolies. Perpetuities. Corporations. Ecclesiastical Endowments." in Fleet, Madison's "Detatched Memoranda," 3 Wm. & Mary Q. 534, 551, 554–556 (1946). See authorities cited in note 3, *supra*.

[44] See Proceedings of the First General Assembly of "The Incorporation of Providence Plantations," and the Code of Laws, 1647 (1847), 50: ". . . and, otherwise than thus what is herein forbidden, all men may walk as their consciences persuade them, every one in the name of his GOD . . . ." See Cobb, The Rise of Religious Liberty in America (1902), 423–440.

[45] See note 2, *supra*.

[46] New Hampshire enacted Sunday laws in 1785 and 1789, New York in 1788, Virginia in 1786. Rhode Island in 1784 exempted from

The earlier among the colonial Sunday statutes were unquestionably religious in purpose. Their preambles recite that profanation of the Lord's day "to the great Reproach of the Christian Religion," [47] or "to the great offence of the Godly welafected among us," [48] must be suppressed; that "the keeping holy the Lord's day, is a principal part of the true service of God"; [49] that neglecting the Sabbath "pulls downe the judgments of God upon that place or people that suffer the same . . . ." [50] The first Pennsylvania Sunday law announces a purpose "That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience . . . ." [51] Sometimes

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her Sunday labor ban members of Sabbatarian societies, but specified that the exemption did not extend to allow such persons to keep shops open or to do mechanical labor in compact places; in 1798 Rhode Island again enacted a comprehensive Sunday law with the same exceptions.

[47] Delaware, 1740.

[48] Massachusetts (Plymouth), 1658.

[49] Georgia, 1762. See also Maryland, 1696; New York, 1685; South Carolina, 1712. See the statute of 1 Charles I, quoted in text at note 12, *supra*. The law of the Massachusetts Bay Colony in 1653 recited that playing, walking, drinking, sporting, and traveling on the Lord's day tend "much to the Dishonour of God, the Reproach of Religion, Grieving the Souls of Gods Servants, and the Prophanation of his Holy Sabbath, the Sanctification whereof is sometimes put for all Duties, immediately respecting the service of God contained in the first Table . . . ."

[50] Connecticut, 1668.

[51] Pennsylvania, 1682; see also the statutes of 1690, 1700. The "Body of Laws" of 1682 declared religious tolerance for all persons believing in a Supreme Being: "But to the end That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience in this Province, *Be It further Enacted* . . . That, according to the example of the primitive Christians, and for the ease of the Creation, Every first day of the week, called the Lord's day, People shall abstain from their usual and common toil and labour, That whether Masters, Parents, Children, or Servants, they may the better dispose themselves to read the Scriptures of truth at home, or fre-

reproach of God is made an operative element of the offense.[52] Prohibitions of Sunday labor are frequently coupled with admonitions that all persons shall "carefully apply themselves to Duties of Religion and Piety, publickly and privately . . . ," [53] and are found in comprehensive ecclesiastical codes which also prohibit blasphemy,[54] lay taxes for the support of the church,[55] or compel attendance at divine services.[56]

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quent such meetings of religious worship abroad, as may best sute their respective persuasions."

[52] The New Haven Code of 1656 provides: "Whosoever shal prophane the Lord's Day, or any part of it, either by sinful servile work, or by unlawful sport, recreation or otherwise, whether wilfully, or in a careless neglect, shal be duly punished by fine, imprisonment, or corporally, according to the nature and measure of the sinn, and offence. But if the court upon examination, by clear and satisfying evidence, find that the sin was proudly, presumptuously, and with a high hand committed against the known command and authority of the blessed God, such a person, therein despising and reproaching the Lord, shal be put to death, that all others may fear and shun such provoaking Rebellious courses. Numb. 15: from 30 to 36 verse." The Plymouth Colony law of 1671 is similar. And see the act published in the Bay Colony in 1647, by which to "deny the moralitie of the fourth commandement" is branded among other heresies and made punishable by banishment. Laws and Liberties of Massachusetts, 1648 (reprinted 1929), 24.

[53] Massachusetts, 1692. See also New Hampshire, 1700; North Carolina, 1741. These statutes are patterned on 29 Charles II, c. 7, quoted in text at note 15, *supra*.

[54] Maryland, 1649; cf. Virginia, 1705 (atheism).

[55] Maryland, 1692, "An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province."

[56] See the Connecticut statute set forth in the Acts and Laws, 1750; Georgia, 1762; Massachusetts, 1761. Compulsory church-attendance laws in the New England Colonies dated from before the middle of the seventeenth century. See the Code of 1650 of the General Court of Connecticut (1822) 46; and the Bay Colony's act published in 1647, Laws and Liberties of Massachusetts, 1648 (reprinted 1929), 20.

But even the seventeenth century legislation does not show an exclusively religious preoccupation. The same Pennsylvania law which speaks of the suppression of atheism also ordains Sunday rest "for the ease of the Creation," and shows solicitude that servants, as well as their masters, may be free on that day to attend such spiritual pursuits as they may wish.[57] The Rhode Island Assembly in 1679 enacted:

> "Voted, Whereas there hath complaint been made that sundry persons being evill minded, have pre-

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[57] See note 51, *supra*. This latter object, not the compulsion of conscience but the liberation of all individuals from Sunday labor and Sunday disturbance so that they might worship God as their own consciences dictated, was, at one period, not infrequently put forward as the justifying purpose of the Sunday laws. *State* v. *Ambs*, 20 Mo. 214, 218 (1854); *George* v. *George*, 47 N. H. 27, 34 (1866); *Lindenmuller* v. *People*, 33 Barb. 548, 564 (N. Y. Sup. Ct., 1861); *Johnston* v. *Commonwealth*, 22 Pa. 102, 115 (1853). As the habits and preoccupations of the people themselves changed, it was but a short step from this reasoning to the recognition that Sunday laws serve the purpose of providing leisure and peace favorable to the pursuit of whatever aspirations, religious or secular, various individuals may choose. See text at note 35, *supra*. Sensitive to emerging new popular needs and desires, legislatures were later to reshape the Sunday laws by complex patterns of exceptions permitting numerous recreational activities which, far from according with the original puritanical inspiration of the Lord's day acts, were precisely those games and sports which colonial legislation most severely condemned. See, *e. g.*, Virginia, 1610; Connecticut, 1668. The development of these evolving exceptions is discussed briefly in text at notes 124–131, *infra;* its product may be seen in Appendix II to this opinion, *post*, p. 551. What it is significant to note at this point is that the continuity which marks the history of the Sunday laws is a continuity both of enduring and changing social demands. The enduring feature has been man's need for a day set apart, a day of community repose: this he has persistently, continuingly demanded. The changing feature has been the way in which he chooses to spend his day. The need which the "Body of Laws" recognized in Pennsylvania in 1682 was

sumed to employ in servile labor, more than necessity requireth, their servants, and alsoe hire other mens' servants and sell them to labor on the first day of the week: . . . bee it enacted . . . . That if any person or persons shall employ his servants or hire and employ any other man's servant or servants, and set them to labor as aforesaid [he shall be penalized]." [58]

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both the same and different than that expressed by Luther, see note 20, *supra*, and that which twentieth century Sunday legislation accommodates. It is the need for a recurrent time when the common concerns of the working week cease to make their demands, and there is a peace that is general to the community—whether the individual finds it at church, at home, at the beach, in the country, or at the baseball game.

[58] 3 Records of the Colony of Rhode Island and Providence Plantations, 1678–1706 (1858), 30–31. The first Rhode Island Sunday law was an enactment of 1673 prohibiting the dispensing of alcoholic beverages on Sunday. Its preamble is this:

"Voted, this Assembly consideringe that the King hath granted us that not any in this Collony are to be molested in the liberty of their consciences, who are not disturbers of the civill peace, and wee are perswaded that a most flourishing civil government with loyalty may be best propagated where liberty of conscience by any corporall power is not obstructed that is not to any unchastness of body, and not by a body doeinge any hurt to a body, neither indeavoringe soe to doe; and although wee know by man not any can be forced to worship God or for to keep holy or not to keep holy any day; but forasmuch as the first dayes of weeks, it is usuall for parents and masters not to imploy their children or servants as upon other dayes, and some others alsoe that are not under such government, accountinge it as a spare time, and soe spend it in debaistnes or tipplinge and unlawfull games and wantonness, and most abhominably there practiced by those that live with the English at such times to resort to townes. Therefore, this Assembly, not to oppose or propagate any worship, but as by preventinge debaistnes, although wee know masters or parents cannot and are not by violence, to indeavor to force any under their govornment, to any worshipper from any worshipp, that is not debaistnes or disturbant to the civill peace, but they are to require them, and if that will not prevaile, if they can they should compell

In the latter half of the eighteenth century, the Sunday laws, while still giving evidence of concern for the "immorality" of the practices they prohibit, tend no longer to be prefixed by preambles in the form of theological treatises.[59] Now it appears to be the community, rather than the Deity, which is offended by Sunday labor. New York's statute of 1788 no longer refers to the Lord's day, but to "the first day of the week commonly called Sunday." [60] Where preambles do appear, they display a duplicity of purpose. The Massachusetts Act of 1792 begins:

> "Whereas the observance of the Lord's Day is highly promotive of the welfare of a community, by affording necessary seasons for relaxation from labour and the cares of business; for moral reflections and conversation on the duties of life . . . ; for public and private worship of the Maker, Governor and Judge of the world; and for those acts of charity which support and adorn a Christian society: And whereas some thoughtless and irreligious persons, inattentive to the duties and benefits of the Lord's Day, profane the same, by unnecessarily pursuing their worldly business and recreations on that day, to their own great damage, as members of a Christian

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them not to doe what is debaistnes, or uncivill or inhuman, not to frequent any imodest company or practices."

[59] See New Jersey, 1798: Delaware, 1795 (this statute does recite that its purpose is to deter those who "profane" the Lord's day); New Hampshire, 1785 and 1789 (these acts were, however, recommended to be read by ministers to their congregations). It is true that the Pennsylvania statute of 1794 is an act for the prevention of immorality and that the New Jersey statute of 1790 is "An Act to promote the Interest of Religion and Morality, and for suppressing of Vice . . . ," but even these enactments show a very different tenor than that of earlier legislation in the same Colonies. See, *e. g.*, Pennsylvania, 1682; New Jersey, 1693.

[60] Compare New York's legislation of 1685, 1695.

> society; to the great disturbance of well-disposed persons, and to the great damage of the community, by producing dissipation of manners and immoralities of life . . . ."

An enactment of Vermont in 1797 is similar.[61]

More significant is the history of Sunday legislation in Virginia. Even before the English statute of 29 Charles II, that Colony had had laws compelling Sunday attendance at worship [62] and forbidding Sunday labor.[63] In 1776, the General Convention at Williamsburg adopted a Declaration of Rights, providing, *inter alia*, that " . . . all men are equally entitled to the free exercise of religion, according to the dictates of conscience . . . ," [64] and in the same year the acts of Parliament compelling church attendance and punishing deviation in belief were declared void, dissenters were exempted from the tax for support of the established church, and the levy of that tax was suspended.[65] Eight years later came the battle over the Assessment Bill. Under Madison's leadership the forces supporting entire freedom of religion wrote the definitive quietus to the Virginia establishment, and Jefferson's Bill for Establishing Religious Freedom was enacted in 1786:

> "I. Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal

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[61] An Act to enforce the due observation of the Sabbath, 1 Laws of Vermont (1808) 275.

[62] The earliest law was that of 1610. For the Colony in Virginea Britannia, Lawes Divine, Morall and Martiall (1612), in 3 Force, Tracts Relating to the Colonies in North America (1844), II, 10–11. This was followed by an Act of 1623–1624. 1 Hening, Statutes of Virginia (1823), 123. And see *id.*, at 144.

[63] See Appendix I to this opinion, *post*, p. 549. The most important statutes are those of 1629 and 1705, 1 Hening, Statutes of Virginia (1823), 144; 3 Hening, Statutes of Virginia (1823), 358.

[64] 9 Hening, Statutes of Virginia (1821), 109, 111–112.

[65] *Id.*, at 164.

> punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to . . . propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; . . . that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, . . . that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, ...
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> "II. *Be it enacted* . . . That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge, or affect their civil capacities." [66]

In this bill breathed the full amplitude of the spirit which inspired the First Amendment, and this Court has looked

[66] 12 Hening, Statutes of Virginia (1823), 84–86.

to the bill, and to the Virginia history which surrounded its enactment, as a gloss on the signification of the Amendment. See the opinions in *Everson* v. *Board of Education*, 330 U. S. 1. The bill was drafted for the Virginia Legislature as No. 82 of the Revised Statutes returned to the Assembly by Jefferson and Wythe on June 18, 1779.[67] Bill No. 84 of the Revision provided:

> "If any person on Sunday shall himself be found labouring at his own or any other trade or calling, or shall employ his apprentices, servants or slaves in labour, or other business, except it be in the ordinary household offices of daily necessity, or other work of necessity or charity, he shall forfeit the sum of ten shillings . . . ." [68]

This bill was presented to the Assembly by Madison in 1785,[69] and was enacted in 1786.[70] Apparently neither Thomas Jefferson nor James Madison regarded it as

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[67] 2 Papers of Thomas Jefferson (Boyd ed. 1950) 305–324, 545–553. For the story of the Revision, see Jefferson's Autobiography, in I Writings of Thomas Jefferson (Memorial ed. 1903) 62–67; I Randall, Life of Thomas Jefferson (1858), 202–203, 208, 216 *et seq.*

[68] 2 Papers of Thomas Jefferson (Boyd ed. 1950) 555. The bill was entitled: "A Bill for Punishing Disturbers of Religious Worship and Sabbath Breakers." It also forbade the arrest for any civil cause of any minister of the gospel while engaged in public preaching or performing religious worship in any church, and punished any person who should maliciously disturb any worshipping congregation or misuse any minister therein. There is evidence to attribute the original draft of the provision to Jefferson, *id.*, at 314–321; in any event, we know that, with the other revisers, he studied and reworked every bill in the revision until it satisfied him. Autobiography, in I Writings of Thomas Jefferson (Memorial ed. 1903) 66.

[69] Journal of the House of Delegates, Commonwealth of Virginia, Oct. 17, 1785 (1828), 12–14.

[70] 12 Hening, Statutes of Virginia (1823), 336. The wording of the statute as passed differs slightly from that of the bill reported by the revisers.

repugnant to religious freedom. Nor did the Virginia legislators who thirteen years later reaffirmed the Bill for Establishing Religious Freedom as "a true exposition of the principles of the bill of rights and constitution," by repealing all laws which they deemed inconsistent with it.[71] The Sunday law of 1786 was not among those repealed.

IV.

Legislation currently in force in forty-nine of the fifty States illegalizes on Sunday some form of conduct lawful if performed on weekdays.[72] In several States only one or a few activities are banned—the sale of alcoholic beverages,[73] hunting,[74] barbering,[75] pawnbroking,[76] trad-

[71] 2 Shepherd, Statutes of Virginia (1835), 149.

[72] Appendix II to this opinion, *post*, p. 551. Only Alaska has no such legislation.

[73] See Delaware, Iowa, Wyoming. Many States which have broader Sunday statutes also provide special regulations for the sale of intoxicants on Sunday. Significantly, even those who have assailed the ban on Sunday labor as an unconstitutional religious establishment assert the constitutionality of Sunday alcohol control. See, *e. g.*, Lewis, A Critical History of Sunday Legislation (1888), ix. They point to the contemporary justification for the prohibition of liquor sales on that day: the greater danger of abusive use of alcohol during a time when virtually all persons are at leisure. Admitting that there are also cogent contemporary reasons for a Sunday labor ban, they assert that the history of Sunday labor legislation reveals that these legitimate reasons are not those which in fact underlie it. But the roots of Sunday alcohol control are as deeply bedded in early Sabbath anti-tippling statutes as are those of Sunday labor laws in Lord's day acts. See the Connecticut statute set forth in the Acts and Laws, 1750; Delaware, 1740; Maryland, 1674; Massachusetts Bay, 1653; Massachusetts, 1761; New Hampshire, 1715; New York, 1685. See *State* v. *Eskridge*, 31 Tenn. 413 (1852). Indeed, the most severe efforts to enforce Sunday prohibitions in England were for centuries directed against tippling. See Whitaker, The Eighteenth-Century English Sunday (1940), passim; Whitaker, Sunday in Tudor and Stuart Times (1933), passim.

[*Footnotes 74–76 are on p. 496*]

ing in automobiles [77]—but thirty-four jurisdictions broadly ban Sunday labor, or the employment of labor, or selling or keeping open for sale, or some two or more of these comprehensive categories of affairs. In many of these States, and in others having no state-wide prohibition of industrial or commercial activity, municipal Sunday ordinances are ubiquitous.[78] Most of these regulations are the product of many re-enactments and amendments. Although some are still built upon the armatures

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[74] See North Carolina. Many States with more comprehensive bans also specifically proscribe hunting. See, *e. g.*, Connecticut, Kentucky, Mississippi, Tennessee, Virginia.

[75] See, *e. g.*, Arizona, Colorado, Montana.

[76] Oregon. Cf. Michigan, New Jersey, Pennsylvania, Rhode Island.

[77] Colorado, Wisconsin. Cf., *e. g.*, Connecticut, Maine, Michigan, Pennsylvania.

[78] Some States have specific legislation enabling municipalities to regulate Sunday business (*e. g.*, Nebraska, North Dakota), or to suppress desecration of the Sabbath (*e. g.*, Michigan, Mississippi, Rhode Island). Often such authority is written into a city's charter. See, *e. g.*, *State* v. *McGee*, 237 N. C. 633, 75 S. E. 2d 783 (1953), app. dism'd for want of a substantial federal question, 346 U. S. 802. In some cases charter authority to regulate a given business or activity has been held to support Sunday regulation of that business or activity. See, *e. g.*, *Hicks* v. *City of Dublin*, 56 Ga. App. 63, 191 S. E. 659 (1937). Where no other enabling provision is found, it is virtually unanimously held that power to enact Sunday ordinances exists under the general grant of police power to a municipality. *E. g.*, *In re Sumida*, 177 Cal. 388, 170 P. 823 (1918); *Theisen* v. *McDavid*, 34 Fla. 440, 16 So. 321 (1894); *Karwisch* v. *Mayor of Atlanta*, 44 Ga. 204 (1871); *Humphrey Chevrolet, Inc.*, v. *City of Evanston*, 7 Ill. 2d 402, 131 N. E. 2d 70 (1955); *Komen* v. *City of St. Louis*, 316 Mo. 9, 289 S. W. 838 (1926) (subsequently overruled on another point); *City of Elizabeth* v. *Windsor-Fifth Avenue, Inc.*, 31 N. J. Super. 187, 106 A. 2d 9 (1954); *Ex parte Johnson*, 20 Okla. Cr. 66, 201 P. 533 (1921); *Mayor of Nashville* v. *Linck*, 80 Tenn. 499 (1852); *City of Seattle* v. *Gervasi*, 144 Wash. 429, 258 P. 328 (1927); *State ex rel. Smith* v. *Wertz*, 91 W. Va. 622, 114 S. E. 242 (1922).

of earlier statutes, they are all, like the laws of Maryland, Massachusetts and Pennsylvania which are before us in these cases,[79] recently reconsidered legislation. As expressions of state policy, they must be deemed as contemporary as their latest-enacted exceptions in favor of moving pictures [80] or severer bans of Sunday motor vehicle trading.[81] In all, they reflect a widely felt present-day need, for whose satisfaction old laws are shaped and new laws enacted.

To be sure, the Massachusetts statute now before the Court, and statutes in Pennsylvania and Maryland, still call Sunday the "Lord's day" or the "Sabbath." So do the Sunday laws in many other States.[82] But the con-

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[79] There have been more than seventy amendments to the Massachusetts Sunday regulation over the past century. See the opinion below, 176 F. Supp. 466, 472, n. 2. The latest amendments prior to the bringing of suit in the *Gallagher* case were in 1957. Mass. Acts 1957, cc. 300, 356, §§ 16, 17, 18. By Mass. Acts 1960, c. 812, § 3, the provisions of chapter 136, Massachusetts' general Sunday regulations, were made applicable to all or part of certain legal holidays, *e. g.*, January first, July fourth, Thanksgiving Day. The Pennsylvania statute which is considered here was enacted in 1959. Pa. Laws 1959, No. 212. And in the same year that State's Lord's Day statute was three times amended. Pa. Laws 1959, Nos. 278, 540, 684. Maryland amended the provisions which are now its Code, Art. 27, §§ 492 to 534A, seven times in 1959. Maryland Laws 1959, cc. 232, 236, 248, 503, 510, 715, 811.

[80] *E. g.*, N. D. Laws 1959, c. 131; Tenn. Acts 1957, c. 219.

[81] *E. g.*, Fla. Laws 1959, c. 59–295; Me. Laws 1959, c. 302; Okla. Laws 1959, p. 210.

[82] Maine, Minnesota, Mississippi, North Dakota, Oklahoma, West Virginia. Cf. Indiana, Missouri. But see Alabama, Illinois, New Mexico, Ohio.

Language can also be found in judicial opinions interpreting Sunday statutes which attributes religious purpose to them. See *O'Donnell* v. *Sweeney*, 5 Ala. 467, 469 (1843); *Weldon* v. *Colquitt*, 62 Ga. 449, 451–452 (1879); *State* v. *Beaudette*, 122 Me. 44, 45, 118 A. 719, 720 (1922); *Pearce* v. *Atwood*, 13 Mass. 324, 346–348 (1816); *Bennett* v. *Brooks*, 91 Mass. 118, 119–121 (1864); *Davis* v. *City of Somerville*,

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tinuation of seventeenth century language does not of itself prove the continuation of the purposes for which the colonial governments enacted these laws, or that these are the purposes for which their successors of the twentieth have retained them and modified them. We know,

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128 Mass. 594, 596 (1880); *Commonwealth* v. *White,* 190 Mass. 578, 580–582, 77 N. E. 636, 637 (1906); *Commonwealth* v. *McCarthy,* 244 Mass. 484, 486, 138 N. E. 835, 836–837 (1923); *Allen* v. *Duffie,* 43 Mich. 1, 7–9, 4 N. W. 427, 431–433 (1880); *Brimhall* v. *Van Campen,* 8 Minn. 13, 22 (1862); *Kountz* v. *Price,* 40 Miss. 341, 348 (1866); *People* v. *Ruggles,* 8 Johns. 290, 296–297 (N. Y. Sup. Ct. 1811); *Sellers* v. *Dugan,* 18 Ohio 489, 490, 492 (1849); *Commonwealth* v. *American Baseball Club,* 290 Pa. 136, 143, 138 A. 497, 499 (1927); *Commonwealth* v. *Coleman,* 60 Pa. Super. 380, 385–386 (1915); *Parker* v. *State,* 84 Tenn. 476, 477–479, 1 S. W. 202–203 (1886); *Graham* v. *State,* 134 Tenn. 285, 292, 183 S. W. 983, 985 (1915). And see *Smith* v. *Boston & Maine R. Co.,* 120 Mass. 490, 493 (1876); *Society for the Visitation of the Sick* v. *Commonwealth,* 52 Pa. 125, 135 (1866). Even some decisions sustaining the constitutionality of the statutes have found their justification, in part, in the preservation of Christian traditions. *Shover* v. *State,* 10 Ark. 259 (1850); *State* v. *Ambs,* 20 Mo. 214 (1854); *State ex rel. Temple* v. *Barnes,* 22 N. D. 18, 132 N. W. 215 (1911); *City Council* v. *Benjamin,* 2 Strob. L. 508 (S. C. 1848). Cf. *Varney* v. *French,* 19 N. H. 233 (1848); *Adams* v. *Gay,* 19 Vt. 358, 366 (1847). But most of these latter decisions date from an era when day-of-rest conceptions were not yet fully developed: the then prevailing notions of the police power did not accord to state legislatures authority to protect a man from the harm to himself of uninterrupted labor. Compare *Thomasson* v. *State,* 15 Ind. 449, 454 (1860) (speaking of the "patriarchal theory of government") with, *e. g., People* v. *Klinck Packing Co.,* 214 N. Y. 121, 108 N. E. 278 (1915) (sustaining New York's six-day-week statute by analogy to the Sunday law cases). The large majority of decisions applying the Sunday laws in cases where their constitutionality as possible infringements of religious liberty was not in issue have regarded the laws as having either an exclusively secular function or a function accommodating both the civil and religious needs of the community. As to the former, see, *e. g., State* v. *Shuster,* 145 Conn. 554, 145 A. 2d 196 (1958); *Rogers* v. *State,* 60 Ga. App. 722, 4 S. E. 2d 918 (1939); *Carr* v. *State,* 175 Ind. 241, 93 N. E. 1071 (1911);

for example, that Committees of the New York Legislature, considering that State's Sabbath Laws on two occasions more than a century apart, twice recommended no repeal of those laws, both times on the ground that the laws did not involve "any partisan religious issue, but

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Tinder v. *Clarke Auto Co.*, 238 Ind. 302, 149 N. E. 2d 808 (1958); *City of Harlan* v. *Scott*, 290 Ky. 585, 162 S. W. 2d 8 (1942); *Levering* v. *Park Commissioners*, 134 Md. 48, 106 A. 176 (1919); *State ex rel. Hoffman* v. *Justus*, 91 Minn. 447, 98 N. W. 325 (1904); *City of St. Louis* v. *DeLassus*, 205 Mo. 578, 104 S. W. 12 (1907) (subsequently overruled on another point); *State* v. *Chicago, Burlington & Quincy R. Co.*, 239 Mo. 196, 143 S. W. 785 (1912); *State* v. *Malone*, 238 Mo. App. 939, 192 S. W. 2d 68 (1946); *More* v. *Clymer*, 12 Mo. App. 11 (1882); *Auto-Rite Supply Co.* v. *Mayor of Woodbridge*, 25 N. J. 188, 135 A. 2d 515 (1957); *Rodman* v. *Robinson*, 134 N. C. 503, 47 S. E. 19 (1904); *State* v. *Ricketts*, 74 N. C. 187 (1876); *Bloom* v. *Richards*, 2 Ohio St. 387 (1853); *McGatrick* v. *Wason*, 4 Ohio St. 566 (1855); *Krieger* v. *State*, 12 Okla. Cr. 566, 160 P. 36 (1916); *State* v. *Smith*, 19 Okla. Cr. 184, 198 P. 879 (1921); *State* v. *James*, 81 S. C. 197, 62 S. E. 214 (1908); *Francisco* v. *Commonwealth*, 180 Va. 371, 23 S. E. 2d 234 (1942); *State* v. *Baltimore & Ohio R. Co.*, 15 W. Va. 362 (1879); *State ex rel. Smith* v. *Wertz*, 91 W. Va. 622, 114 S. E. 242 (1922); and see *Stark* v. *Backus*, 140 Wis. 557, 123 N. W. 98 (1909). As to the latter, see *Rosenbaum* v. *State*, 131 Ark. 251, 199 S. W. 388 (1917); *State* v. *Hurliman*, 143 Conn. 502, 123 A. 2d 767 (1956); *Richmond* v. *Moore*, 107 Ill. 429 (1883); *State* v. *Mead*, 230 Iowa 1217, 300 N. W. 523 (1941); *Cleveland* v. *City of Bangor*, 87 Me. 259, 32 A. 892 (1895); *Matter of Rupp*, 33 App. Div. 468, 53 N. Y. S. 927 (1898); *People* v. *Moses*, 140 N. Y. 214, 35 N. E. 499 (1893); *Moore* v. *Owen*, 58 Misc. 332, 109 N. Y. S. 585 (N. Y. Sup. Ct. 1908); *Melvin* v. *Easley*, 52 N. C. 356 (1860); *Johnston* v. *Commonwealth*, 22 Pa. 102 (1853). Cf. the cases finding foundation for the laws in long-established usage. *Commonwealth* v. *Louisville & Nashville R. Co.*, 80 Ky. 291 (1882); *Mohney* v. *Cook*, 26 Pa. 342 (1855); *Commonwealth* v. *Nesbit*, 34 Pa. 398 (1859); *Commonwealth* v. *Jeandelle*, 3 Phila. 509 (Pa. Q. S. 1859). And see *People* v. *Law*, 142 N. Y. S. 2d 440 (Spec. Sess. 1955); *People* v. *Binstock*, 7 Misc. 2d 1039, 170 N. Y. S. 2d 133 (Spec. Sess. 1957).

rather economic and health regulation of the activities of the people on a universal day of rest," [83] and that a Massachusetts legislative committee rested on the same views.[84] Sunday legislation has been supported not only

[83] State of New York, Second Report of the Joint Legislative Committee on Sabbath Law, N. Y. Leg. Doc. No. 48 (1953), 9. See Report of the Committee on the Judiciary, on the petition praying the repeal of the laws for the observance of the sabbath, &c., 5 State of New York, Assembly Docs., Doc. No. 262 (1838). This latter report, denying any intention to enforce the duties of religious conscience, *id.*, at 7, regarded retention of the Sunday law as advisable, "Viewing the sabbath merely as a civil institution, venerable from its age, consecrated as a day of rest by the usage of our fathers, and cherished by the common consent of mankind throughout the nations of christendom . . . ." *Id.*, at 5. "The experience of mankind has shewn that occasional rest is necessary for the health of the laborer and for his continued ability to toil; that 'the interval of relaxation which Sunday affords to the laborious part of mankind, contributes greatly to the comfort and satisfaction of their lives, both as it refreshes them for the time, and as it relieves their six days' labor by the prospect of a day of rest always approaching . . . .'" *Id.*, at 7. The Committee did regard as a third consideration of importance the necessity of taking account of the moral temper of the Christian majority of the community, and of affording the laborer an opportunity to attend church if he so wished. *Id.*, at 6–8.

[84] "The committee are of one mind as to the need of a weekly day of rest for the preservation of the health and strength of the community, and would therefor recommend legislation to secure to all citizens the right of one clear day's rest in seven. In so far as possible, Sunday should be maintained as the weekly day of rest; and whenever the needs of the community, public convenience or demand compel labor on Sunday, persons thus employed should be given a legal right to rest on some other day of the week." Report of the Joint Special Committee to Revise, Consolidate and Arrange the General Laws . . . Relating to the Observance of the Lord's Day, Mass. Leg. Docs., H. Doc. No. 1160 (1907), 9. For a similar, more recent expression, see Report Submitted by the Legislative Research Council Relative to Legal Holidays and Their Observance, Mass. Leg. Docs., S. Doc. No. 525 (1960), 24–25.

In the legislative debates on the bill which became the 1959 Pennsylvania Sunday retail sales act, the charge of religious purpose

by such clerical organizations as the Lord's Day Alliance, but also by labor and trade groups.[85] The interlocking sections of the Massachusetts Labor Code construct their six-day-week provisions upon the basic premise of Sunday

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was persistently made by the bill's opponents, but such a purpose was disavowed by every speaker who favored the bill. 36 Pennsylvania Legislative Journal, 143d General Assembly (1959), 1137–1140, 2564–2565, 2682–2685. See, *e. g.*, the remarks of Mr. Walker, *id.*, at 1139: "As I read this bill, I find nothing in it which is of a religious nature. The bill is prompted by the thousands of letters that we have all received in the Senate of Pennsylvania, asking us to do something for the men and women who work in the department stores. These people are not asking to go to church; they are asking for a day of rest." It is apparent even from the objections raised by the opponents that various economic interests, among them those of organized retailers' and labor groups, were influential in supporting the measure. See especially *id.*, at 2682–2683.

[85] Jacoby, Remember the Sabbath Day?—The Nature and Causes of the Changes in Sunday Observance Since 1800 (Dissertation in Sociology, Microfilm, University of Pennsylvania Library (1942)), pp. 137–140, 147–148, 154–155, 200–202, c. 9; Kirstein, Stores and Unions (1950), 19–21; State of New York, Second Report of the Joint Legislative Committee on Sabbath Law, N. Y. Leg. Doc. No. 48 (1953), 16 *et seq.;* Report of the Unpaid Special Commission to Investigate . . . the Laws Relating to the Observance of the Lord's Day, Mass. Leg. Docs., H. Doc. No. 2413 (1954), 6; 36 Pennsylvania Legislative Journal, 143d General Assembly (1959), 1139, 2553. See the Sunday Business resolution of the 1959 and 1960 Conventions of the National Retail Merchants Association, 41 Stores 6–7 (Feb. 1959); 42 Stores 13 (Feb. 1960); and see note 40 *supra.* Frequently legislation closing establishments of a given trade is the product of lobbying efforts by associations of traders seeking to quash the competitive pressures which force unwanted Sunday labor. See *Gundaker Central Motors, Inc.*, v. *Gassert,* 23 N. J. 71, 127 A. 2d 566 (1956), app. dism'd for want of a substantial federal question, 354 U. S. 933; *Breyer* v. *State,* 102 Tenn. 103, 50 S. W. 769 (1899). But see Sunday Observance, Hearings before the Subcommittee on Judiciary of the Committee on the District of Columbia, House of Representatives, on H. R. 7189 and H. R. 10311, 69th Cong., 1st

rest.[86] Other States have similar laws.[87] When in Pennsylvania motion pictures were excepted from the Lord's day statute, a day-of-rest-in-seven clause for motion picture personnel was written into the exempting statute to

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Sess. (1926) (labor and trade groups oppose Sunday legislation supported primarily by clerical faction). Increasingly, the religious proponents of Sunday legislation have themselves come to couch their arguments in terms of hygienic and social, rather than transcendental, values. See Gilfillan, The Sabbath Viewed in the Light of Reason, Revelation, and History (Am. ed. 1862), 209–227; Floody, Scientific Basis of Sabbath and Sunday (2d ed. 1906), 311–315; McMillan, Influence of the Weekly Rest-Day on Human Welfare (1927).

[86] Mass. Gen. Laws Ann., 1958, c. 149, §§ 47 to 51. Section 47 provides:

"Whoever, except at the request of the employee, requires an employee engaged in any commercial occupation or in the work of any industrial process not subject to the following section or in the work of transportation or communication to do on Sunday the usual work of his occupation, unless he is allowed during the six days next ensuing twenty-four consecutive hours without labor, shall be punished by a fine of not more than fifty dollars; but this and the following section shall not be construed as allowing any work on Sunday not otherwise authorized by law."

Section 48 provides:

"Every employer of labor engaged in carrying on any manufacturing, mechanical or mercantile establishment or workshop . . . shall allow every person . . . [with exceptions: see §§ 49, 50] employed in such manufacturing, mechanical or mercantile establishment or workshop at least twenty-four consecutive hours of rest, which shall include an unbroken period comprising the hours between eight o'clock in the morning and five o'clock in the evening, in every seven consecutive days. No employer shall operate any such manufacturing, mechanical or mercantile establishment or workshop on Sunday unless he has complied with section fifty-one. . . ."

Section 51 is:

"Before operating on Sunday, every employer subject to section forty-eight . . . shall post in a conspicuous place on the premises a schedule containing a list of his employees who are required or allowed to work on Sunday, and designating the day of rest for each. No

[*Footnote 87 is on p. 503*]

fill the gap.[88] Puerto Rico's closing law, which limits the weekday hours of commercial establishments as well as proscribing their Sunday operation, does not express a religious purpose.[89] Rhode Island and South Carolina now enforce portions of their Sunday employment bans through their respective Departments of Labor.[90] It cannot be fairly denied that the institution of Sunday as a time whose occupations and atmosphere differ from those of other days of the week has now been a portion of the American cultural scene since well before the Constitution; that for many millions of people life has a hebdomadal rhythm in which this day, with all its particular associations, is the recurrent note of repose.[91] Cultural history establishes not a few practices and prohibitions religious in origin which are retained as secular

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employee shall be required or allowed to work on the day of rest designated for him."

Note the evolution of these sections through Mass. Acts 1907, c. 577, codified in the Labor Code of 1909, Mass. Acts 1909, c. 514, § 52; Mass. Acts 1913, c. 619.

[87] See Ill. Rev. Stat., 1959, c. 48, §§ 8a to 8g; N. H. Rev. Stat. Ann., 1955, §§ 275.32, 275.33; N. Y. Lab. Law § 161; Ore. Wage and Hour Comm'n Orders Nos. 8 (1959), 9 (1952), 12 (1953), CCH Lab. Law Rep., State Laws (1960), pp. 57,561, 57,562, 57,564. Cf. West's Wis. Stat. Ann., 1957, § 103.85. And see Purdon's Pa. Stat. Ann., 1952, Tit. 43, § 361.

[88] Purdon's Pa. Stat. Ann., 1960 Supp., Tit. 4, § 60. See also Me. Rev. Stat., 1954, c. 134, § 41; Sunday Entertainments Act, 1932, 22 & 23 Geo. V, c. 51, § 1 (1) (a). Cf. P. R. Laws Ann., 1955, Tit. 29, § 295.

[89] P. R. Laws Ann., 1955, Tit. 33, § 2201. Cf. Colo. Rev. Stat. Ann., 1953, § 27–1–4; R. I. Gen. Laws, 1956, § 5–16–5.

[90] R. I. Gen. Laws, 1956, §§ 25–1–6, 25–1–8; S. C. Code, 1952, Tit. 64, § 5. See also *Mullis* v. *Celanese Corp.*, 234 S. C. 380, 108 S. E. 2d 547 (1959).

[91] See Mead, The Pattern of Leisure in Contemporary American Culture, 313 Annals of The American Academy of Political and Social Science 11–12 (Sept. 1957).

institutions and ways long after their religious sanctions and justifications are gone.[92] In light of these considerations, can it reasonably be said that no substantial non-

[92] Among the many examples that might be found in Frazer's Golden Bough, see his discussions of incest and murder, The Golden Bough (3d ed., Am. reprint 1951), II The Magic Art 107–117; Taboo and the Perils of the Soul 218–219. For other classic instances in various fields, see Weston, From Ritual to Romance (Anchor ed. 1957), *passim*, especially 81–100; Gilbert Murray, "Excursus on the Ritual Forms Preserved in Greek Tragedy," in Harrison, Themis (1912), 341 *et seq.*; Kluckhohn and Leighton, The Navaho (1946), 162–163; Tawney, Religion and The Rise of Capitalism (3d Mentor ed. 1950), *passim*.

See Weekly Rest in Commerce and Offices, Report A, International Labour Conference, 26th Sess., Geneva, 1940 (1939), 2: "Sunday rest laws, from the Fourth Commandment downwards, have always been social as well as religious in intention, seeking to provide a periodic rest from daily toil as well as an opportunity for religious observance." Among the weekly-rest legislation of the many nations surveyed by the International Labor Organization's pertinent reports, the system most common is to provide for a uniform rest day, usually on Sunday. See, *id.*, *passim*, especially at 71–74; Weekly Rest in Commerce and Offices, Report VII (1), International Labour Conference, 39th Sess., Geneva, 1956 (1955), *passim*, especially at 18, 24–26. "This tendency to ensure that the weekly rest is taken at the same time by all workers on the day established by tradition or custom has an obvious social purpose, namely to enable the workers to take part in the life of the community and in the special forms of recreation which are available on certain days." *Id.*, at 24. Commenting on the world-wide practice of weekly rest, the ILO reporters observe: "Quite often the practice originated as a religious observance and developed into a tradition which has persisted despite the disappearance of the original reasons or the decline in the part played by religious institutions in the social structure. At a very early stage this religious observance was backed by civil law and even today traces of this can often be found in constitutions and civil codes, in municipal by-laws and in the regulations of many countries concerning opening and closing hours of commercial and other establishments. Labour legislation has endeavoured to maintain and extend this practice in the light of the economic needs of modern society . . . ." *Id.*, at 3.

ecclesiastical purpose relevant to a well-ordered social life exists for Sunday restrictions?

It is urged, however, that if a day of rest were the legislative purpose, statutes to secure it would take some other form than the prohibition of activity on Sunday.[93] Such statutes, it is argued, would provide for one day's labor

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[93] The District Court in the *Gallagher* case believed that the Massachusetts Lord's day statute could not reasonably be regarded as a day-of-rest provision, first, because its extensive exceptions allowed many persons to labor seven days a week and, second, because Massachusetts has other statutes providing for twenty-four consecutive hours of rest every seven days. Mass. Gen. Laws Ann., 1958, c. 149, §§ 47 to 51. These latter provisions, however, by their express terms, supplement, do not supplant, the Sunday prohibitions. The two objections to some extent answer each other: the existence of the six-day law is justified by, and in part provides for, the deficiencies of the Lord's day statute as day-of-rest legislation. But, in any event, the Lord's day statute is not merely day-of-rest legislation. It is common-day-of-rest legislation. To certain persons who, for reasons deemed compelling by the Massachusetts Legislature, cannot share in this common day—simply because not all activity can cease, even on Sunday—the Labor Code at least assures a day of physical rest. Compare the conclusions found in Weekly Rest in Commerce and Offices, Report VII (1), International Labour Conference, 39th Sess., Geneva, 1956 (1955), 52. It may be noted that a large majority of the thirty-four States having comprehensive Sunday restrictions also have some six-day-week provisions in their labor or child-labor codes or regulations. See Appendix II to this opinion, *post*, p. 551.

The District Court, in concluding that the Massachusetts Lord's day statute is religious legislation, took account of its origins in colonial laws, of its language and the language of the Massachusetts courts in cases applying it, of the statutory exceptions permitting certain recreational activity only in the afternoon hours and, in some cases, at a designated distance from places of worship, and of statements in an *amicus* brief indicating that *amici* had an interest in preventing the secularization of Sunday. The implications of history and of the statutory language have already been discussed herein. The opinions in the Massachusetts cases adverted to by the court below, the latest decided in 1923, are insufficient to establish that the Massa-

stoppage in seven, leaving the choice of the day to the individual; or, alternatively, would fix a common day of rest on some other day—Monday or Tuesday. But, in all fairness, certainly, it would be impossible to call unreasonable a legislative finding that these suggested alternatives were unsatisfactory. A provision for one day's closing per week, at the option of every particular enterpriser, might be disruptive of families whose members are employed by different enterprises.[94] Enforcement might be more difficult, both because violation would be less easily discovered and because such a law would not be seconded, as is Sunday legislation, by the community's moral temper. More important, one-day-a-week laws do not accomplish all that is accomplished by Sunday laws. They provide only a periodic physical rest, not that atmosphere of entire community repose which Sunday has traditionally brought and which, a legislature might reasonably believe, is necessary to the welfare of those who for

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chusetts legislation as applied in 1960 to prohibit the Sunday operation of supermarkets lacks substantial secular purposes and effects. See note 101, *infra*. The validity of applications of the statute possibly affected by the afternoon-hour exceptions is not now presented; suffice to say that these exceptions do not render the legislation unconstitutional in its entirety or in the circumstances of this litigation. And the purposes, views and intentions of *amici*, of course, cannot be attributed to the legislature of the State of Massachusetts.

[94] See text at note 37, *supra*. Cf. Report of the Unpaid Special Commission to Investigate . . . the Laws Relating to the Observance of the Lord's Day, Mass. Leg. Docs., H. Doc. No. 2413 (1954), 9: "The wave of materialism which is sweeping the country makes it most important that one day be set aside for worship, rest and to give all persons an opportunity to strengthen the bulwark of our American civilization—the home." Compare Report on the Weekly Rest-Day in Industrial and Commercial Employment, Report VII, International Labour Conference, 3d Sess., Geneva, 1921 (1921), 127: "Social custom requires that the same rest-day should as far as possible be accorded to the members of the same working family and to the working class community as a whole."

many generations have been accustomed to its recuperative effects.

The same considerations might also be deemed to justify the choice of Sunday as the single common day when labor ceases. For to many who do not regard it sacramentally, Sunday is nevertheless a day of special, long-established associations, whose particular temper makes it a haven that no other day could provide. The will of a majority of the community, reflected in the legislative process during scores of years, presumably prefers to take its leisure on Sunday.[95] The spirit of any people expresses in goodly measure the heritage which links it to its past. Disruption of this heritage by a regulation which, like the unnatural labors of Claudius' shipwrights, does not divide the Sunday from the week, might prove a measure ill-designed to secure the desirable community repose for which Sunday legislation is designed. At all events, Maryland, Massachusetts and Pennsylvania, like thirty-one other States with similar regulations, could reasonably so find. Certainly, from failure to make a substitution for Sunday in securing a socially desirable day of surcease from subjection to labor and routine a purpose cannot be derived to establish or promote religion.

The question before the Court in these cases is not a new one. During a hundred and fifty years Sunday laws have been attacked in state and federal courts as disregarding constitutionally demanded Church-State separation, or infringing protected religious freedoms, or on the ground that they subserved no end within the legitimate compass of legislative power. One California court in 1858 held California's Sunday statute unconstitutional.[96]

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[95] See note 92, *supra*. See also the resolution of the International Congress for weekly rest, 1889, quoted in note 40, *supra*.

[96] *Ex parte Newman*, 9 Cal. 502. Justice Field's dissent in this case has become a leading pronouncement on the constitutionality of Sunday laws.

That decision was overruled three years later.[97] Every other appellate court that has considered the question has found the statutes supportable as civil regulations [98] and

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[97] *Ex parte Andrews,* 18 Cal. 678. The controlling California constitutional guarantee of religious freedom comports only an analogue to the First Amendment's "free exercise," not an analogue to the "establishment" clause.

[98] *E. g., Petit* v. *Minnesota,* 177 U. S. 164. Cf. *Hennington* v. *Georgia,* 163 U. S. 299; *Soon Hing* v. *Crowley,* 113 U. S. 703, 710. *In re Sumida,* 177 Cal. 388, 170 P. 823 (1918); *McClelland* v. *City of Denver,* 36 Colo. 486, 86 P. 126 (1906) (barbering prohibited); *Rosenbaum* v. *City & County of Denver,* 102 Colo. 530, 81 P. 2d 760 (1938) (automobile sales prohibited); *Mosko* v. *Dunbar,* 135 Colo. 172, 309 P. 2d 581 (1957) (automobile sales prohibited); *Walsh* v. *State,* 33 Del. [3 W. W. Harr.] 514, 139 A. 257 (1927), *semble; Gillooley* v. *Vaughan,* 92 Fla. 943, 956, 110 So. 653, 657 (1926) (cabarets and cinema prohibited); *State* v. *Dolan,* 13 Idaho 693, 92 P. 995 (1907); *State* v. *Cranston,* 59 Idaho 561, 85 P. 2d 682 (1938); *McPherson* v. *Village of Chebanse,* 114 Ill. 46, 28 N. E. 454 (1885) (ordinance held authorized by police power); *Voglesong* v. *State,* 9 Ind. 112 (1857); *Foltz* v. *State,* 33 Ind. 215 (1870); *State* v. *Linsig,* 178 Iowa 484, 159 N. W. 995 (1916); *People* v. *DeRose,* 230 Mich. 180, 203 N. W. 95 (1925) (ordinance closing markets held authorized by police power); *In re Berman,* 344 Mich. 598, 75 N. W. 2d 8 (1956) (ordinance prohibiting sale of furniture held authorized by police power); *State* v. *Dean,* 149 Minn. 410, 184 N. W. 275 (1921); *Power* v. *Nordstrom,* 150 Minn. 228, 184 N. W. 967 (1921) (ordinance closing cinema, shows, theater, held authorized by police power); *Paramount-Richards Theatres, Inc.,* v. *City of Hattiesburg,* 210 Miss. 271, 49 So. 2d 574 (1950); *State* v. *Loomis,* 75 Mont. 88, 242 P. 344 (1925) (closing dance halls); *Gundaker Central Motors, Inc.,* v. *Gassert,* 23 N. J. 71, 127 A. 2d 566 (1956), app. dism'd for want of a substantial federal question, 354 U. S. 933 (automobile trading prohibited); *People* v. *Havnor,* 149 N. Y. 195, 43 N. E. 541 (1896), writ of error dism'd, 170 U. S. 408 (barbering prohibited); *State* v. *Weddington,* 188 N. C. 643, 125 S. E. 257 (1924) (ordinance held authorized by police power); *State* v. *Haase,* 97 Ohio App. 377, 116 N. E. 2d 224 (1953); *Ex parte Johnson,* 20 Okla. Cr. 66, 201 P. 533 (1921) (ordinance closing cinema and theaters held authorized by police power); *Ex parte Johnson,* 77 Okla. Cr. 360, 141 P. 2d 599 (1943) (barbering prohibited); *Ex parte Northrup,* 41 Ore. 489, 69

not repugnant to religious freedom.[99] These decisions are assailed as latter-day justifications upon specious civil grounds of legislation whose religious purposes were either overlooked or concealed by the judges who passed upon it.

P. 445 (1902) (barbering prohibited); *State* v. *Nicholls*, 77 Ore. 415, 151 P. 473 (1915); *Breyer* v. *State*, 102 Tenn. 103, 50 S. W. 769 (1899) (barbering prohibited); *State* v. *Sopher*, 25 Utah 318, 71 P. 482 (1903); *Norfolk & Western R. Co.* v. *Commonwealth*, 93 Va. 749, 24 S. E. 837 (1896) (statute prohibiting operation of railroads held sustainable as exercise of police power); *State* v. *Nichols*, 28 Wash. 628, 69 P. 372 (1902); *City of Seattle* v. *Gervasi*, 144 Wash. 429, 258 P. 328 (1927) (comprehensive ordinance found authorized by police power). See also *Kreider* v. *State*, 103 Ark. 438, 440, 147 S. W. 449, 450 (1912); *State* v. *Miller*, 68 Conn. 373, 377–378, 36 A. 795, 796 (1896); *State* v. *Diamond*, 56 N. D. 854, 857–858, 219 N. W. 831, 832–833 (1928); *Rich* v. *Commonwealth*, 198 Va. 445, 449, 453, 94 S. E. 2d 549, 552, 555 (1956). Compare *Pacesetter Homes, Inc.*, v. *Village of South Holland*, 18 Ill. 2d 247, 163 N. E. 2d 464 (1960), admitting legislative power to prohibit Sunday activity disturbing to the community, but striking down a blanket closing ordinance with virtually none of the usual exceptions as too extreme to be justified under this rationale.

[99] *E. g.*, *Frolickstein* v. *Mayor of Mobile*, 40 Ala. 725 (1867); *Lane* v. *McFadyen*, 259 Ala. 205, 66 So. 2d 83 (1953) (issue not raised by litigants; court nevertheless considers it); *Elliott* v. *State*, 29 Ariz. 389, 242 P. 340 (1926) (dictum); *Shover* v. *State*, 10 Ark. 259 (1850); *Scales* v. *State*, 47 Ark. 476, 1 S. W. 769 (1886); *Ex parte Koser*, 60 Cal. 177 (1882); *Karwisch* v. *Mayor of Atlanta*, 44 Ga. 204 (1871), settling the issue left open in *Sanders* v. *Johnson*, 29 Ga. 526 (1859); *Humphrey Chevrolet, Inc.*, v. *City of Evanston*, 7 Ill. 2d 402, 131 N. E. 2d 70 (1955) (at least as applied to corporate and non-Sabbatarian parties); *State* v. *Blair*, 130 Kan. 863, 288 P. 729 (1930); *State* v. *Haining*, 131 Kan. 853, 293 P. 952 (1930); *Strand Amusement Co.* v. *Commonwealth*, 241 Ky. 48, 43 S. W. 2d 321 (1931), *semble*; *State* v. *Bott*, 31 La. Ann. 663 (1879) (forbidding liquor sales); *State ex rel. Walker* v. *Judge*, 39 La. Ann. 132, 1 So. 437 (1887); *Judefind* v. *State*, 78 Md. 510, 28 A. 405 (1894) (considered dictum); *Hiller* v. *State*, 124 Md. 385, 92 A. 842 (1914) (prohibiting sports); *Commonwealth* v. *Has*, 122 Mass. 40 (1877); *Commonwealth* v. *Chernock*, 336 Mass. 384, 145 N. E. 2d 920 (1957); *Scougale* v. *Sweet*, 124 Mich. 311, 82 N. W. 1061 (1900) (considered dictum);

Of course, it is for this Court ultimately to determine whether federal constitutional guarantees are observed or undercut. But this does not mean that we are to be indifferent to the unanimous opinion of genera-

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State v. *Petit*, 74 Minn. 376, 77 N. W. 225 (1898), aff'd, 177 U. S. 164; *State* v. *Weiss*, 97 Minn. 125, 105 N. W. 1127 (1906); *State* v. *Ambs*, 20 Mo. 214 (1854); *Komen* v. *City of St. Louis*, 316 Mo. 9, 289 S. W. 838 (1926) (closing bakeries) (subsequently overruled on another point); *In re Caldwell*, 82 Neb. 544, 118 N. W. 133 (1908), *semble; Stewart Motor Co.* v. *City of Omaha*, 120 Neb. 776, 235 N. W. 332 (1931) (prohibiting automobile sales), *semble; Two Guys from Harrison, Inc.*, v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960); *Lindenmuller* v. *People*, 33 Barb. 548 (N. Y. Sup. Ct. 1861) (closing theaters); *Neuendorff* v. *Duryea*, 69 N. Y. 557 (1877) (same); *People* v. *Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), app. dism'd for want of a substantial federal question, 341 U. S. 907; *State* v. *McGee*, 237 N. C. 633, 75 S. E. 2d 783 (1953), app. dism'd for want of a substantial federal question, 346 U. S. 802; *State ex rel. Temple* v. *Barnes*, 22 N. D. 18, 132 N. W. 215 (1911) (closing theaters); *State* v. *Powell*, 58 Ohio St. 324, 50 N. E. 900 (1898) (prohibiting sports); *State* v. *Kidd*, 167 Ohio St. 521, 150 N. E. 2d 413 (1958), app. dism'd for want of a substantial federal question, 358 U. S. 131, 132; *Commonwealth* v. *Wolf*, 3 S. & R. 48 (Pa. 1817); *Specht* v. *Commonwealth*, 8 Pa. 312 (1848); *Commonwealth* v. *Bauder*, 188 Pa. Super. 424, 145 A. 2d 915 (1958); *City Council* v. *Benjamin*, 2 Strob. L. 508 (S. C. 1848); *Xepapas* v. *Richardson*, 149 S. C. 52, 146 S. E. 686 (1929); *Ex parte Sundstrom*, 25 Tex. App. 133, 8 S. W. 207 (1888); *Sayeg* v. *State*, 114 Tex. Cr. R. 153, 25 S. W. 2d 865 (1930), *semble; Clark* v. *State*, 167 Tex. Cr. R. 204, 319 S. W. 2d 726 (1959), *semble; Pirkey Bros.* v. *Commonwealth*, 134 Va. 713, 114 S. E. 764 (1922) (issue not raised by litigants; court nevertheless considers it); *Crook* v. *Commonwealth*, 147 Va. 593, 136 S. E. 565 (1927) (same); *State* v. *Bergfeldt*, 41 Wash. 234, 83 P. 177 (1905), writ of error dism'd, 210 U. S. 438 (prohibiting barbering); *State* v. *Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949). Following the decision in the *Gallagher* case below, and relying on it, a Pennsylvania Court of Quarter Sessions recently held the 1959 Pennsylvania Sunday retail sales act unconstitutional on the grounds that its incidence is discriminatory and arbitrary and that it operates to prefer Sunday-observing religions. *Common-*

tions of judges who, in the conscientious discharge of obligations as solemn as our own, have sustained the Sunday laws as not inspired by religious purpose. The Court did not ignore that opinion in *Friedman* v. *New York,* 341 U. S. 907; *McGee* v. *North Carolina,* 346 U. S. 802; *Kidd* v. *Ohio,* 358 U. S. 132; and *Ullner* v. *Ohio,* 358 U. S. 131, dismissing for want of a substantial federal question appeals from state decisions sustaining Sunday laws which were obnoxious to the same objections urged in the present cases.[100] I cannot ignore that consensus of view now. The statutes of Maryland, Massachusetts and Pennsylvania which we here examine are not constitutionally forbidden fusions of church and state.[101]

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wealth v. *Cavalerro,* 142 Legal Intelligencer 519 (Phila., Ap. 22, 1960) (Pa. Q. S. 1960). Another Pennsylvania court of first impression shortly thereafter reached the same conclusions. *Bargain City U. S. A., Inc.,* v. *Dilworth,* 142 Legal Intelligencer 813 (Phila., June 22, 1960) (Pa. C. P. 1960). These appear to be the only two standing state-court decisions striking down Sunday laws, as, in part, violative of religious freedom, in a century and a half of litigation.

In *District of Columbia* v. *Robinson,* 30 App. D. C. 283 (1908), the Court of Appeals, while recognizing the validity as civil regulations of modern Sunday closing statutes, held the 1723 Maryland Sunday law obsolete and inapplicable in the District of Columbia, largely on the ground that its purpose was religious. Compare *O'Hanlon* v. *Myers,* 10 Rich. L. 128 (S. C. 1856). In *Brunswick-Balke-Collander Co.* v. *Evans,* 228 F. 991 (D. C. D. Ore. 1916), app. dism'd, 248 U. S. 587, a Federal District Court sustained Oregon's general closing law against contentions that it violated religious freedom. Cf. *Swann* v. *Swann,* 21 F. 299 (C. C. E. D. Ark. 1884); *In re King,* 46 F. 905 (C. C. W. D. Tenn. 1891).

[100] Appeals in cases challenging Sunday laws as violative of the Due Process Clause were also dismissed for want of a substantial federal question in *Gundaker Central Motors, Inc.,* v. *Gassert,* 354 U. S. 933, and *Grochowiak* v. *Pennsylvania,* 358 U. S. 47.

[101] This does not, of course, imply an opinion of the legitimacy of all the Sunday provisions of all the States, or of every application of the statutes now before this Court. It is true that the Massachu-

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Appellees in the *Gallagher* case and appellants in the *Braunfeld* case contend that, as applied to them, Orthodox Jewish retailers and their Orthodox Jewish customers, the Massachusetts Lord's day statute and the Pennsylvania Sunday retail sales act violate the Due Process Clause of the Fourteenth Amendment because, in effect, the statutes deter the exercise and observance of their religion. The argument runs that by compelling the Sunday closing of retail stores and thus making unavailable for business and shopping uses one-seventh part of the week, these statutes force them either to give up the Sabbath observance—an essential part of their faith—or to forego advantages enjoyed by the non-Sabbatarian majority of the community. They point out, moreover, that because of the prevailing five-day working week of a large proportion of the population, Sunday is a day peculiarly profitable to retail sellers and peculiarly convenient to retail shoppers. The records in these cases support them in this.

The claim which these litigants urge assumes a number of aspects. First, they argue that any one-common-day-

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setts courts have at times expressed an intention to apply the Massachusetts Lord's day statute in accordance with the temper in which its historical antecedents were enacted. Compare the language of *Davis* v. *City of Somerville,* 128 Mass. 594 (1880); *Commonwealth* v. *Dextra,* 143 Mass. 28, 8 N. E. 756 (1886); *Commonwealth* v. *White,* 190 Mass. 578, 77 N. E. 636 (1906); *Commonwealth* v. *McCarthy,* 244 Mass. 484, 138 N. E. 835 (1923), with the Virginia cases, *Francisco* v. *Commonwealth,* 180 Va. 371, 23 S. E. 2d 234 (1942), and *Rich* v. *Commonwealth,* 198 Va. 445, 94 S. E. 2d 549 (1956). See *Commonwealth* v. *Sampson,* 97 Mass. 407 (1867). But see *Stone* v. *Graves,* 145 Mass. 353, 13 N. E. 906 (1887). It will be time enough to pass upon the constitutionality of such applications as do not reasonably come within the rationale of the present decision, and of *Commonwealth* v. *Has,* 122 Mass. 40, 42 (1877), if and when those cases arise. See *Brattle Films, Inc.,* v. *Commissioner of Public Safety,* 333 Mass. 58, 127 N. E. 2d 891 (1955).

of-closing regulation which selected a day other than their Sabbath would be *ipso facto* unconstitutional in its application to them because of its effect in preferring persons who observe no Sabbath, therefore creating economic pressures which urge Sabbatarians to give up their usage. The creation of this pressure by the Sunday statutes, it is said, is not so necessary a means to the achievement of the ends of day-of-rest legislation as to justify its employment when weighed against the injury to Sabbatarian religion which it entails. Six-day-week regulation, with the closing day left to individual choice, is urged as a more reasonable alternative.

Second, they argue that even if legitimate state interests justify the enforcement against persons generally of a single common day of rest, the choice of Sunday as that day violates the rights of religious freedom of the Sabbatarian minority. By choosing a day upon which Sunday-observing Christians worship and abstain from labor, the statutes are said to discriminate between religions. The Sunday observer may practice his faith and yet work six days a week, while the observer of the Jewish Sabbath, his competitor, may work only during five days, to the latter's obvious disadvantage. Orthodox Jewish shoppers whose jobs occupy a five-day week have no week-end shopping day, while Sunday-observing Christians do. Leisure to attend Sunday services, and relative quiet throughout their duration, is assured by law, but no equivalent treatment is accorded to Friday evening and Saturday services. Sabbatarians feel that the power of the State is employed to coerce their observance of Sunday as a holy day; that the State accords a recognition to Sunday Christian doctrine which is withheld from Sabbatarian creeds. All of these prejudices could be avoided, it is argued, without impairing the effectiveness of common-day-of-rest regulation, either by fixing as the rest time some day which is held sacred by no sect, or by pro-

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viding for a Sunday work ban from which Sabbatarians are excepted, on condition of their abstaining from labor on Saturday. Failure to adopt these alternatives in lieu of Sunday statutes applicable to Sabbatarians is said to constitute an unconstitutional choice of means.

Finally, it is urged that if, as means, these statutes *are* necessary to the goals which they seek to attain, nevertheless the goals themselves are not of sufficient value to society to justify the disadvantage which their attainment imposes upon the religious exercise of Sabbatarians.

The first of these contentions has already been discussed. The history of Sunday legislation convincingly demonstrates that Sunday statutes may serve other purposes than the provision merely of one day of physical stoppage in seven. These purposes fully justify common-day-of-rest statutes which choose Sunday as the day.

In urging that an exception in favor of those who observe some other day as sacred would not defeat the ends of Sunday legislation, and therefore that failure to provide such an exception is an unnecessary—hence an unconstitutional—burden on Sabbatarians, the *Gallagher* appellees and *Braunfeld* appellants point to such exceptions in twenty-one of the thirty-four jurisdictions which have statutes banning labor or employment or the selling of goods on Sunday.[102] Actually, in less than half of these twenty-one States does the exemption extend to

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[102] Wisconsin, which does not have a general ban on Sunday labor, but does have a statute prohibiting automobile trading on that day, also makes an exception in favor of those who conscientiously observe the Jewish Sabbath. West's Wis. Stat. Ann., 1961 Supp., § 218.01 (3) (a) 21. Other jurisdictions having statutes which cover only one or a few enumerated activities provide no Sabbatarian exception. Fla. Laws 1959, Special Acts, c. 59–1650, a local-option shop-closing statute applicable to Orange County, does contain such an exception, and in Michigan there are similar excepting clauses attached to barbering and auto-trading bans as well as to the general Sunday laws. Mich. Stat. Ann., 1957 Rev. Vol., §§ 18.122, 9.2702.

sales activity as well as to labor.[103] There are tenable reasons why a legislature might choose not to make such an exception. To whatever extent persons who come within the exception are present in a community, their activity would disturb the atmosphere of general repose and reintroduce into Sunday the business tempos of the week. Administration would be more difficult, with violations less evident and, in effect, two or more days to police

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[103] In Kansas, Massachusetts, Missouri, New Jersey, New York, North Dakota, Rhode Island, South Dakota, Texas, Washington, and probably in Connecticut and Maine, the exception does not cover the sale of goods. Kan. Gen. Stat. Ann., 1949, § 21–953, *State* v. *Haining,* 131 Kan. 853, 293 P. 952 (1930); Mass. Gen. Laws Ann., 1958, c. 136, § 6, *Commonwealth* v. *Has,* 122 Mass. 40 (1877); *Commonwealth* v. *Starr,* 144 Mass. 359, 11 N. E. 533 (1887); *Commonwealth* v. *Kirshen,* 194 Mass. 151, 80 N. E. 2 (1907); Vernon's Mo. Stat. Ann., 1953, § 563.700; N. J. Stat. Ann., 1953, § 2A:171–4; McKinney's N. Y. Laws, Pen. Law § 2144, *People* v. *Friedman,* 302 N. Y. 75, 96 N. E. 2d 184 (1950), app. dism'd for want of a substantial federal question, 341 U. S. 907; cf. *People* v. *Adler,* 174 App. Div. 301, 160 N. Y. S. 539 (1916) (manufacturing activities); N. D. Century Code, 1960, § 12–21–17; R. I. Gen. Laws, 1956, § 11–40–4 (shops, mechanical work in compact places, etc.); S. D. Code, 1939, § 13.1710; Vernon's Tex. Stat., 1952, Pen. Code, Art. 284; Wash. Rev. Code, 1959, § 9.76.020, *State* v. *Grabinski,* 33 Wash. 2d 603, 206 P. 2d 1022 (1949); Conn. Gen. Stat. Rev., 1958, § 53–303; Me. Rev. Stat., 1954, c. 134, § 44. Cf. *State* v. *Weiss,* 97 Minn. 125, 105 N. W. 1127 (1906). The exemption in Indiana, Kentucky, Michigan, Nebraska, Ohio, Oklahoma, Virginia and West Virginia does extend to selling, but in the last two named States an exempted person may not employ other persons not of his belief on Sunday. Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 10–4301; Ky. Rev. Stat., 1960, § 436.160, *Cohen* v. *Webb,* 175 Ky. 1, 192 S. W. 828 (1917); Mich. Stat. Ann., 1957 Rev. Vol., §§ 18.855, 18.856 (1), *Builders Assn.* v. *City of Detroit,* 295 Mich. 272, 294 N. W. 677 (1940), *semble;* Neb. Rev. Stat., 1956 Reissued Vol., § 28–940; Page's Ohio Rev. Code Ann., 1954, § 3773.24; Okla. Stat. Ann., 1958, Tit. 21, § 909, *Krieger* v. *State,* 12 Okla. Cr. 566, 160 P. 36 (1916); Va. Code, 1960 Replacement Vol., § 18.1–359; W. Va. Code Ann., 1955, c. 61, Art. 8, § 18 [6073]. The meaning of the provision in Illinois, Ill. Rev. Stat., 1959, c. 38, § 549, is not clear.

instead of one. If it is assumed that the retail demand for consumer items is approximately equivalent on Saturday and on Sunday, the Sabbatarian, in proportion as he is less numerous, and hence the competition less severe, might incur through the exception a competitive advantage over the non-Sabbatarian, who would then be in a position, presumably, to complain of discrimination against *his* religion.[104] Employers who wished to avail themselves of the exception would have to employ only their co-religionists,[105] and there might be introduced into private employment practices an element of religious differentiation which a legislature could regard as undesirable.[106]

Finally, a relevant consideration which might cause a State's lawmakers to reject exception for observers of another day than Sunday is that administration of such a provision may require judicial inquiry into religious belief. A legislature could conclude that if all that is made requisite to qualify for the exemption is an abstinence from labor on some other day, there would be nothing to prevent an enterpriser from closing on his slowest business day, to take advantage of the whole of

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[104] See 101 H. L. Deb. 430 (5th ser. 1935–1936); 311 H. C. Deb. 492 (5th ser. 1935–1936). On this ground some state courts have even held Sabbatarian exceptions invalid as discriminatory. *City of Shreveport* v. *Levy*, 26 La. Ann. 671 (1874); *Kislingbury* v. *Treasurer of Plainfield*, 10 N. J. Misc. 798, 160 A. 654 (C. P. 1932). See *State* v. *Grabinski*, 33 Wash. 2d 603, 206 P. 2d 1022 (1949), reserving the question. However, in *Johns* v. *State*, 78 Ind. 332 (1881), the exemption was sustained.

[105] See Va. Code, 1960 Replacement Vol., § 18.1–359; W. Va. Code Ann., 1955, c. 61, Art. 8, § 18 [6073]; Factories Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 67, § 91.

[106] Both Pennsylvania and Massachusetts have fair employment practices acts prohibiting religious discrimination in hiring. Purdon's Pa. Stat. Ann., 1960 Supp., Tit. 43, §§ 951 to 963; Mass. Gen. Laws Ann., 1958, c. 151B, §§ 1 to 10.

the profitable week-end trade, thereby converting the Sunday labor ban, in effect, into a day-of-rest-in-seven statute, with choice of the day left to the individual. All of the state exempting statutes seem to reflect this consideration. Ten of them require that a person claiming exception "conscientiously" believe in the sanctity of another day or "conscientiously" observe another day as the Sabbath.[107] Five demand that he keep another day as "holy time." [108] Three allow the exemption only to members of a "religious" society observing another day,[109] and a fourth provides for proof of membership in such a society by the certificate of a preacher or of any three adherents.[110] In Illinois the claimant must observe some day as a "Sabbath," and in New Jersey he must prove that he devotes that day to religious exercises.[111] Connecticut, one of the jurisdictions demanding conscientious belief, requires in addition that he who seeks the benefit of the exception file a notice of such belief with the prosecuting attorney.[112]

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[107] Connecticut, Indiana, Maine, Massachusetts, Michigan, Nebraska, Ohio, Texas, Virginia, West Virginia. Wisconsin's statute is similar.

[108] New York, North Dakota, Oklahoma, South Dakota, Washington.

[109] Kansas, Kentucky, Missouri.

[110] Rhode Island.

[111] This New Jersey excepting statute appears to be currently inoperative. The State's general labor ban has recently been held impliedly repealed by the enactment of a Sunday retail sales prohibition, *Two Guys from Harrison, Inc.*, v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960), and the excepting provision, by its terms, does not extend to Sunday selling by Sabbatarians.

[112] And see *In re Berman*, 344 Mich. 598, 75 N. W. 2d 8 (1956), determining the posture under a conscientious-Sabbatarian exception of a Sabbatarian owner of three stores who operated one himself, closing on Saturdays and opening on Sundays, and the other two through agents, opening Saturdays and closing Sundays.

Indicative of the practical administrative difficulties which may arise in attempts to effect, consistently with the purposes of Sunday closing legislation, an exception for persons conscientiously observing another day as Sabbath, are the provisions of § 53 of the British Shops Act, 1950,[113] continuing in substance § 7 of the Shops (Sunday Trading Restriction) Act, 1936.[114] These were the product of experience with earlier forms of exemptions which had proved unsatisfactory,[115] and the new 1936 provisions were enacted only after the consideration and rejection of a number of proposed alternatives.[116] They allow shops

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[113] 14 Geo. VI, c. 28.

[114] 26 Geo. V & 1 Edw. VIII, c. 53.

[115] Principally the Jewish exemption in the Hairdressers' and Barbers' Shops (Sunday Closing) Act, 1930, 20 & 21 Geo. V, c. 35, § 3. See 101 H. L. Deb. 439, 442 (5th ser. 1935–1936); 311 H. C. Deb. 502 (5th ser. 1935–1936). The 1930 act was repealed by the Shops Act, 1950, 14 Geo. VI, c. 28, Eighth Schedule, although § 67 of the latter act continues similar provisions for Scotland. The problem of special Sunday regulation for the Jewish population had involved Parliament at least since the turn of the century. Sections 47, 48 of the Factory and Workshop Act, 1901, 1 Edw. VII, c. 22, permitted Jewish employers certain exemptions from that act's prohibition of Sunday employment of women and children. The terms of the exemption are altered by the Factories Act, 1937, 1 Edw. VIII & 1 Geo. VI, c. 67, § 91. See also Report from the Select Committee of the House of Lords on the Sunday Closing (Shops) Bill [H. L.] (1905), 71–83, 142–147, 153–157.

[116] Among these was a provision permitting any shopkeeper in London to elect to close on Saturdays instead of Sundays. See 311 H. C. Deb. 447–461 (5th ser. 1935–1936). The Jewish exemption provisions of § 7 were the most strenuously debated provisions of the Shops (Sunday Trading Restriction) Act. See 308 H. C. Deb. 2188–2192, 2202–2203, 2217 (5th ser. 1935–1936); 101 H. L. Deb. 263, 270, 427–434 (5th ser. 1935–1936); 311 H. C. Deb. 447–461, 478–507 (5th ser. 1935–1936). The recognized inadequacy of the exemption was in part responsible for the act's special provisions (§ 8) for the London area, where the bulk of the English Jewish trading population does business. *Id.*, at 2087, 2090–2091, 2103–2104.

which are registered under the section and which remain closed on Saturday to open for trade until 2 p. m. on Sunday. Applications for registration must contain a declaration that the shop occupier "conscientiously objects on religious grounds to carrying on trade or business on the Jewish Sabbath," [117] and any person who, to procure registration, "knowingly or recklessly makes an untrue statement or untrue representation," is subject to fine and imprisonment. Whenever upon representations made to them the local authorities find reason to believe that a registered occupier is not a person of the Jewish religion or "that a conscientious objection on religious grounds . . . is not genuinely held," the authorities may furnish particulars of the case to a tribunal established after consultation with the London Committee of Deputies of the British Jews,[118] which tribunal, if in their opinion the occupier is not a person of the Jewish religion or does not genuinely hold a conscientious objection to trade on the Jewish Sabbath, shall so report to the local authorities; and upon this report the occupier's registration is to be revoked.[119] Surely, in light of the delicate

[117] See the statutory form prescribed by the Shops Regulations, 1937, S. R. & O., 1937, No. 271, Schedules IV (a) and IV (b).

[118] The constitution of the tribunals for Jews and for Seventh Day Adventists (see note 119, *infra*) and the procedures of the tribunals are prescribed by the Shops Regulations, 1937, S. R. & O., 1937, No. 271, Reg. 4, and the Shops (Procedure for Jewish Tribunals) Regulations, 1937, S. R. & O., 1937, No. 1038.

[119] Other provisions indicate the intricate problems of administration which the exemption raises. Section 53 (3) provides that in the case of shops occupied by a partnership or company the application of the exemption is determined by the religion of the majority of the partners or directors. Section (5) prohibits the occupier of a shop registered for the exemption from keeping open any other shop on Saturday, and prohibits any person who has made a statutory declaration of conscientious objection for purposes of registration from working in, or employing any other person in, or being concerned in the control of a firm which employs any other person in, a shop open on

enforcement problems to which these provisions bear witness, the legislative choice of a blanket Sunday ban applicable to observers of all faiths cannot be held unreasonable. A legislature might in reason find that the alternative of exempting Sabbatarians would impede the effective operation of the Sunday statutes, produce harmful collateral effects, and entail, itself, a not inconsiderable intrusion into matters of religious faith. However preferable, personally, one might deem such an exception, I cannot find that the Constitution compels it.

It cannot, therefore, be said that Massachusetts and Pennsylvania have imposed gratuitous restrictions upon the Sunday activities of persons observing the Orthodox Jewish Sabbath in achieving the legitimate secular ends at which their Sunday statutes may aim. The remaining question is whether the importance to the public of those ends is sufficient to outweigh the restraint upon the religious exercise of Orthodox Jewish practicants which the restriction entails. See *Prince* v. *Massachusetts,* 321 U. S. 158; *Cox* v. *New Hampshire,* 312 U. S. 569. The nature of the legislative purpose is the preservation of a traditional institution which assures to the community a time during which the mind and body are released from the demands and distractions of an increasingly mechanized and competition-driven society. The right to this

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Saturday. Compare *In re Berman,* note 112, *supra.* Subsection (9) permits cancellation of the registration of any shop at the application of the occupier, but provides that registration shall not be cancelled within twelve months of the date upon which application for registration was made; and subsection (10) precludes the same occupier's again registering the shop for exemption. Section 53 (12) makes the exception provisions applicable as well to members of any religious body regularly observing the Jewish Sabbath as to Jews, and provides that for such persons the function served in the case of Jews by the London Committee of Deputies of the British Jews shall be served by "such body as appears to the Secretary of State to represent such persons."

release has been claimed by workers and by small enterprisers, especially by retail merchandisers, over centuries, and finds contemporary expression in legislation in three-quarters of the States. The nature of the injury which must be balanced against it is the economic disadvantage to the enterpriser, and the inconvenience to the consumer, which Sunday regulations impose upon those who choose to adhere to the Sabbatarian tenets of their faith.

These statutes do not make criminal, do not place under the onus of civil or criminal disability, any act which is itself prescribed by the duties of the Jewish or other religions. They do create an undeniable financial burden upon the observers of one of the fundamental tenets of certain religious creeds, a burden which does not fall equally upon other forms of observance. This was true of the tax which this Court held an unconstitutional infringement of the free exercise of religion in *Follett* v. *Town of McCormick,* 321 U. S. 573. But unlike the tax in *Follett,* the burden which the Sunday statutes impose is an incident of the only feasible means to achievement of their particular goal. And again unlike *Follett,* the measure of the burden is not determined by fixed legislative decree, beyond the power of the individual to alter. Upon persons who earn their livelihood by activities not prohibited on Sunday, and upon those whose jobs require only a five-day week, the burden is not considerable. Like the customers of Crown Kosher Super Market in the *Gallagher* case, they are inconvenienced in their shopping. This is hardly to be assessed as an injury of preponderant constitutional weight. The burden on retail sellers competing with Sunday-observing and non-observing retailers is considerably greater, But, without minimizing the fact of this disadvantage, the legislature may have concluded that its severity might be offset by the industry and commercial initiative of the individual merchant. More is demanded of him, admittedly, whether in the

form of additional labor or of material sacrifices, than is demanded of those who do not choose to keep his Sabbath. More would be demanded of him, of course, in a State in which there were no Sunday laws and in which his competitors chose—like "Two Guys from Harrison-Allentown"—to do business seven days a week. In view of the importance of the community interests which must be weighed in the balance, is the disadvantage wrought by the non-exempting Sunday statutes an impermissible imposition upon the Sabbatarian's religious freedom? Every court which has considered the question during a century and a half has concluded that it is not.[120] This Court so concluded in *Friedman* v. *New York*, 341 U. S. 907. On the basis of the criteria for determining constitutionality, as opposed to what one might desire as a matter of legislative policy, a contrary conclusion cannot be reached.

VI.

Two further grounds of unconstitutionality are urged in all these cases, based upon the selection in the challenged statutes of the activities included in, or excluded

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[120] *Frolickstein* v. *Mayor of Mobile*, 40 Ala. 725 (1867); *Scales* v. *State*, 47 Ark. 476 (1886); *State* v. *Haining*, 131 Kan. 853, 293 P. 952 (1930); *Commonwealth* v. *Has*, 122 Mass. 40 (1877); *Commonwealth* v. *Chernock*, 336 Mass. 384, 145 N. E. 2d 920 (1957); *State* v. *Weiss*, 97 Minn. 125, 105 N. W. 1127 (1906); *Komen* v. *City of St. Louis*, 316 Mo. 9, 289 S. W. 838 (1926) (subsequently overruled on another point); *State* v. *Fass*, 62 N. J. Super. 265, 162 A. 2d 608 (County Ct. 1960); *People* v. *Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), app. dism'd for want of a substantial federal question, 341 U. S. 907; *Silverberg Bros.* v. *Douglass*, 62 Misc. 340, 114 N. Y. S. 824 (Sup. Ct. 1909); *Commonwealth* v. *Wolf*, 3 S. & R. 48 (Pa. 1817); *Specht* v. *Commonwealth*, 8 Pa. 312 (1848); *City Council* v. *Benjamin*, 2 Strob. L. 508 (S. C. 1848); *Xepapas* v. *Richardson*, 149 S. C. 52, 146 S. E. 686 (1929), *semble*; *State* v. *Bergfeldt*, 41 Wash. 234, 83 P. 177 (1905), writ of error dism'd, 210 U. S. 438 (prohibiting barbering). And see *State ex rel. Walker* v. *Judge*, 39 La. Ann. 132, 141, 1 So. 437, 444 (1887); cf. *Ex parte Sundstrom*, 25 Tex. App. 133 (1888).

from, the Sunday ban. First it is argued that, if the aim of the statutes is to secure a day of peace and repose, the laws of Massachusetts and Maryland, by their exceptions, and the retail sales act of Pennsylvania, by its enumeration of the articles whose sale is forbidden, operate so imperfectly in the service of this aim—show so little rational relation to it—that they must be accounted as arbitrary and therefore violative of due process. The extensive range of recreational and commercial Sunday activity permitted in these States is said to deprive the statutes of any reasonable basis. The distinctions drawn by the laws between what may be sold or done and what may not, it is claimed, are unsupported by reason. Second, these claimants argue that the same discriminations between items which may and may not be sold, and in some cases between the persons who may and those who may not sell identical items, deprive them of the equal protection of the laws.

Although these contentions require the Court to examine separately and with particularity the provisions of each of the three States' statutes which are attacked, the general considerations which govern these cases are the same. It is clear that in fashioning legislative remedies by fine distinctions to fit specific needs, "The range of the State's discretion is large." *Bain Peanut Co.* v. *Pinson,* 282 U. S. 499, 501. This is especially so where, by the nature of its subject, regulation must take account of traditional and prevailing local customs. See *Kotch* v. *Board of River Port Pilot Comm'rs,* 330 U. S. 552. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner* v. *Texas,* 310 U. S. 141, 147. "Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. . . . Or the reform may take one step at a time, addressing itself to the phase of the

problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson* v. *Lee Optical, Inc.*, 348 U. S. 483, 489.

Neither the Due Process nor the Equal Protection Clause demands logical tidiness. *Metropolis Theatre Co.* v. *City of Chicago*, 228 U. S. 61. No finicky or exact conformity to abstract correlation is required of legislation. The Constitution is satisfied if a legislature responds to the practical living facts with which it deals. Through what precise points in a field of many competing pressures a legislature might most suitably have drawn its lines is not a question for judicial re-examination. It is enough to satisfy the Constitution that in drawing them the principle of reason has not been disregarded. See *Goesaert* v. *Cleary*, 335 U. S. 464. And what degree of uniformity reason demands of a statute is, of course, a function of the complexity of the needs which the statute seeks to accommodate.

In the case of Sunday legislation, an extreme complexity of needs is evident. This is so, first, because one of the prime objectives of the legislation is the preservation of an atmosphere—a subtle desideratum, itself the product of a peculiar and changing set of local circumstances and local traditions. But in addition, in the achievement of that end, however formulated, numerous compromises must be made. Not all activity can halt on Sunday. Some of the very operations whose doings most contribute to the rush and clamor of the week must go on throughout that day as well, whether because life depends upon them, or because the cost of stopping and restarting them is simply too great, or because to be without their services would be more disruptive of peace than to have them continue. Many activities have a double aspect: providing entertainment or recreation for some persons, they

entail labor and workday tedium for others.[121] Cogent expression of the intricate problems which these various countervalent pressures pose was given by Mr. Lloyd in the course of the debate in Commons on the English Sunday closing act of 1936:

> ". . . We should all like to see shopkeepers and their staffs as far as possible in a position to observe Sunday in a normal way like most other people. On the other hand, we know that there are certain reasonable needs of the public which require to be met even on a Sunday, and I think we should also all agree that the fewest possible number of people should have to give up their Sunday in order to cater for those public needs. I think we should probably reach a large measure of general agreement on the principle that only those shops should remain open which are essential to meet the requirements of the public and only to the extent that they are essential . . . . Therefore, the problem is to strike a just balance between the reasonable needs of the

[121] Consider Mr. Loftus' comments on the proposed Shops (Sunday Trading Restriction) Bill before the House of Commons in 1936: "During the last 20 years there has been a very great change in the habits of our people—a change for the better. Vast masses of our people, in fact, literally millions, go out into the countryside on fine Sunday afternoons in the Summer, and that is good for their health; it is good for the mind as well as the body that they should do so. Going into the country . . . they have been accustomed to certain facilities in the way of obtaining refreshment, fresh fruit, flowers and vegetables to bring home, and it would be regretted, particularly by the working classes, if there was any interference by legislation that would stop those facilities or check the tendency of our people to go into the country and to take advantage of the amenities of the countryside. . . .

". . . The first principle is to frame such exemptions as will not unduly interfere with the ordinary health and habits of our people. . . ." 308 H. C. Deb. 2159 (5th ser. 1935–1936).

public and the equally reasonable desire of the great bulk of those engaged in the distributive trades to enjoy their share of Sunday rest and recreation.

"If that is accepted, it follows at once that the crux of any Bill of this kind lies in the scope and the nature of the exemptions to the general principle of closing on Sunday. . . ." [122]

Moreover, the variation from activity to activity in the degree of disturbance which Sunday operation entails, and the similar variation in degrees of temptation to flout the law, and in degrees of ability to absorb and ignore various legal penalties, make exceedingly difficult the devising of effective, yet comprehensively fair, schemes of sanctions.

Early in the history of the Sunday laws there developed mechanisms which served to adapt their wide general prohibitions both to practical exigencies and to the evolving concerns and desires of the public. Where it was found that persons in certain activities tended with particular frequency to engage in violations, those activities were singled out for harsher punishment.[123] On the other hand, practices found necessary or convenient to popular habits were specifically excepted from the ban.[124] Under the basic English Sunday statute, 29 Charles II, c. 7, a wide general exception obtained for "Works of Necessity

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[122] *Id.*, at 2200–2201.

[123] The statute 29 Charles II, c. 7, punished worldly labor of one's ordinary calling by a forfeiture of five shillings, punished traveling by drovers or butchers by a forfeiture of twenty shillings, and punished the exhibition of merchandise for sale by forfeiture of the goods. Early American colonial legislation similarly provided greater fines for engaging in some than in other Sunday activity. See, *e. g.*, Delaware, 1740; Massachusetts, 1692; New Hampshire, 1700; New Jersey, 1798.

[124] The statute 29 Charles II, c. 7, itself contained several exceptions, and subsequent statutes added others. See notes 15, 18, *supra*. The original Sunday edict of Constantine in 321 A. D. had exempted farm labor.

and Charity"; [125] this provision found its way into the American colonial laws,[126] and has descended into all of their successors currently in force.[127] The effect of the phrase has been to give the courts a wide range of discretion in determining exceptions. But reasonable men can and do differ as to what is "necessity." [128] In every juris-

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[125] The statute 27 Henry VI, c. 5, had excepted "necessary victual" from its prohibition of sales at fairs and markets; 5 & 6 Edw. VI, c. 3, had contained a broad exception for labor at harvest or at any other time in the year when necessity required.

[126] See, *e. g.*, Jefferson's bill quoted in text at note 68, *supra*. Other laws made specific exceptions as well: the Pennsylvania statute of 1705, for example, exempted not only works of necessity and charity but the dressing of victuals in cookshops, watermen landing passengers, butchers slaughtering and selling meat or fishermen selling fish in the morning in summer, and the sale of milk before 9 a. m. and after 5 p. m.

[127] Where statutes ban the keeping open of places of business as well as laboring, the exception is frequently worded to apply only to the latter. See *Commonwealth* v. *Dextra*, 143 Mass. 28 (1886).

[128] See *Williams* v. *State*, 167 Ga. 160, 144 S. E. 745 (1928) (sale of gasoline is necessity); *Jacobs* v. *Clark*, 112 Vt. 484, 28 A. 2d 369 (1942) (same is not necessity); *Commonwealth* v. *Louisville & Nashville R. Co.*, 80 Ky. 291 (1882) (operating railroad is necessity); cf. *Philadelphia, W. & B. R. Co.* v. *Lehman*, 56 Md. 209 (1881); *Sparhawk* v. *Union Passenger R. Co.*, 54 Pa. 401 (1867) (same is not necessity); *State* v. *Needham*, 134 Kan. 155, 4 P. 2d 464 (1931) (distribution of newspapers is necessity); *Commonwealth* v. *Matthews*, 152 Pa. 166, 25 A. 548 (1893) (same is not necessity); *Augusta & S. R. Co.* v. *Renz*, 55 Ga. 126 (1875) (operating streetcar is necessity); *Johnston* v. *Commonwealth*, 22 Pa. 102 (1853) (operating bus is not necessity); *Turner* v. *State*, 67 Ind. 595 (1879) (cutting ripe wheat is necessity); *State* v. *Goff*, 20 Ark. 289 (1859) (same is not necessity); *Wilkinson* v. *State*, 59 Ind. 416 (1877) (hauling ripe watermelons is necessity); *Commonwealth* v. *White*, 190 Mass. 578, 77 N. E. 636 (1906) (picking ripe cranberries is not necessity); *Rich* v. *Commonwealth*, 198 Va. 445, 94 S. E. 2d 549 (1956) (where evidence of widespread retail sale of groceries is not rebutted, jury cannot find that sale of groceries is not necessity); *State* v. *James*, 81 S. C. 197, 62 S. E. 214 (1908) (sale of ice and meat is not necessity);

diction legislatures, presumably deeming themselves fitter tribunals for decisions of this sort than were courts, acted to resolve the question against, or in favor of, various particular activities. Some pursuits were expressly declared not works of necessity, or were specially banned.[129]

State v. *Corologos,* 101 Vt. 300, 143 A. 284 (1928) (sale of confectionery is not necessity as matter of law, although jury could so find); cf. *State ex rel. Smith* v. *Wertz,* 91 W. Va. 622, 114 S. E. 242 (1922); *Thompson* v. *City of Atlanta,* 178 Ga. 281, 172 S. E. 915 (1934), and *Rosenbaum* v. *State,* 131 Ark. 251, 199 S. W. 388 (1917) (operation of motion picture theater is not necessity); *Williams* v. *Commonwealth,* 179 Va. 741, 750, 20 S. E. 2d 493, 496 (1942) (concurring opinion) (operation of motion picture theater is necessity); *McGatrick* v. *Wason,* 4 Ohio St. 566 (1855) (loading ship with navigation-closing weather impending is necessity); *Commonwealth* v. *Sampson,* 97 Mass. 407 (1867) (gathering seaweed which tide threatens to float away is not necessity); *Hennersdorf* v. *State,* 25 Tex. App. 597, 8 S. W. 926 (1888) (manufacturing ice is necessity); *State* v. *McBee,* 52 W. Va. 257, 43 S. E. 121 (1902) (pumping oil is not necessity as matter of law, although jury could so find); *State* v. *Ohmer,* 34 Mo. App. 115 (1889) (retail sale of tobacco is not necessity); *Francisco* v. *Commonwealth,* 180 Va. 371, 23 S. E. 2d 234 (1942) (jury may find retail sale of beer necessity).

[129] In *Petit* v. *Minnesota,* 177 U. S. 164, this Court sustained against a claim of arbitrary classification a statute which in express terms provided that its exception for works of necessity should not include barbering. In other jurisdictions the same result was reached by judicial interpretation of the "necessity" clause. *State* v. *Linsig,* 178 Iowa 484, 159 N. W. 995 (1916); *Ex parte Kennedy,* 42 Tex. Cr. R. 148, 58 S. W. 129 (1900); *State* v. *Sopher,* 25 Utah 318, 71 P. 482 (1903). Cf. *Commonwealth* v. *Dextra,* 143 Mass. 28, 8 N. E. 756 (1886); *Stark* v. *Backus,* 140 Wis. 557, 123 N. W. 98 (1909). Statutes prohibiting Sunday barbering were enacted in a number of States. These were voided as discriminatory in *Ex parte Jentzsch,* 112 Cal. 468, 44 P. 803 (1896); *Eden* v. *People,* 161 Ill. 296, 43 N. E. 1108 (1896); *Armstrong* v. *State,* 170 Ind. 188, 84 N. E. 3 (1908); *State* v. *Granneman,* 132 Mo. 326, 33 S. W. 784 (1896); cf. *Ragio* v. *State,* 86 Tenn. 272, 6 S. W. 401 (1888), but have been generally sustained. *McClelland* v. *City of Denver,* 36 Colo. 486, 86 P. 126 (1906); *State* v. *Murray,* 104 Neb. 51, 175 N. W. 666

Others were expressly permitted: series of exceptions, giving the laws resiliency in the course of cultural change, proliferated.[130] Today, as Appendix II to this opinion, *post,* p. 551, shows, the general pattern in over half of the States and in England [131] is similar. Broad general pro-

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(1919); *People* v. *Bellet,* 99 Mich. 151, 57 N. W. 1094 (1894); *People* v. *Havnor,* 149 N. Y. 195, 43 N. E. 541 (1896), writ of error dism'd, 170 U. S. 408; *Ex parte Johnson,* 77 Okla. Cr. 360, 141 P. 2d 599 (1943); *Ex parte Northrup,* 41 Ore. 489, 69 P. 445 (1902); *Breyer* v. *State,* 102 Tenn. 103, 50 S. W. 769 (1899); *State* v. *Bergfeldt,* 41 Wash. 234, 83 P. 177 (1905), overruling *City of Tacoma* v. *Krech,* 15 Wash. 296, 46 P. 255 (1896).

[130] One may trace in these exceptions the evolving habits of life of the people. Compare *State* v. *Hogreiver,* 152 Ind. 652, 53 N. E. 921 (1899), sustaining a statute specifically prohibiting Sunday baseball, with *Carr* v. *State,* 175 Ind. 241, 93 N. E. 1071 (1911), sustaining a statute excepting baseball from the general Sunday prohibition.

[131] The Shops Act, 1950, 14 Geo. VI, c. 28, excepts from the general Sunday ban the keeping open of a shop to sell liquor, meals or refreshments (whether or not for consumption on the premises, but excluding fried fish and chips sold at a fish and chip shop), newly cooked provisions and cooked tripe, table waters, chocolates, sweets, sugar confectionery and ice cream, flowers, fruit and vegetables (other than tinned), milk and cream (other than tinned), medicines and medical and surgical appliances (by certain registered shops), aircraft, motor or cycle supplies or accessories, tobacco and smokers' requisites, newspapers, periodicals and magazines, books and stationery at rail and bus terminals and aerodromes, guide books, photographs, reproductions, photographic films and plates and souvenirs at public or specially approved galleries, museums, etc., passport photos, requisites for games or sports sold on the premises where the sport is played, fodder for horses, mules, etc. Post office and funeral business is permitted. (§ 47 & Fifth Schedule.) Local authority may permit the opening of shops before 10 a. m. for the sale of bread and flour, confectionery, fish, groceries and grocer's products. (§ 48 & Sixth Schedule.) Local authority may prohibit sales of meals and refreshments for consumption off the premises (exempted by the Fifth Schedule) in the case of classes of shops in which sales for on-the-premises consumption do not constitute a substantial part of the business carried on. (§ 49.) Where the area

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hibitions are qualified by numerous precise exemptions, often with provision for local variation within a State, and are frequently bolstered by special provisions more heavily penalizing named activities. The regulations of Maryland, Massachusetts and Pennsylvania are not atypical in this regard, although they are undoubtedly among the more complex of the statutory patterns.

The degree of explicitness of these provisions in so many jurisdictions demonstrates the intricacy of the adjustments which they are designed to make. How delicate those adjustments can be is strikingly illustrated, once again, by a remark of the sponsor of the British closing bill of 1936, the most extensively documented modern Sunday statute. Supporting an amendment which permitted local authority to authorize the opening, during

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of a local authority is a district frequented as a holiday resort during certain seasons of the year, the local authority may provide by order that shops of such classes as it designates may open on specified Sundays (not to exceed eighteen per year) for the sale of bathing and fishing articles, photographic requisites, toys, souvenirs and fancy goods, books, stationery, photographs, reproductions and postcards, and food. (§ 51 & Seventh Schedule.) Special provisions applicable to the London area permit local councils to authorize the opening before 2 p. m. of shops where street markets or (in some regions) shops were customarily opened on Sunday prior to the date of the original act, 1936, where, in the latter case, the councils find that "having regard to the character and habits of the population in the district," Sunday closing would cause undue hardship; but if such an exempting order is made, it must fix some weekday closing day for these shops, which may differ for different classes of shops. (§ 54.) In the case of these local exempting orders, provision is made for a plebiscite among the shopkeepers affected. (§§ 52, 54 (1), par. 2.) The act further excepts the sale and delivery of stores or necessaries to arriving or departing ships and aircraft and of goods to private clubs for club purposes, the cooking before 1:30 p. m. of food brought by customers to be cooked for consumption that day, and attendance as a barber upon invalids or upon residents of hotels or clubs therein. (§ 56.) This summary digest can scarcely suggest the complexity of the text.

a portion of the year, of shops in areas frequented as seaside resorts, Mr. Loftus said:

> ". . . In a Bill such as this one must have elasticity. . . . We had a unanimous demand from the Association of Fish Fryers, representing the trade all over England, asking that fish-frying shops should be closed on Sundays, and we agreed and took them out of the First Schedule [which exempts shops selling meals or refreshments]. But then we heard from Blackpool, which is visited every year by, I suppose, millions of poor people, cotton operatives and others, who like to get cheap meals of fried fish on Sunday afternoons and Sunday evenings, and we feel there must be some provision in the Bill to allow the grant of exemptions in such a case. The difficulty is to avoid putting in a Clause which is open to abuse and I submit that there are two provisions which provide a safeguard. The first is that the local authority must approve the granting of exemptions, and the second is that the local authority cannot approve unless two-thirds of those particular shops in its locality are in favour of exemption. Having no desire that hardships should be inflicted on poor class people I would ask the House to accept the Clause." [132]

Certainly, when relevant considerations of policy demand decisions and distinctions so fine, courts must accord to the legislature a wide range of power to classify and to delineate. It is true that, unlike their virtually unanimous attitude on the issue of religious freedom, state courts have not always sustained Sunday legislation against the charge of unconstitutional discrimination. Statutes and ordinances have been struck down as arbitrary [133] or as violative of state constitutional prohibitions

[132] 311 H. C. Deb. 465 (5th ser. 1935–1936).

[133] *Elliott* v. *State*, 29 Ariz. 389, 242 P. 340 (1926) (banning enumerated businesses; court distinguishes general closing statute with

of special legislation.[134] A far greater number of courts, in similar classes of cases, have sustained the legislation.[135] But the very diversity of judicial opinion as to what is rea-

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exceptions); *Bocci & Sons Co.* v. *Town of Lawndale,* 208 Cal. 720, 284 P. 654 (1930) (exceptions for classes of businesses); *Justesen's Food Stores, Inc.,* v. *City of Tulare,* 12 Cal. 2d 324, 84 P. 2d 140 (1938) (closing food stores; exceptions for classes of businesses); *Deese* v. *City of Lodi,* 21 Cal. App. 2d 631, 69 P. 2d 1005 (1937) (exceptions for classes of businesses); *Allen* v. *City of Colorado Springs,* 101 Colo. 498, 75 P. 2d 141 (1937) (exceptions for classes of businesses and commodities); *Henderson* v. *Antonacci,* 62 So. 2d 5 (Fla. 1952) (exceptions for classes of businesses and commodities); *Kelly* v. *Blackburn,* 95 So. 2d 260 (Fla. 1957) (exceptions for newspapers and cinema); *City of Mt. Vernon* v. *Julian,* 369 Ill. 447, 17 N. E. 2d 52 (1938) (exceptions for classes of businesses); *Auto-Rite Supply Co.* v. *Mayor of Woodbridge,* 41 N. J. Super. 303, 124 A. 2d 612 (1956), aff'd on other grounds, 25 N. J. 188, 135 A. 2d 515 (1957) (banning sale of enumerated classes of commodities); *Chan Sing* v. *Astoria,* 79 Ore. 411, 155 P. 378 (1916) (closing shops selling enumerated classes of commodities); *Broadbent* v. *Gibson,* 105 Utah 53, 140 P. 2d 939 (1943) (exceptions for classes of businesses, some restricted to sale of specified commodities); *Gronlund* v. *Salt Lake City,* 113 Utah 284, 194 P. 2d 464 (1948) (sales ban with exceptions for classes of commodities; court distinguishes statutory scheme banning all labor and sales with exceptions). Cf. *State* v. *Trahan,* 214 La. 100, 36 So. 2d 652 (1948), and *Arrigo* v. *City of Lincoln,* 154 Neb. 537, 48 N. W. 2d 643 (1951) (exceptions for classes of businesses), holding unconstitutional Sunday statutes in particular applications deemed discriminatory.

[134] *City of Denver* v. *Bach,* 26 Colo. 530, 58 P. 1089 (1899) (closing classes of businesses); *City of Springfield* v. *Smith,* 322 Mo. 1129, 19 S. W. 2d 1 (1929) (banning enumerated entertainments); *Ex parte Ferguson,* 62 Okla. Cr. 145, 70 P. 2d 1094 (1937) (banning sale of enumerated commodities) (alternative holding); *Ex parte Hodges,* 65 Okla. Cr. 69, 83 P. 2d 201 (1938) (exceptions for classes of businesses) (alternative holding). Cf. *McKaig* v. *Kansas City,* 363 Mo. 1033, 256 S. W. 2d 815 (1953) (automobile sales), disapproving *City of St. Louis* v. *DeLassus,* 205 Mo. 578, 104 S. W. 12 (1907), and *Komen* v. *City of St. Louis,* 316 Mo. 9, 289 S. W. 838 (1926).

[135] *Lane* v. *McFadyen,* 259 Ala. 205, 66 So. 2d 83 (1953) (banning merchandising with exceptions for classes of businesses); *Taylor* v.

sonable classification—like the conflicting views on what is such "necessity" as will justify Sunday operations—testifies that the question of inclusion with regard to Sunday bans is one where judgments rationally differ, and hence

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City of Pine Bluff, 226 Ark. 309, 289 S. W. 2d 679 (1956) (ordinance applied only to single class of business); *Hickinbotham* v. *Williams*, 227 Ark. 126, 296 S. W. 2d 897 (1956) (banning enumerated businesses); *Ex parte Koser*, 60 Cal. 177 (1882) (exceptions for classes of businesses); *In re Sumida*, 177 Cal. 388, 170 P. 823 (1918) (exceptions for classes of businesses); *State* v. *Hurliman*, 143 Conn. 502, 123 A. 2d 767 (1956) (exceptions for classes of services, activities and commodities, the latter to be sold by persons who sell them on weekdays); *State* v. *Shuster*, 145 Conn. 554, 145 A. 2d 196 (1958) (same); *Theisen* v. *McDavid*, 34 Fla. 440, 16 So. 321 (1894) (excepting sales of classes of commodities); *State* v. *Dolan*, 13 Idaho 693, 92 P. 995 (1907) (exceptions for classes of services and commodities); *State* v. *Cranston*, 59 Idaho 561, 85 P. 2d 682 (1938) (exceptions for classes of businesses, services and commodities); *Humphrey Chevrolet, Inc.*, v. *City of Evanston*, 7 Ill. 2d 402, 131 N. E. 2d 70 (1955) (exceptions for classes of commodities); *Ness* v. *Supervisors of Elections*, 162 Md. 529, 160 A. 8 (1932) (unspecified); *People* v. *DeRose*, 230 Mich. 180, 203 N. W. 95 (1925) (banning classes of businesses and sales of classes of commodities); *People* v. *Krotkiewicz*, 286 Mich. 644, 282 N. W. 852 (1938) (banning sales of classes of commodities); *People's Appliance, Inc.*, v. *City of Flint*, 358 Mich. 34, 99 N. W. 2d 522 (1959) (banning businesses selling classes of commodities); *State ex rel. Hoffman* v. *Justus*, 91 Minn. 447, 98 N. W. 325 (1904) (exceptions for classes of commodities); *Liberman* v. *State*, 26 Neb. 464, 42 N. W. 419 (1889) (exceptions for classes of businesses and commodities); *In re Caldwell*, 82 Neb. 544, 118 N. W. 133 (1908) ("common" labor banned); *State* v. *Somberg*, 113 Neb. 761, 204 N. W 788 (1925) (banning classes of businesses and sales of classes of commodities); *City of Elizabeth* v. *Windsor-Fifth Avenue, Inc.*, 31 N. J. Super. 187, 106 A. 2d 9 (1954) (banning businesses selling classes of commodities); *Masters-Jersey, Inc.*, v. *Mayor of Paramus*, 32 N. J. 296, 160 A. 2d 841 (1960) (exceptions for classes of commodities); *Richman* v. *Board of Comm'rs*, 122 N. J. L. 180, 4 A. 2d 501 (1939) (banning businesses selling a class of commodities, *semble*); *People* v. *Friedman*, 302 N. Y. 75, 96 N. E. 2d 184 (1950), app. dism'd for want of a substantial federal question, 341 U. S. 907 (exceptions for classes of businesses, commodities, other activities); *State* v. *Medlin*, 170 N. C. 682, 86

where a State's determinations must be given every fair presumption of a reasonable support in fact. The restricted scope of this Court's review of state regulatory legislation under the Equal Protection Clause is of long

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S. E. 597 (1915) (exception for a class of business, restricted to sale of specified classes of commodities); *State* v. *Trantham,* 230 N. C. 641, 55 S. E. 2d 198 (1949) (exceptions for classes of commodities to be sold by classes of businesses); *State* v. *McGee,* 237 N. C. 633, 75 S. E. 2d 783 (1953), app. dism'd for want of a substantial federal question, 346 U. S. 802 (exceptions for classes of businesses, commodities, other activities); *State* v. *Towery,* 239 N. C. 274, 79 S. E. 2d 513 (1954), app. dism'd for want of a substantial federal question, 347 U. S. 925 (exceptions for classes of businesses, some restricted to sales of specified classes of commodities); *State* v. *Diamond,* 56 N. D. 854, 219 N. W. 831 (1928) (exceptions for classes of commodities); *State* v. *Haase,* 97 Ohio App. 377, 116 N. E. 2d 224 (1953) (exceptions for classes of recreational activities); *State* v. *Kidd,* 167 Ohio St. 521, 150 N. E. 2d 413 (1958), app. dism'd for want of a substantial federal question, 358 U. S. 132 (exceptions for classes of recreational activities); *Commonwealth* v. *Bauder,* 188 Pa. Super. 424, 145 A. 2d 915 (1958) (exceptions for classes of recreational activities); *Bothwell* v. *York City,* 291 Pa. 363, 140 A. 130 (1927) (banning classes of recreational activities); *Mayor of Nashville* v. *Linck,* 80 Tenn. 499 (1883) (exceptions for sales of classes of commodities by classes of businesses); *Kirk* v. *Olgiati,* 203 Tenn. 1, 308 S. W. 2d 471 (1957) (banning classes of businesses); *Ex parte Sundstrom,* 25 Tex. App. 133, 8 S. W. 207 (1888) (exceptions for classes of commodities); *Searcy* v. *State,* 40 Tex. Cr. R. 460, 51 S. W. 1119 (1899) (exceptions for classes of commodities); *Sayeg* v. *State,* 114 Tex. Cr. R. 153, 25 S. W. 2d 865 (1930) (exceptions for classes of commodities); *City of Seattle* v. *Gervasi,* 144 Wash. 429, 258 P. 328 (1927) (exceptions for classes of commodities); *State* v. *Grabinski,* 33 Wash. 2d 603, 206 P. 2d 1022 (1949) (exceptions for classes of commodities). See also *Rosenbaum* v. *City & County of Denver,* 102 Colo. 530, 81 P. 2d 760 (1938) (banning automobile trading); *Mosko* v. *Dunbar,* 135 Colo. 172, 309 P. 2d 581 (1957) (banning automobile trading); *Gillooley* v. *Vaughan,* 92 Fla. 943, 110 So. 653 (1926) (banning classes of amusements); *Stewart Motor Co.* v. *City of Omaha,* 120 Neb. 776, 235 N. W. 332 (1931) (banning automobile trading); *ABC Liquidators, Inc.,* v. *Kansas City,* 322 S. W. 2d 876 (Mo. 1959) (banning auctions); *State* v. *Loomis,* 75 Mont. 88, 242 P. 344 (1925)

standing. *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78–79. The applicable principles are that a state statute may not be struck down as offensive of equal protection in its schemes of classification unless it is obviously arbitrary, and that, except in the case of a statute whose discriminations are so patently without reason that no conceivable situation of fact could be found to justify them, the claimant who challenges the statute bears the burden of affirmative demonstration that in the actual state of facts which surround its operation, its classifications lack rationality.

When these standards are applied, first, to the Maryland statute challenged in the *McGowan* case, appellants' claims under the Due Process and Equal Protection Clauses show themselves clearly untenable. Counsel contend that the Sunday sales prohibition, Md. Code Ann., 1957, Art. 27, § 521, is rendered arbitrary by its exception of retail sales of tobacco items and soft drinks,

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(banning, *e. g.*, classes of dance halls); *Gundaker Central Motors, Inc.*, v. *Gassert*, 23 N. J. 71, 127 A. 2d 566 (1956), app. dism'd for want of a substantial federal question, 354 U. S. 933 (banning automobile trading); *Ex parte Johnson*, 20 Okla. Cr. 66, 201 P. 533 (1921) (banning cinema and theaters); *Consolidated Enterprises, Inc.*, v. *State*, 150 Tenn. 148, 263 S. W. 74 (1924) (banning cinema and theaters). Statutory provisions whose effect was to punish some Sunday activities more severely than others have been sustained. *State* v. *Hogreiver*, 152 Ind. 652, 53 N. E. 921 (1899); *Tinder* v. *Clarke Auto Co.*, 238 Ind. 302, 149 N. E. 2d 808 (1958); *State* v. *Murray*, 104 Neb. 51, 175 N. W. 666 (1919); *Commonwealth* v. *Grochowiak*, 184 Pa. Super. 522, 136 A. 2d 145 (1957), app. dism'd for want of a substantial federal question, 358 U. S. 47; *Breyer* v. *State*, 102 Tenn. 103, 50 S. W. 769 (1899). Cf. *Sherman* v. *Mayor of Paterson*, 82 N. J. L. 345, 82 A. 889 (1912). For cases sustaining state statutes applicable in some, but not all, localities, see *People* v. *Havnor*, 149 N. Y. 195, 43 N. E. 541 (1896); *Bohl* v. *State*, 3 Tex. App. 683 (1878); and compare *Sarner* v. *Township of Union*, 55 N. J. Super. 523, 151 A. 2d 208 (1959), with *Two Guys from Harrison, Inc.*, v. *Furman*, 32 N. J. 199, 160 A. 2d 265 (1960).

ice and ice cream, confectionery, milk, bread, fruit, gasoline products, newspapers and periodicals, and of drugs and medical supplies by apothecaries—by the further exemption in Anne Arundel County, under § 509, of certain recreational activities and sales incidental to them—and by the permissibility under other state and local regulations of various amusements and public entertainments on Sunday, Sunday beer and liquor sales, and Sunday pinball machines and bingo. The short answer is that these kinds of commodity exceptions, and most of these exceptions for amusements and entertainments, can be found in the comprehensive Sunday statutes of England, Puerto Rico, a dozen American States, and many other countries having uniform-day-of-rest legislation.[136] Surely unreason cannot be so widespread. The notion that, with these matters excepted, the Maryland statute lacks all rational foundation is baseless. The exceptions relate to products and services which a legislature could reasonably find necessary to the physical and mental health of the people or to their recreation and relaxation on a day of repose. Other sales activity and, under Art. 27, § 492, all other labor, are forbidden. That more or fewer activities than fall within the exceptions could with equal rationality have been excluded from the general ban does not make irrational the selection which has actually been made. There is presented in this record not a trace of evidence as to the habits and customs of the population of Maryland or of Anne Arundel County, nothing that suggests that the pattern of legislation which their representatives have devised is not reasonably related to local circumstances determining their ways of

[136] See note 131, *supra;* Appendix II to this opinion, *post,* p. 551; Weekly Rest in Commerce and Offices, Report VII (1), International Labour Conference, 39th Sess., Geneva, 1956 (1955), 27–52; Weekly Rest in Commerce and Offices, Report A, International Labour Conference, 26th Sess., Geneva, 1940 (1939), 82–127.

life. Appellants have wholly failed to meet their burden of proof.

Counsel for McGowan urge that the allowance, limited to Anne Arundel County, of retail sales of merchandise customarily sold at bathing beaches, bathhouses, amusement parks and dancing saloons, violates the equal protection of the laws both by discriminating between Anne Arundel retailers and those in other counties, and by discriminating among classes of persons within Anne Arundel County who compete in sales of the same articles.[137] Clearly appellants, who were convicted for selling within the county, would not ordinarily have standing to raise the issue of possible discrimination against out-of-county merchants; in any event, on this record, it is dubious that the contention was adequately raised below. Suffice to say, for purposes of the due process issue which appellants did raise, that the provision of different Sunday regulations for different regions of a State is not *ipso facto* arbitrary. See *Salsburg* v. *Maryland,* 346 U. S. 545; *Missouri* v. *Lewis,* 101 U. S. 22, 31.[138]

As for the asserted discrimination in favor of those who sell at the beach or the park articles not permitted to

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[137] It is unclear whether the exception here assailed permits the sale of merchandise essential to, or customarily sold at, bathing beaches, bathhouses, etc., *only* at those enumerated places or by all retailers within the county. Since the Maryland Court of Appeals left this question of construction open below, I assume the interpretation most favorable to appellants' claim.

[138] Many of the jurisdictions which have Sunday laws provide some form of local option procedure for the creation of exceptions. This is only to recognize the obvious fact that conditions of limited geographical range may be determinative in striking the balance of forbidden and permissible Sunday activity which best accords with popular habits and desires. In Maryland the State Legislature itself does the job of adapting the general state-wide law to local circumstances. This difference in method can scarcely entail different federal constitutional consequences.

be sold elsewhere, the answer must be that between such beach-side enterprisers and the general suburban merchandising store at which appellants are employed there is a reasonable line of demarcation. The reason of the exemption dictates the human logic of its scope. The legislature has found it desirable that persons seeking certain forms of recreation on Sunday have the convenience of purchasing on that day items which add enjoyment to the recreation and which, perhaps, could not or would not be provided for by a vacationer prior to the day of his Sunday outing. On the other hand, the policy of securing to the maximum possible number of distributive employees their Sunday off might reasonably preclude allowing every retail establishment in the county to open to serve this convenience. A tenable resolution, surely, is to permit these particular sales only on the premises where the items will be needed and used. The enforcement problem which could arise from permitting general merchandising outlets to open for the sale of these items alone, but not for the sale of thousands of other items at adjacent counters and shelves, might in itself justify the limitation of the exception to the group of on-the-premises merchants who are less likely to stock articles extraneous to the use of the enumerated amusement facilities.

The Massachusetts statute attacked in the *Gallagher* case contains a wider range of exceptions but, again, none that this record shows to be patently baseless and therefore constitutionally impermissible. The court below believed that reason was offended by such provisions as those which allow, apparently, digging for clams but not dredging for oysters, or which permit certain professional sports during the hours from 1:30 to 6:30 p. m. while restricting their amateur counterparts to 2 to 6, or which make lawful (as the court below read the statute) Sunday pushcart vending by conscientious Sabbatarians, but not

Sunday vending within a building. But the record below, on the basis of which a federal court has been asked to enjoin the enforcement of a state statute, contains no evidence concerning clam-digging or oyster-dredging, nothing to indicate that these two activities have anything more in common—requiring similar treatment—than that in each there is involved the pursuit of mollusca. There is nothing in the record concerning professional or amateur athletic events, and certainly nothing to support the conclusion that the problem of Sunday regulation of pushcarts is so similar to the problem of Sunday regulation of indoor markets as to require uniform treatment for both.[139] These various differently treated situations may be different in fact, or they may not. A statute is not to be struck down on supposition.

It is true, as appellees there claim, that Crown Kosher Super Market may not sell on Sunday products which other retail establishments may sell on that day: bread (which may be sold during certain hours by innkeepers, common victuallers, confectioners and fruiterers, and, along with other bakery products, by bakers), confectionery, frozen desserts and dessert mix, and soda water (which may be sold by innkeepers, common victuallers, confectioners and fruiterers, and druggists), tobacco (which may be sold by innkeepers, common victuallers, druggists, and regular newsdealers), etc. (The sale of drugs and newspapers on Sunday is permitted generally.) But although Crown Kosher undoubtedly suffers an element of competitive disadvantage from these provisions, the provisions themselves are not irrational. Their purpose, apparently, is to permit dealers specializing in certain products whose distribution on Sunday is regarded as necessary, to sell those products and also such other among the same group

[139] See *Eldorado Ice Cream Co.* v. *Clark*, [1938] 1 K. B. 715, holding the sale of ice cream from a box tricycle without the prohibition of the Shops (Sunday Trading Restriction) Act.

of necessaries as are generally found sold together with the products in which they specialize, thus fostering the maximum dissemination of the permitted products with the minimum number of retail employees required to work to disseminate them. Shops such as newsdealers, druggists, and confectioners may in Massachusetts tend, for all we know, to be smaller, less noisy, more widely distributed so that access to them from residential areas entails less traveling, than is the case with other stores. They may tend to hire fewer employees. They may present, because they specialize in products whose sale is permitted, less of a policing problem than would general markets selling these and many other products.[140] Again there is nothing in the record to support the conclusion that Massachusetts has failed to afford to the Crown Kosher Super Market treatment which is equivalent to that enjoyed by all other retailers of a class not rationally distinguishable from Crown. "The prohibition of the Equal Protection Clause goes no further than the invidious discrimination. We cannot say that that point has been reached here." *Williamson* v. *Lee Optical, Inc.*, 348 U. S. 483, 489.

Nor, on the record of the *McGinley* case, can any other conclusion be reached as to the 1959 Pennsylvania Sunday retail sales act. Appellants in this case argue that to punish by a fine of up to one hundred dollars per sale—or two hundred dollars per sale within one year after the first offense—the retail selling of some twenty enumerated broad categories of commodities, while punishing all other sales and laboring activity by the four-dollars-per-Sunday

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[140] Consider the alternative suggested by the ordinance sustained in *In re Sumida*, 177 Cal. 388, 170 P. 823 (1918), requiring that where an establishment housing both permitted and prohibited businesses remains open on Sunday for transaction of the former, a five-foot-high permanent partition or screen must be erected to separate the two business areas.

fine fixed by the earlier Lord's day statute,[141] is arbitrary and violative of equal protection. But the court below found, and in this it is supported by the legislative history of the 1959 act,[142] that the enactment providing severer penalties for these classes of sales was responsive to the appearance in the Commonwealth, only shortly before the act's passage, of a new kind of large-scale mercantile enterprise which, absorbing without difficulty a four-dollar-a-week fine, made a profitable business of persistent violation of the earlier statute. These new enterprises may have attracted a disturbing volume of Sunday traffic; they may have employed more retail salesmen, and under different conditions, than other kinds of businesses in the State; some of the legislators, apparently, so believed.[143] The danger may have been apprehended that not only would these violations of long-standing State legislation continue, but that competition would force open other enterprises which had for years closed on Sunday. Under this threat the 1959 statute was designed. It applies not only to the new merchandisers—if that were so, quite obviously, different constitutional problems would arise. Rather it singles out the area where a danger has been made most evident, and within that area treats all business enterprises equally. That in so doing it may have drawn the line between the sale of a sofa cover, punished by a hundred-dollar fine, and the sale of an automobile seat cover, punished by a four dollar fine, is not sufficient to void the legislation. "[A] State may classify with reference to the evil to be prevented, and . . . if the class discriminated against is or reasonably might be considered to define those from whom the evil mainly is to be feared, it properly may be

[141] See *Friedeborn* v. *Commonwealth,* 113 Pa. 242, 6 A. 160 (1886).

[142] See 36 Pennsylvania Legislative Journal, 143d General Assembly (1959), 1139.

[143] See *id.*, at 1142–1143, 2568.

picked out. A lack of abstract symmetry does not matter. The question is a practical one dependent upon experience. The demand for symmetry ignores the specific difference that experience is supposed to have shown to mark the class. It is not enough to invalidate the law that others may do the same thing and go unpunished, if, as a matter of fact, it is found that the danger is characteristic of the class named." Mr. Justice Holmes, in *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144.

Even less should a legislature be required to hew the line of logical exactness where the statutory distinction challenged is merely one which sets apart offenses subject to penalties of differing degrees of severity, not one which divides the lawful from the unlawful. "Judgment on the deterrent effect of the various weapons in the armory of the law can lay little claim to scientific basis. Such judgment as yet is largely a prophecy based on meager and uninterpreted experience. . . .

". . . Moreover, the whole problem of deterrence is related to still wider considerations affecting the temper of the community in which law operates. The traditions of a society, the habits of obedience to law, the effectiveness of the law-enforcing agencies, are all peculiarly matters of time and place. They are thus matters within legislative competence." *Tigner* v. *Texas,* 310 U. S. 141, 148, 149. Appellants in *McGinley,* like appellants in the *McGowan* and appellees in the *Gallagher* cases, have had full opportunity to demonstrate the arbitrariness of the statute which they challenge. On this record they have entirely failed to satisfy the burden which they carry. *Friedman* v. *New York,* 341 U. S. 907; *McGee* v. *North Carolina,* 346 U. S. 802; *Towery* v. *North Carolina,* 347 U. S. 925. Cf. *Missouri, K. & T. R. Co.* v. *Cade,* 233 U. S. 642.

The *Braunfeld* case, however, comes here in a different posture. Appellants, plaintiffs below, allege in their

amended complaint that the 1959 Pennsylvania Sunday retail sales act is irrational and arbitrary. The three-judge court dismissed the amended complaint for failure to state a claim. Speaking for myself alone and not for MR. JUSTICE HARLAN on this point, I think that this was too summary a disposition. However difficult it may be for appellants to prove what they allege, they must be given an opportunity to do so if they choose to avail themselves of it, in view of the Court's decisions in this series of cases. I would remand No. 67 to the District Court.

APPENDIX I TO OPINION OF MR. JUSTICE FRANKFURTER.

PRINCIPAL COLONIAL SUNDAY STATUTES AND THEIR CONTINUATION UNTIL THE END OF THE EIGHTEENTH CENTURY.

CONNECTICUT:

New Haven Colony:

1656: Prophanation of the Lord's Day, New Haven's Settling in New England. And Some Laws for Government (1656), reprinted in Hinman, The Blue Laws (1838), 132, 206.

See also Prince, An Examination of Peters' "Blue Laws," H. R. Doc. No. 295, 55th Cong., 3d Sess. 95, 109, 113–114, 123–125.

Connecticut Colony:

1668: 2 Public Records of the Colony of Connecticut, 1665–1678 (1852), 88 (traveling, playing).

1672: Prophanation of the Sabbath, Laws of Connecticut, 1673 (Brinley reprint 1865), 58.

1676: 2 Public Records of the Colony of Connecticut, 1665–1678 (1852), 280.

See An Act for the due Observation, and keeping the Sabbath, or Lord's Day; and for Preventing, and Punishing Disorders, and Prophaneness on the same, Acts and Laws of His Majesty's English Colony of Connecticut in New-England (1750), 139; An Act for the due Observation of the Sabbath or Lord's-Day, Acts and Laws of the State of Connecticut (1784), 213; An Act for the due Observation of the Sabbath or Lord's-Day, Acts and Laws of the State of Connecticut (1796), 368.

DELAWARE:

1740: An Act to prevent the Breach of the Lord's Day commonly called Sunday, Laws of the Government of New-Castle, Kent and Sussex Upon Delaware (1741), 121.

1795: An Act more effectually to prevent the profanation of the Lord's day, commonly called Sunday, 2 Laws of Delaware, 1700–1797 (1797), 1209.

GEORGIA:

1762: An Act For preventing and punishing Vice, Profaneness, and Immorality, and for keeping holy the Lord's Day, commonly called Sunday, Acts Passed by the General Assembly of Georgia, 1761–1762 (ca. 1763), 10.

See Marbury and Crawford, Digest of the Laws of Georgia, 1755–1800 (1802), 410.

MARYLAND:

1649: An Act concerning Religion, 1 Archives of Maryland (Proceedings and Acts of the General Assembly), 1637/8–1664 (1883), 244.

1654: Concerning the Sabboth Day, *id.*, at 343.

1674: An Act against the Prophaning of the Sabbath day, 2 Archives of Maryland (Proceedings and Acts of

the General Assembly), 1666–1676 (1884), 414 (innkeepers).

1692: An Act for the Service of Almighty God and the Establishment of the Protestant Religion within this Province, 13 Archives of Maryland (Proceedings and Acts of the General Assembly), 1684–1692 (1894), 425.

1696: An Act for Sanctifying & keeping holy the Lord's Day Comonly called Sunday, 19 Archives of Maryland (Proceedings and Acts of the General Assembly), 1693–1697 (1899), 418.

1723: An Act to punish Blasphemers, Swearers, Drunkards, and Sabbath-Breakers . . . , Bacon, Laws of Maryland (1765), Sf2.

See 1 Dorsey, General Public Statutory Law of Maryland, 1692–1839 (1840), 65.

MASSACHUSETTS:

Plymouth Colony:

1650: Prophanacon the Lord's Day, Compact with the Charter and Laws of the Colony of New Plymouth (1836), 92.

1658: *Id.*, at 113 (traveling).

1671: General Laws of New Plimouth, c. III, §§ 9, 10 (1672), in *id.*, at 247.

Massachusetts Bay Colony:

1653: Sabbath, Colonial Laws of Massachusetts (reprinted from the edition of 1672 with the supplements through 1686) (1887), 132 (traveling, sporting, drinking).

1668: For the better Prevention of the Breach of the Sabbath, *id.*, at 134.

1692: An Act for the better Observation and Keeping the Lord's Day, Acts and Laws of His Majesty's Province

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of the Massachusetts-Bay in New-England, in Charter of the Province of the Massachusetts-Bay in New-England (1759 [*sic*]), 13.

1761: An Act for Repealing the several Laws now in Force which relate to the Observation of the Lord's-Day, and for making more effectual Provision for the due Observation thereof, *id.*, at 392.

1782: An Act for Making More Effectual Provision for the Due Observation of the Lord's Day . . . , Acts and Laws of Massachusetts, 1782 (reprinted 1890), 63.

1792: An Act providing for the due Observation of the Lord's Day, 2 Laws of Massachusetts, 1780–1800 (1801), 536.

See also the act of 1629 set forth in Blakely, American State Papers on Freedom in Religion (4th rev. ed. 1949), at 29–30.

NEW HAMPSHIRE:

1700: An Act for the better Observation and Keeping the Lords Day, Acts and Laws Passed by the General Court of His Majesties Province of New-Hampshire in New-England, 1726 (reprinted 1886), 7.

1715: An Act for the Inspecting, and Supressing of Disorders in Licensed Houses, *id.*, at 57 (innkeepers).

1785: An Act for the Better Observation and Keeping the Lords Day, 5 Laws of New Hampshire (First Constitutional Period), 1784–1792 (1916), 75.

1789: An Act for the better Observation of the Lord's day . . . , *id.*, at 372.

1799: An Act for the better observation of the Lords day . . . , 6 Laws of New Hampshire (Second Constitutional Period), 1792–1801 (1917), 592.

NEW JERSEY:

1675: Leaming and Spicer, Grants, Concessions and Original Constitutions of the Province of New-Jersey with the Acts Passed during the Proprietary Governments (ca. 1752), 98.

1683: Against prophaning the Lord's Day, *id.*, at 245.

1693: An Act for preventing Profanation of the Lords Day, *id.*, at 519.

1704: An Act for Suppressing of Immorality, 1 Nevill, Acts of the General Assembly of the Province of New-Jersey, 1703–1752 (1752), 3.

1790: An Act to promote the Interest of Religion and Morality, and for suppressing of Vice . . . , Acts of the Fourteenth General Assembly of the State of New Jersey, c. 311 (1790), 619.

1798: An Act for suppressing vice and immorality, Laws of New Jersey, Revised and Published under the Authority of the Legislature (1800), 329.

NEW YORK:

1685: A Bill against Sabbath breaking, 1 Colonial Laws of New York, 1664–1775 (1894), 173.

1695: An Act against profanation of the Lords Day, called Sunday, *id.*, at 356.

1788: An Act for suppressing immorality, Laws of New York, 1785–1788 (1886), 679.

NORTH CAROLINA:

1741: An Act for the better observation and keeping of the Lord's day, commonly called Sunday; and for the more effectual suppression of vice and immorality, 1 Laws of North Carolina (1821), 142.

PENNSYLVANIA:

1682: The Great Law or The Body of Laws, in Charter and Laws of the Province of Pennsylvania, 1682–1700 (with the Duke of Yorke's Book of Laws, 1676–1682) (1879), 107.

1690: The Law Concerning Liberty of Conscience (A Petition of Right, First Law), *id.*, at 192.

1700: The Law Concerning Liberty of Conscience, 2 Statutes at Large of Pennsylvania (1896), 3.

1705: An Act to Restrain People from Labor on the First Day of the Week, *id.*, at 175.

1779: An Act for the Suppression of Vice and Immorality, 9 Statutes at Large of Pennsylvania (1903), 333.

1786: An Act for the Prevention of Vice and Immorality . . . , 12 Statutes at Large of Pennsylvania (1906), 313.

1794: An Act for the Prevention of Vice and Immorality . . . , 15 Statutes at Large of Pennsylvania (1911), 110.

RHODE ISLAND:

1673: 2 Records of the Colony of Rhode Island and Providence Plantations, 1664–1677 (1857), 503 (alcoholic beverages).

1679: 3 Records of the Colony of Rhode Island and Providence Plantations, 1678–1706 (1858), 30 (employing servants).

1679: An Act Prohibiting Sports and Labours on the First Day of the Week, Acts and Laws, of His Majesty's Colony of Rhode-Island and Providence-Plantations (1730), 27.

1784: Rhode Island Acts and Resolves, Aug. 1784 (1784), 9 (excepting members of Sabbatarian societies; but exception does not extend to opening shops, to mechanical work in compact places, etc.).

1798: An Act prohibiting Sports and Labour on the first Day of the Week, Public Laws of Rhode-Island and Providence Plantations (1798), 577.

SOUTH CAROLINA:

1692: An Act for the better Observance of the Lord's Day, commonly called Sunday, 2 Statutes at Large of South Carolina (1837), 74.

1712: An Act for the better observation of the Lord's Day, commonly called Sunday, *id.*, at 396.

See Grimke, Public Laws of South-Carolina (1790), 19.

VIRGINIA:

1610: For the Colony in Virginea Britannia, Lawes Divine, Morall and Martiall (1612), in 3 Force, Tracts Relating to the Colonies in North America (1844), II, 10 (gaming).

1629: 1 Hening, Statutes of Virginia (1823), 144.

1642–1643: *Id.*, at 261 (traveling, shooting).

1657: The Sabboth to bee kept holy, *id.*, at 434 (traveling, shooting, lading).

1661–1662: Sundays not to bee profaned, 2 Hening, Statutes of Virginia (1823), 48.

1691: An act for the more effectual suppressing the severall sins and offences of swaring, cursing, profaineing Gods holy name, Sabbath abuseing, drunkenness, ffornication, and adultery, 3 Hening, Statutes of Virginia (1823), 71.

1705: An act for the effectual suppression of vice, and restraint and punishment of blasphemous, wicked, and dissolute persons, *id.*, at 358.

1786: An act for punishing disturbers of Religious Worship and Sabbath breakers, 12 Hening, Statutes of Virginia (1823), 336.

In some of the Colonies the English Sunday laws were also in effect. See, *e. g.*, Martin, Collection of the Statutes of England in Force in North-Carolina (1792), 379.

APPENDIX II TO OPINION OF MR. JUSTICE FRANKFURTER.

ANALYSIS OF IMPORTANT STATE SUNDAY STATUTES CURRENTLY IN FORCE.

This Appendix sets forth the important state legislative provisions currently in force prohibiting or regulating private activity on Sunday. In reducing these often complex laws to tabular form, a certain simplification has been required. Provisions in different States which are found in a single category, *e. g.*, "Trade in Alcoholic Beverages," or "Racing," may differ considerably in detail. This Appendix does not include references to: (1) provisions declaring Sunday a holiday or non-business day; (2) provisions closing the courts on Sunday or prohibiting the service of judicial process on that day; (3) provisions giving various government employees Sunday off or excepting Sunday from the days of labor for state prisoners; (4) penalty sections where Sunday laws are parts of general regulatory codes, *e. g.*, fish and game laws; (5) jurisdictional provisions or provisions authorizing arrest and detention on Sunday of offenders against the various Sunday laws, unless these are of special interest; and (6) definition provisions, statutes of limitation of prosecution, and similar ancillary provisions.

STATES		GENERAL PROHIBITIONS				
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous
ALABAMA	Ala. Code (1940) (Recomp. 1958)		T. 14, §§ 420, 422	T. 14, § 420	T. 14, § 420 (gaming) T. 14, § 421 (various public sports)	T. 9, § 21 (contracts void)
ALASKA	Alaska Comp. Laws Ann. (1958 Cum. Supp.)					
ARIZONA	Ariz. Rev. Stat. Ann. (1956)					
ARKANSAS	Ark. Stat. Ann. (1947) (Replacement Vols. 1956 & 1960)				§ 41-3809 (card games)	
CALIFORNIA	Codes					
COLORADO	Colo. Rev. Stat. Ann. (1953)					
CONNECTICUT	Conn. Gen. Stat. Rev. (1958)	§ 53-300 ("secular")	§ 53-300	§ 53-300 § 53-302 (permitting industrial or commercial employee to work Sun. unless relieved one day in next six; does not make lawful activity prohibited under § 53-300)	§ 53-300 (sport; presence at concert, dance, public diversion)	
DELAWARE	Del. Code Ann. (1953)				T. 28, § 906 (public dance, theater or cinema outside town limits or during hours specified, differing for two classes of cities)	
DISTRICT OF COLUMBIA	D.C. Code (1951) (Supp. VIII, 1960) D.C. Police Regs. (1955)				Pol. Regs., art. 6, § 4(d) (circus, carnival, etc.); art. 17, § 18 (paid public entertainment, cinema, etc., in place of public amusement)	
FLORIDA	Fla. Stat. Ann. (1943)	§ 855.01 [held unconstitutional as arbitrary in view of exceptions, *Kelly* v. *Blackburn*, 95 So. 2d 260; see *Henderson* v. *Antonacci*, 62 So. 2d 5]	§ 855.02 Fla. Laws 1959, Special Acts, c. 59-1650 (one county)	§ 855.03	§ 855.05 (game; sport)	

STATES	SPECIAL REGULATIONS OR PROHIBITIONS						
State	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling	Hunting, Shooting, and Fishing	Racing	Miscellaneous
ALABAMA	T. 29, §§ 36, 36 (1) (sale or public consumption)			T. 55, § 346	T. 14, § 420 (hunt & shoot)	T. 14, § 420	T. 5, § 131 (banks)
ALASKA							
ARIZONA	§ 4-244 (15) (permitted hours)		§ 32-357	§ 5-202			
ARKANSAS	§§ 48-901 (b), 48-904 to 48-906			§§ 84-2901, 84-2902		§§ 41-3807, 41-3808 (horse race and cock fight); see § 84-2828 (dog race)	
CALIFORNIA				Pen. Code § 413½	F. G. Code §§ 864, 865 (net salmon & shad Sat., Sun.)		Ag. Code § 309 (slaughtering Sun. & hols.)
COLORADO	§§ 75-2-3 (3), 75-2-3 (4) (permitted hours)	§§ 13-20-1 to 13-20-3	§§ 40-12-20, 40-12-21 (1st & 2d class cities)	§ 129-1-16		§ 129-2-10	§ 27-1-4 (cleaning & dyeing trade:—section of comprehensive hours-of-labor provisions)
CONNECTICUT		§ 53-301	§ 20-246 (& hols.)	§ 19-334 (& hols.)	§ 26-73 (hunt, with exceptions); §26-282 (clam on Fairfield beach)		
DELAWARE	T. 4, § 717 (& hols.)			T. 28, § 151	T. 7, § 714 (hunt, with exception)	T. 28, § 906 (outside town limits or during hours specified, differing for two classes of cities)	T. 28, § 906 (public auction outside town limits or during hours specified, differing for two classes of cities) T. 28, § 1139 (bingo)
DISTRICT OF COLUMBIA	§ 25-107 (comm'rs may forbid sale)						Pol Regs., art. 2, § 1 (street vendors); art. 25, § 14 (a) (labor in building construction or demolition near residential area or place of worship)
FLORIDA	§ 562.14 (with local option provisions)	§ 320.272 (& hols.) (2d hand dealers)			§ 855.04 (hunt & shoot) § 370.11 (shad)	§ 855.05 § 550.04 (with exception)	§ 551.11 (fronton)

STATES	EXCEPTIONS TO GENERAL PROHIBITIONS								
State	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or Sale of Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels	Sale of Milk, Bread, Eggs
ALABAMA	(Yes)	(Druggists) [Excepted commodities may not be sold in connection with prohibited activities]	(Newsstands; sale of newspapers)	(R. R., stages; steamboats & vessels)	(Sale of gas & oil; auto repair shops)	(Fruit stands; ice cream shops; ice mfg. plants; sale of ice)		(Lunchstands; restaurants; delicatessens)	
ALASKA									
ARIZONA									
ARKANSAS									
CALIFORNIA									
COLORADO					(Sale of petrol products, tires; auto accessories; repairs; towing, wrecking)				
CONNECTICUT	(Yes)	§53-300 (sale of medical supplies) §53-302 (druggists) [Sales exceptions limited to those who sell products on secular days]	(Production, distribution & sale of newspapers & periodicals)	§16-72 (street R. R. & bus)	(Emergency repair to auto, motor, aircraft, boats, etc., "including" sale of gas, towing & washing, sale of supplies, repair parts)	(Sale of fruit, ice, ice cream, confectionery, non-alcoholic beverages)	(Sale of tobacco & smokers' supplies)		(Sale of dairy prods., eggs, bakery prods.)
DELAWARE									
DISTRICT OF COLUMBIA									
FLORIDA	(Yes)	[Exceptions to §§ 855.01, 855.02 omitted] L. 1959, c. 59-1650 (sale of drugs)	L. 1959, c. 59-1650 (sale of newspapers)		L. 1959, c. 59-1650 (sale of heating fuel, gas)	L. 1959, c. 59-1650 (sale of ice)		L. 1959, c. 59-1650 (sale of meals)	

STATES	EXCEPTIONS TO GENERAL PROHIBITIONS (cont.)				EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
State	Sports	Entertainments	Operation of Manufacturing Processes Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecration	
ALABAMA	(Various local option provisions for cities of two classes: various sports, some may be authorized by all cities; others only by cities of one class)	(Local option provisions for two classes of cities: cinema; cinema-vaudeville)	(Yes)	(Communications; public utilities; florists)				T. 26, § 344 (children)
ALASKA								§ 43-2-112 (children)
ARIZONA								§ 23-281 (women)
ARKANSAS		§§ 19-2336, 41-3805 (cinema cannot be banned locally)				§ 19-2335		§§ 81-706, 81-707 (children) § 81-601 (women, unless paid overtime)
CALIFORNIA								Lab. Code §§ 551 to 556 Lab. Code § 851 (12 days in 14: pharmacists)
COLORADO								Indust. Comm'n Orders Nos. 10, 13 (1956), CCH Lab. Law Rep., State Laws (1960), pp. 52,756, 52,758 (women & children in specified occups.)
CONNECTICUT	§ 53-300 (amateur ball games & outdoor sports not disturbing quiet or worship; park comm'rs may permit free concerts & athletics) § 7-167 (local option enumerated professional & amateur sports, after 2 p.m.) § 7-168 (local option dog trials after 10 a.m.) § 27-35 (rifle ranges)	§ 7-164 (local option indoor concerts 2-6 p.m.—classical music only) § 7-165 (local option cinema 1-11:30 p.m.) § 7-166 (local option theater & vaudeville 2-11 p.m.)	§ 53-302	§ 53-300 (sale of fresh agricultural & horticultural products, antiques) § 53-302 (farm & personal services; watchmen; janitors & superintendents; transportation; sale & delivery of newspapers, milk & food; necessary repairs)	§ 53-303 (conscientious observer of 7th day or Jewish Sabbath who disturbs no other person at public worship not subject to penalty for laboring if notice of belief filed)			§§ 31-13, 31-18 (women & children in specified occups.)
DELAWARE		(Cinema outside towns during specified hours, differing for two and a third named counties)				T. 28, § 906 (in effect, any "worldly activity", not to conflict with State prohibitions)		T. 19, § 515 (children) T. 19, § 302 (women in specified occups.)
DISTRICT OF COLUMBIA		Pol. Regs., art. 6, § 4d (circus, etc. 2-11 p.m.); art. 17, § 18 (public entertainment, etc., before 3 a.m. & after 1 p.m.)						§ 36-202 (children) § 36-301 (women in specified occups.) § 2-1114 (barber: one-day closing)
FLORIDA	§ 855.06 (skeet & trap) § 855.07 (baseball 2-11 p.m.) See also L. 1959, c. 59-1650	L. 1959, c. 59-1650 (theater)	§ 855.07		See L. 1959, c. 59-1650.			§ 450.081(1) (children)

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STATES		GENERAL PROHIBITIONS					SPECIAL REGULATIONS OR PROHIBITIONS							EXCEPTIONS TO GENERAL PROHIBITIONS												EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainments	Miscellaneous	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling	Hunting, Shooting, and Fishing	Racing	Miscellaneous	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or sale of Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels	Sale of Milk, Bread, Eggs	Sports	Entertainments	Operation of Manufacturing Processes Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecration	
GEORGIA	Ga. Code Ann. (1936)	§ 26-6905 (business or work of "ordinary calling")			§ 26-6914 (public dancing) See also Ga. Laws 1906, No. 356 (amusements in certain non-urban areas without neighbors' approval)	§ 14-1810 (Sunday only religious holiday) § 26-6903 (R. R. except mail, passenger, perishables, livestock, etc.)	§§ 26-6105; 58-738; 58-625; 58-1002; 58-1079 (sale & purchase)				§ 26-6926 (hunt) § 26-6927 (shoot) § 26-6908 (fish)	§ 26-6915	§ 26-6919 (bathing in view of road to place of worship)	(Yes)									Ga. Laws 1941, No. 113 (outdoor entertainments & sports 1-6 p.m. in cities without population) §§ 26-6915 to 26-6920 (local option athletics)	§ 26-6916 (local option cinema; if authorized to operate, cinema must show one religious or educational film per month)		§ 5-813 (perishable farm products & seed & growing plants)				
HAWAII	Hawaii Rev. Laws (1955)				§ 144-33 (county boards of supervisors may provide for exhibitions of cinema after 12:30 p.m. & during prohibited hours under such restrictions as they prescribe)		§ 159-77 (clubs may be licensed)			§ 165-9															[See heading "General Prohibition: Public Entertainment".]				§ 88-22 (children)
IDAHO	Idaho Code Ann. (1947)				§ 18-6303 (dance hall must close 1 a.m. year-round before 5 p.m.; circus, show, concert saloon, variety hall)	§ 18-6302 (Sun. not aside as day of public rest; no penalty)	§§ 23-307, 23-927 (& bois.)			§ 54-413		§ 18-6303 (race track except auto 1-4:30 p.m.)	§§ 18-6303, 18-1201 (pool, billiard & card room)															
ILLINOIS	Ill. Rev. Stat. (1959)	C. 38, § 349 (disturbing peace and good order of society by labor)		C. 48, § 8d (unlawful to operate specified establishment for sale unless posting schedule of alternative day off for Sun. employees)	C. 38, § 349 (disturbing peace, etc. by any amusement or diversion)	C. 38, § 550 (disturbing private family)	C. 43, § 139 (with local option provisions)				C. 61, § 187 (hunting by nonresidents unless State affords reciprocity)	C. 8, § 279.7		(Yes)			(R. R. & watermen unloading; ferrymen; families removing)										C. 38, § 349 (section shall not be construed to prevent due exercise of rights of conscience by person keeping another day as Sabbath)			C. 48, § 31.3 (children) C. 48, §§ 8a-9g (employees in specified occups.; exempts employees working less than 3 hours Sun.)
INDIANA	Burns' Ind. Stat. Ann. (Replacement Vols. 1956, 1951, 1956)	§ 10-4301 ("common" labor; "usual vocation")			§ 10-4202 (professional games; football)	§ 10-4201 (rioting; quarreling)	§§ 12-436 (& bois.), 12-917	§ 10-4305		§§ 63-205, 63-216, 63-217	§§ 10-4301, 10-4303 (hunt)			(Yes)		(Persons engaged in publication & distribution of news)	(Travelers & those conveying them; families removing; tollgates, ferrymen)					(Baseball & ice hockey after 1 p.m. more than 1000' from place of worship or hospital)				§ 10-4301 (conscientious observer of seventh day)			§ 28-521 (children)
IOWA	Iowa Code Ann. (1949)						§§ 123.25, 124.20 (& bois.; sale & consumption)																							
KANSAS	Kan. Gen. Stat. Ann. (1949) & Supp. (1959)	§ 21-952	§ 21-955	§ 21-952	§ 21-954 (rockfight, card games or other gamer); § 19-2220 (dance halls)		§ 41-712; 41-2704					§ 21-954		(& sale of articles of immediate necessity)	§21-906 (sale of drugs, medicines)		§21-953 (ferrymen)					(See heading "Miscellaneous")			§ 21-956 (sale of provisions)		§ 21-953 (§ 21-952 penalties not applicable to person who has already observed another Sabbath)		§§ 14-417; 13-422; 13-430; (& theater)	Lab. Dep't. Orders Nos. 2, 3, 5 (1936), CCH Lab. Law Rep., State Laws (1960) pp. 34,328, 34,329, (1,350 (women & children in specified occups.)
KENTUCKY	Ky. Rev. Stat. (1960)	§ 436.160 (working at "occupation")		§ 436.160			§§ 244.290, 244. 480 (some local options)			§ 436.160	§ 436.160 (hunt)		§ 436.160 (pool or billiards)	(Yes)				(Gas stations)					(Amateur sports; athletics)	(Cinema & opera)		(Public services or public utilities)		§ 436.160 (member of religious society observing another day)			§ 339.280 (children) § 337.050(1) (overtime for 7th day's employment)
LOUISIANA	La. Rev. Stat. (1950)		§ 51:191 (stores, shops, saloons & licensed places of public business)				§§ 26:89, 26:286, 51:192		§ 51:193			§ 4:151	§ 33:216 (hours for children in street trades)		(Drug stores; apothecaries; sale of anything necessary in sickness)	(Newspealers; newspaper offices)	(R. R.; boats)	(Watering places; livery stables)	(Sale of ice; soda fountains)		(Hotels; boarding houses; restaurants)	(Bakers; dairies)		(Theaters; any place of amusement not serving alcohol; parks; resorts for recreation & health)		(Bookstores; printing offices; undertakers; markets; freight warehouses; telegraph; sale of burial items)		§ 33:4763 (two classes of cities by population may regulate (1) meat markets & bakers; (2) manner & delivery of bakery prods.)	§ 33:401 (7)	§ 23:211 (children) § 23:332 (women in specified occups.)
MAINE	Me. Rev. Stat. (1954)	C. 134, § 28	C. 134, § 36; C. 134, § 43 (imbibers carried on certain other persons than travelers, lodgers)		C. 134, § 28 (sport, game, recreation; presence at dance, public diversion, show, entertainment)	C. 134, § 38 (travelling)	C. 61, § 27 (sale & purchase)	C. 134, § 38-A (& mobile homes)		C. 134, §§ 38, 39	C. 27, § 76 (hunt); C. 37, § 120 (hunt fox; but digging out fox permitted)	C. 134, §§ 38, 39		[All exemptions contained in § 51:192] (Yes)	(Drug stores)	(Printing & selling Sun. newspapers)	(Vehicles; common carriers; cabs; carriages; airplanes)	(Garages; sale of gas)	(See heading "Drug Stores".)		(Hotels; restaurants)	(See heading "Miscellaneous")	C. 134, § 39 (outdoor amateur sports & games with exceptions 1-7 p.m., at local option, within 1000' restrict area to avoid disturbance to worshippers) C. 134, § 40 (local option bowling, 2-11 p.m.)	(Concerts; theaters; scientific, philosophical, religious, educational lectures) C. 134, § 41 (cinema 2-11:30 p.m. at local option; but cinema employes may not be employed more than 6-day week)		Grocery		C. 134, § 44 (conscientious observer of Sat. as Sabbath not disturbing others)			C. 30, § 24 (children)

STATES		GENERAL PROHIBITIONS				
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous
MARYLAND	Md. Code Ann. (1957)	Art. 27, § 492	Art. 27, § 521	Art. 27, § 492	Art. 27, § 522 (keeping dancing saloon, opera, ball or bowling alley)	Art. 27, § 492 (permit child or servant to profane day by gaming)
MASSACHUSETTS	Mass. Gen. Laws Ann. (1958)	C. 136, § 5	C. 136, § 5 C. 136 § 12 (innholders cannot entertain other persons than travellers, lodgers)	C. 149, § 47 (compelling unwilling employee to work Sun. in certain industries & establishments unless he is relieved one day in next six) C. 149, § 48 (unlawful to operate mechanical, mercantile or manufacturing establishments Sun. without posting schedule of alternative day off for Sun. employees); See C. 149, § 51	C. 136, § 2 (presence at or participation in play, sport, game, public diversion) C. 136, § 3 (maintaining public entertainment)	C. 136, § 14 (indecent behavior in places of worship) C. 266, §§ 113, 117 (more severe penalties for certain trespasses to property on Sun.)
MICHIGAN	Mich. Stat. Ann. (Rev. Vols. 1949, 1952, 1957, 1959, 1960)	§ 18.851	§ 18.851 § 18.852 (keepers of entertainment houses & taverns cannot entertain other persons than travellers, lodgers)		§§ 18.851, 18.854 (presence or participation at dance, game, sport, play, public show, diversion, entertainment or public assembly other than meetings for worship or moral instruction or concerts of sacred music; § 18.854 applies Sun. evening)	
MINNESOTA	Minn. Stat. Ann. (1947)	§ 614.29 (& trades, manufacturers, mechanical employments)	§ 614.29 (sale of raw meat, groceries, clothing, shoes not within "necessity" exception)		§ 614.29 (gaming; shows) § 617.51 (public dancing before noon; local ordinance may ban thereafter)	§ 614.29 (noises disturbing peace)
MISSISSIPPI	Miss. Code Ann. (1942) (Recomp. 1956)	§ 2368 (labor at trade, calling, business)	§ 2369	§ 2368	§ 2370 (various exhibitions; bear-baiting, etc.)	
MISSOURI	Vernon's Mo. Stat. Ann. (1953)	§ 563.690	§ 563.720	§ 563.690	§ 563.710 (cockfights, cards, games)	

State	SPECIAL REGULATIONS OR PROHIBITIONS						
	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling	Hunting, Shooting, and Fishing	Racing	Miscellaneous
MARYLAND	Art. 2B, §§ 90 to 106 (provisions of local application banning sales with various exceptions differing as to hours, geographic scope, sales permitted, establishments which may sell)		Art. 27, § 522		Art. 66C, § 132(d) (hunt) Art. 66C, § 698 (d) (take oysters)		Art. 27, § 252 (c) (bingo in Baltimore County)
MASSACHUSETTS	C. 138, §§ 12, 33 (blanket & hour prohibitions; some local option)			C. 136, §§ 2, 3, 25, 32	C. 131, § 58 (hunt birds or mammals; but trapping permitted); C. 136, § 17 (shoot, with exceptions; hunt; net, spear or commercial fishing, with exceptions)	C. 136, §§ 2, 3, 25, 32	C. 140, § 177A (pinball license revocation) C. 136, § 18 (innholders letting gaming apparatus)
MICHIGAN		§§ 9.2701, 9.2702 (counties over specified population)	§§ 18.121, 18.122	§ 18.422(10)			§ 19.597 (pawnbroker) § 18.531 (pool & billiard halls outside cities)
MINNESOTA	§ 340.14, Subd. 1	§ 168.275	§ 614. 29 (not "necessity"); § 154.16 (license revocation)	§ 341.07 (& certain hols.)		§ 614.29 (except county fairs)	§ 221.191 (trucks within 35 miles of city in summer: Sun. & hols.)
MISSISSIPPI				§ 8924	§ 2371 (hunt with dog or gun; fish)	§ 2370	
MISSOURI	§ 311.480. See § 311.296 (certain local option provisions for sale before 1:30 a.m.)				§ 563.690 (hunt; shoot)	§ 563.710	

State	EXCEPTIONS TO GENERAL PROHIBITIONS													EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or sale of Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels	Sale of Milk, Bread, Eggs	Sports	Entertainments	Operation of Manufacturing Processes Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecration	
MARYLAND	Art. 27, § 492	(Apothecaries may sell drugs, medicines, patent medicines)	(Sale of newspapers; periodicals)		(Retail sale of gasoline, oil, greases)	(Retail sale of candy, soda, soft drinks, ice, ice cream, ices, confectionery, fruits)	(Retail sale of tobacco, cigars, cigarettes)		(Retail sale of milk, bread)	Art. 27 §§ 493 to 534C (various provisions of local application, permitting enumerated sports, cinema, theater, amusement parks, swimming pools, beaches, dancing, music, etc., in areas of differing dimension, with differing hours of permitted activity, differing penalties, differing conditions upon permissibility, including minimum distance from places of worship, etc.)			Art. 27, § 509 (sale of merchandise customarily sold at beach, amusement parks, etc., in one county) (1959 amendment to Art. 27, § 521 permits sale in same county of various specified food & toilet articles, ornaments, auto & boat accessories, etc., at retail; and keeping open retail shops not employing more than one employee)				Art. 100, § 20 (children)
MASSACHUSETTS	(Yes) C. 136, § 9 (provision permitting police authorization of work which cannot be done on another day without hardship)	C. 136, § 6 (retail sale of drugs & medicines, articles on physician's prescription, mechanical appliances used by physicians or surgeons)	C. 136, § 6 (preparation, printing, publication, sale, delivery of newspapers)	C. 136, § 6 (various provisions permitting different categories of trucking at different hours; transporting perishables, produce to fairs, etc.; operation of motor vehicles; letting of horses, carriages, boats, motor vehicles, bicycles; running steam ferries on established routes; street R. R.; steamboats & R. R.)	C. 136, § 6 (sale of gas; oil for use; retail sale of accessories for immediate necessary use in connection with motor vehicles, boats & aircraft; emergency repairs & towing of disabled motor vehicles; wholesale or retail sale of fuel)	C. 136, §§ 6, 7 (delivery of frozen desserts & dessert mix; wholesale or retail sale of ice; various classes of enterprise, some at local option· specified dealers may sell at retail frozen dessert, frozen dessert mix, soda water, confectionery; in some enterprises, fruit)	C. 136, § 6 (specified dealers may sell tobacco at retail)	C. 136, § 6 (sales of meals by innholders & common victualers for off-premises consumption)	C. 136, § 6 (permitted hours: specified dealers may sell bread at retail; bakers may sell bread & bakery prods. during same hours; milk may be sold & delivered all day, wholesale or retail; making butter & cheese permitted)	C. 136, §§ 21 to 25, 26 to 32 (two sets of local option provisions for amateur & professional athletics with differing permitted hours: activities to be more than 1,000′ from place of worship (with exception); noncontest outdoor exercises permitted) C. 136, § 4B (local option bowling 1–11 p.m.) C. 136, § 2 (golf; tennis; certain dancing; after 1 p.m., lawn bowling, miniature golf & golf driving range) C. 136, § 17 (local option skeet, trap & target shooting)	C. 136, § 4 (public entertainment in keeping with character of day and not inconsistent with its due observance may be locally licensed after 1 p.m.) C. 136, § 4A (bowling alleys, certain shooting galleries, photo galleries, & games at amusement parks & beaches in keeping with character of day, etc., may be locally licensed after 1 p.m.) C. 136, §§ 10, 11 (certain parades with music not within 200′ of place of worship) C. 136, § 6 (unpaid work on pleasure boats; letting on trains of outdoor recreational or sports accessories) C. 136, § 2 (concert of sacred music; licensed free open air concert)		C. 136, § 6 (tel. & tel., water, steam, gas, electricity, etc.; certain chemical distribution; wholesale handling & delivery of fish & perishable foods; sale of live bait, of poultry before certain holidays, of certain foods before noon on specified Jewish holidays, of catalogues & art works at certain art exhibits; noncommercial photography; nonpublic trade expositions 1–10 p.m.; sale of fruits and vegetables by person raising same; bootblacking before 11 a.m. (local option); digging clams; dressing fish; cultivating land and transporting produce in wartime; unpaid quiet work in private gardens; public baths)	C. 136, § 6 (secular business by conscientious observer of Sat. not disturbing others; sale of kosher meat 6–10 a.m. by dealer closing Sat. for reasons of conscience)			C. 149, § 67 (children in specified occups.) C. 149, §§ 47 to 51 (enumerated industries and occupations) (see heading: "General Prohibitions: Permitting child or servant to work or labor") C. 160, § 184 (2 days off per month: specified R.R. employees)
MICHIGAN	(Yes)													§§ 18.855, 18.856(1), 18.122, 9.2702 (conscientious observer of Sat. or Jewish Sabbath not disturbing others)	§ 5.1740, Ninth (4th class cities)	§ 5.1740, Ninth (4th class cities)	§§ 17.717, 17.718 (children) § 17.261 (motormen)
MINNESOTA	(In orderly manner so as not to disturb repose & religious liberty)	(Sale of drugs, medicines, surgical appliances)	(Sale of newspapers)			(Fruits, confectionery)	(Sale of prepared tobacco)	(Meals served on or off premises by caterers)		(Baseball in orderly manner so as not to disburb repose)			(Shoeshine)				
	[All excepted commodities must be sold in quiet, orderly manner]																
MISSISSIPPI	(Yes)	(Druggists may sell medicines)	(Labor on newspapers)	(R. R.; steamboat; common or contract truck transport; street R. R.)	(Livery stable, garage, gas station)	(Ice house)				§§ 2370, 2370.5 (various specified sports 1–6 p.m.; but local ordnance may ban these, *semble*)	§§ 2370, 2370.5 (cinema & plays 1–6 p.m.; 9–12 p.m.; but local ordinance may ban these, *semble*)	(Yes)	(Tel. & tel.; meat markets in towns of less than specified population; all activities by religious societies which they can otherwise perform)		§ 2368 (can close garages & gas stations during 3 hours). See also § 3374–54	§ 3374–133	
MISSOURI	(& sale of articles of immediate necessity)	§ 563.730 (sale of drugs, medicines)		§ 563.700 (ferrymen)					(See heading "Miscellaneous")				§ 563.730 (sale of provisions)	§ 563.700 (member of religious society observing other Sabbath; defense to § 563.690)			§ 294.030 (children)

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STATES		GENERAL PROHIBITIONS					SPECIAL REGULATIONS OR PROHIBITIONS							EXCEPTIONS TO GENERAL PROHIBITIONS												EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling	Hunting, Shooting, and Fishing	Racing	Miscellaneous	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or sale of: Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels	Sale of Milk, Bread, Eggs	Sports	Entertainments	Operation of Manufacturing Processes Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecration	
MONTANA	Mont. Rev. Code Ann. (1947)				§ 94-35-216 (dance hall, gambling house, variety hall)		§ 94-35-216 (place of amusement serving alcohol) § 4-114 (State stores)		§ 94-3111			§ 94-35-216 (racetrack)	§ 94-35-216 (pool room)											(Free dance in public park)				
NEBRASKA	Neb. Rev. Stat. (1943) (Reissued Vols. 1964, 1956, 1958, 1960) & Cum. Supp. (1959)	§ 28-910 ("common" labor)			§ 28-940 (public dancing; baseball)	§ 28-940 (rioting, quarreling)	§ 53-179 (some local option)		§ 28-938			§ 2-1213	§ 9-107 (bingo) § 69-207 (pawnshop)	(Yes)			(Families travelling, watermen landing passengers, tollgate & bridgekeepers; ferry operators; R. R. insofar as necessary)						(Local option baseball)	(Certain regulated public dancing)			§ 28-940 (conscientious observer of Sat.)	§ 13-258 (various § 15-226 classes § 17-126) of cities)	§ 14-102(24) (various § 15-226 classes § 17-126) of cities)		
NEVADA	Nev. Rev. Stat. (1960)				§ 201.260 (noisy sport or amusement disturbing peace of day)							§ 201.200 (race grounds)																		
NEW HAMPSHIRE	N.H. Rev. Stat. Ann. (1955)	§ 578:2 (labor of "secular calling" disturbing others)	§ 578:4	§ 275:32 (working employment of children in occupation unless he receives one day off in next six) § 275:34 (unlawful to operate Sun. without posting schedule of alternative day off for Sun. employees)	§ 578:3 (play, game, sport) § 578:5 (public dancing)	§ 578:6 (rude behavior in place of worship)	§ 181:7 § 176:11 (with exceptions)			§ 578:3, 578:5		§ 284:17; §§ 578:3, 578:5	§ 287:2 (beano)	(& sale of necessaries)	(Sale of drugs & medicines)						(Entertaining boarders)	(Sale of milk & bread)	§ 578:5 (local option plays, games, sports & exhibitions; can authorize specified sports, and all sports with admission fee, only after 1 p.m.; cinema, theater, vaudeville only after 2 p.m.)		(Emergency repairs on mills and factories); § 578:3 (local option retail business)			§§ 275:32 to 275:35 (See heading "General Prohibitions: Permitting child or servant to work or labor")	
NEW JERSEY	N.J. Stat. Ann. (1939-1953)	§§ 2A:171-3 ("worldly" employment; no penalty) held impliedly repealed by *Braen v. Pines Manufacturing, Inc.*, 8 N.J. *Farmers*, 22 N.J. 196, 160 A. 2d 265.	§§ 2A:171-5.8 to -5.18 (sales or offers to sell of several broad categories, including clothing or wearing apparel, household, business or office appliances. Applies only to counties adopting the statute by referendum)				§ 33: 1-49 (local option)	§ 2A: 171-1.1	§ 45: 4-26. See §§ 40: 48-2.1, 40:52-1 (municipalities may regulate barber & beauty shop hours Sun. & hols.)		§ 22:4-24 (hunt, with exceptions; see § 23:2-32; § 23:2-24 (net fish, with exceptions) §§ 30:2-11, 30:3-15 (take clams, oysters)	N.J. Rev. Stat., Cum. Supp. (1953-1924), § 5:5-38; N.J. Rev. Stat. Cum. Supp. (1951-1952), § 5:2-47	§ 45:22-31 (pawnbroker) N.J. Rev. Stat. Cum. Supp. (1953-1954), § 5:8-31 (bingo; local option) N.J. Rev. Stat. Cum. Supp. (1953-1954), § 5:8-58 (raffles; local option)	[2A:171-5.8 (& non-business sales) [Exceptions to § 2A: 171-1: included for possible relevance under *Auto-Rite Supply Co.* v. *Mayor of Woodbridge*, 25 N.J. 188, 135 A. 2d. 515. But see *Masters-Jersey, Inc.*, v. *Mayor of Paramus*, 32 N.J. 296, 160 A., 2d 841]												§ 2A:171-4 (conscientious observer of Sat. who devotes same to religious exercises & refrains from labor; exception does not permit selling or showing merchandise)	§§40:95-3, 40:95-4 (requisite passenger carriage & landing by vessel & certain R.R. operations); less other headings.		§ 34:2-21.3 (children) § 34:2-24 (women in specified occups.)
NEW MEXICO	N.M. Stat. Ann. (1953)	§ 40-44-2			§ 40-44-2 (sports, cockfight, public meetings & exhibitions except for religious worship, etc.)	§ 40-44-2 (disturbing worshippers or family)	§ 46-10-14.1					§ 40-44-2	§ 67-13-5 (sale of jewelry at auction)	(Yes)	§ 2A: 171-2 (preparation & sale of drugs)	§ 2A: 171-6 (local option publication & sale of newspapers)							§ 2A:171-5 (recreation, sport, amusement not disturbing others, at local option and no part to total repulsion, walking & driving for recreation; letting conveyances for same)		§ 2A:171-5 (preparation & sale of perishable agricultural & horticultural prods.)			
NEW YORK	McKinney's N.Y. Laws	Pen. Law § 2143 Pen. Law § 2146 (trades, manufactures, agricultural or mechanical employments.)	Pen. Law § 2147 (barn-all public selling or offering; expressly applies exception for sales of meat & for delicatessen) Pen. Law § 2149 (forfeiture of goods)	Lab. Law § 161 (unlawful to operate Sun. without posting schedule of alternative day off for Sun. employees in specified occups.)	Pen. Law § 2145 (public sports, exercises, shows) Pen. Law § 2132 (theater, concert, circus, etc., & all public shows, exhibitions, entertainments)	Pen. Law § 2145 (noise disturbing peace of day) Pen. Law § 2121 (parades in cities)	Alco. Bev. §§ 105, 106 (some permitted hours) Pen. Law § 2147		Pen. Law § 2153	Unconsol. § 9105	Conserv. § 226(9)(a) (hunt deer in one county, Sat. & Sun.)	Unconsol. §§ 7581, 7598	Gen. Mun. § 483 (local option bingo)	Pen. Law § 2143 Pen. Law § 2146 (in usual, orderly manner not disturbing repose & religious liberty)	Pen. Law § 2147 (sale of drugs, medicine & surgical instruments)	Pen. Law § 2147 (sale of newspapers, magazines)		Pen. Law § 2147 (sale of gas, oil, tires)	Pen. Law § 2147 (sale of ice, soda water, fruit, confectionery)	Pen. Law § 2147 (sale of prepared tobacco)	Pen. Law § 2147 (sale of prepared food, non-alcoholic beverages)	Pen. Law § 2147 (sale of meals eaten on premises, caterers)	Pen. Law § 2147 (sale of bread, milk, eggs)	Pen. Law § 2145 (private sports, games & activities primarily for enjoyment & participation; must not disturb repose & religious liberty; local option spectator sports, exercises, shows after 2 p.m.)	Pen. Law § 2152 (local option public entertainment after 1 p.m.) Pen. Law § 2151 (certain processions without music; specified groups may parade with music but not within one block of place of worship; religious society may parade with music after 2 p.m.; town option parades with or without music after 2 p.m.)		Pen. Law § 2147 (food sale, service & delivery before 10 a.m.; sale of flowers, souvenirs; sale of prepared foods by grocers, delicatessens, bakeries, farmers & roadside, farm stands & bait stores on all usual merchandise)	Pen. Law § 2144 (person uniformly keeping another day as holy time, if he does not disturb others keeping Sun. as holy time; defense to § 2145)			Lab. Law §§ 161, 167 (specified occups.) Lab. Law §§ 170 to 185-a (women and children, specified occups.) Lab. Law § 186 (2 days rest per month; specified R. R. employees) Educ. Law § 6807 (1 day per 2 weeks' pharmacists)
NORTH CAROLINA	N.C. Gen. Stat. (Recomp. 1953) (Replacement Vols. 1958 & 1960)						§§ 18-45(f), 18-47 (State stores)				§ 103-2 (hunt) § 113-267 (net fish, with exceptions) §§ 113-210, 113-211 (take oysters; night or Sun.)															N.C. Laws 1959, c. 633 (no recently authorized to prohibit commercial entertainment near place of worship)		§ 110.2 (children) § 95.17 (6-day week for women; 12 days in 14 for men, with exceptions)

Appendix II to Opinion of FRANKFURTER, J.

STATES		GENERAL PROHIBITIONS					SPECIAL REGULATIONS OR PROHIBITIONS							EXCEPTIONS TO GENERAL PROHIBITIONS										EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling	Hunting, Shooting, and Fishing	Racing	Miscellaneous	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or sale of Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels	Sale of Milk, Bread, Eggs	Sports	Entertainments	Operation of Manufacturing Processes Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecration	
NORTH DAKOTA	N.D. Century Code (1960)	§ 12-21-15 ("servile" labor, trades, manufactures, mechanical employments)	§ 12-21-15		§ 12-21-15 (public sports, circuses, carnivals) § 12-21-19 (place for public dancing)						§ 12-21-15 (shoot)	§ 12-21-15		(Yes)	(Sale of drugs, medicines, surgical appliances)	(Newspaper plants; sale of newspapers, magazines)	(Steam & street R.R.; cabs, buses)	(Livery & feed barns; garages; gas stations)	(Ice cream; soda fountain operations; candy; confectionery)	(Sale of tobacco, cigars)	(Sale of food to be eaten on premises)	(Bakeries; sale of milk)	(Local option baseball after 1:15 p.m. played quietly and not within 500' of place of worship) § 12-21-25 (bowling after 1 p.m. unless local option bans it)	§ 12-21-30 (theater & cinema after 1:15 p.m.) § 12-21-22 (chalkbouncer, beaches, pleasure boats)		(Electric light, gas, heat & power; sale of meat & fish before 10 a.m.; bootblack; del. & tel.; popcorn stands)	§ 12-21-17 (person keeping another day as holy time not disturbing other persons keeping Sun. as holy time; defense to labor)	§ 40-05-02 (food markets may be banned by cities of specified minimum population)		§ 34-07-15 (children) § 34-07-16 (wages in specified occups.) Comm'r Ag. & Lab. Order No. 6 (1939), CCH Lab. Law Rep., State Laws (1960) ¶ 37,121 (children)
[Exempted commodities may not be sold in pool or billiard halls, bowling alleys, saloons, gaming places]																											
OHIO	Page's Ohio Rev. Code Ann. (1954)	§ 3773.24 ("common" labor)	§ 3773.24	§ 3773.24	§ 3773.23 (theatrical or dramatic performance; boxing, sparring, or hitting; baseball & cinema before noon)	§ 3773.25 (keeping low or disorderly house)	§ 4301.22 (some local option as to morning hrs.) See § 3772.23		§ 4709.24		§ 1531.02 (hunt bird or quadruped) § 3772.26 (possess hunting or shooting implements in open air)			(Yes)			(Traveling; incidental services & commodities)						§ 3773.26 (trap shooting)	(Recreation, sports, amusements, entertainment, exhibitions; incidental services & commodities)		(Publicly owned entertainment places; state & other fairs & incidents)	§ 3773.24 (person conscientiously observing flat.)		§ 4109.22 (children in specified occups.) §§ 4107.46, 4107.47 (women)
OKLAHOMA	Okla. Stat. Ann. (1951) (Vols. 1952-1958)	T. 21, § 908 ("servile" labor, trades, manufactures, mechanical employment)	T. 21, § 908		T. 21, § 908 (gaming)		Okla. Const., Art. 27, § 2 § 37, § 213 (permitted hours, but local option may ban)	T. 21, §§ 917 to 919			T. 21, § 908 (shoot) T. 29, § 6-308 (no fish commercially Sat. & Sun.)	T. 21, § 908		(& sale of necessaries)	(Sale of drugs, medicines, surgical appliances)			T. 21, § 928 (sale of gas prods., tires, auto accessories; repairs, towing & wrecking)	(Sale of ice) [See headings "Restaurants, etc.", "Miscellaneous"]		(Sale of food & drink for consumption on premises)	(Sale of milk, bread)				(Sale of meat, fish & other food; sale of burial appliances)	T. 21, § 909 (person keeping another day as holy time, not disturbing other persons keeping Sun. as holy time)			
OREGON	Ore. Rev. Stat. (1959)								§ 690.210	§ 463.030 (& certain bouts.)		§ 462.120	§ 726.270 (pawnbroker)														§ 653.315 (children) Wage and Hour Comm'r, Orders Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13 (Gen. Wage Order) State Laws (1960) pp. 37,334 to 37,368 (various day-of-rest & 7th-day overtime provisions for women & children in specified occups.; Orders 8, 9 & 12 fix Sun. as established day of rest unless another is scheduled)		
PENNSYLVANIA	Purdon's Pa. Stat. Ann. (1945-1957)	T. 18, § 4699.4 ("worldly employment or business")	T. 18, § 4699.10 (selling or offering at retail various categories of merchandise, e.g., clothing or wearing apparel, household, business, or office appliances, furniture, hardware, tools, paints, lumber, luggage, jewelry, toys (excluding novelties or souvenirs, etc.)		T. 18, § 4699.4 (game, sport, diversion) T. 4, §§ 39 to 65 (cinema banned before 2 p.m.; banned after 2 p.m. unless consent of local option (not applicable to films on church premises excepted); no employee may work at Sun. cinema unless he has had one day off in preceding week) T. 4, §§ 51 to 61 (baseball & football), and T. 4, §§ 181 to 197 (polo) (similar general bans with local option authorized 1-7 p.m.)	T. 18, §§ 622, 633 (jurisdictional and forfeiture-allocating provisions)	T. 47, § 4-402 T. 47, § 4-405 (some local option as to p.m. hotel sales) T. 4, § 3-304 (state stores)	T. 18, § 4699.9 (& trailers)	T. 63, § 339 (barber license revocation) T. 63, § 319 (same for beauty parlor)	T. 4, §§ 1, 30.202	T. 34, § 1311.702 (hunt, with exceptions for trapping & dog train) T. 63, § 261-28 (pawnbroker) T. 34, § 1311.721 (retriever train) T. 34, § 1311.719 (training dog on land without owner's consent)	T. 4, § 307(c)	T. 18, § 4631 (pool, billiard hall) T. 63, § 261-28 (pawnbroker) T. 34, § 1311.721 (retriever train) T. 34, § 1311.719 (training dog on land without owner's consent)	(& delivery of necessaries before 9 a.m. and after 5 p.m.)		(Sale of newspapers)	(Ferrymen carrying passengers; watermen landing passengers; persons removing with families)				(Serving travellers, sojourners, strangers, in bake-houses, lodging houses, inns, other houses of entertainment)	(Delivery of milk before 9 a.m. & after 5 p.m.)	T. 18, § 4699.4 ("wholesome recreation"; various enumerated sports and entertainments; various professional activities) (1959 amend.) T. 4, §§ 181 to 185 (tennis 1-2 p.m.) T. 4, § 185 (line fishing up to specified number of lines, hooks, etc; bait not fishing with bait below specified size; landowner's consent required in certain cases) [See heading: "General Prohibitions: Public Entertainment"]	T. 4, §§ 121 to 127 (licensed public concerts after noon; music must be of high order, and subject to revocation & penalty for presenting other entertainment than music at licensed concert)		T. 18, § 4639.4 (public utilities) (1959 amend.) T. 31, § 623 (veterans att'n band)		T. 43, §§ 28130, 37453 (24) (other of two dianes)	T. 43, § 46 (children) T. 43, § 103(a) (women) T. 43, §§ 261,481 (specified occupations)
PUERTO RICO	P.R. Laws Ann. (1955-1956)	T. 33, § 2201 (commercial establishments to close and no work to be done thereon Sun. & named hols. Also fixes weekday closing hours.)				T. 33, § 2203 (in case of disorder in any excepted establishment, officials may close it)			T. 33, § 2204					(Permits in cases of necessity)	(Pharmacies)	(Newspaper enterprises; newspaper stands)		(Garages; gas stations; livery stables)	(Confectionery & pastry stores & stands selling candy; ice depots)	(Sale of matches, manufactured tobacco at certain stands)	(Stores selling coffee only as a beverage & refreshments; restaurants; cafes; hotels; inns)	(Milk depots, dairies, pastry stores)		(Theaters, racetracks & places of amusement; casinos; billiard rooms)		(Printers; public utilities; public markets selling local produce; stands selling flashlights, batteries, bulbs, fuses; slaughterhouses; meat stands; docks; undertakers; airport & hotel shops)			T. 29, § 295 (employees of commercial and manufacturing establishments not subject to T. 33, § 2201; penalty: double wages); see also T. 29, § 273

STATES: State	STATES: Code (and Supps.)	GENERAL PROHIBITIONS: "Work" or "Labor"	GENERAL PROHIBITIONS: Keeping Open Shop or Selling Goods	GENERAL PROHIBITIONS: Permitting Child or Servant To Work or Labor	GENERAL PROHIBITIONS: Public Entertainment	GENERAL PROHIBITIONS: Miscellaneous
RHODE ISLAND	R.I. Gen. Laws (1956)	§ 11-40-1 (labor of "ordinary calling") § 25-1-6 (engage in gainful activities in store, mill, factory, commercial occupation, communications or industrial work on Sun. & specified hols. except work absolutely necessary and permitted on Sun.)		§ 11-40-1 (or play) § 11-40-2 (servant of another) § 25-1-6 (no person to permit employee to work at gainful activity in store, mill, factory, commercial occupation, communications or industrial work on Sun. & specified hols. except work absolutely necessary and permitted on Sun. Enforced by Dept. of Labor)	§ 11-40-1 (game, sport, play, recreation) § 11-9-1 (certain performances by children)	See § 5-22-5 (limiting municipal power to authorize Sun. activity)
SOUTH CAROLINA	S.C. Code Laws (1952)	§ 64-2 ("wordly" labor of "ordinary calling")		§ 64-3 (machine shop work other than emergency) § 64-4 (textile plants may not permit regular employee to do ordinary worldly work of his regular occupation (with exceptions for emergencies and voluntary work to eliminate processing bottlenecks, in which case pay is time and a half)) § 64-5 (manufacturing & mercantile establishments may not employ women & children. Enforced by Comm'r of Labor)	§ 64-1 (public sports or pastimes; bear-baiting, football, plays, etc.; or other sports, exercises, pastimes) § 5-601 (dance halls) § 5-103 (cinema, athletics, concerts during prohibited hours)	§ 16-506 (keeping gaming table or permitting games played in house) §§ 58-1021 to 58-1023 (R.R. trains, with exceptions, *e.g.*, mail, passengers, through freight, perishables)
SOUTH DAKOTA	S.D. Code (1939)	§ 13.1709 ("servile" labor; trades, manufactures, mechanical employments)	§ 13.1709		§ 13.1709 (gaming; public sport) § 53.0208 (dance halls)	
TENNESSEE	Tenn. Code Ann. (1955)	§ 39-4001 ("common vocations")		§ 39-4001		
TEXAS	Vernon's Tex. Stat. (Vols. 1949, 1952)	Pen. Code, Art. 283	Pen. Code, Art. 286	Pen. Code, Art. 283	Pen. Code, Art. 285 (bowling alley, match shooting, gaming in towns); Pen. Code, Art. 286 (place of public amusement: circus, theater, variety, other amusements charging fee for admission)	Pen. Code, Art. 286 (dances at low dives)
UTAH	Utah Code Ann. (1953)	§ 76-55-1 [held unconstitutional as arbitrary: *Broadbent* v. *Gibson*, 105 Utah 53, 140 P. 2d 939]				

State	SPECIAL REGULATIONS OR PROHIBITIONS: Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling	Hunting, Shooting, and Fishing	Racing	Miscellaneous
RHODE ISLAND	§ 3-8-1 (with exceptions, and see § 3-7-14)	§ 31-5-19	§ 5-27-17 § 5-27-23 (barber school) § 5-10-23 (hairdresser) § 5-32-9 (electrolysis) [All sections: Sun. & hols.]	§§ 41-5-2, 41-5-21		§ 41-6-1	§ 19-26-16 (pawnbroker) § 5-16-5 (public laundry cleaning & pick-up Sun. & night in cities of specified minimum population)
SOUTH CAROLINA	§§ 4-204, 4-205, 4-205.1 § 4-102				§ 64-1 (hunt, fish, shoot) § 28-861.2-11 (commercial shrimp trawling in designated county)	§ 64-1	§§ 5-616, 5-625 to 5-638.21 (provisions of local application banning juke boxes or outside speakers on music machines; sections differ in application to towns in different counties, in activity prohibited. Some prohibit activity in vicinity of place of worship. Some prohibit Sun. & night operation.)
SOUTH DAKOTA	§ 5.0226(4) § 5.0108(3) (local option)			§ 53.0604	§ 13.1709 (shoot)	§ 13.1709	
TENNESSEE	§§ 57-142(5), 57-221		§ 39-4003		§ 39-4002 (hunt)		
TEXAS	Pen. Code, Arts. 666-25, 667-10(a)(1), 667-10½ Pen. Code, Art. 666-4(c) (public consumption)			Pen. Code, Arts. 614-1, 614-11(a)	Pen. Code, Art. 283 (hunt within ½ mile of place of worship, school, residence)	Pen. Code, Art. 285	Civ. Stat., Art. 6153 (pawnbroker Sun. & hols.)
UTAH				§ 11-5-1(1)	§ 23-1-15 (hunting season not to open on Sun.)		

State	EXCEPTIONS TO GENERAL PROHIBITIONS: Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or sale of Newspapers, Magazines	Operation of Railroads, Vessels, Tollgates, Ferries; "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels
RHODE ISLAND	(Yes) § 25-1-6 (permits in cases of necessity)	§ 5-23-2 (local option retail sale of prescriptions, patent medicines, drugs, hospital supplies) [Excepted commodities and services may be sold or furnished only by persons who engage in the same activities on secular days]	§ 5-23-2 (local option retail sale of newspapers & periodicals); see § 5-23-5 (delivery of newspapers)		§ 5-23-3 (sale of gas, oil, grease, auto parts; auto service & accessories)	§ 5-23-2 (local option retail sale of fruit, ice, ice cream, confectionery, soda & mineral waters, non-alcoholic tonics & drinks); see § 5-23-5 (delivery of ice)	§ 5-23-2 (local option retail sale of tobacco & smokers' supplies)	
SOUTH CAROLINA	(Yes) (See also §§ 64-4.1, 64-5 ¶ 2, providing for permits issued by Comm'r of Labor excepting from prohibitions of §§ 64-4, 64-5 industries producing goods essential to national defense under government contract in national emergencies; but no employee opposed on physical or conscientious grounds to Sun. labor may be required to work.)							§ 64-5 (restaurants & cafeterias may employ women & children)
SOUTH DAKOTA	(Yes)	(Sale of drugs, medicines, surgical appliances)				[See "Restaurants, etc."]		(Sale of food to be eaten on premises)
TENNESSEE	(Yes)							
TEXAS	Pen. Code, Art. 284	Pen. Code, Art. 287 (drug stores)	Pen. Code, Art. 287 (sale of newspapers)	Pen. Code, Arts. 284, 287 (vessels; R. R.; wagon trains; common carriers (including delivery & receipt of goods); mail or passenger stages; persons travelling; ferrymen; toll bridges)	Pen. Code, Art. 287 (livery stables; sale of gas, motor fuel, greases)	Pen. Code, Art. 287 (ice dealers; sale of ice, ice cream)		Pen. Code, Arts. 284, 287 (hotels; boarding houses; restaurants)
UTAH	[Exceptions to § 76-55-1 omitted]							

State	EXCEPTIONS TO GENERAL PROHIBITIONS (cont.): Sale of Milk, Bread, Eggs	Sports	Entertainments	Operation of Manufacturing Processes Requiring Constant Operation	Miscellaneous	EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS: Regulation of Sunday Business	MUNICIPAL ENABLING PROVISIONS: Suppression of Sabbath Desecration	PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
RHODE ISLAND	§ 5-23-2 (local option retail sale of milk, bakery prods., bread); see § 5-23-5 (delivery of milk)	§§ 41-6-1 to 41-6-7 (local option athletic games (with exceptions) with differing permitted hours for amateur and professional games (some professional games may be licensed only in Providence); but license may not be granted for open-air games over protest of majority of landowners within 200′, or for game within 500′ of place of worship); § 25-1-6 § 5-2-9 (local option bowling, pool, billiards after 1 p.m. not within 200′ of place of worship) § 5-23-2 (local option public golf courses)	§ 5-22-6 (Providence may license auto shows, ice skating & polo, roller skating & hockey in halls after 2 p.m.) § 5-22-7 (local option roller skating after 2 p.m.) §§ 5-22-8 to §§ 5-22-11 (local option provisions applicable to various named towns, permitting musical entertainment, lectures, vaudeville, cinema, amusement parks, miniature golf, etc. Different permitted activities for different towns, and different permitted hours for different towns)		§ 5-23-3 (farmers co-op ass'n wholesale produce auction) § 5-23-2 (local option retail sale of various classes of commodities, *e.g.*, stationery, books, shaving & dental needs, cosmetics, photo supplies, fish, vegetables, bait, etc.; rental of bathing accessories & bathhouses; parking lots; bootblack & hat cleaning (except Providence); shoeshines in Union Station, Providence)	§ 11-40-4 (professor of Sabbatarian or Jewish faith may labor, but not open shops for trade, load or unload vessels, work at mechanical trades in compact places (except in two named towns), etc.; provision for proof of status by certificate from pastor or adherents)	See § 5-23-4	§ 45-6-1	(See heading: "General Prohibitions: Permitting child or servant to work or labor") Dir. Lab. Mandatory Order No. 4-R-3 (1958), CCH Lab. Law Rep., State Laws (1960) p. 58,262 (retail trade: day of rest in 7 minimum wage for 7th day)
SOUTH CAROLINA		§ 5-103; see also § 5-110 (athletics, cinema, concerts in described counties and cities designated specifically and by classes, 2-7 p.m. & 9-12 p.m.)		§ 64-6 (chemical plants, except certain designated textile processes; in excepted plants, fixed daily and weekly hour maxima apply)	§ 64-5.1 (textile plants in designated town; fixed daily and weekly hour maxima apply and Sun. work may not begin before 10 a.m.)				(See heading: "General Prohibitions: Permitting child or servant to work or labor") § 40-52 (5-day week: textile mills)
SOUTH DAKOTA	(Sale of milk before 9:00 a.m.)				(Sale of meat & fish before 9 a.m.)	§ 13.1710 (person keeping another day as holy time, not disturbing other persons keeping Sun. as holy time; defense to labor)			
TENNESSEE									§ 50-709 (children)
TEXAS	Pen. Code, Art. 287 (sale of milk) [See also heading "Miscellaneous"]		Pen. Code, Art. 287 (theater & cinema in towns after 1 p.m.; local option may prohibit or regulate)		Pen. Code, Art. 287 (markets & dealers in provisions before 9 a.m.; sales of burial materials; bathhouses; tel. & tel.) Pen. Code, Art. 284 (necessary farm work; foundries; sugar mills; herders)	Pen. Code, Art. 284 (person conscientiously observing another day; defense to Art. 283)			
UTAH									§ 34-5-2 (children) Indust. Comm'n Mandatory Orders Nos. 1 to 4, supplemented by Order No. 5 (1960), CCH Lab. Law Rep., State Laws (1960) pp. 58,929 to 58,935 (women & children in specified occups.)

STATES		GENERAL PROHIBITIONS					SPECIAL REGULATIONS OR PROHIBITIONS							EXCEPTIONS TO GENERAL PROHIBITIONS													EXCEPTION FOR OBSERVERS OF OTHER DAYS	MUNICIPAL ENABLING PROVISIONS		PROVISIONS FOR 6-DAY WEEK FOR EMPLOYEES
State	Code (and Supps.)	"Work" or "Labor"	Keeping Open Shop or Selling Goods	Permitting Child or Servant To Work or Labor	Public Entertainment	Miscellaneous	Trade in Alcoholic Beverages	Automobile Trading	Barbering	Boxing, Wrestling	Hunting, Shooting, and Fishing	Racing	Miscellaneous	Works of Necessity and Charity	Drug Stores; Sale of Drugs, Medical Supplies	Preparation, Distribution or sale of Newspapers, Magazines	Operation of Railroads, Vessels; Tollgates, Ferries, "Families Removing"	Operation of Gasoline Stations; Provision of Automobile Repairs, Service and Accessories; Operation of Livery Stables	Sale of Ice, Ice Cream, Soda, Confectionery, Fresh Fruit	Sale of Tobacco	Operation of Restaurants, Inns, Hotels	Sale of Milk, Bread, Eggs	Sports	Entertainments	Operation of Manufacturing Processes Requiring Constant Operation	Miscellaneous		Regulation of Sunday Business	Suppression of Sabbath Desecration	
VERMONT	Vt. Stat. Ann. (Rev. 1959)	T. 13, § 3301 ("secular business or employment")				T. 13, § 3301 (dance; play, game, sport or entertainment disturbing peace or for compensation)	T. 7, § 62 (with exceptions)					T. 31, § 604 T. 31, § 307 (motor races)	See T. 13, § 3612 (more severe penalty for certain trespass to property on Sun.)	(Yes)			T. 13, §§ 3308 (P, U C. may permit such trains as are necessary, having regard to observance of the day)					T. 13, § 3301 (winter sports, golf, tennis) C. 31, § 207 (local option motor races after 2 p.m.) T. 13, § 3302 (local option enumerated competition sports, cinema, lectures, concerts after 2 p.m.)							T. 21, § 434 (children)
VIRGINIA	Va. Code (1950) (Replacement Vols. 1953 & 1960)	§ 18.1-358	§ 18.1-358 (expressly negates "necessity" exemption for sale of listed categories of merchandise, *e.g.*, jewelry, silverware, musical instruments, records, sporting goods & accessories, boat, home, business, or outdoor furniture, furnishings or appliances, sporting goods (except sale or rental of bathing, boating, fishing paraphernalia & sale or rent on premises of equipment essential to sports, athletic events, recreational facilities), pets, farm produce (by producer), antiques (by seller sold at roadside or where grown), fresh, frozen or salt meat, etc. (except smoked or cured ham); list is not exclusive)	§ 18.1-358		§ 18.1-360 (running, loading, unloading R.R. trains, with exceptions, *e.g.*, mail, passenger, nonstop interstate trains & those not carrying persons) § 18.1-363 (loading, unloading steamships, with similar exceptions)	§ 4-19 (State stores) § 4-97 (local option)	§ 18.1-358 (negates "necessity" exception for sale of motor vehicles, trailers (except mobile homes))			§ 29-143(a) (hunt) § 29-193 (take or load oysters, clams, crabs for sale on Sun.; oyster dredging on Sun.) § 28-224 (set fish in Potomac) § 29-150 [Va. Acts 1956, c. 620] (fish on private property without owner's permission in described class of county)		§ 18.1-241 (carry weapon)	(Yes) § 18.1-360 (Comm'n may issue R.R. emergency permits)		(Publication, distribution & sale of newspapers & magazines)		(Sale of gas, oil, repair parts, accessories for immediate necessary use on autos, boats, planes, etc.)				(Sports & athletic events)	(Cinema, concs, historic, recreational, amusement facilities)	[See "Miscellaneous"]	(Operation of furnaces, kilns, plants, wholesale food warehouses; ship chandlers; other business of kind necessary to conduct Sun.)	§ 18.1-359 (person conscientiously observing Sat., not compelling any servant not of his faith to labor on Sun.)		§ 40-97 (children)
WASHINGTON	Wash. Rev. Code (1959)	§ 9.76.010 (labor about any trade or manufacture)	§ 9.76.010 (& expressly negates "necessity" exception for sale of uncooked meat, groceries, clothing, footwear)	§ 9.76.010	§ 9.76.030 (promoting any noisy sport or amusement disturbing the peace of the day)		§ 9.76.010 (keeping open saloon)		§ 9.76.050 (expressly negatives "necessity" exemption)	§ 67.08.070 (& specified bois.)				(Conducted in orderly manner not interfering with repose & religious liberty of the community)	(Sale of medical & surgical appliances)	(Sale of newspapers, magazines)		(Livery stables; garages)	(Sale of fruit, confectionery)	(Sale of prepared tobacco)	(Caterers may serve meals on or off the premises)	(Sale of milk)	[All exempted commodities to be sold in quiet, orderly manner]				§ 9.76.030 (person keeping another day as holy time, not disturbing other persons keeping Sun. as Sabbath; defense to labor)			Infant, Welfare Comm. Orders Nos. 49 (1950), 53 (1951), CCH Lab. Law Rep., State Laws, (1960) pp. 59,356, 59,362 (children in specified occups.)
WEST VIRGINIA	W. Va. Code Ann. (1955) & Cum. Supp. (1960)	C. 61, art. 8, § 17 [6072]		C. 61, art. 8, § 17 [6072]			C. 60, art. 3, § 12 [5067(40)] (State stores)			C. 29, art. 5A, § 6 [2853(5)]	C. 61, art. 8, § 17 [6072] (shoot; carry firearms) C. 20, art. 3, § 4 [2216] (hunt; but bending traps previously set permitted)	C. 19, art. 23, § 5 [2300(b)]	C. 20, art. 3, § 4 [2216] (carry unsealed gun)	(Yes)			C. 61, art. 8, § 18 [6073] (carrying mail or passengers; R.R. or motor transport carrying passengers; vessels may also carry freight)	C. 61, art. 8, § 18 [6073] (garage; gas station)	(See heading: "Miscellaneous")			(See heading: "Miscellaneous")		C. 61, art. 8, § 18 [6073] (employees must be on rotating schedule on Sabbath)	C. 61, art. 8, § 18 [6073] (grocers or sellers primarily of food, not within 200' of place of worship during hours of worship)	C. 61, art. 8, § 18 [6073] (person conscientiously observing Sat., not disturbing other persons in Sun. observance, and not compelling any servant not of his faith to labor on Sun.)			C. 21, art. 6, § 7 [2345] (children)
WISCONSIN	West'n Wis. Stat. Ann. (1957-1958)						§ 176.06 (permitted hours)	§ 218.01(3)(a) 21 (license revocation)		§ 169.11			§ 215.45(1)(a) (savings & loan assns.) § 221.04 (banks) § 348.07(2)(d) (restriction on length of automobile horse unit, in p.m. Sun. & hols.)												§ 218.01(3)(a) 21 (person conscientiously observing Sat., Jewish Sabbath)			§ 103.68(1) (children) § 103.85 (factory or mercantile establishments, with exceptions, inapplicable to employees whose only Sun. labor is tending animals or tending fire)
WYOMING	Wyo. Stat. (1957)						§ 12-19			§ 33-112																	§ 15-160, Twelfth	§ 15-160, Eleventh	§ 27-228 (children)

MR. JUSTICE DOUGLAS, dissenting.*

The question is not whether one day out of seven can be imposed by a State as a day of rest. The question is not whether Sunday can by force of custom and habit be retained as a day of rest. The question is whether a State can impose criminal sanctions on those who, unlike the Christian majority that makes up our society, worship on a different day or do not share the religious scruples of the majority.

If the "free exercise" of religion were subject to reasonable regulations, as it is under some constitutions, or if all laws "respecting the establishment of religion" were not proscribed, I could understand how rational men, representing a predominantly Christian civilization, might think these Sunday laws did not unreasonably interfere with anyone's free exercise of religion and took no step toward a burdensome establishment of any religion.

But that is not the premise from which we start, as there is agreement that the fact that a State, and not the Federal Government, has promulgated these Sunday laws does not change the scope of the power asserted. For the classic view is that the First Amendment should be applied to the States with the same firmness as it is enforced against the Federal Government. See *Lovell* v. *Griffin,* 303 U. S. 444, 450; *Minersville District* v. *Gobitis,* 310 U. S. 586, 593; *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108; *Board of Education* v. *Barnette,* 319 U. S. 624, 639; *Staub* v. *City of Baxley,* 355 U. S. 313, 321; *Talley* v.

*[NOTE: This opinion applies also to No. 36, *Two Guys From Harrison-Allentown, Inc.,* v. *McGinley, District Attorney, Lehigh County, Pennsylvania, et al., post,* p. 582; No. 67, *Braunfeld et al.* v. *Brown, Commissioner of Police of Philadelphia, et al., post,* p. 599; and No. 11, *Gallagher, Chief of Police of Springfield, Massachusetts, et al.* v. *Crown Kosher Super Market, Inc., et al., post,* p. 617.]

California, 362 U. S. 60. The most explicit statement perhaps was in *Board of Education* v. *Barnette, supra,* 639.

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

With that as my starting point I do not see how a State can make protesting citizens refrain from doing innocent acts on Sunday because the doing of those acts offends sentiments of their Christian neighbors.

The institutions of our society are founded on the belief that there is an authority higher than the authority of the State; that there is a moral law which the State is powerless to alter; that the individual possesses rights, conferred by the Creator, which government must respect.

The Declaration of Independence stated the now familiar theme:

> "We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness."

And the body of the Constitution as well as the Bill of Rights enshrined those principles.

The Puritan influence helped shape our constitutional law and our common law as Dean Pound has said: The Puritan "put individual conscience and individual judgment in the first place." The Spirit of the Common Law (1921), p. 42. For these reasons we stated in *Zorach* v. *Clauson,* 343 U. S. 306, 313, "We are a religious people whose institutions presuppose a Supreme Being."

But those who who fashioned the First Amendment decided that if and when God is to be served, His service will not be motivated by coercive measures of government. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof"—such is the command of the First Amendment made applicable to the State by reason of the Due Process Clause of the Fourteenth. This means, as I understand it, that if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government. This necessarily means, *first,* that the dogma, creed, scruples, or practices of no religious group or sect are to be preferred over those of any others; *second,* that no one shall be interfered with by government for practicing the religion of his choice; *third,* that the State may not require anyone to practice a religion or even any religion; and *fourth,* that the State cannot compel one so to conduct himself as not to offend the religious scruples of another. The idea, as I understand it, was to limit the power of government to act in religious matters (*Board of*

Education v. *Barnette, supra; McCollum* v. *Board of Education,* 333 U. S. 203), not to limit the freedom of religious men to act religiously nor to restrict the freedom of atheists or agnostics.

The First Amendment commands government to have no interest in theology or ritual; it admonishes government to be interested in allowing religious freedom to flourish—whether the result is to produce Catholics, Jews, or Protestants, or to turn the people toward the path of Buddha, or to end in a predominantly Moslem nation, or to produce in the long run atheists or agnostics. On matters of this kind government must be neutral. This freedom plainly includes freedom *from* religion with the right to believe, speak, write, publish and advocate antireligious programs. *Board of Education* v. *Barnette, supra,* 641. Certainly the "free exercise" clause does not require that everyone embrace the theology of some church or of some faith, or observe the religious practices of any majority or minority sect. The First Amendment by its "establishment" clause prevents, of course, the selection by government of an "official" church. Yet the ban plainly extends farther than that. We said in *Everson* v. *Board of Education,* 330 U. S. 1, 16, that it would be an "establishment" of a religion if the Government financed one church or several churches. For what better way to "establish" an institution than to find the fund that will support it? The "establishment" clause protects citizens also against any law which selects any religious custom, practice, or ritual, puts the force of government behind it, and fines, imprisons, or otherwise penalizes a person for not observing it. The Government plainly could not join forces with one religious group and decree a universal and symbolic circumcision. Nor could it require all children to be baptized or give tax exemptions only to those whose children were baptized.

Could it require a fast from sunrise to sunset throughout the Moslem month of Ramadan? I should think not.

Yet why then can it make criminal the doing of other acts, as innocent as eating, during the day that Christians revere?

Sunday is a word heavily overlaid with connotations and traditions deriving from the Christian roots of our civilization that color all judgments concerning it. This is what the philosophers call "word magic."

> "For most judges, for most lawyers, for most human beings, we are as unconscious of our value patterns as we are of the oxygen that we breathe." Cohen, Legal Conscience (1960), p. 169.

The issue of these cases would therefore be in better focus if we imagined that a state legislature, controlled by orthodox Jews and Seventh-Day Adventists, passed a law making it a crime to keep a shop open on Saturdays. Would a Baptist, Catholic, Methodist, or Presbyterian be compelled to obey that law or go to jail or pay a fine? Or suppose Moslems grew in political strength here and got a law through a state legislature making it a crime to keep a shop open on Fridays. Would the rest of us have to submit under the fear of criminal sanctions?

Dr. John Cogley recently summed up [1] the dominance of the three-religion influence in our affairs:

> "For the foreseeable future, it seems, the United States is going to be a three-religion nation. At the present time all three are characteristically 'Amer-

[1] The Problems of Pluralism, Danforth Lectures, Miami University, Oxford, Ohio (1960). Other writers suggest that America is still subject to a customary and nonlegal "Protestant establishment" which comes to the surface only on certain political issues. Thus, a Rabbi Arthur Hartzberg was able to analyze the "religious issue" of the recent presidential campaign in these terms:

"As we have seen, the First Amendment was the battleground, at the end of the 18th century, of a major transition in American society in which the old Protestant establishment was forced to yield to the newer ethos of Protestant non-conformity. Today in American society, we are witnessing a change perhaps as important—the full

> ican,' some think flavorlessly so. For religion in America is almost uniformly 'respectable,' bourgeois, and prosperous. In the Protestant world the 'church' mentality has triumphed over the more venturesome spirit of the 'sect.' In the Catholic world, the mystical is muted in favor of booming organization and efficiently administered good works. And in the Jewish world the prophet is too frequently without honor, while the synagogue emphasis is focused on suburban togetherness. There are exceptions to these rules, of course; each of the religious communities continues to cast up its prophets, its rebels and radicals. But a Jeremiah, one fears, would be positively embarrassing to the present position of the Jews; a Francis of Assisi upsetting the complacency of American Catholics would be rudely dismissed as a fanatic; and a Kierkegaard, speaking with an American accent, would be considerably less welcome than Norman Vincent Peale in most Protestant pulpits."

This religious influence has extended far, far back of the First and Fourteenth Amendments. Every Sunday School student knows the Fourth Commandment:

> "Remember the sabbath day, to keep it holy.
>
> "Six days shalt thou labour, and do all thy work:
>
> "But the seventh day is the sabbath of the LORD thy God: in it thou shalt not do any work, thou, nor thy son, nor thy daughter, thy manservant, nor thy

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entry of the post-bellum immigrant groups into the national life. Though the battle once again seems to be raging around the First Amendment, it would appear from the foregoing analysis that the true issue is not the separation of church and state, but the symbolic significance for American life and culture of having a non-Protestant—whether he be a Catholic, a Jew, or an avowed atheist—as President of the United States." Hartzberg, "The Protestant 'Establishment,' Catholic Dogma, and the Presidency," Commentary (October 1960), p. 285.

maidservant, nor thy cattle, nor thy stranger that is within thy gates:

"For in six days the LORD made heaven and earth, the sea, and all that in them is, and rested the seventh day: wherefore the LORD blessed the sabbath day, and hallowed it." Exodus 20:8–11.

This religious mandate for observance of the Seventh Day became, under Emperor Constantine, a mandate for observance of the First Day "in conformity with the practice of the Christian Church." See *Richardson* v. *Goddard,* 23 How. 28, 41. This religious mandate has had a checkered history, but in general its command, enforced now by the ecclesiastical authorities, now by the civil authorities, and now by both, has held good down through the centuries.[2] The general pattern of these laws in the United States was set in the eighteenth century and derives, most directly, from a seventeenth century English statute. 29 Charles II, c. 7. Judicial comment on the

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[2] Blackstone's Commentaries, Bk. IV, c. 4, entitled "Of Offenses Against God and Religion," says in part:

"IX. Profanation of the Lord's day, vulgarly (but improperly) called *Sabbath-breaking,* is a ninth offence against God and religion, punished by the municipal law of England. For, besides the notorious indecency and scandal of permitting any secular business to be publicly transacted on that day, in a country professing christianity, and the corruption of morals which usually follows it's profanation, the keeping one day in seven holy, as a time of relaxation and refreshment as well as for public worship, is of admirable service to a state, considered merely as a civil institution. It humanizes by the help of conversation and society the manners of the lower classes; which would otherwise degenerate into a sordid ferocity and savage selfishness of spirit: it enables the industrious workman to pursue his occupation in the ensuing week with health and cheerfulness: it imprints on the minds of the people that sense of their duty to God, so necessary to make them good citizens; but which yet would be worn out and defaced by an unremitted continuance of labour, without any stated times of recalling them to the worship of their Maker."

Sunday laws has always been a mixed bag. Some judges have asserted that the statutes have a "purely" civil aim, *i. e.*, limitation of work time and provision for a common and universal leisure. But other judges have recognized the religious significance of Sunday and that the laws existed to enforce the maintenance of that significance. In general, both threads of argument have continued to interweave in the case law on the subject. Prior to the time when the First Amendment was held applicable to the States by reason of the Due Process Clause of the Fourteenth, the Court at least by *obiter dictum* approved State Sunday laws on three occasions: *Soon Hing* v. *Crowley,* 113 U. S. 703, in 1885; *Hennington* v. *Georgia,* 163 U. S. 299, in 1896; *Petit* v. *Minnesota,* 177 U. S. 164, in 1900. And in *Friedman* v. *New York,* 341 U. S. 907, the Court, by a divided vote, dismissed [3] "for want of a substantial federal question" an appeal from a New York decision upholding the validity of a Sunday law against an attack based on the First Amendment.

The *Soon Hing, Hennington,* and *Petit* cases all rested on the police power of the State—the right to safeguard the health of the people by requiring the cessation of normal activities one day out of seven. The Court in the *Soon Hing* case rejected the idea that Sunday laws rested on the power of government "to legislate for the promotion of religious observances." 113 U. S., at 710. The New York Court of Appeals in the *Friedman* case followed the reasoning of the earlier cases,[4] 302 N. Y. 75, 80, 96 N. E. 2d 184, 186.

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[3] See also *Ullner* v. *Ohio,* 358 U. S. 131; *Kidd* v. *Ohio,* 358 U. S. 132; *McGee* v. *North Carolina,* 346 U. S. 802; cf. *Grochowiak* v. *Pennsylvania,* 358 U. S. 47; *Gundaker Cent. Motors, Inc.,* v. *Gassert,* 354 U. S. 933; *Towery* v. *North Carolina,* 347 U. S. 925.

[4] As respects the First Amendment the court said:

"It does not set up a church, make attendance upon religious worship compulsory, impose restrictions upon expression of religious belief, work a restriction upon the exercise of religion according to the

The Massachusetts Sunday law involved in one of these appeals was once characterized by the Massachusetts court as merely a civil regulation providing for a "fixed period of rest." *Commonwealth* v. *Has,* 122 Mass. 40, 42. That decision was, according to the District Court in the *Gallagher* case, "an *ad hoc* improvisation" made "because of the realization that the Sunday law would be more vulnerable to constitutional attack under the state Constitution if the religious motivation of the statute were more explicitly avowed." 176 F. Supp. 466, 473. Certainly prior to the *Has* case, the Massachusetts courts had indicated that the aim of the Sunday law was religious. See *Pearce* v. *Atwood,* 13 Mass. 324, 345–346; *Bennett* v. *Brooks,* 91 Mass. 118, 121. After the *Has* case the Massachusetts court construed the Sunday law as a religious measure. In *Davis* v. *Somerville,* 128 Mass. 594, 596, 35 Am. Rep. 399, 400, it was said:

> "Our Puritan ancestors intended that the day should be not merely a day of rest from labor, but also a day devoted to public and private worship and to religious meditation and repose, undisturbed by secular cares or amusements. They saw fit to enforce the observance of the day by penal legislation, and the statute regulations which they devised for that purpose have continued in force, without any substantial modification, to the present time."

And see *Commonwealth* v. *Dextra,* 143 Mass. 28, 8 N. E. 756. In *Commonwealth* v. *White,* 190 Mass. 578, 581, 77 N. E. 636, 637, the court refused to liberalize its construction of an exception in its Sunday law for works of "necessity." That word, it said, "was originally inserted to secure the observance of the Lord's day in accordance with

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dictates of one's conscience, provide compulsory support, by taxation or otherwise, of religious institutions, nor in any way enforce or prohibit religion." 302 N. Y., at 79, 96 N. E. 2d, at 186.

the views of our ancestors, and it ever since has stood and still stands for the same purpose." In *Commonwealth* v. *McCarthy*, 244 Mass. 484, 486, 138 N. E. 835, 836, the court reiterated that the aim of the law was "to secure respect and reverence for the Lord's day."

The Pennsylvania Sunday laws before us in Nos. 36 and 67 have received the same construction. "Rest and quiet, on the Sabbath day, with the right and privilige of public and private worship, undisturbed by any mere wordly employment, are exactly what the statute was passed to protect." *Sparhawk* v. *Union Passenger R. Co.*, 54 Pa. 401, 423. And see *Commonwealth* v. *Nesbit*, 34 Pa. 398, 405, 406–408. A recent pronouncement by the Pennsylvania Supreme Court is found in *Commonwealth* v. *American Baseball Club*, 290 Pa. 136, 143, 138 A. 497, 499: "Christianity is part of the common law of Pennsylvania . . . and its people are christian people. Sunday is the holy day among christians."

The Maryland court, in sustaining the challenged law in No. 8, relied on *Judefind* v. *State*, 78 Md. 510, 28 A. 405, and *Levering* v. *Park Commissioner*,[5] 134 Md. 48, 106 A. 176. In the former the court said:

> "It is undoubtedly true that rest from secular employment on Sunday does have a tendency to foster and encourage the Christian religion—of all sects and denominations that observe that day—as rest from work and ordinary occupation enables many to engage in public worship who probably would not otherwise do so. But it would scarcely be asked of a Court, in what professes to be a Christian land, to declare a law unconstitutional because it requires rest from bodily labor on Sunday, (except works of necessity and charity,) and *thereby* promotes the

[5] Cf. *Bowman* v. *Secular Society, Ltd.* [1917] A. C. 406, 464 (opinion of Lord Sumner).

> cause of Christianity. If the Christian religion is, incidentally or otherwise, benefited or fostered by having this day of rest, as it undoubtedly is, there is all the more reason for the enforcement of laws that help to preserve it." 78 Md., at 515–516, 128 A., at 407.

In the *Levering* case the court relied on the excerpt from the *Judefind* decision just quoted. 134 Md., at 54–55, 106 A., at 178.

We have then in each of the four cases Sunday laws that find their source in Exodus, that were brought here by the Virginians and by the Puritans, and that are today maintained, construed, and justified because they respect the views of our dominant religious groups and provide a needed day of rest.

The history was accurately summarized a century ago by Chief Justice Terry of the Supreme Court of California in *Ex parte Newman,* 9 Cal. 502, 509:

> "The truth is, however much it may be disguised, that this one day of rest is a purely religious idea. Derived from the Sabbatical institutions of the ancient Hebrew, it has been adopted into all the creeds of succeeding religious sects throughout the civilized world; and whether it be the Friday of the Mohammedan, the Saturday of the Israelite, or the Sunday of the Christian, it is alike fixed in the affections of its followers, beyond the power of eradication, and in most of the States of our Confederacy, the aid of the law to enforce its observance has been given under the pretence of a civil, municipal, or police regulation."

That case involved the validity of a Sunday law under a provision of the California Constitution guaranteeing the "free exercise" of religion. Calif. Const., 1849, Art. I, § 4. Justice Burnett stated why he concluded that the

Sunday law, there sought to be enforced against a man selling clothing on Sunday, infringed California's constitution:

> "Had the act made Monday, instead of Sunday, a day of compulsory rest, the constitutional question would have been the same. The fact that the Christian *voluntarily* keeps holy the first day of the week, does not authorize the Legislature to make that observance *compulsory*. The Legislature can not compel the citizen to do that which the Constitution leaves him free to do or omit, at his election. The act violates as much the religious freedom of the Christian as of the Jew. Because the conscientious views of the Christian compel him to keep Sunday as a Sabbath, he has the right to object, when the Legislature invades his freedom of religious worship, and assumes the power to compel him to do that which he has the right to omit if he pleases. The principle is the same, whether the act of the Legislature *compels* us to do that which we wish to do, or not to do. . . .
>
> "Under the Constitution of this State, the Legislature can not pass any act, the legitimate effect of which is *forcibly* to establish any merely religious truth, or enforce any merely religious observances. The Legislature has no power over such a subject. When, therefore, the citizen is sought to be compelled by the Legislature to do any affirmative religious act, or to refrain from doing anything, because it violates simply a religious principle or observance, the act is unconstitutional." *Id.*, at 513–515.

The Court picks and chooses language from various decisions to bolster its conclusion that these Sunday laws in the modern setting are "civil regulations." No matter how much is written, no matter what is said, the parentage of these laws is the Fourth Commandment; and they

serve and satisfy the religious predispositions of our Christian communities.[6] After all, the labels a State places on its laws are not binding on us when we are confronted with a constitutional decision. We reach our own conclusion as to the character, effect, and practical operation of the regulation in determining its constitutionality. *Carpenter* v. *Shaw,* 280 U. S. 363, 367–368; *Dyer* v. *Sims,* 341 U. S. 22, 29; *Memphis Steam Laundry* v. *Stone,* 342 U. S. 389, 392; *Society for Savings* v. *Bowers,* 349 U. S. 143, 151; *Gomillion* v. *Lightfoot,* 364 U. S. 339, 341–342.

It seems to me plain that by these laws the States compel one, under sanction of law, to refrain from work or recreation on Sunday because of the majority's religious views about that day. The State by law makes Sunday a symbol of respect or adherence. Refraining from work or recreation in deference to the majority's religious feelings about Sunday is within every person's choice. By what authority can government compel it?

Cases are put where acts that are immoral by our standards but not by the standards of other religious

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[6] Today we retreat from that jealous regard for religious freedom which struck down a statute because it was "a handy implement for disguised religious persecution." *Board of Education* v. *Barnette, supra,* 644 (concurring opinion). It does not do to say, as does the majority, "Sunday is a day apart from all others. The cause is irrelevant; the fact exists." The cause of Sunday's being a day apart is determinative; that cause should not be swept aside by a declaration of parochial experience.

The judgment the Court is called upon to make is a delicate one. But *in the light of our society's religious history* it cannot be avoided by arguing that a hypothetical lawgiver could find nonreligious reasons for fixing Sunday as a day of rest. The effect of that history is, indeed, still with us. Sabbath is no less Sabbath because it is now less severe in its strictures, or because it has come to be expedient for some nonreligious purposes. The Constitution must guard against "sophisticated as well as simple-minded modes" of violation. *Lane* v. *Wilson,* 307 U. S. 268, 275.

groups are made criminal. That category of cases, until today, has been a very restricted one confined to polygamy (*Reynolds* v. *United States,* 98 U. S. 145) and other extreme situations. The latest example is *Prince* v. *Massachusetts,* 321 U. S. 158, which upheld a statute making it criminal for a child under twelve to sell papers, periodicals, or merchandise on a street or in any public place. It was sustained in spite of the finding that the child thought it was her religious duty to perform the act. But that was a narrow holding which turned on the effect which street solicitation might have on the child-solicitor:

> "The state's authority over children's activities is broader than over like actions of adults. This is peculiarly true of public activities and in matters of employment. A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies. It may secure this against impeding restraints and dangers within a broad range of selection. Among evils most appropriate for such action are the crippling effects of child employment, more especially in public places, and the possible harms arising from other activities subject to all the diverse influences of the street. It is too late now to doubt that legislation appropriately designed to reach such evils is within the state's police power, whether against the parent's claim to control of the child or one that religious scruples dictate contrary action." *Id.,* 168–169.

None of the acts involved here implicates minors. None of the actions made constitutionally criminal today involves the doing of any act that any society has deemed to be immoral.

The conduct held constitutionally criminal today embraces the selling of pure, not impure, food; wholesome,

not noxious, articles. Adults, not minors, are involved. The innocent acts, now constitutionally classified as criminal, emphasize the drastic break we make with tradition.

These laws are sustained because, it is said, the First Amendment is concerned with religious convictions or opinion, not with conduct. But it is a strange Bill of Rights that makes it possible for the dominant religious group to bring the minority to heel because the minority, in the doing of acts which intrinsically are wholesome and not antisocial, does not defer to the majority's religious beliefs. Some have religious scruples against eating pork. Those scruples, no matter how bizarre they might seem to some, are within the ambit of the First Amendment. See *United States* v. *Ballard,* 322 U. S. 78, 87. Is it possible that a majority of a state legislature having those religious scruples could make it criminal for the nonbeliever to sell pork? Some have religious scruples against slaughtering cattle. Could a state legislature, dominated by that group, make it criminal to run an abattoir?

The Court balances the need of the people for rest, recreation, late sleeping, family visiting and the like against the command of the First Amendment that no one need bow to the religious beliefs of another. There is in this realm no room for balancing. I see no place for it in the constitutional scheme. A legislature of Christians can no more make minorities conform to their weekly regime than a legislature of Moslems, or a legislature of Hindus. The religious regime of every group must be respected—unless it crosses the line of criminal conduct. But no one can be forced to come to a halt before it, or refrain from doing things that would offend it. That is my reading of the Establishment Clause and the Free Exercise Clause. Any other reading imports, I fear, an element common in other societies but foreign to us. Thus Nigeria in Article 23 of her Constitution, after

guaranteeing religious freedom, adds, "Nothing in this section shall invalidate any law that is reasonably justified in a democratic society in the interest of defence, public safety, public order, public morality, or public health." And see Article 25 of the Indian Constitution. That may be a desirable provision. But when the Court adds it to our First Amendment, as it does today, we make a sharp break with the American ideal of religious liberty as enshrined in the First Amendment.

The State can, of course, require one day of rest a week: one day when every shop or factory is closed. Quite a few States make that requirement.[7] Then the "day of rest" becomes purely and simply a health measure. But the Sunday laws operate differently. They force minorities to obey the majority's religious feelings of what is due and proper for a Christian community; they provide a coercive spur to the "weaker brethren," to those who are indifferent to the claims of a Sabbath through apathy or scruple. Can there be any doubt that Christians, now aligned vigorously in favor of these laws, would be as strongly opposed if they were prosecuted under a Moslem law that forbade them from engaging in secular activities on days that violated Moslem scruples?

There is an "establishment" of religion in the constitutional sense if any practice of any religious group has the sanction of law behind it. There is an interference with the "free exercise" of religion if what in conscience one

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[7] Or the State may merely fix a maximum hours' limitation in other terms, either for particular classes of employees, particular classes of employment, or straight across the board. See laws and decisions gathered in 1 & 2 CCH Labor Law Reporter, State Laws, par. 44,500 *et seq.* On argument, there was much made over the desirability of fixing a single day for rest, either on grounds of administrative convenience or on grounds of the need for leisure. In light of the history and meaning of the shared leisure of Sunday, this aim still has religious overtones. Cf. *Joseph Burstyn, Inc.,* v. *Wilson,* 343 U. S. 495, 505.

can do or omit doing is required because of the religious scruples of the community. Hence I would declare each of those laws unconstitutional as applied to the complaining parties, whether or not they are members of a sect which observes as its Sabbath a day other than Sunday.

When these laws are applied to Orthodox Jews, as they are in No. 11 and in No. 67, or to Sabbatarians their vice is accentuated. If the Sunday laws are constitutional, kosher markets are on a five-day week. Thus those laws put an economic penalty on those who observe Saturday rather than Sunday as the Sabbath. For the economic pressures on these minorities, created by the fact that our communities are predominantly Sunday-minded, there is no recourse. When, however, the State uses its coercive powers—here the criminal law—to compel minorities to observe a second Sabbath, not their own, the State undertakes to aid and "prefer one religion over another"—contrary to the command of the Constitution. See *Everson* v. *Board of Education, supra,* 15.

In large measure the history of the religious clause of the First Amendment was a struggle to be free of economic sanctions for adherence to one's religion. *Everson* v. *Board of Education, supra,* 11–14. A small tax was imposed in Virginia for religious education. Jefferson and Madison led the fight against the tax, Madison writing his famous Memorial and Remonstrance against that law. *Id.,* 12. As a result, the tax measure was defeated and instead Virginia's famous "Bill for Religious Liberty," written by Jefferson, was enacted. *Id.,* 12. That Act provided: [8]

> "That no man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall other-

[8] 12 Hening, Stat. Va. (1823), p. 86.

wise suffer on account of his religious opinions or belief . . . ."

The reverse side of an "establishment" is a burden on the "free exercise" of religion. Receipt of funds from the State benefits the established church directly; laying an extra tax on nonmembers benefits the established church indirectly. Certainly the present Sunday laws place Orthodox Jews and Sabbatarians under extra burdens because of their religious opinions or beliefs. Requiring them to abstain from their trade or business on Sunday reduces their work-week to five days, unless they violate their religious scruples. This places them at a competitive disadvantage and penalizes them for adhering to their religious beliefs.

"The sanction imposed by the state for observing a day other than Sunday as holy time is certainly more serious economically than the imposition of a license tax for preaching," [9] which we struck down in *Murdock* v. *Pennsylvania,* 319 U. S. 105, and in *Follett* v. *McCormick,* 321 U. S. 573. The special protection which Sunday laws give the dominant religious groups and the penalty they place on minorities whose holy day is Saturday constitute, in my view, state interference with the "free exercise" of religion.[10]

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[9] Pfeffer, Church, State, and Freedom (1953), p. 235.

[10] ". . . assuming that the idle Sunday is an 'institution' of Christianity, does a statute which for that reason requires men to be idle on Sunday give a preference to one particular religion? How can it be maintained that it does not, unless a similar institution of every other religion be honored with like recognition? As to the individual aspect of the case, if the law is to assist Christianity by making idleness compulsory on its sacred day, thereby presumably commending it to those who reject it, and strengthening its hold upon its devotees, is there not a 'preference' given to a religion, unless the Hebrew and all other faiths have a like recognition extended to their sacred days? And as to the social aspect, assuming that it is an advantage to have other people kept extraordinarily quiet while we pray, and to have

I dissent from applying criminal sanctions against any of these complainants since to do so implicates the States in religious matters contrary to the constitutional mandate.[11] Reverend Allan C. Parker, Jr., Pastor of the

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an especial 'peace' established by law on the day we select for public worship, and that we have the right to prevent our neighbor from earning his living at a certain time because the practice of his avocation interferes with our religious exercises, must it not be called a 'preference' to do all this for the Christian's benefit, and not to do it for the benefit of the followers of Moses, or Mahomet, or Confucius or Buddha?" Ringgold, Legal Aspects of the First Day of the Week (1891), pp. 68–69.

[11] It is argued that the wide acceptance of Sunday laws at the time of the adoption of the First Amendment makes it fair to assume that they were never thought to come within the "establishment" Clause, and that the presence in the country at that time of large numbers of Orthodox Jews makes it clear that those laws were not thought to run afoul of the "free exercise" Clause. Those reasons would be compelling if the First Amendment had, at the time of its adoption, been applicable to the States. But since it was then applicable only to the Federal Government, it had no possible bearing on the Sunday laws of the States. The Fourteenth Amendment, adopted years later, made the First Amendment applicable to the States for the first time. That Amendment has had unsettling effects on many customs and practices—a process consistent with Jefferson's precept "that laws and institutions must go hand in hand with the progress of the human mind." 15 The Writings of Thomas Jefferson (Memorial ed. 1904), p. 41.

Moreover, there is solid evidence to suggest that the Jewish population of our Nation was then minuscule. "Despite the roseate estimates of some Jewish writers on the subject, it is safe to say there were never more than one thousand Jews living among the three million and more inhabitants of the colonies. The Newport community in its heyday totaled at most one hundred and fifty to one hundred and seventy-five Jews. Perhaps New York had as many, or more. Philadelphia, Charleston and Savannah were certainly smaller communities. Even when combining their Jewish populations with the lonely groups in the back county, we still are far from an impressive total." Goodman, American Overture: Jewish Rights in Colonial Times (1947), p. 3.

South Park Presbyterian Church, Seattle, Washington, has stated my views:

> "We forget that, though Sunday-worshiping Christians are in the majority in this country among religious people, we do not have the right to force our practice upon the minority. Only a Church which deems itself without error and intolerant of error can justify its intolerance of the minority.
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> "A Jewish friend of mine runs a small business establishment. Because my friend is a Jew his business is closed each Saturday. He respects my right to worship on Sunday and I respect his right to worship on Saturday. But there is a difference. As a Jew he closes his store voluntarily so that he will be able to worship his God in his fashion. Fine! But, as a Jew living under Christian inspired Sunday closing laws, he is required to close his store on Sunday so that I will be able to worship my God in my fashion.
>
> "Around the corner from my church there is a small Seventh Day Baptist church. I disagree with the Seventh Day Baptists on many points of doctrine. Among the tenets of their faith with which I disagree is the 'seventh day worship.' But they are good neighbors and fellow Christians, and while we disagree we respect one another. The good people of my congregation set aside their jobs on the first of the week and gather in God's house for worship. Of course, it is easy for them to set aside their jobs since Sunday closing laws—inspired by the Church—keep them from their work. At the Seventh Day Baptist church the people set aside their jobs on Saturday to worship God. This takes real sacrifice because Saturday is a good day for business. But that is not all—they are required by law to set aside

their jobs on Sunday while more orthodox Christians worship.

". . . I do not believe that because I have set aside Sunday as a holy day I have the right to force all men to set aside that day also. Why should my faith be favored by the State over any other man's faith?" [12]

With all deference, none of the opinions filed today in support of the Sunday laws has answered that question.

[12] 56 Liberty, January-February 1961, No. 1, pp. 21–22.

TWO GUYS FROM HARRISON-ALLENTOWN, INC., *v.* McGINLEY, DISTRICT ATTORNEY, LEHIGH COUNTY, PENNSYLVANIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 36. Argued December 8, 1960.—Decided May 29, 1961.

Appellant, a corporation operating a large discount department store located on a highway in a suburban section of Lehigh County, Pa., sued in a Federal District Court to enjoin enforcement of certain Pennsylvania Sunday Closing Laws, claiming that they were unconstitutional and that the County District Attorney was discriminating against it. One was a 1939 statute which prohibited all worldly employment or business on Sunday, with narrowly drawn exceptions, on penalty of a fine of $4 or 6 days' imprisonment. The other was a supplementary statute enacted in 1959 which forbade the retail sale on Sunday of 20 specified commodities, on penalty of a fine of up to $100 for the first offense and up to $200 for subsequent offenses within a year or imprisonment for 30 days in default thereof. There were many other Pennsylvania Sunday Laws which prohibited specific activities on Sundays or limited them to certain hours, places or conditions. *Held:*

1. Since the relief sought was prospective only, the term of office of the District Attorney was about to expire, and appellant's employees could defend against any pending prosecutions on the ground of unconstitutional discrimination, the District Court did not err in refusing to exercise its injunctive powers at that time against alleged discriminatory enforcement by the County District Attorney. Pp. 588–589.

2. The District Court did not abuse its discretion in declining to pass on the constitutionality of the 1939 statute, on the grounds that there was no imminent threat of appellant being prosecuted under it and that there was a substantial unsettled question of Pennsylvania law as to whether it had been superseded by the 1959 Act as to the specific commodities covered by the latter. P. 589.

3. The District Court did not abuse its equity power in refusing to continue a preliminary injunction against enforcement of the 1939 statute against appellant, since there was no imminent threat of prosecution. P. 589.

4. The 1959 Act does not violate the Equal Protection Clause of the Fourteenth Amendment. *McGowan* v. *Maryland, ante,* p. 420. Pp. 589–592.

5. Since appellant alleges only economic injury to itself, it has no standing to raise the question whether the statute here involved prohibits the free exercise of religion; but it does have standing to raise the question whether it is a law respecting an establishment of religion, within the meaning of the First Amendment. *McGowan* v. *Maryland, supra.* P. 592.

6. In the light of a careful examination of the entirety of the present legislation, the relevant judicial characterizations and, particularly, the legislative history leading to the passage of the 1959 Act here involved, that Act is not a law respecting an establishment of religion, within the meaning of the First Amendment. *McGowan* v. *Maryland, supra.* Pp. 592–598.

7. This Court rejects appellant's contention that the State has other means at its disposal to accomplish its secular purpose that would not even remotely or incidentally give state aid to religion. *McGowan* v. *Maryland, supra.* P. 598.

179 F. Supp. 944, affirmed.

Harold E. Kohn argued the cause for appellant. With him on the brief were *William T. Coleman, Jr., Louis E. Levinthal, Harry A. Kalish* and *Oscar Brown.*

Harry J. Rubin argued the cause for appellees. With him on the brief was *Anne X. Alpern,* Attorney General of Pennsylvania.

Lawrence Speiser, Rowland Watts and *Jacob S. Richman* filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

The primary questions presented in this case are whether a Pennsylvania statute enacted in 1959 [1] which

[1] 18 Purdon's Pa. Stat. Ann. (1960 Cum. Supp.) § 4699.10 provides:

"Selling certain personal property on Sunday

"Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel,

makes unlawful the Sunday retail sale of certain commodities, imposing a fine of up to one hundred dollars for the first offense, is violative of the constitutional guarantees of equal protection of the laws and religious freedom.

This case is essentially the same as *McGowan* v. *Maryland, ante,* p. 420, decided today. The major differences between the Pennsylvania and Maryland Sunday Closing Laws concern the specific provisions for exemptions from the general proscription of Sunday sales and activities. The religiously oriented backgrounds of both the Maryland and Pennsylvania statutes are strikingly similar although the Pennsylvania colony never had an established church while one did exist for a time in Maryland. While the pronouncements of the Supreme Court of Pennsylvania indicate that it disclaimed a religious purpose for Sunday closing at an earlier date than did the Maryland Court of Appeals, later Pennsylvania decisions returned to religious purpose language while the Maryland opinions consistently rested on secular bases. On the other hand, the legislative history of the most recent Pennsylvania Sunday provisions is more striking than that

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clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense.

"Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereafter."

of the Maryland laws in providing support for the position that temporal considerations preoccupied the State Legislature.

Appellant is a corporation which operates a large discount department store located on a highway in Lehigh County, Pennsylvania. For some time prior to the instant litigation, McGinley, the County District Attorney, prosecuted a number of appellant's employees for violating 18 Purdon's Pa. Stat. Ann. § 4699.4, a section of the Pennsylvania Penal Code of 1939.[2] This statute, with certain exceptions, generally forbids all worldly employment, business and sports on Sunday. Works of charity and necessity are excepted, as is the delivery of milk and necessaries before 9 a. m. and after 5 p. m. Two recent amendments also except wholesome recreation (defined as golf, tennis, boating, swimming, bowling, basketball, picnicking, shooting at inanimate targets and similar healthful or recreational exercises and activities) and work in connection with the rendering of service by a public utility. Violations of this section carry a penalty

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[2] § 4699.4. "Worldly employment or business on Sunday

"Whoever does or performs any worldly employment or business whatsoever on the Lord's day, commonly called Sunday (works of necessity and charity only excepted), or uses or practices any game, hunting, shooting, sport or diversion whatsoever on the same day not authorized by law, shall, upon conviction thereof in a summary proceeding, be sentenced to pay a fine of four dollars ($4), for the use of the Commonwealth, or, in default of the payment thereof, shall suffer six (6) days' imprisonment.

"Nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bake-houses, lodging-houses, inns and other houses of entertainment for the use of sojourners, travellers or strangers, or to hinder watermen from landing their passengers, or ferrymen from carrying over the water travellers, or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessaries of life, before nine of the clock in the forenoon, nor after five of the clock in the afternoon of the same day."

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of four dollars. Appellant then sought an injunction in the court below to restrain the District Attorney from enforcing this statute against it, alleging that the statute was unconstitutional for the reasons stated above and because the District Attorney was discriminating against appellant in enforcing the law. Accordingly, a three-judge court was convened pursuant to 28 U. S. C. §§ 2281 and 2284. Before trial, the Pennsylvania Legislature enacted the 1959 provision and appellant amended its complaint to include it, alleging that the District Attorney was threatening to enforce it against appellant.

Although appellant challenged only the statutory sections mentioned above, in order to properly consider appellant's contentions, the whole body of Pennsylvania Sunday Laws must be examined.[3] Among the other activities prohibited on Sunday by these Pennsylvania statutes are selling of motor vehicles and trailers, operation of pool rooms or billiard rooms, conduct of boxing or wrestling matches, harness racing, pawnbrokering, contests for retrieving dogs, catching of fish in the Delaware River by use of a net, and extension education in public school buildings. The Sunday exhibition of motion pictures is permitted only after 2 p. m., and then only if the voters in each municipality approve; however, religious motion pictures may be shown by churches at any time providing they are shown within church property and no admission price is charged. Baseball, football and

[3] These laws, in their entirety, may be found in 4 Purdon's Pa. Stat. Ann. §§ 1, 30.202, 59–66, 81–91, 121–127, 151–157, 181–185, 307 (c); 18 Purdon's Pa. Stat. Ann. §§ 632, 633, 4651, 4699.4, 4699.9, 4699.10; 24 Purdon's Pa. Stat. Ann. § 19–1903; 30 Purdon's Pa. Stat. Ann. §§ 118, 138, 153, 265, 273; 34 Purdon's Pa. Stat. Ann. §§ 1311.702, 1311.719, 1311.721, 1311.731, 1311.1205; 43 Purdon's Pa. Stat. Ann. § 361; 47 Purdon's Pa. Stat. Ann. §§ 3–304, 4–406, 4–492; 51 Purdon's Pa. Stat. Ann. § 623; 53 Purdon's Pa. Stat. Ann. §§ 23130, 37403 (24); 61 Purdon's Pa. Stat. Ann. §§ 184, 195; 63 Purdon's Pa. Stat. Ann. §§ 281–28, 519, 559.

polo receive similar treatment except the permitted hours are between 1 p. m. and 7 p. m. Public concerts, of music of high order though not necessarily sacred, may only be performed after noon.

The off-the-premises sale of alcoholic beverages on Sunday is disallowed; but private clubs may sell alcoholic beverages to their members on Sunday, as may hotel restaurants between 1 p. m. and 10 p. m. in first- and second-class Pennsylvania cities if the voters in those cities so choose. Municipalities and third-class Pennsylvania cities have statutory authority to restrain desecrations of the Sabbath day; one statutory section simply empowers various judicial officers to punish persons who profane the Lord's day. Barbering and beauty culture work on Sunday subjects the actor to license revocation. Male prisoners may not perform manual labor on Sunday, and bakery employees are not permitted to commence working on Sunday before 6 p. m.

The statutes generally proscribe hunting and shooting on Sunday but make an exception for the removal of fur-bearing animals from traps. Sunday fishing from public lands or in public waters is permitted, but not on private property without the consent of the owner. Also banned is the training of dogs except with the permission of the owner upon whose land the activity is undertaken.

The court below, although finding that McGinley threatened to enforce the 1959 Act against appellant's employees, denied appellant the injunctive relief sought, dismissing appellant's constitutional objections that the 1959 statute was a law respecting an establishment of religion, that the statute preferred one religion over others and that the classifications drawn by the statute were violative of equal protection of the law. The three-judge court declined to pass on the constitutionality of the 1939 statute because it found that, since the 1959 statute was now in effect, there was no imminent threat

to appellant of being prosecuted under the 1939 enactment. The court also felt it its duty to refrain from passing upon the 1939 statute because it believed that there was a substantial unsettled question of Pennsylvania law as to whether the 1939 Act was superseded by the 1959 Act so far as the specific commodities covered by the latter statute. Regarding appellant's contention that McGinley was enforcing the 1939 statute discriminatorily, the court held that since McGinley had recently made substantial efforts to compel observance of the statute by numerous retail stores, since the relief appellant sought was wholly prospective and since McGinley's term of office as District Attorney was expiring within a month of the decision, there was no basis for finding that there would be future discriminatory enforcement of the 1959 statute, 179 F. Supp. 944. On appeal brought under 28 U. S. C. § 1253, we noted probable jurisdiction. 362 U. S. 960.

I.

Before reaching the primary questions presented, several ancillary matters must be considered. First, appellant contends that McGinley discriminated against it in enforcing the laws. Recognizing that a mootness problem exists because Lehigh County now has a new District Attorney,[4] appellant contends that there are still pending prosecutions against its employees initiated as the result of the alleged discriminatory action. Since 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

[4] The new District Attorney was "substituted as an additional defendant" in the court below on appellant's motion, which stated that appellant "has no reason to believe and, therefore, does not aver that [the new District Attorney] will discriminatorily enforce [the] laws as did his predecessor . . . ."

was incorrect in refusing to exercise its injunctive powers at that time.

Furthermore, we do not believe that the three-judge District Court abused its discretion in declining to pass on the constitutionality of the 1939 statute for the reasons stated. *Railroad Commission* v. *Pullman Co.*, 312 U. S. 496. The court below made clear that if appellant's employees were threatened with prosecution under the 1939 Act, and if the Pennsylvania courts decided that the 1939 Act still applies to appellant, that would be time enough to consider that statute's validity. Similarly, we do not believe that the court abused its equity power in refusing to continue the preliminary injunction barring enforcement of the 1939 statute against appellant, since there was no imminent threat of prosecution.

II.

Appellant urges that the 1959 enactment is contrary to the Fourteenth Amendment's mandate of equal protection of the laws because, without rational basis, the statute singles out only twenty specified commodities, the Sunday sale of which is penalized by a fine of up to one hundred dollars for the first offense and, for subsequent offenses committed within one year, a fine of up to two hundred dollars or, in default thereof, imprisonment not to exceed thirty days; and also because the statute's proscription extends only to retail sales. Appellant argues that to forbid the Sunday sale of only some items while permitting the sale of many others and to exclude only retailers from Sunday operation while exempting wholesalers, service dealers, factories, and those engaged in the other excepted activities defeats the State's alleged interest of providing a day of rest and tranquillity for all.[5]

[5] Concomitantly, appellant states the statute violates due process for these same reasons.

The standards for evaluating these contentions have been set out in *McGowan* v. *Maryland, ante,* pp. 425–426; we need not restate them here. First, appellant's argument overlooks the fact that the 1939 Pennsylvania statute prohibits *all* worldly employment or business, with narrowly drawn exceptions; the 1959 enactment now before us simply supplements the prior regulation. The existing system then imposes a greater penalty for the Sunday sale of some items at retail than it imposes for other Sunday retail sales and for the other Sunday activities that appellant seems to have assumed are not forbidden at all. Of course, as to works of charity, necessity or recreation, the State Legislature could find that the interests of its citizens are best served by permitting these Sunday activities; that their interference with the absolute tranquillity of the day is justified by their requirement and desirability. *McGowan* v. *Maryland, supra,* at p. 426.

As to the rationality of imposing a heavier penalty for the Sunday sale of the selected commodities, the court below found:

> "that the 1939 closing law was observed by most retail sellers in Lehigh County, though not all, who were subject to its provisions, until the very recent opening of substantial suburban retail businesses like that of the plaintiff initiated and triggered new and rather large scale violations, and threats of others . . . [and] that the small four dollar penalty of the earlier law was inadequate to deter the Sunday opening of large retail establishments which could easily absorb such small fines as an incidental cost of doing a profitable business. Moreover, it appeared that the types of commodities covered by this new enactment are principal categories of merchandise sold in these establishments which have made the problem of

Sunday retail selling newly acute." 179 F. Supp., at 952.[6]

It was within the power of the legislature to have concluded that these businesses were particularly disrupting the intended atmosphere of the day because of the great volume of motor traffic attracted,[7] the danger of their competitors also opening on Sunday [8] and their large number of employees. "Evils in the same field may be of different dimensions and proportions, requiring dif-

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[6] Commenting on prior English Sunday legislation, a Member of Parliament stated:

"The penalty is a fine of 5s., and nobody will suggest that that is effective in any way. It simply means the payment of 5s., with a little expense added to that, in order to keep open on Sundays, and it seems to me that the Statute of 1677, applied to modern conditions, is nothing short of ridiculous." 308 Parliamentary Debates, Commons, 2167.

[7] A Pennsylvania legislator stated:

"It was several months ago, over a year ago, that a business from New Jersey moved into the aforementioned Whitehall Township of Lehigh County. It was known as the 'Two Guys from Harrison.' They started operating on Sunday. It was a novelty. The people came from Northampton, Bucks, Monroe, Pike, Schuylkill and all the surrounding counties, so much so that they jammed traffic on the highways of the Seventh Street Pike in Allentown and Whitehall Township. However, the people came and they did business. There were other enterprises along the same route which were open on Sunday and doing business." 36 Pennsylvania Legislative Journal 1143.

[8] This problem was recognized when the English legislation was being considered. A Member of Parliament stated:

"So far, happily, the great combine and chain stores have not entered on Sunday trading, but they are business enterprises and it is not impossible that they may find themselves compelled by economic considerations and pressure of local circumstances to open on Sunday, because Parliament takes no action to control and regulate Sunday business in retail shops. If that development should take place, we shall find our shopping centres on a Sunday no different in any way from the bustle, noise and glamour of the week-day trade." 308 Parliamentary Debates, Commons, 2166.

ferent remedies. . . . Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. . . . The legislature may select one phase of one field and apply a remedy there, neglecting the others." *Williamson* v. *Lee Optical,* 348 U. S. 483, 489.[9]

III.

Appellant contends that the Pennsylvania Sunday Closing Law is one respecting an establishment of religion because it commemorates the Resurrection, obliges everyone to honor this basic doctrine of the major Christian denominations by abstaining from work and encourages Christian religious worship. Appellant also alleges that the statute discriminates against certain religions. For the same reasons stated in *McGowan* v. *Maryland, supra,* at pp. 429–431, we hold that appellant has standing to raise only the first contention.[10]

To prove its argument, appellant relies on the language of the present laws in question, on the prior history of this legislation and on various statements of the Pennsylvania courts in interpreting the statutes. We agree that an inquiry into these matters is relevant. *McGowan* v. *Maryland, supra,* at p. 431.

The court below found that the connection between religion and the original Pennsylvania Sunday closing statutes was obvious and indisputable. This is clearly demonstrated by the first Pennsylvania Sunday law, enacted in 1682.[11] There were re-enactments several years

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[9] The basic English Sunday statute, 29 Charles II, c. 7 (1677), imposed differing fines for different proscribed activities.

[10] Mr. Justice Black is of the opinion that appellant also has standing to raise the second contention and that the claim is without merit. See *McGowan* v. *Maryland, ante,* at p. 429, n. 6.

[11] "Whereas, the glory of Almighty God and the good of Mankind, is the reason & end of government, and therefore, government in

later, and again in 1700, which once more stated the purposes of preventing "Looseness, Irreligion, and Atheism," and of better permitting on Sunday the reading of the scriptures at home or the frequenting of meetings of religious worship. *Id.*, at 192. 2 Statutes at Large of Pennsylvania 3–4. In 1705, some changes appeared.

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itself is a venerable Ordinance of God. And forasmuch as it is principally desired and intended by the Proprietary and Governor and the freemen of the Province of Pennsylvania and territories thereunto belonging, to make and establish such Laws as shall best preserve true Christian and Civil Liberty, in opposition to all Unchristian, Licentious, and unjust practices, (Whereby God may have his due, Caesar his due, and the people their due,) from tyranny and oppression on the one side, and insolence, and Licentiousness on the other, so that the best and firmest foundation may be layd for the present and future happiness of both the Governor and people, of the Province and territories aforesaid, and their posterity.

"*Be it therefore Enacted by William Penn, Proprietary and Governour, by, and with the Advice and Consent of the Deputies of the freemen of this Province and Counties aforesaid, in Assembly met, and by the Authority of the same,* That these following Chapters and Paragraphs shall be the Laws of Pennsylvania and the territories thereof.

"Chap. I. Almighty God, being Only Lord of Conscience father of Lights and Spirits, and the author as well as object of all Divine knowledge, faith, and Worship, who only can enlighten the mind, and persuade and convince the understandings of people. In due reverence to his Sovereignty over the Souls of Mankind . . . .

. . . . . .

"But to the end That Looseness, irreligion, and Atheism may not Creep in under pretense of Conscience in this Province, *Be It further Enacted by the Authority aforesaid,* That, according to the example of the primitive Christians, and for the ease of the Creation, Every first day of the week, called the Lord's day, People shall abstain from their usual and common toil and labour, That whether Masters, Parents, Children, or Servants, they may the better dispose themselves to read the Scriptures of truth at home, or frequent such meetings of religious worship abroad, as may best sute their respective persuasions." Charter and Laws of the Province of Pennsylvania 1682–1700, 107–108.

The preamble of the statute remained religious [12] and the stated purposes of Bible reading and religious worship continued. However, some of the exceptions still present in the 1939 statute first appeared, but a specific ban on the drinking of alcoholic beverages in public houses was enacted. *Id.*, at 175–177. The most apparent forerunner of the 1939 statute was passed in 1779. The preamble stated only that the purpose was "for the due observation of the Lord's day." 9 Statutes at Large of Pennsylvania 333. No mention was made of Bible reading or religious worship and the specific Sunday prohibition concerning alcoholic beverages was omitted. By 1786, the preamble completely disappeared, 12 Statutes at Large of Pennsylvania 314. See 15 Statutes at Large of Pennsylvania 110 for the final colonial enactment in 1794.

The present statutory sections still contain some traces of the early religious influence. The 1939 statute refers to Sunday as "the Lord's day"; but it is included in the general section entitled, "Offenses Against Public Policy, Economy and Health." Title 18 Purdon's Pa. Stat. Ann. § 4651 uses the term "Sabbath Day" and refers to the other days of the week as "secular days." But almost every other statutory section simply uses the word "Sunday" and contains no language with religious connotation. It would seem that those traces that have remained are simply the result of legislative oversight in failing to remove them. Section 4651 was re-enacted in 1959 and happened to retain the religious language; many other statutory sections, passed both before and after this date, omit it. Certain political subdivisions are authorized to restrain "desecrations of the Sabbath day," and there is a

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[12] It stated:

"To the end that all people within this province may with the greater freedom devote themselves to religious and pious exercises." *Id.*, at p. 175.

jurisdictional section authorizing the punishment of persons who "profane the Lord's day." But many of the activities historically considered to be profane—*e. g.*, the consumption of alcoholic beverages—are now no longer totally prohibited. There is a general immunity for religious motion pictures and some of the recently exempted activities are permitted only during Sunday afternoons.

On the other hand, we find that the 1939 statute was recently amended to permit all healthful and recreational exercises and activities on Sunday. This is not consistent with aiding church attendance; in fact, it might be deemed inconsistent. And the statutory section, § 4699.10, the constitutionality of which is immediately before us, was promoted principally by the representatives of labor and business interests.[13] Those Pennsylvania legislators who favored the bill specifically disavowed any religious purpose for its enactment but stated instead that economics required its passage.[14]

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[13] 36 Pennsylvania Legislative Journal 1139, 2553, 2682–2683.

[14] For example:

"As I read this bill, I find nothing in it which is of a religious nature. The bill is prompted by the thousands of letters that we have all received in the Senate of Pennsylvania, asking us to do something for the men and women who work in the department stores. These people are not asking to go to church; they are asking for a day of rest.

"I do not find anyone complaining about the Act passed at the last Session concerning the automobile business.

"This is a bill which has been crystalized by, I think, a very great organized labor section in our Commonwealth, the American Federation of Labor. They are in favor of it. They are heading up a group of people who have no particular voice to speak for them. I believe it is the obligation of the Senate of Pennsylvania to vote for this bill in order to give some recognition to the men and women who work and who are compelled to work on Sundays, whether they like it or whether they do not like it.

"This is not a bill. It is rather an indictment of our civilization which makes this kind of legislation possible and necessary. It is

As early as 1848, the Pennsylvania Supreme Court vociferously disclaimed that the purpose of Sunday closing was religious:

> "All agree that to the well-being of society, periods of rest are absolutely necessary. To be productive of the required advantage, these periods must recur at stated intervals, so that the mass of which the community is composed, may enjoy a respite from labour at the same time. They may be established by common consent, or, as is conceded, the legislative power of the state may, without impropriety, interfere to fix the time of their stated return and enforce obedience to the direction. When this happens, some one day must be selected, and it has been said the round of the week presents none which, being preferred, might not be regarded as favouring some one of the numerous religious sects into which mankind are divided. In a Christian community, where a very large majority of the people celebrate the first day of the week as their chosen period of rest from labour, it is not surprising that that day should have received the legislative sanction: and as it is also devoted to religious observances, we are prepared to estimate the reason why the statute should speak of it as the Lord's day, and denominate the infraction of its legalized rest, a profanation. *Yet this does not change the character of the enactment. It is still, essentially, but a civil regulation made for the government of man as a member of society,* and obedience to it may properly be enforced by penal sanctions." *Specht*

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too bad that business will not permit its employees to have a day of rest. It is too bad that we must legislate morals, as we may be doing in this bill." *Id.*, at 1139. See also *id.*, at 1137–1140, 2564–2565, 2682–2685.

v. *Commonwealth,* 8 Pa. 312, 323. (Emphasis added.) [15]

Concededly, there were a number of cases [16] decided after *Specht* which used language strongly supporting appel-

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[15] The Pennsylvania court also stated:

"The error of the plaintiff's position is that it confounds the reason of the prohibition with its actual effect, and thus mistakes the mere restraint of physical exertion for the fetters that clog the freedom of mind and conscience. But were this otherwise, the plaintiff's argument is inapplicable to the act of 1794. The conclusions drawn from some of its language are as inexpressive of its practical operation, as of the principal intent of its makers. The phraseology used may indicate a conviction of the holy character of the first day of the week, but as this simple expression of an abstract opinion, which all other men are at liberty to adopt or reject, carries with it no obligation beyond the influence attendant upon the expression itself, it cannot be said a primary object of the act was, authoritatively, to assert the supremacy of Sunday as of Divine appointment. Had such been the intent, irrespective of its statutory character as a day of rest from secular employment, its framers would not have stopped short with a bare interdiction of labour and worldly amusements. Following the example offered by older states and communities, they would have commanded the performance of religious rites, or at least, some express recognition of the day as the true Sabbath. Such a requisition, we agree with the plaintiff in error, would be a palpable interference with the rights of conscience. But nothing like this is exacted. On the contrary, every one is left at full liberty to shape his own convictions, and practically to assert them to the extent of a free exercise of his religious views. In this, as in other respects, the conscience of each is left uncontrolled by legal coercion, to pursue its own inquiries and to adopt its own conclusions. In this aspect of the statute there is, therefore, nothing in derogation of the constitutional inhibition." *Id.,* at 324.

[16] See *Johnston* v. *Commonwealth,* 22 Pa. 102, 111 (1853); *Commonwealth* v. *Nesbit,* 34 Pa. 398, 405–409 (1859); *Society for the Visitation of the Sick* v. *Commonwealth ex rel. Meyer,* 52 Pa. 125, 135 (1866); *Sparhawk* v. *Union Passenger R. Co.,* 54 Pa. 401, 408–409, 423 (1867); *Commonwealth* v. *American Baseball Club,* 290 Pa. 136, 141, 143, 138 A. 497, 499 (1927).

lant's position. But these cases, the last of which was decided more than thirty years ago, did not squarely decide a constitutional contention. More persuasively, in the only recent appellate case dealing with the constitutionality of the 1939 statute, the Pennsylvania Superior Court affirmed an opinion which specifically relied on the language and reasoning of *Specht*. *Commonwealth* v. *Bauder,* 188 Pa. Super. 424, 145 A. 2d 915, affirming 14 Pa. D. & C. 2d 571.

Having carefully examined the entirety of the present legislation, the relevant judicial characterizations and, particularly, the legislative history leading to the passage of the 1959 Act immediately before us, we hold that neither the statute's purpose nor its effect is religious. See *McGowan* v. *Maryland, supra,* at p. 449. Moreover, for the same reasons stated in *McGowan* v. *Maryland, supra,* at pp. 449–452, we reject appellant's contention that the State has other means at its disposal to accomplish its secular purpose that would not even remotely or incidentally give state aid to religion.

Accordingly, the decision is

Affirmed.

[For opinion of Mr. Justice Frankfurter, joined by Mr. Justice Harlan, see *ante,* p. 459.]

[For dissenting opinion of Mr. Justice Douglas, see *ante,* p. 561.]

BRAUNFELD ET AL. *v.* BROWN, COMMISSIONER OF POLICE OF PHILADELPHIA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

No. 67. Argued December 8, 1960.—Decided May 29, 1961.

Appellants are members of the Orthodox Jewish Faith, which requires the closing of their places of business and total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. As merchants engaged in the retail sale of clothing and home furnishings in Philadelphia, they sued to enjoin enforcement of a 1959 Pennsylvania criminal statute which forbade the retail sale on Sundays of those commodities and other specified commodities. They claimed that the statute violated the Equal Protection Clause of the Fourteenth Amendment and constituted a law respecting an establishment of religion and that it interfered with the free exercise of their religion by imposing serious economic disadvantages upon them, if they adhere to the observance of their Sabbath, and that it would operate so as to hinder the Orthodox Jewish Faith in gaining new members. *Held:* The statute does not violate the Equal Protection Clause of the Fourteenth Amendment nor constitute a law respecting an establishment of religion, *Two Guys from Harrison-Allentown, Inc.*, v. *McGinley, ante*, p. 582; and it does not prohibit the free exercise of appellants' religion, within the meaning of the First Amendment, made applicable to the States by the Fourteenth Amendment. Pp. 600–610.

184 F. Supp. 352, affirmed.

Theodore R. Mann argued the cause for appellants. With him on the brief were *Marvin Garfinkel* and *Stephen B. Narin.*

David Berger argued the cause and filed a brief for appellees.

Arthur Littleton, Benjamin M. Quigg, Jr. and *Russell C. Dilks* filed a brief for the Pennsylvania Retailers' Association, intervening defendant-appellee.

Briefs of *amici curiae,* urging affirmance, were filed by *S. G. Lippman* for the Retail Clerks International Association, AFL–CIO, and *George C. Warner* for the National Retail Merchants Association.

Leo Pfeffer, Lewis H. Weinstein, Shad Polier and *Samuel Lawrence Brennglass* filed a brief for the Synagogue Council of America et al., as *amici curiae,* urging reversal.

MR. CHIEF JUSTICE WARREN announced the judgment of the Court and an opinion in which MR. JUSTICE BLACK, MR. JUSTICE CLARK, and MR. JUSTICE WHITTAKER concur.

This case concerns the constitutional validity of the application to appellants of the Pennsylvania criminal statute,[1] enacted in 1959, which proscribes the Sunday retail sale of certain enumerated commodities. Among the questions presented are whether the statute is a law

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[1] 18 Purdon's Pa. Stat. Ann. (1960 Cum. Supp.) § 4699.10 provides:

"Selling certain personal property on Sunday

"Whoever engages on Sunday in the business of selling, or sells or offers for sale, on such day, at retail, clothing and wearing apparel, clothing accessories, furniture, housewares, home, business or office furnishings, household, business or office appliances, hardware, tools, paints, building and lumber supply materials, jewelry, silverware, watches, clocks, luggage, musical instruments and recordings, or toys, excluding novelties and souvenirs, shall, upon conviction thereof in a summary proceeding for the first offense, be sentenced to pay a fine of not exceeding one hundred dollars ($100), and for the second or any subsequent offense committed within one year after conviction for the first offense, be sentenced to pay a fine of not exceeding two hundred dollars ($200) or undergo imprisonment not exceeding thirty days in default thereof.

"Each separate sale or offer to sell shall constitute a separate offense.

"Information charging violations of this section shall be brought within seventy-two hours after the commission of the alleged offense and not thereafter."

respecting an establishment of religion and whether the statute violates equal protection. Since both of these questions, in reference to this very statute, have already been answered in the negative, *Two Guys from Harrison-Allentown, Inc.*, v. *McGinley, ante*, p. 582, and since appellants present nothing new regarding them, they need not be considered here. Thus, the only question for consideration is whether the statute interferes with the free exercise of appellants' religion.

Appellants are merchants in Philadelphia who engage in the retail sale of clothing and home furnishings within the proscription of the statute in issue. Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. They instituted a suit in the court below seeking a permanent injunction against the enforcement of the 1959 statute. Their complaint, as amended, alleged that appellants had previously kept their places of business open on Sunday; that each of appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday; that Sunday closing will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment; that the statute is unconstitutional for the reasons stated above.

A three-judge court was properly convened and it dismissed the complaint on the authority of the *Two Guys From Harrison* case. 184 F. Supp. 352. On appeal brought under 28 U. S. C. § 1253, we noted probable jurisdiction, 362 U. S. 987.

Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise

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of their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath. Appellants also assert that the statute will operate so as to hinder the Orthodox Jewish faith in gaining new adherents. And the corollary to these arguments is that if the free exercise of appellants' religion is impeded, that religion is being subjected to discriminatory treatment by the State.

In *McGowan* v. *Maryland, ante,* at pp. 437–440, we noted the significance that this Court has attributed to the development of religious freedom in Virginia in determining the scope of the First Amendment's protection. We observed that when Virginia passed its Declaration of Rights in 1776, providing that "all men are equally entitled to the free exercise of religion," Virginia repealed its laws which in any way penalized "maintaining any opinions in matters of religion, forbearing to repair to church, or the exercising any mode of worship whatsoever." But Virginia retained its laws prohibiting Sunday labor.

We also took cognizance, in *McGowan,* of the evolution of Sunday Closing Laws from wholly religious sanctions to legislation concerned with the establishment of a day of community tranquillity, respite and recreation, a day when the atmosphere is one of calm and relaxation rather than one of commercialism, as it is during the other six days of the week. We reviewed the still growing state

preoccupation with improving the health, safety, morals and general well-being of our citizens.

Concededly, appellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate; and appellants point out that their religion requires them to refrain from work on Saturday as well. Our inquiry then is whether, in these circumstances, the First and Fourteenth Amendments forbid application of the Sunday Closing Law to appellants.

Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute. *Cantwell* v. *Connecticut,* 310 U. S. 296, 303; *Reynolds* v. *United States,* 98 U. S. 145, 166. Thus, in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, this Court held that state action compelling school children to salute the flag, on pain of expulsion from public school, was contrary to the First and Fourteenth Amendments when applied to those students whose religious beliefs forbade saluting a flag. But this is not the case at bar; the statute before us does not make criminal the holding of any religious belief or opinion, nor does it force anyone to embrace any religious belief or to say or believe anything in conflict with his religious tenets.

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions. *Cantwell* v. *Connecticut, supra,* at pp. 303–304, 306. As pointed out in *Reynolds* v. *United States, supra,* at p. 164, legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when

the actions are demanded by one's religion. This was articulated by Thomas Jefferson when he said:

> "Believing with you that religion is a matter which lies solely between man and his God, that he owes account to none other for his faith or his worship, that *the legislative powers of government reach actions only, and not opinions,* I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion, or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced *he has no natural right in opposition to his social duties.*" (Emphasis added.) 8 Works of Thomas Jefferson 113.[2]

And, in the *Barnette* case, the Court was careful to point out that "The freedom asserted by these appellees does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. . . . It is . . . to be noted that the compulsory flag salute and

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[2] Oliver Ellsworth, a member of the Constitutional Convention and later Chief Justice, wrote:

"But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. It has a right to prohibit and punish gross immoralities and impieties; because the open *practice* of these is of evil example and detriment." (Emphasis added.) Written in the Connecticut Courant, Dec. 17, 1787, as quoted in 1 Stokes, Church and State in the United States, 535.

pledge requires *affirmation of a belief* and an *attitude of mind.*" 319 U. S., at 630, 633. (Emphasis added.)

Thus, in *Reynolds* v. *United States,* this Court upheld the polygamy conviction of a member of the Mormon faith despite the fact that an accepted doctrine of his church then imposed upon its male members the *duty* to practice polygamy. And, in *Prince* v. *Massachusetts,* 321 U. S. 158, this Court upheld a statute making it a crime for a girl under eighteen years of age to sell any newspapers, periodicals or merchandise in public places despite the fact that a child of the Jehovah's Witnesses faith believed that it was her religious *duty* to perform this work.

It is to be noted that, in the two cases just mentioned, the religious practices themselves conflicted with the public interest. In such cases, to make accommodation between the religious action and an exercise of state authority is a particularly delicate task, *id.,* at 165, because resolution in favor of the State results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.

But, again, this is not the case before us because the statute at bar does not make unlawful any religious practices of appellants; the Sunday law simply regulates a secular activity and, as applied to appellants, operates so as to make the practice of their religious beliefs more expensive. Furthermore, the law's effect does not inconvenience all members of the Orthodox Jewish faith but only those who believe it necessary to work on Sunday.[3] And even these are not faced with as serious a choice as forsaking their religious practices or subjecting themselves to criminal prosecution. Fully recognizing that the alter-

[3] See the concurring opinion of Mr. Justice Cardozo, joined by Mr. Justice Brandeis and Mr. Justice Stone, in *Hamilton* v. *Regents,* 293 U. S. 245, 265–268.

natives open to appellants and others similarly situated—retaining their present occupations and incurring economic disadvantage or engaging in some other commercial activity which does not call for either Saturday or Sunday labor—may well result in some financial sacrifice in order to observe their religious beliefs, still the option is wholly different than when the legislation attempts to make a religious practice itself unlawful.

To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i. e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. These denominations number almost three hundred. Year Book of American Churches for 1958, 257 *et seq.* Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test

for determining whether the legislation violates the freedom of religion protected by the First Amendment.

Of course, to hold unassailable all legislation regulating conduct which imposes solely an indirect burden on the observance of religion would be a gross oversimplification. If the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect. But if the State regulates conduct by enacting a general law within its power, the purpose and effect of which is to advance the State's secular goals, the statute is valid despite its indirect burden on religious observance unless the State may accomplish its purpose by means which do not impose such a burden. See *Cantwell* v. *Connecticut, supra,* at pp. 304–305.[4]

As we pointed out in *McGowan* v. *Maryland, supra,* at pp. 444–445, we cannot find a State without power to provide a weekly respite from all labor and, at the same time, to set one day of the week apart from the others as a day of rest, repose, recreation and tranquillity—a day when the hectic tempo of everyday existence ceases and a more pleasant atmosphere is created, a day which all members of the family and community have the opportunity to spend and enjoy together, a day on which people may visit friends and relatives who are not available during working days, a day when the weekly laborer may best regenerate himself. This is particularly true in this day and age of increasing state concern with public welfare legislation.

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[4] Thus in cases like *Murdock* v. *Pennsylvania,* 319 U. S. 105, and *Follett* v. *McCormick,* 321 U. S. 573, this Court struck down municipal ordinances which, in application, required religious colporteurs to pay a license tax as a condition to the pursuit of their activities because the State's interest, the obtaining of revenue, could be easily satisfied by imposing this tax on nonreligious sources.

Also, in *McGowan,* we examined several suggested alternative means by which it was argued that the State might accomplish its secular goals without even remotely or incidentally affecting religious freedom. *Ante,* at pp. 450–452. We found there that a State might well find that those alternatives would not accomplish bringing about a general day of rest. We need not examine them again here.

However, appellants advance yet another means at the State's disposal which they would find unobjectionable. They contend that the State should cut an exception from the Sunday labor proscription for those people who, because of religious conviction, observe a day of rest other than Sunday. By such regulation, appellants contend, the economic disadvantages imposed by the present system would be removed and the State's interest in having all people rest one day would be satisfied.

A number of States provide such an exemption,[5] and this may well be the wiser solution to the problem. But our concern is not with the wisdom of legislation but with its constitutional limitation. Thus, reason and experience teach that to permit the exemption might well undermine the State's goal of providing a day that, as best possible, eliminates the atmosphere of commercial noise and activity. Although not dispositive of the issue, enforcement problems would be more difficult since there would be two or more days to police rather than one and it would be more difficult to observe whether violations were occurring.

Additional problems might also be presented by a regulation of this sort. To allow only people who rest on a day other than Sunday to keep their businesses open on that day might well provide these people with an economic advantage over their competitors who must

[5] *E. g.,* Ind. Ann. Stat. § 10–4301.

remain closed on that day; [6] this might cause the Sunday-observers to complain that their religions are being discriminated against. With this competitive advantage existing, there could well be the temptation for some, in order to keep their businesses open on Sunday, to assert that they have religious convictions which compel them to close their businesses on what had formerly been their least profitable day. This might make necessary a state-conducted inquiry into the sincerity of the individual's religious beliefs,[7] a practice which a State might believe would itself run afoul of the spirit of constitutionally protected religious guarantees. Finally, in order to keep the disruption of the day at a minimum, exempted employers would probably have to hire employees who themselves qualified for the exemption because of their own religious beliefs,[8] a practice which a State might feel to be opposed to its general policy prohibiting religious discrimination in hiring.[9] For all of these reasons, we cannot say that the Pennsylvania statute before us is invalid, either on its face or as applied.

MR. JUSTICE HARLAN concurs in the judgment. MR. JUSTICE BRENNAN and MR. JUSTICE STEWART concur in

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[6] "If he [the Orthodox Jewish storekeeper] opens on Saturday, he is subjected to very fierce competition indeed from Christian shopkeepers, whereas on Sunday, supposing he closes on Saturday, he has an absolutely free run and no competition from Christian shopkeepers at all." 311 Parliamentary Debates, Commons, 492.

"It is true that the orthodox Jew will only be allowed to trade until two o'clock on Sunday, but during that time he will have a monopoly. That is a tremendous advantage. In many districts he will be the only trader with a shop open in that district." 101 Parliamentary Debates, Lords, 430.

[7] Connecticut, which has such an exemption statute, requires that Sabbatarians, in order to qualify, file a written notice of religious belief with the prosecuting attorney. Conn. Gen. Stat. Rev. § 53-303.

[8] *E. g.*, Va. Code Ann., § 18.1-359.

[9] *E. g.*, 43 Purdon's Pa. Stat. Ann. (1960 Cum. Supp.) §§ 951-963.

our disposition of appellants' claims under the Establishment Clause and the Equal Protection Clause. MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN have rejected appellants' claim under the Free Exercise Clause in a separate opinion.

Accordingly, the decision is

Affirmed.

[For opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE HARLAN, see *ante,* p. 459.]

[For dissenting opinion of MR. JUSTICE DOUGLAS, see *ante,* p. 561.]

MR. JUSTICE BRENNAN, concurring and dissenting.

I agree with THE CHIEF JUSTICE that there is no merit in appellants' establishment and equal-protection claims. I dissent, however, as to the claim that Pennsylvania has prohibited the free exercise of appellants' religion.

The Court has demonstrated the public need for a weekly surcease from worldly labor, and set forth the considerations of convenience which have led the Commonwealth of Pennsylvania to fix Sunday as the time for that respite. I would approach this case differently, from the point of view of the individuals whose liberty is—concededly—curtailed by these enactments. For the values of the First Amendment, as embodied in the Fourteenth, look primarily towards the preservation of personal liberty, rather than towards the fulfillment of collective goals.

The appellants are small retail merchants, faithful practitioners of the Orthodox Jewish faith. They allege—and the allegation must be taken as true, since the case comes to us on a motion to dismiss the complaint—that ". . . one who does not observe the Sabbath [by refraining from labor] . . . cannot be an Orthodox Jew."

In appellants' business area Friday night and Saturday are busy times; yet appellants, true to their faith, close during the Jewish Sabbath, and make up some, but not all, of the business thus lost by opening on Sunday. "Each of the plaintiffs," the complaint continues, "does a substantial amount of business on Sundays, and the ability of the plaintiffs to earn a livelihood will be greatly impaired by closing their business establishment on Sundays." Consequences even more drastic are alleged: "Plaintiff, Abraham Braunfeld, will be unable to continue in his business if he may not stay open on Sunday and he will thereby lose his capital investment." In other words, the issue in this case—and we do not understand either appellees or the Court to contend otherwise—is whether a State may put an individual to a choice between his business and his religion. The Court today holds that it may. But I dissent, believing that such a law prohibits the free exercise of religion.

The first question to be resolved, however, is somewhat broader than the facts of this case. That question concerns the appropriate standard of constitutional adjudication in cases in which a statute is assertedly in conflict with the First Amendment, whether that limitation applies of its own force, or as absorbed through the less definite words of the Fourteenth Amendment. The Court in such cases is not confined to the narrow inquiry whether the challenged law is rationally related to some legitimate legislative end. Nor is the case decided by a finding that the State's interest is substantial and important, as well as rationally justifiable. This canon of adjudication was clearly stated by Mr. Justice Jackson, speaking for the Court in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639 (1943):

> "In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for

transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment, because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard. The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the State may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case."

This exacting standard has been consistently applied by this Court as the test of legislation under all clauses of the First Amendment, not only those specifically dealing with freedom of speech and of the press. For religious freedom—the freedom to believe and to practice strange and, it may be, foreign creeds—has classically been one of the highest values of our society. See, *e. g.*, *Murdock* v. *Pennsylvania,* 319 U. S. 105, 115 (1943); *Jones* v. *City of Opelika,* 319 U. S. 103 (1943); *Martin* v. *City of Struthers,* 319 U. S. 141 (1943); *Follett* v. *Town of McCormick,* 321 U. S. 573 (1944); *Marsh* v. *Alabama,* 326 U. S. 501, 510 (1946). Even the most concentrated and fully articulated attack on this high standard has seemingly admitted its validity in principle, while

deploring some incidental phraseology. See *Kovacs* v. *Cooper,* 336 U. S. 77, 89, 95–96 (1949) (concurring opinion); but cf. *Ullmann* v. *United States,* 350 U. S. 422 (1956). The honored place of religious freedom in our constitutional hierarchy, suggested long ago by the argument of counsel in *Permoli* v. *Municipality No. 1 of the City of New Orleans,* 3 How. 589, 600 (1845), and foreshadowed by a prescient footnote in *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, n. 4 (1938), must now be taken to be settled. Or at least so it appeared until today. For in this case the Court seems to say, without so much as a deferential nod towards that high place which we have accorded religious freedom in the past, that any substantial state interest will justify encroachments on religious practice, at least if those encroachments are cloaked in the guise of some nonreligious public purpose.

Admittedly, these laws do not compel overt affirmation of a repugnant belief, as in *Barnette,* nor do they prohibit outright any of appellants' religious practices, as did the federal law upheld in *Reynolds* v. *United States,* 98 U. S. 145 (1878), cited by the Court. That is, the laws do not say that appellants must work on Saturday. But their effect is that appellants may not simultaneously practice their religion and their trade, without being hampered by a substantial competitive disadvantage. Their effect is that no one may at one and the same time be an Orthodox Jew and compete effectively with his Sunday-observing fellow tradesmen. This clog upon the exercise of religion, this state-imposed burden on Orthodox Judaism, has exactly the same economic effect as a tax levied upon the sale of religious literature. And yet, such a tax, when applied in the form of an excise or license fee, was held invalid in *Follett* v. *Town of McCormick, supra.* All this the Court, as I read its opinion, concedes.

What, then, is the compelling state interest which impels the Commonwealth of Pennsylvania to impede

appellants' freedom of worship? What overbalancing need is so weighty in the constitutional scale that it justifies this substantial, though indirect, limitation of appellants' freedom? It is not the desire to stamp out a practice deeply abhorred by society, such as polygamy, as in *Reynolds,* for the custom of resting one day a week is universally honored, as the Court has amply shown. Nor is it the State's traditional protection of children, as in *Prince* v. *Massachusetts,* 321 U. S. 158 (1944), for appellants are reasoning and fully autonomous adults. It is not even the interest in seeing that everyone rests one day a week, for appellants' religion requires that they take such a rest. It is the mere convenience of having everyone rest on the same day. It is to defend this interest that the Court holds that a State need not follow the alternative route of granting an exemption for those who in good faith observe a day of rest other than Sunday.

It is true, I suppose, that the granting of such an exemption would make Sundays a little noisier, and the task of police and prosecutor a little more difficult. It is also true that a majority—21—of the 34 States which have general Sunday regulations have exemptions of this kind.[1] We are not told that those States are significantly noisier, or that their police are significantly more burdened, than

[1] Conn. Gen. Stat., 1958 rev., § 53–303; Fla. Laws 1959, c. 59–1650, § 2; Ill. Rev. Stat., 1959, c. 38, § 549; Burns' Ind. Ann. Stat., 1956 repl., § 10–4301; Kan. Gen. Stat. Ann., 1949, § 21–953; Ky. Rev. Stat., 1959, § 436.160 (2); Me. Rev. Stat., 1954, c. 134, § 44; Mass. Gen. Laws Ann., 1958, c. 136, § 6; Mich. Stat. Ann., 1957 rev., §§ 18.855, 18.122, 9.2702; Mo. Rev. Stat., 1959, § 563.700; Neb. Rev. Stat., 1943, § 28–940; N. J. Stat. Ann., 1953, § 2A:171–4; McKinney's N. Y. Laws, Penal Law § 2144; N. D. Rev. Code, 1943, § 12–2117; Page's Ohio Rev. Code Ann., 1954, § 3773.24; Okla. Stat. Ann., 1958, Tit. 21, § 909; R. I. Gen. Laws, 1956, § 11–40–4; S. D. Code, 1939, § 13.1710; Tex. Pen. Code Art. 284; Va. Code, 1950, § 18.1–359; Wash. Rev. Code, 1951, § 9.76.020; W. Va. Code Ann., 1955, c. 61, Art. 8, § 6073. Cf. Wis. Stat. Ann., 1958, § 301.33.

Pennsylvania's. Even England, not under the compulsion of a written constitution, but simply influenced by considerations of fairness, has such an exemption for some activities.[2] The Court conjures up several difficulties with such a system which seem to me more fanciful than real. Non-Sunday observers might get an unfair advantage, it is said. A similar contention against the draft exemption for conscientious objectors (another example of the exemption technique) was rejected with the observation that "its unsoundness is too apparent to require" discussion. *Selective Draft Law Cases,* 245 U. S. 366, 390 (1918). However widespread the complaint, it is legally baseless, and the State's reliance upon it cannot withstand a First Amendment claim. We are told that an official inquiry into the good faith with which religious beliefs are held might be itself unconstitutional. But this Court indicated otherwise in *United States* v. *Ballard,* 322 U. S. 78 (1944). Such an inquiry is no more an infringement of religious freedom than the requirement imposed by the Court itself in *McGowan* v. *Maryland, ante,* p. 420, decided this day, that a plaintiff show that his good-faith religious beliefs are hampered before he acquires standing to attack a statute under the Free-Exercise Clause of the First Amendment. Finally, I find the Court's mention of a problem under state antidiscrimination statutes almost chimerical. Most such statutes provide that hiring may be made on a religious basis if religion is a *bona fide* occupational qualification.[3] It happens, moreover, that Pennsylvania's statute has such a provision.[4]

In fine, the Court, in my view, has exalted administrative convenience to a constitutional level high enough to

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[2] *E. g.,* Shops Act, 1950, 14 Geo. VI, c. 28, § 53.

[3] *E. g.,* Mass. Gen. Laws Ann., 1958, c. 151B, § 4, par. 1.

[4] 43 Purdon's Pa. Stat. Ann. (1960 Cum. Supp.) § 955.

justify making one religion economically disadvantageous. The Court would justify this result on the ground that the effect on religion, though substantial, is indirect. The Court forgets, I think, a warning uttered during the congressional discussion of the First Amendment itself: ". . . the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ." [5]

I would reverse this judgment and remand for a trial of appellants' allegations, limited to the free-exercise-of-religion issue.

MR. JUSTICE STEWART, dissenting.

I agree with substantially all that MR. JUSTICE BRENNAN has written. Pennsylvania has passed a law which compels an Orthodox Jew to choose between his religious faith and his economic survival. That is a cruel choice. It is a choice which I think no State can constitutionally demand. For me this is not something that can be swept under the rug and forgotten in the interest of enforced Sunday togetherness. I think the impact of this law upon these appellants grossly violates their constitutional right to the free exercise of their religion.

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[5] I Annals of Cong. 730 (remarks of Representative Daniel Carroll of Maryland, August 15, 1789).

Syllabus.

GALLAGHER, CHIEF OF POLICE OF SPRINGFIELD, MASSACHUSETTS, ET AL. *v.* CROWN KOSHER SUPER MARKET OF MASSACHUSETTS, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 11. Argued December 7–8, 1960.—Decided May 29, 1961.

Appellees are members of the Orthodox Jewish Faith, whose religion forbids them to shop on their Sabbath (from sundown on Friday until sundown on Saturday) and requires them to eat kosher food; a group of orthodox rabbis and a corporation selling kosher food mainly to such customers. They sued in a Federal District Court to enjoin as unconstitutional enforcement of certain sections of the Massachusetts Sunday Closing Laws which had been construed as forbidding the corporation to keep its store open on Sundays (except for the sale of kosher meat until 10 a. m.), though it had formerly been open for business all day on Sundays and had done about a third of its weekly business then. It had been closed from sundown on Fridays until sundown on Saturdays, and it claimed that it was economically impractical for it to keep open on Saturday nights and until 10 a. m. on Sundays. The laws in question generally forbid the keeping open of shops and the doing of any labor, business or work on Sundays; but they are subject to a great many detailed exceptions of many different kinds, which are summarized in the opinion. *Held:* The statutes here involved do not violate the Equal Protection Clause of the Fourteenth Amendment, and they are not laws respecting an establishment of religion or prohibiting the free exercise thereof, within the meaning of the First Amendment, made applicable to the States by the Fourteenth Amendment. Pp. 618–631.

176 F. Supp. 466, reversed.

Joseph H. Elcock, Jr., Assistant Attorney General of Massachusetts, argued the cause for appellants. With him on the brief were *Edward J. McCormack, Jr.,* Attorney General, *John Warren McGarry,* Assistant Attorney General, *Arthur E. Sutherland* and *S. Thomas Martinelli.*

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Herbert B. Ehrmann argued the cause for appellees. With him on the brief was *Samuel L. Fein.*

Briefs of *amici curiae,* urging affirmance, were filed by *Leo Pfeffer, Lewis H. Weinstein, Shad Polier* and *Samuel Lawrence Brennglass* for the Synagogue Council of America et al.; *Frederick F. Greenman, Arnold Forster, Paul Hartman, Theodore Leskes, Edwin J. Lukas* and *Sol Rabkin* for the American Jewish Committee et al.; *Reuben Goodman* and *Rowland Watts* for the American Civil Liberties Union et al.; and *William D. Donnelly* for the General Conference of Seventh-Day Adventists.

MR. CHIEF JUSTICE WARREN announced the judgment of the Court and an opinion in which MR. JUSTICE BLACK, MR. JUSTICE CLARK, and MR. JUSTICE WHITTAKER concur.

The principal issues presented in this case are whether the Massachusetts Sunday Closing Laws [1] violate equal protection, are statutes respecting the establishment of religion or prohibit the free exercise thereof.

Appellees are Crown Kosher Super Market, a corporation whose four stockholders, officers and directors are members of the Orthodox Jewish faith, which operates in Springfield, Massachusetts, and sells kosher meat and other food products that are almost exclusively kosher and which has many Orthodox Jewish customers; three of Crown's customers of the Orthodox Jewish faith, whose religion forbids them to shop on the Sabbath and requires them to eat kosher food, as representatives of that class

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[1] The statutory sections immediately before the Court are Mass. Gen. Laws Ann., c. 136, §§ 5 and 6. The Massachusetts Sunday Closing Laws in their entirety may be found in Mass. Gen. Laws Ann., c. 136; c. 131, § 58; c. 138, §§ 12 and 33; c. 149, §§ 47 and 48; c. 266, §§ 113 and 117. Those sections considered particularly relevant are set forth in an Appendix to this opinion.

of patrons; and the chief orthodox rabbi of Springfield, as representative of a class of orthodox rabbis whose duties include the inspecting of kosher food markets to insure compliance with Orthodox Jewish dietary laws.

Crown had previously been open for business on Sunday, on which day it had conducted about one-third of its weekly business. No other supermarket in the Springfield area had kept open on Sunday. Since the Orthodox Jewish religion requires its members to refrain from any commercial activity on the Sabbath—from sundown on Friday until sundown on Saturday—Crown was not open during those hours. Although there is a statutory provision which permits Sabbatarians to keep their shops open until 10 a. m. on Sunday for the sale of kosher meat, Crown did not do so because it was economically impractical; for the same reason, Crown did not open after sundown on Saturday.

Those provisions of the law immediately under attack are in a chapter entitled "Observance of the Lord's Day." They forbid, under penalty of a fine of up to fifty dollars, the keeping open of shops and the doing of any labor, business or work on Sunday. Works of necessity and charity are excepted as is the operation of certain public utilities. There are also exemptions for the retail sale of drugs, the retail sale of tobacco by certain vendors, the retail sale and making of bread at given hours by certain dealers, and the retail sale of frozen desserts, confectioneries and fruits by various listed sellers. The statutes under attack further permit the Sunday sale of live bait for noncommercial fishing; the sale of meals to be consumed off the premises; the operation and letting of motor vehicles and the sale of items and emergency services necessary thereto; the letting of horses, carriages, boats and bicycles; unpaid work on pleasure boats and about private gardens and grounds if it does not cause unreasonable noise; the running of trains and boats; the

printing, sale and delivery of newspapers; the operation of bootblacks before 11 a. m., unless locally prohibited; the wholesale and retail sale of milk, ice and fuel; the wholesale handling and delivery of fish and perishable foodstuffs; the sale at wholesale of dressed poultry; the making of butter and cheese; general interstate truck transportation before 8 a. m. and after 8 p. m. and at all times in cases of emergency; intrastate truck transportation of petroleum products before 6 a. m. and after 10 p. m.; the transportation of livestock and farm items for participation in fairs and sporting events; the sale of fruits and vegetables on the grower's premises; the keeping open of public bathhouses; the digging of clams; the icing and dressing of fish; the sale of works of art at exhibitions; the conducting of private trade expositions between 1 p. m. and 10 p. m.

These statutes do not prohibit Sunday business and labor by Sabbatarian observers so long as it disturbs no other person. However, this has been construed to forbid the keeping open of shops for the sale of merchandise. *Commonwealth* v. *Has,* 122 Mass. 40. Permission is granted by local option for the Sunday operation after 1 p. m. of amusement parks and beach resorts, including participation in bowling and games of amusement for which prizes are awarded. Special licenses for emergency Sunday work may be obtained from local officials.

Other provisions of the Massachusetts Sunday legislation make generally unlawful Sunday attendance or participation in any public entertainments except for those which are duly licensed locally, conducted after 1 p. m., and are in keeping with the character of the day and not inconsistent with its due observance.

Although there is a general bar of games and sports on Sunday, professional sports may be played between 1:30 p. m. and 6:30 p. m., and indoor hockey and basketball

any time after 1:30 p. m.; amateur sports may be played between 2 p. m. and 6 p. m.; this is all subject to local option and no game may be conducted within one thousand feet of any regular place of worship except in a public playground or park. There are specific bans on auto racing, horse racing, boxing and hunting with firearms. And there are a number of additional exemptions from the general proscription. Golf, tennis, dancing at weddings, concerts of sacred music and the celebration of religious customs or rituals are all allowed on Sunday as are the operation of miniature golf courses and golf driving ranges after 1 p. m. Motion pictures may be exhibited after this hour if a local license is obtained. Parades with music for certain commemorative purposes may be held on Sunday by veterans', civic, fraternal, policemen's and firemen's organizations providing that they are suspended while passing within two hundred feet of public worship services.

Persons who keep places of public entertainment or refreshment lose their licenses if they entertain, on Sunday, people other than travelers, strangers or lodgers. With limited exceptions, discharging firearms for sport except on one's own land, fishing for commercial purposes, and fishing with nets or spears are prohibited on Sunday. The use of gaming devices is not allowed. Outdoor exercise without the element of contest is generally permitted as is the taking of mammals by means of traps. Heavier penalties are imposed for the willful cutting and destruction of timber, shrubs, fruits or vegetables on Sunday than on other days of the week.

Still other statutory sections make it a crime for most employers to require their employees to engage in ordinary occupation on Sunday unless the employee is allowed twenty-four consecutive hours off during the following six days. The sale of alcoholic beverages by certain

licensees is permitted on Sunday after 1 p. m., by local option. However, patrons consuming the beverages on the premises must be seated at tables.

Appellees sought permanently to enjoin the enforcement of the statute against them, alleging that appellant, Springfield's chief of police, had previously arrested and prosecuted Crown's manager for keeping open on Sunday; that, unless restrained, appellant would continue to enforce the statute against Crown; that the statute was unconstitutional for the reasons stated above. The three-judge Federal District Court, one judge dissenting, agreed with appellees, 176 F. Supp. 466. On appeal brought under 28 U. S. C. § 1253, we noted probable jurisdiction, 362 U. S. 960.

I.

The equal protection arguments advanced by appellees are much the same as those made by appellants in *McGowan* v. *Maryland, ante,* p. 420. They contend that the exceptions to the statute are so numerous and arbitrary as to be found to have no rational basis;[2] that the law permits the sale of certain food items sold by Crown but limits this permission to selected types of stores; that the employees in the exempted activities are just as much in need of a day of rest as are Crown's employees. The three-judge District Court described the present statutory system as an "unbelievable hodgepodge" and sustained appellees' allegations.

The answers to these arguments are likewise similar to those given in *McGowan* when the contentions are examined under the standards set forth in that opinion. Many of the exceptions in the Massachusetts Sunday Laws are

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[2] A similar argument made is that the exemptions from the statutes' proscription "eat up the rule," bear no rational relationship to the alleged interest of the State and therefore violate due process.

reasonably explainable on their face. Such items as tobaccos, confectioneries, fruits and frozen desserts could have been found by the legislature to be useful in adding to Sunday's enjoyment; such items as newspapers, milk and bread could have been found to be required to be sold fresh daily.[3] It is conceivable that the legislature believed that the sale of fish and perishable foodstuffs at wholesale would not detract from the atmosphere of the day, while the retail sale of these items would inject the distinctly commercial element that exists during the other six days of the week. It is fair to believe that the allowance of professional and amateur sports on Sunday would add to the day's special character rather than detract from it. And the legislature could find that the circumstances attendant to the conduct of professional sports are sufficiently different from those of amateur sports to justify different treatment as to the hours during which they may be played. Furthermore, the legislature could determine that, although many retailers, including Crown, sell frozen desserts, to permit only a limited number of innholders, druggists and common victuallers to sell them on Sunday would serve the public purpose of providing these items on Sunday and, at the same time, limit the commercial activities ordinarily attendant to their sale. And, if such determination requires this limited number of stores to be open to serve the public interest, the employees of most of the stores are still protected by the statutory provision giving the employees another day of rest. To permit all stores which sell the exempted products to remain open on Sunday but to limit them to the sale of the exempted items

[3] It may be noted that, contrary to the interpretation of the court below, since there is no restriction on the sale of milk, Crown may vend it at any time on Sunday.

might well be believed to impose near insuperable enforcement problems.

The fact is that the irrationality of these and the many other apparently reasonable distinctions has not been shown. The presumption of validity upon which the other classifications stand has not been dispelled. "A classification having some reasonable basis does not offend against [the equal protection] clause merely because it is not made with mathematical nicety or because in practice it results in some inequality." *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U. S. 61, 78. Thus, we hold that the Massachusetts Sunday Laws do not violate equal protection of the laws.

II.

Appellees make several contentions that the statutes violate the constitutional guarantees of religious freedom. *First,* they allege that the statutes are laws respecting an establishment of religion in that both their original and current purposes are to enforce the observance of Sunday as the Sabbath.

We agree with the court below that, like the Sunday laws of other States, the Massachusetts statutes have an unmistakably religious origin. The first enactment of the Plymouth Colony in 1650 stated simply that "whosoever shall prophane the Lords day by doeing any servill worke or any such like abusses" shall either be fined or whipped. The Compact, Charter and Laws of the Colony of New Plymouth, 92. Eight years later, a ban on Sunday traveling was enacted with the following preamble:

> "Wheras complaint is made of great abuses in sundry places of this Govrment of prophaning the Lords day by travellers both horse and foot by bearing of burdens carrying of packes &c. upon the Lords day to the great offence of the Godly welafected among us." *Id.*, at 113.

And, in 1671, the religious purpose was made clear beyond doubt:

> "9. This Court taking notice of great abuse, and many misdemeanours, committed by divers persons in these many wayes, Profaneing the Sabbath or Lord's-day, to the great dishonour of God, Reproach of Religion, and Grief of the Spirits of God's People
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> "Do therefore Order, That whosoever shall Prophane the Lord's-day, by doing unnecessary servile Work, by unnecessary travailing, or by sports and recreations, he or they that so transgress, shall forfeit for every such default forty shillings, or be publickly whipt: But if it clearly appear that the sin was proudly, Presumptuously and with a high hand committed, against the known Command and Authority of the blessed God, such a person therein Despising and Reproaching the Lord, shall be put to death or grievously punished at the Judgement of the Court.
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> "10. And whosoever shall frequently neglect the public Worship of God on the Lords day, that is approved by this Government, shall forfeit for every such default convicted of, ten shillings, especially where it appears to arise from negligence, Idleness or Prophaness of Spirit." *Id.*, at 247.

The Sunday regulations of the Massachusetts Colony were no different. The 1653 version spoke of the abuses of the Dishonor of God and the Reproach of Religion which were Grieving the Souls of God's Servants. Among other things, the statute forbade Drinking and Sporting on Sunday. The Colonial Laws of Massachusetts 132–133. In 1665, Neglect of God's Public Worship was made a crime. *Id.*, at 133. Every person was required to apply himself to Duties of Religion and Piety on Sunday according to the 1692 statute which continued the ban on

Sunday sports. Charter of the Province of the Massachusetts-Bay in New-England 13–14. The preamble to the new statute in 1761 retained the Religion and Piety language and added that Profanation of the Lord's Day is highly offensive to Almighty God. This statute retained and strengthened the former prohibitions. *Id.*, at 392–394.

A change came about in 1782. The preamble added the following:

> "Whereas the Observance of the Lord's Day is highly promotive of the Welfare of a Community, by affording necessary Seasons for Relaxation from Labor and the Cares of Business; for moral Reflections and Conversation on the Duties of Life, and the frequent Errors of human Conduct; . . ." Acts and Laws of the Commonwealth of Massachusetts 63.

Thus, the statute's announced purpose was no longer solely religious. But this statute proscribed the Sunday attendance at any Concert of Music and Dancing in addition to the previously mentioned activities. *Ibid.* This law was re-enacted in 1792. 2 Laws of Massachusetts 536 *et seq.*

However, when we examine the statutes now before the Court, we find that, for the most part, they have been divorced from the religious orientation of their predecessors. The preambles' statements, in certain terms, of religious purpose exist no longer. Sports of almost all kinds are now generally allowed on Sunday. The absolute prohibition against alcoholic beverages has disappeared. Concerts and dancing are permitted. Church attendance is no longer required.

Admittedly, the statutes still contain references to the Lord's Day and some provisions speak of weekdays as being secular days. Although § 2 of c. 136 excepts concerts of *sacred* music, the next clause of the section

permits free open-air concerts. It would seem that the objectionable language is merely a relic. The fact that certain Sunday activities are permitted only if they are "in keeping with the character of the day and not inconsistent with its due observance," does not necessarily mean that the day is intended to be religious; the "character" of the day would appear more likely to be intended to be one of repose and recreation. We are told that those provisions forbidding certain activities to be conducted within a set distance from a place of public worship are especially devoted to maintaining Sunday as the Sabbath. But because the State wishes to protect those who do worship on Sunday does not mean that the State means to impose religious worship on all. See *Everson* v. *Board of Education,* 330 U. S. 1, 16. Although many of the more recently allowed Sunday activities may not commence prior to 1 p. m., others may be undertaken at any time during the day. And the contention that evening church services are being protected cannot be maintained since most of those activities that begin after 1 p. m. may continue throughout the day.

Furthermore, the long list of exemptions that have been recently granted evidences that the present scheme is one to provide an atmosphere of recreation rather than religion. The court below pointed out that, since 1858, the statutes have been amended more than seventy times. It would not seem that the Sunday sales of tobacco, soda water, fruit, et cetera, are in aid of religion. It would seem that the operation of amusement parks and beach resorts is in aid of recreation.

An examination of recent Massachusetts legislative history bolsters the State's position that these statutes are not religious. In 1960, a report of the Legislative Research Council stated:

> "In general, Sunday laws protect the public by guaranteeing one day in seven to provide a period of

> rest and quiet. Health, peace and good order of society are thereby promoted. Such provision is essentially civil in character and the statutes are not regarded as religious ordinances." Report of the Legislative Research Council relative to Legal Holidays and their Observance, Mass. Leg. Docs., Sen. Doc. No. 525 (1960), 24.[4]

The earliest pronouncements of the Supreme Judicial Court of Massachusetts are further indication of the religious origin of the Sunday Laws. In *Pearce* v. *Atwood,* 13 Mass. 324, 348 (1816), it was stated that the statute's sole object was "ensuring reverence and respect for one day of the week, in order that religious exercises should be performed without interruption from common and secular employments." In *Bennett* v. *Brooks,* 91 Mass. 118, 119 (1864), the day was characterized as one "set apart for religious services and observances."

In 1877, a case arose in which a charge of violation of religious freedom was made. The Supreme Judicial Court relied on the Pennsylanvia case of *Specht* v. *Commonwealth,* 8 Pa. 312, and stated clearly:

> "It is essentially a civil regulation, providing for a fixed period of rest in the business, the ordinary avocations and the amusements of the community. If there is to be such a cessation from labor and amusement, some one day must be selected for the purpose; and even if the day thus selected is chosen because a great majority of the people celebrate it as a day

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[4] A 1953 report concluded:

"The wave of materialism which is sweeping the country makes it most important that one day be set aside for worship, rest and to give all persons an opportunity to strengthen the bulwark of our American civilization—the home." Report of the Unpaid Special Commission to Investigate and Study the Provisions of the Laws Relating to the Observance of the Lord's Day, Mass. Leg. Docs., H. Doc. No. 2413 (1954) 9.

> of peculiar sanctity, the legislative authority to provide for its observance is derived from its general authority to regulate the business of the community and to provide for its moral and physical welfare. The act imposes upon no one any religious ceremony or attendance upon any form of worship, and any one, who deems another day more suitable for rest or worship, may devote that day to the religious observance which he deems appropriate. That one who conscientiously observes the seventh day of the week may also be compelled to abstain from business of the kind expressly forbidden on the first day, is not occasioned by any subordination of his religion, but because as a member of the community he must submit to the rules which are made by lawful authority to regulate and govern the business of that community." *Commonwealth* v. *Has,* 122 Mass. 40, 42 (1877).

The court below characterized this decision as an *ad hoc* improvisation by the Massachusetts court. Of course, the court below was correct in deciding that it was not bound by the Massachusetts characterization of the statutes. See *Society for Savings* v. *Bowers,* 349 U. S. 143, 151. But ten years later, in *Commonwealth* v. *Starr,* 144 Mass. 359, 361, 11 N. E. 533, 534 (1887), another religious charge against the statute was made; it was rejected on the authority of *Has.*

As the court below pointed out, there have been several cases,[5] between 1877 and 1923, which gave a religious characterization to the statute. But in none of these cases was there a contention regarding religious freedom, and

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[5] *Davis* v. *Somerville,* 128 Mass. 594 (1880); *Commonwealth* v. *Dextra,* 143 Mass. 28, 8 N. E. 756 (1886); *Commonwealth* v. *White,* 190 Mass. 578, 77 N. E. 636 (1906); *Commonwealth* v. *McCarthy,* 244 Mass. 484, 138 N. E. 835 (1923).

none of the cases stated the statute's purpose to be exclusively religious.[6] Finally, in the only recent case passing on the Massachusetts Sunday Closing Laws, *Commonwealth* v. *Chernock,* 336 Mass. 384, 145 N. E. 2d 920 (1957), the court summarily dismissed the complainant's religious contention, relying on *Has.*

The relevant factors having been most carefully considered, we do not find that the present statutes' purpose or effect is religious. Although the three-judge court found that Massachusetts had no legitimate secular interest in maintaining Sunday closing, we have held differently in *McGowan* v. *Maryland, supra.* And, for the reasons stated in that case, we reject appellees' request to hold these statutes invalid on the ground that the State may accomplish its secular purpose by alternative means that would not even remotely or incidentally aid religion.

Secondly, appellees contend that the application to them of the Sunday Closing Laws prohibits the free exercise of their religion. Crown alleges that if it is required by law to abstain from business on Sunday, then, because its owners' religion demands closing from sundown Friday to sundown Saturday, Crown will be open only four and one-half days a week, thereby suffering extreme economic disadvantage. Crown's Orthodox Jewish customers allege that because their religious beliefs forbid their shopping on the Jewish Sabbath, the statutes' effect is to deprive them, from Friday afternoon until Monday of each week, of the opportunity to purchase the kosher food sanctioned by their faith. The orthodox rabbis allege that the

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[6] *E. g.,* "The Legislature intended by this statute to keep the ordinary places of traffic, business, and work closed on this day, so that those persons who desired to relax from labor and business, and attend to private and public worship, might not be disturbed by persons pursuing their worldly business and avocations in open shop." *Commonwealth* v. *Dextra,* 143 Mass., at p. 31, 8 N. E., at p. 759.

statutes' effect greatly complicates their task of supervising the condition of kosher meat because the meat delivered on Friday would have to be kept until Monday. Furthermore, appellees contend that, because of all this, the statutes discriminate against their religion.

These allegations are similar, although not as grave, as those made by appellants in *Braunfeld* v. *Brown, ante,* p. 599. Since the decision in that case rejects the contentions presented by these appellees on the merits, we need not decide whether appellees have standing to raise these questions.[7]

MR. JUSTICE FRANKFURTER and MR. JUSTICE HARLAN concur in a separate opinion.

Accordingly, the decision below is *Reversed.*

[For opinion of MR. JUSTICE FRANKFURTER, joined by MR. JUSTICE HARLAN, see *ante,* p. 459.]

[For dissenting opinion of MR. JUSTICE DOUGLAS, see *ante,* p. 561.]

[For dissenting opinion of MR. JUSTICE BRENNAN and MR. JUSTICE STEWART, see *post,* p. 642.]

APPENDIX TO OPINION OF THE CHIEF JUSTICE.

MASSACHUSETTS GENERAL LAWS ANNOTATED, C. 136.

§ 1. *Lord's day, definition.* The Lord's day shall include the time from midnight to midnight.

§ 2. *Presence at games, sports, plays or public diversions on the Lord's day; exceptions.* Whoever on the

[7] Appellants have advanced several procedural arguments. Since these were briefed only as ancillary issues and were not orally argued, and since their determination is not necessary to the disposition of the major questions presented, we deem it inappropriate to pass upon them now.

Lord's day is present at a game, sport, play or public diversion, except a concert of sacred music, a public entertainment duly licensed as provided in section four or a free open air concert given by a town, or by license of the mayor or the selectmen, upon a common or public park, street or square, or except a game of golf conducted on an open air golf course, or except a game of tennis or dancing at a wedding or celebration of a religious custom or ritual if no charge is made for being present or for dancing, or except after one o'clock post-meridian a game of outdoor lawn bowling or the playing of golf or driving on an outdoor golf driving range or playing on a miniature golf course, so called, shall be punished by a fine of not more than five dollars. Whoever on the Lord's day takes part in any game, sport, play or public diversion, except as aforesaid, shall be punished by a fine of not more than fifty dollars. This and the following section shall not apply to amusement enterprises lawfully conducted under section four A or four B or to sports or games conducted in accordance with sections twenty-one to twenty-five, inclusive, in any city or town which accepts said sections or in accordance with sections twenty-six to thirty-two, inclusive, in any city or town in which said sections twenty-six to thirty-two are then in force.

§ 3. *Establishing and maintaining public entertainment on the Lord's day.* Whoever offers to view, sets up, establishes, maintains, or attempts to set up, establish or maintain, or promotes or assists in such attempt, or promotes, or aids, abets or participates in offering to view, setting up, establishing or maintaining any public entertainment on the Lord's day, except as provided in section two, unless such public entertainment shall be in keeping with the character of the day and not inconsistent with its due observance and duly licensed as provided in section four, or whoever on the Lord's day acts as proprietor, manager or person in charge of a game, sport, play or pub-

lic diversion, except a public entertainment licensed under section four and except as provided in section two, shall be punished by a fine of not more than five hundred dollars.

§ 4. *License to hold public entertainment on the Lord's day; application; fee; suspension; revocation; hearing.* Except as provided in section one hundred and five of chapter one hundred and forty-nine, the mayor of a city or the selectmen of a town may, upon written application describing the proposed entertainment, grant, upon such terms or conditions as they may prescribe, a license to hold on the Lord's day a public entertainment, including musical entertainment provided by mechanical or electrical means, in keeping with the character of the day and not inconsistent with its due observance, whether or not admission is to be obtained upon payment of money or other valuable consideration, and, if the proposed entertainment described in the application is solely for the exhibition of motion pictures, for the benefit of patrons in a public dining room or for the use of television, the use of radio, or musical entertainment provided by mechanical or electrical means, the mayor or selectmen may grant an annual license therefor; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed entertainment shall have been approved in writing by the commissioner of public safety as being in keeping with the character of the day and not inconsistent with its due observance. The application for the approval of the proposed entertainment by the commissioner shall be accompanied by a fee of two dollars, or, in the case of an application for the approval of an annual license, as herein provided, by a fee of fifty dollars. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving

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the hearing. The foregoing provisions, insofar as they authorize any person to refuse to grant, or to suspend, revoke or annul a license upon the ground that the proposed entertainment is not in keeping with the character of the Lord's day or not consistent with its due observance, and insofar as they require written approval of the proposed entertainment by said commissioner, shall not apply to any person making an application for a license to exhibit motion pictures or for the use of radio or television on said day, nor to any license issued upon such application.

§ 4A. *Maintenance and operation of enterprises at amusement parks, beaches or resorts on the Lord's day; licenses; suspension; revocation.* The mayor of a city or the selectmen of a town, upon written application therefor, and upon such terms and conditions as they may prescribe, may grant licenses for the maintenance and operation upon the Lord's day at amusement parks or beach resorts, so called, in such city or town, of any enterprise hereinafter described, for admission to which or for the use of which a payment of money or other valuable consideration may or may not be charged, namely:— Bowling alleys, shooting galleries restricted to the firing therein of rifles, revolvers or pistols using cartridges not larger than twenty-two calibre, photographic galleries or studios in which pictures are made and sold, games, and such amusement devices as may lawfully be operated therein on secular days; provided, that no such license shall be granted to have effect before one o'clock in the afternoon, nor shall it have effect unless the proposed enterprise shall, upon application accompanied by a fee of two dollars, have been approved in writing by the commissioner of public safety as provided in the case of public entertainments under section four. Any licensee hereunder may distribute premiums or prizes in connection

with any game or device lawfully maintained and operated by him under authority hereof. Any such license may, after notice and a hearing given by the mayor or selectmen issuing the same, or by said commissioner, be suspended, revoked or annulled by the officer or board giving the hearing. So much of this section as relates to the maintenance and operation of bowling alleys shall not apply in any city or town which shall have accepted the provisions of section four B.

§ 4B. *Licenses for operation of bowling alleys on the Lord's day.* In any city which accepts this section by vote of its city council and in any town which accepts this section by vote of is inhabitants, the city council, with the approval of the mayor, or the selectmen, as the case may be, may grant licenses for the operation of bowling alleys on the Lord's day between the hours of one and eleven post meridian; provided, that no such license may authorize the operation of bowling alleys on Easter, or on Christmas day if such day falls on the Lord's day. Every license granted hereunder shall specify the location of the place of business in which the license is to be exercised, and the license shall not be valid in any other place. Bowling alleys operated under such licenses shall be operated subject to such regulations and restrictions as shall be prescribed from time to time by the city council, with the approval of the mayor, or by the selectmen. Said regulations and restrictions shall be stated in the license. Said licensing authorities may at any time and without previous notice revoke licenses issued under this section if they have reason to believe that any provision of this section, or of any regulation or restriction prescribed thereunder, is being or will be violated.

§ 5. *Keeping open shops or warehouses and conducting business or doing work on the Lord's day.* Whoever on the Lord's day keeps open his shop, warehouse or work-

house, or does any manner of labor, business or work, except works of necessity and charity, shall be punished by a fine of not more than fifty dollars.

§ 6. *Limit of operation of section 5.* The preceding section shall not prohibit the manufacture and distribution of steam, gas or electricity for illuminating purposes, heat or motive power; the distribution of water for fire or domestic purposes; the use of the telegraph or the telephone; the manufacture and distribution of oxygen, hydrogen, nitrogen, acetylene and carbon dioxide; the retail sale of drugs and medicines, or articles ordered by the prescription of a physician, or mechanical appliances used by physicians or surgeons.

Nor shall it prohibit the retail sale of tobacco in any of its forms by licensed innholders, common victuallers, druggists and newsdealers whose stores are open for the sale of newspapers every day in the week; the retail sale of bread, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon by licensed innholders and by licensed common victuallers authorized to keep open their places of business on the Lord's day and by persons licensed under the following section to keep open their places of business as aforesaid; the retail sale of frozen desserts and/or frozen dessert mix, soda water and confectionery by licensed innholders and druggists, and by such licensed common victuallers as are not also licensed to sell alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, and who are authorized to keep open their places of business on the Lord's day; the sale of frozen desserts and/or frozen dessert mix, soda water, confectionery or fruit by persons licensed under the following section or the keeping open of their places of business for the sale thereof; the sale of live bait for use by fishermen for non-commercial purposes.

Nor shall it prohibit work lawfully done by persons working under permits granted under section nine; the sale by licensed innholders and common victuallers of meals such as are usually served by them, consisting in no part of alcoholic beverages, as so defined, which meals are cooked on the premises but are not to be consumed thereon; the operation of motor vehicles; the sale of gasoline and oil for use, and the retail sale of accessories for immediate necessary use, in connection with the operation of motor vehicles, motor boats and aircraft; the making of such emergency repairs on disabled motor vehicles as may be necessary to permit such vehicles to be towed or to proceed under their own power, and the towing of disabled motor vehicles; the letting of horses and carriages or of boats, motor vehicles or bicycles; the letting on trains of equipment or accessories for personal use in connection with outdoor recreation and sports activities; unpaid work on pleasure boats; the running of steam ferry boats on established routes; the running of street railway cars; the running of steamboat lines and railroad trains or of steamboats.

Nor shall it prohibit the preparation, printing and publication of newspapers, or the sale and delivery thereof; the wholesale or retail sale and delivery of milk, or the transportation thereof, or the delivery of frozen desserts or frozen dessert mix, or both, or the wholesale or retail sale of ice or of fuel; the transportation of general commodities by motor truck or trailers, then engaged in interstate commerce before eight o'clock in the forenoon and after eight o'clock in the evening or in the event of an emergency between the aforesaid hours; the transportation of petroleum products by motor truck or trailers then engaged in intrastate commerce before six o'clock in the forenoon and after ten o'clock in the evening; the transportation of livestock, farm commodities and farm equip-

ment for participation in fairs, exhibitions and sporting events and veterinary purposes; the handling, transportation and delivery of fish and perishable foodstuffs at wholesale; the sale at wholesale of dressed poultry, and the transportation of such poultry so sold, on the Lord's day next preceding Thanksgiving day, and on the Lord's day next preceding Christmas day except when Christmas day occurs on Saturday, the Lord's day or Monday; the making of butter and cheese; the keeping open of public bathhouses; the making or selling by bakers or their employees, before ten o'clock in the forenoon and between the hours of four o'clock and half past six o'clock in the afternoon, of bread or other food usually dealt in by them; whenever Rosh Hashonah, or the Day of Atonement, begins on the Lord's day, the retail sale and delivery of fish, fruit and vegetables before twelve o'clock noon of that day; the selling or delivering of kosher meat by any person who, according to his religious belief, observes Saturday as the Lord's day by closing his place of business during the day until six o'clock in the afternoon, or the keeping open of his shop on the Lord's day for the sale of kosher meat between the hours of six o'clock and ten o'clock in the forenoon.

Nor shall it prohibit the performing of secular business and labor on the Lord's day by any person who conscientiously believes that the seventh day of the week ought to be observed as the Sabbath and actually refrains from secular business and labor on that day, if he disturbs no other person thereby; the carrying on of the business of bootblack before eleven o'clock in the forenoon, unless prohibited in a city or town by ordinance or by-law; the digging of clams; the icing and dressing of fish; the cultivation of land, and the raising, harvesting, conserving and transporting of agricultural products during the existence of war between the United States and any other nation and until the first day of January following the termina-

tion thereof; such unpaid work in or about private gardens or private grounds, adjacent to a dwelling house, as shall not cause unreasonable noise, having regard to the locality where such work is performed.

Nor shall it prohibit the sale of catalogues of pictures and other works of art in exhibitions held by societies organized for the purpose of promoting education in the fine arts or the exposure of photographic plates and films for pleasure, if the pictures to be made therefrom are not intended to be sold and are not sold.

Nor shall it prohibit the conduct of any enterprise lawfully conducted under section four A or section four B.

Nor shall it prohibit the necessary preparation for and the conducting of private industrial trade expositions which are not open to the general public; provided, that said expositions shall be kept open only between the hours of one and ten o'clock post meridian.

Nor shall it prohibit the sale of fruit and vegetables by the person who raised the same, or by his agent thereunto duly authorized, on premises owned or leased by him.

§ 7. *Sale of frozen desserts, frozen dessert mix or confectionery on the Lord's day.* In Boston, and in any other city or town which accepts this and section eight or has accepted corresponding provisions of earlier laws, in a city by its city council or in a town by the voters of the town at an annual town meeting, the licensing board or officer in such city or town, or if there is no such board or officer the aldermen of a city, or if there are no aldermen the city council, with the approval of the mayor, or the selectmen of a town, may grant, to any reputable person who on secular days is a retail dealer in frozen desserts and/or frozen dessert mix, confectionery, soda water or fruit and who does not hold a license for the sale of alcoholic beverages, as defined in section one of chapter one hundred and thirty-eight, a license to keep open his place of business on the Lord's day for the sale of frozen des-

serts and/or frozen dessert mix, confectionery, soda water or fruit.

§ 9. *Permit for performance of necessary work or labor on the Lord's day.* The police commissioner of Boston, or any member of the police department having a rank not lower than that of captain and designated by said commissioner, or the chief of police or other officer in charge of the police department of any other city or of any town, or the chairman of the board of selectmen of any town, upon such terms and conditions as he deems reasonable, may issue a permit for the performance on the Lord's day of necessary work or labor which in his judgment could not be performed on any other day without serious suffering, loss, damage or public inconvenience. Such permit shall cover not more than one day and shall not be issued more than six days prior to the day for which it is issued.

§ 21. *Athletic outdoor sports or games.* In any city which accepts sections twenty-one to twenty-five, inclusive, by vote of its city council, or in any town which accepts said sections by vote of its inhabitants, it shall be lawful on the Lord's day to take part in or witness any athletic outdoor sport or game, as hereinafter provided, between the hours of one thirty and six thirty post meridian and, in the case of a baseball game commenced before the hour of six thirty post meridian, for such further time beyond said hour as may be necessary to complete said game; provided, that said game had been scheduled to commence at or before the hour of three post meridian, or is the second of two successive games to be played on the same day, the first of which had been scheduled to commence at or before the hour of two post meridian. In any such city or town it shall be lawful on the Lord's day to take part in or witness, as hereinafter provided, any indoor hockey or basketball game between the hours of one thirty post meridian and twelve midnight.

§ 22. *Licensed playgrounds or parks for athletic outdoor sports or games.* Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

§ 26. *Athletic outdoor sports or games not involving pecuniary reward, remuneration or consideration.* In any city or town wherein the corresponding provisions of this and the six following sections were in effect on the sixth day of December, nineteen hundred and twenty-eight, and which has not voted against said sections on resubmission as provided in section thirty-one, and has not accepted the provisions of sections twenty-one to twenty-five, inclusive, as provided in section twenty-one, it shall be lawful to take part in or witness any athletic outdoor sport or game, in which the contestants do not receive and have not been promised any pecuniary reward, remuneration or consideration whatsoever directly or indirectly in connection therewith, on the Lord's day between the hours of two and six in the afternoon as hereinafter provided.

§ 27. *Licensed playgrounds or parks for athletic outdoor sports or games not involving pecuniary award, remuneration or consideration.* Such sports or games shall take place on such playgrounds, parks or other places as may be designated for that purpose in a license or permit issued by the city council, with the approval of the mayor, or by the selectmen; provided, that if, under any statute or ordinance, a public playground or park is placed under

the exclusive charge and authority of any other officials, such officials shall, for that playground or park, be the licensing authority; and provided, that no sport or game shall be permitted in a place, other than a public playground or park, within one thousand feet of any regular place of worship.

MR. JUSTICE BRENNAN and MR. JUSTICE STEWART dissent. They are of the opinion that the Massachusetts statute, as applied to the appellees in this case, prohibits the free exercise of religion. See their dissenting opinions in *Braunfeld* v. *Brown, ante,* pp. 610, 616.

UNITED STATES, TRUSTEE, *v.* OREGON.

CERTIORARI TO THE SUPREME COURT OF OREGON.

No. 329. Argued April 25, 1961.—Decided May 29, 1961.

An Oregon resident died in a United States Veterans' Administration Hospital in Oregon without a will or legal heirs, leaving a net estate of personal property. He had not entered into a contract with the United States concerning such property and was mentally incompetent to do so. Oregon claimed such property under its escheat law, and the United States claimed it under 38 U. S. C. (1952 ed.) § 17, which provides that, when a veteran dies in such a hospital without a will or legal heirs, his personal property "shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund." *Held:* The United States was entitled to the property as such trustee. Pp. 643–649.

(a) The federal statute operates automatically and does not require that the veteran shall have entered into a contract with the United States. Pp. 645–648.

(b) The statute is within the power of Congress, and it does not violate the Tenth Amendment. Pp. 648–649.

222 Ore. 40, 352 P. 2d 539, reversed.

Herbert E. Morris argued the cause for the United States. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Orrick, Acting Assistant Attorney General Leonard, Alan S. Rosenthal* and *David L. Rose.*

Catherine Zorn, Assistant Attorney General of Oregon, argued the cause for respondent. With her on the brief was *Robert Y. Thornton,* Attorney General.

MR. JUSTICE BLACK delivered the opinion of the Court.

Adam Warpouske, an Oregon resident, died in a United States Veterans' Administration Hospital in Oregon without a will or legal heirs, leaving a net estate composed of personal property worth about $13,000. Oregon law pro-

vides that such property shall escheat to the State.[1] A United States statute, on the other hand, provides that when a veteran dies without a will or legal heirs in a veterans' hospital, his personal property "shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund . . . ." [2] In reliance upon these provisions of their respective statutes, both the State of Oregon and the Government of the United States filed claims for Warpouske's estate in the Oregon probate court having jurisdiction of the matter.

Recognizing that the federal statute, if applicable and valid, would make the claim of the United States paramount, the State attacked the Government's reliance upon that statute on two grounds: first, it urged that the federal statute did not apply to this case on the theory that its provisions depended upon the Government's having made a valid contract with the veteran prior to his death and that Warpouske had made no such contract because he had been mentally incompetent to do so when he entered the hospital and at all times thereafter up to his death; and, secondly, it urged that the federal statute, even if applicable, was invalid because it pertains to the devolution of property, a matter contended to have been wholly reserved to the States by the Tenth Amendment.

After hearings, the probate court found as a fact that Warpouske had been unable to enter into a valid contract with the Government because of his mental

[1] Ore. Rev. Stat., § 120.010, provides: "Immediately upon the death of any person who dies intestate without heirs, leaving any real, personal or mixed property, interest or estate in this state, the same escheats to and vests in the state, subject only to the claims of the creditors and as provided in ORS 120.060 to 120.130; and the clear proceeds derived therefrom shall be paid into and become a part of the Common School Fund of this state and be loaned or invested by the State Land Board, as provided by law."

[2] 38 U. S. C. (1952 ed.) § 17.

incompetence. That court then accepted the State's interpretation of the federal statute as requiring a valid contract as a prerequisite to its application and concluded that since such a contract could not, in this case, have been made, the State was entitled to Warpouske's property by virtue of its escheat law. On appeal, the State Supreme Court affirmed on the same grounds.[3] Because of the importance of this question of federal statutory construction and an alleged conflict between this decision and decisions previously made by other state courts of final jurisdiction,[4] we granted certiorari.[5]

Since we accept the findings of the two state courts that Warpouske could not and did not enter into a contract to leave his property to the United States, the crucial question is whether the Government can prevail in the absence of such a contract. We hold that it can on the grounds that the federal statute relied upon does not require a contract and that this statute does not violate the Tenth Amendment.

The controlling provision was passed in 1941 as an amendment to the Sundry Appropriations Act of 1910.[6] The 1910 Act quite plainly and unequivocally provided that the admission of an applicant to a veterans' home should "be and constitute a valid and binding contract between such applicant and the Board of Managers of said home that on the death of said applicant while a member of such home, leaving no heirs at law nor next of kin, all personal property owned by said applicant at the time of his death, including money or choses in action held by him and not disposed of by will . . . shall vest in

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[3] 222 Ore. 40, 352 P. 2d 539.

[4] The conflict alleged is with the decisions in *Skriziszouski Estate*, 382 Pa. 634, 116 A. 2d 841; and *In re Gonsky's Estate*, 79 N. D. 123, 55 N. W. 2d 60.

[5] 364 U. S. 877.

[6] 36 Stat. 703, 736

and become the property of the said Board of Managers for the sole use and benefit of the post fund of said home . . . ." The contractual nature of these provisions of the 1910 Act was clear and, indeed, we expressly recognized that fact when the question of the validity of the Act was brought before this Court.[7]

The 1910 Act was greatly amplified, however, by the amendments adopted in 1941 [8] and the central provision of the Act, quoted above, was significantly changed. Section 1 of the new Act restates this provision without reference to the word "contract," providing simply that when a veteran dies "while a member or patient in any facility, or any hospital while being furnished care or treatment," all his personal property "not disposed of by will or otherwise, shall immediately vest in and become the property of the United States as trustee for the sole use and benefit of the General Post Fund . . . ." [9] The Act then goes on to supplement this basic provision with other provisions that are drawn in the language of contract. But these provisions must be read in the context of § 2 of the Act which provides that the death of a veteran in a veterans' hospital "shall give rise to a conclusive presumption of a valid contract." [10] Read in this context, the language of contract which appears in these other provisions of the Act is not at all inconsistent with the provision for automatic vesting without a contract in § 1. Quite the contrary, it seems plain to us that

[7] "In passing the Act of June, 1910, Congress merely directed the terms and conditions under which veterans, consistently with state law, can obtain admittance to Homes built, maintained and operated by the government for the benefit of veterans. Homes for the aged, needy, or infirm, in return for the benefits bestowed by them, generally receive some benefit from any property or estates of their members." *United States* v. *Stevens*, 302 U. S. 623, 627.

[8] 55 Stat. 868, 38 U. S. C. (1952 ed.) § 17 *et seq.*

[9] 38 U. S. C. (1952 ed.) § 17.

[10] 38 U. S. C. (1952 ed.) § 17a.

these "contractual" provisions were included in the Act for the purpose of reinforcing rather than detracting from the provisions of § 1—the thought apparently being that there was some chance that the Act would be attacked as unconstitutional and that it would consequently be advisable to include alternative bases upon which it could be upheld.[11]

This natural construction we give to § 1 makes it fit well in the pattern of legislation dealing with this subject. The solicitude of Congress for veterans is of long standing.[12] Veterans' pensions, homes, hospitals and other facilities have been supplied on an ever-increasing scale. Many veterans, as did the deceased veteran here, have had to depend upon these benefits for long periods of their lives. Warpouske, for example, appears to have spent more than ten years of his life, at various intervals from time to time, in veterans' homes and hospitals throughout the country. These were the only homes he had at those times. The congressional plan here is that whatever little personal property veterans without wills or kin happen to leave when they die in veterans' homes and hospitals should be paid into the General Post Fund, to be used for the recreation and pleasure of other ex-service men and women who have to spend their days in veterans' homes and hospitals. This idea was expressed by Representative Jennings during the discussion of the 1941 Act on the floor of the House: "And would it not be much better to let that money go into a fund that would inure to the benefit of other veterans than to

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[11] These fears doubtless arose, in part at least, from the fact that the Circuit Court of Appeals had, in the *Stevens* case, *supra*, declared even the milder provisions of the 1910 Act unconstitutional under the Tenth Amendment, *Stevens* v. *United States*, 89 F. 2d 151, a holding ultimately reversed by this Court.

[12] See the Brief History of Legislation Pertaining to Veterans' Benefits, 38 U. S. C. A. 1.

let . . . it go into a fund under the escheat laws of [a] State?" [13]

Having concluded that the provisions of § 1 are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act.[14] Since the State has placed such heavy reliance upon that history, however, we do deem it appropriate to point out that this history is at best inconclusive. It is true, as the State points out, that Representative Rankin, as Chairman of the Committee handling the bill on the floor of the House, expressed his view during the course of discussion of the bill on the floor that the 1941 Act would not apply to insane veterans incompetent to make valid contracts.[15] But such statements, even when they stand alone, have never been regarded as sufficiently compelling to justify deviation from the plain language of a statute. They are even less so here for there is powerful countervailing evidence as to the intention of those who drafted the bill. The bill was drawn up and sent to the Speaker of the House, in the very form in which it was passed, by the Veterans' Bureau itself.[16] And that Bureau, we are told, has consistently interpreted the 1941 Act as making the sanity or insanity of a veteran who dies in a veterans' hospital entirely irrelevant to the determination of the Government's rights under the Act.

We see no merit in the challenge to the constitutionality of § 1 as construed in this natural manner. Congress undoubtedly has the power—under its constitutional powers to raise armies and navies and to conduct wars—to pay pensions, and to build hospitals and homes for veterans. We think it plain that the same sources of

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[13] 87 Cong. Rec. 5203–5204.

[14] Cf. *United States* v. *Bowen,* 100 U. S. 508, 513–514; *National Home* v. *Wood,* 299 U. S. 211, 216.

[15] 87 Cong. Rec. 5203.

[16] See H. R. Rep. No. 609, 77th Cong., 1st Sess., pp. 1–2.

power authorize Congress to require that the personal property left by its wards when they die in government facilities shall be devoted to the comfort and recreation of other ex-service people who must depend upon the Government for care. The fact that this law pertains to the devolution of property does not render it invalid.[17] Although it is true that this is an area normally left to the States, it is not immune under the Tenth Amendment from laws passed by the Federal Government which are, as is the law here, necessary and proper to the exercise of a delegated power.[18]

The judgment of the Oregon Supreme Court is reversed and the cause is remanded for further proceedings not inconsistent with this opinion.

Reversed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE WHITTAKER concurs, dissenting.

I do not see how this decedent's estate can constitutionally pass to the United States. The succession of real and personal property is traditionally a state matter under our federal system. *Mager* v. *Grima,* 8 How. 490, 493–494. That tradition continues. *United States* v. *Burnison,* 339 U. S. 87, 91–92; *Clark* v. *Allen,* 331 U. S. 503, 517; *Irving Trust Co.* v. *Day,* 314 U. S. 556, 562; *Lyeth* v. *Hoey,* 305 U. S. 188, 193. An individual can contract away his assets—making the United States the promisee—and the contract will be enforced, provided it

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[17] See, *e. g., Kolovrat* v. *Oregon, ante,* p. 187. This was also implicit in the holding in *United States* v. *Stevens,* 302 U. S. 623. See n. 11, *supra.* Cf. *Hines* v. *Lowrey,* 305 U. S. 85, in which this Court rejected the contention that the Federal Constitution does not confer any authority upon Congress to deal with mental incompetents.

[18] See, *e. g., Case* v. *Bowles,* 327 U. S. 92; *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508; *United States* v. *Darby,* 312 U. S. 100.

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is valid under state law. *United States* v. *Stevens,* 302 U. S. 623, 627. It may be that an action in *quantum meruit* would lie against the estate of a person who, though utterly incompetent as Adam B. Warpouske concededly was, received treatment at a federal hospital.[1] It may be that the United States could appropriate all unexpended funds from federal pensions or federal insurance policies in exchange for the services rendered an incompetent. See *United States* v. *Hall,* 98 U. S. 343; *Wissner* v. *Wissner,* 338 U. S. 655; cf. *Miller Music Corp.* v. *Daniels, Inc.,* 362 U. S. 373. The power of Congress to legislate concerning the claims of all veterans, whether competent or incompetent, is well settled. *Hines* v. *Lowrey,* 305 U. S. 85.

We deal here, however, with an inheritance that the incompetent veteran received from his brother—an estate worth about $13,000. How Congress can provide for that sum to pass to the United States is difficult to understand. Oregon has provided how the property of one who dies intestate and without heirs shall be distributed;[2] and that is its constitutional right under the Tenth Amendment. Never before, I believe, has a federal law governing the property of one dying intestate been allowed to override a state law. Some state inheritance laws are affected by federal policy, as we recently held in *Kolovrat* v. *Oregon, ante,* p. 187. Thus where a treaty

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[1] See Restitution, Restatement of the Law, Am. L. Inst. (1937), § 114; 5 Corbin on Contracts (1951) § 1109.

[2] Ore. Rev. Stat. 120.010 provides:

"Immediately upon the death of any person who dies intestate without heirs, leaving any real, personal or mixed property, interest or estate in this state, the same escheats to and vests in the state, subject only to the claims of the creditors and as provided in ORS 120.060 to 120.130; and the clear proceeds derived therefrom shall be paid into and become a part of the Common School Fund of this state and be loaned or invested by the State Land Board, as provided by law."

made by the United States with another nation provides for reciprocal inheritance rights by the nationals of the two countries, a State cannot provide otherwise. If it could, one State would indeed be revising the foreign policy that the Federal Government makes. In the context of the Fourteenth Amendment, the rights of a State to provide rules governing inheritance may also be compelled to bow to federal policy. See R. S. § 1978, 42 U. S. C. § 1982.

Yet the Supremacy Clause is not without limits. For a federal law to have supremacy it must be made "in pursuance" of the Constitution. The Court, of course, recognizes this; and it justifies this federal law governing devolution of property under the Necessary and Proper Clause of Art. I, § 8.

The power to build hospitals and homes for veterans and to pay them pensions is plainly necessary and proper to the powers to raise and support armies and navies and to conduct wars. The power to provide for the administration of the estates of veterans (which are not made up of federal funds owing the veterans) is to me a far cry from any such power. But the present Act is of that character.

This federal law governing estates of veterans is phrased in the language of contract. It is designed to draw into the federal treasury all estates of the kind mentioned, whether they be worth six cents or a million dollars. The federal claim is not for services rendered, as no effort is made to restrict the amount of the federal claim to benefits received. The Act plainly is a federal succession law.

The Act under which the United States purports to act is now found in 38 U. S. C. §§ 5220–5228. In its present form, it came into the law in 1941. Act of Dec. 26, 1941, 55 Stat. 868. Section 1 regulates the disposition of the property of any veteran who dies while in a Veterans' Hos-

pital and who leaves personal property not disposed of by will and to which no surviving spouse, next of kin or heirs are entitled under the laws of his domicile. Such property, the Act says, "shall immediately vest in and become the property of the United States." § 1. The acceptance of care or treatment at a Veterans' Hospital is by the terms of the Act acceptance of the provisions of the Act, and has "the effect of an assignment" of the property effective at death. § 1. The fact of death in a Veterans' Hospital of a veteran "leaving no spouse, next of kin, or heirs" gives rise "to a conclusive presumption" of a valid contract for the disposition of the property in that way to the United States. § 2. Moreover, the Veterans' Administration is authorized to administer the estate, paying creditors' claims, if presented within designated times, and granting them the preference and priorities prescribed by local law. § 4.

We know that, while the Act is based on "a conclusive presumption" that a contract to assign the property to the United States was made, there was in fact no contract in this case. During the period of Warpouske's hospitalization—from March 1, 1956, to March 19, 1956, the day of his death—he was either comatose or semicomatose.[3] We deal with a presumption that is contrary to the fact (cf. *Tot* v. *United States,* 319 U. S. 463). We have then a case involving the power of Congress to provide for the administration of the estate of a deceased veteran where he has in fact made no assignment of it to the Federal Government. To what power is that necessary and proper?

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[3] Adam Warpouske spent a large part of his life in Veterans' Hospitals, especially during the years from 1930 to 1945. (The record also shows that he received care in the facilities of various states.) But the claim to administer his personal property arises solely from "the fact of death" in a Veterans' Hospital.

Only recently we warned against an expansive construction of the Necessary and Proper Clause. We stated that it is "not itself a grant of power, but a *caveat* that the Congress possesses all the means necessary to carry out" the powers specifically granted. *Kinsella* v. *Singleton,* 361 U. S. 234, 247. Powers not given "were reserved," as Madison said. VI Writings of James Madison (Hunt ed.) 390. And "no powers were given beyond those enumerated in the Constitution, and such as were fairly incident to them." *Ibid.*

Veterans or anyone else may make the United States a beneficiary of their estate, absent a state law that precludes it. See *United States* v. *Burnison, supra.* But if it is "fairly incident" to raising and supporting armies and navies and conducting wars for the United States to take over the administration of the personal property of veterans who die intestate, I see no reason why Congress cannot take over their real estate too. I see no reason why, if the United States can go as far as we allow it to go today, it cannot supersede any will a veteran makes and thus better provide for the comfort, care, and recreation of other ex-service men and women who are dependent on the United States for care. And the more money the Federal Government collects for veterans the better the care they will receive. No greater collision with state law would be present where Congress took realty or displaced an entire will than here. Oregon's law providing for escheat is as explicit as her law providing for the administration of the estates of deceased people. If a contract between the United States and an utterly incompetent person can be conclusively presumed to exist when the incompetent dies intestate, it can be where he leaves a will. If it can be conclusively presumed in case of a veteran, it can be conclusively presumed in case of any federal employee, in case of any

federal officeholder, in case of any federal pensioner. Of course Congress cannot be expected to use this vast new power to the extreme. But we—unlike England—live under a written Constitution that limits powers, not entrusting the Constitution to the conscience of the legislative body.

The Tenth Amendment does not, of course, dilute any power delegated to the national government. That is one face of the truism that runs through our decisions. *United States* v. *Darby,* 312 U. S. 100, 124; *Oklahoma* v. *Atkinson Co.,* 313 U. S. 508, 534; *Case* v. *Bowles,* 327 U. S. 92, 101. But when the Federal Government enters a field as historically local as the administration of decedents' estates, some clear relation of the asserted power to one of the delegated powers should be shown. At times the exercise of a delegated power reaches deep into local problems. *Wickard* v. *Filburn,* 317 U. S. 111, allowed the commerce power to extend to home-grown and home-used wheat, because total control was essential for effective control of the interstate wheat market. But there is no semblance of likeness here. The need of the Government to enter upon the administration of veterans' estates—made up of funds not owing from the United States—is no crucial phase of the ability of the United States to care for ex-service men and women or to manage federal fiscal affairs.

Today's decision does not square with our conception of federalism. There is nothing more deeply imbedded in the Tenth Amendment, as I read history, than the disposition of the estates of deceased people. I do not see how a scheme for administration of decedents' estates of the kind we have here can possibly be necessary and proper to any power delegated to Congress.

Raising money by borrowing or by taxing are explicitly provided for in Art. I, § 8. Raising money by appropriating assets of those who have a relationship with the

Federal Government (as most people do today) is not among the enumerated powers. At bottom of the present statute, as the Court points out, is a desire to make those who use a Veterans' Hospital help finance its operations.[4] Congress can set rates for services rendered; it can obtain from patients assignments of assets to the United States; it can induce and encourage people to make these hospitals beneficiaries under their wills. But I do not see how it is possible for the United States to take a man's property without his consent when the United States is not a creditor in the accepted sense. The only constitutional way in which that can be done is by taxation or by condemnation. This law as applied is indeed a levy that has no support in the Constitution; and it makes a serious inroad on the Tenth Amendment. With all deference, I dissent.

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[4] The inspiration for this law, as seen from the legislative history (H. R. Rep. No. 609, 77th Cong., 1st Sess.; S. Rep. No. 900, 77th Cong., 1st Sess.), was the Veterans' Administration, a fact which perhaps makes relevant the following observation: "Politicians and taxpayers have assumed (with occasional phases of doubt) that a rising total in the number of civil servants must reflect a growing volume of work to be done. Cynics, in questioning this belief, have imagined that the multiplication of officials must have left some of them idle or all of them able to work for shorter hours. But this is a matter in which faith and doubt seem equally misplaced. The fact is that the number of the officials and the quantity of the work are not related to each other at all. The rise in the total of those employed is governed by Parkinson's Law and would be much the same whether the volume of the work were to increase, diminish, or even disappear. The importance of Parkinson's Law lies in the fact that it is a law of growth based upon an analysis of the factors by which that growth is controlled." Parkinson, Parkinson's Law (1957), pp. 3–4.

PAN AMERICAN PETROLEUM CORP. *v.* SUPERIOR COURT OF DELAWARE FOR NEW CASTLE COUNTY ET AL.

CERTIORARI TO THE SUPREME COURT OF DELAWARE.

No. 80. Argued April 18–19, 1961.—Decided May 29, 1961.*

After this Court's decision in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, holding that the jurisdiction of the Federal Power Commission extended to "the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company," and its decision invalidating an order of the Kansas Corporation Commission fixing a minimum price for gas taken from the Kansas Hugoton Field, *Cities Service Gas Co.* v. *State Corporation Comm'n,* 355 U. S. 391, an interstate natural gas pipeline company sued producers of gas from that field in a Delaware State Court to recover for overpayments for such gas made under compulsion of the Kansas order, such refunds having been agreed upon between the parties shortly after entry of the Kansas order. The producers petitioned the Supreme Court of Delaware for writs of prohibition attacking the jurisdiction of the trial court in which the suits were pending. The State Supreme Court sustained the jurisdiction of the trial court and denied the writs. *Held:* Notwithstanding provisions of the Natural Gas Act giving federal district courts exclusive jurisdiction of all suits to enforce liabilities created by that Act and lodging in federal courts of appeals jurisdiction to review orders of the Federal Power Commission, the State Court had jurisdiction, since the suits were not founded upon the Act but upon contract and restitution claims under state law. Pp. 657–666.

52 Del. —, 158 A. 2d 478, affirmed.

Byron M. Gray argued the cause for petitioner in No. 80. With him on the briefs were *Hugh M. Morris, James M. Tunnell, Jr., William J. Grove, Carroll L. Gilliam* and *W. W. Heard.*

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*Together with No. 81, *Texaco, Inc.*, v. *Superior Court of Delaware for New Castle County et al.*, also on certiorari to the same Court.

Paul F. Schlicher argued the cause for petitioner in No. 81. With him on the briefs were *John J. Wilson, Frank H. Strickler, James M. Tunnell, Jr.* and *Andrew B. Kirkpatrick, Jr.*

Charles V. Wheeler argued the cause for the Cities Service Gas Co., respondent in both cases. With him on the brief were *Conrad C. Mount, Jack Werner, Howard L. Williams, Harry S. Littman* and *John T. Grant.*

Briefs of *amici curiae,* urging affirmance, were filed by *J. Weston Miller* and *Mayte Boylan Hardie* for certain municipalities which are political subdivisions of the States of Kansas and Missouri, and by *James Lawrence White, John Fleming Kelley* and *Lewis M. Poe* for the Colorado Interstate Gas Co.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

This case presents for review the judgment of the Supreme Court of Delaware denying a petition for a writ of prohibition to prevent further proceedings before the Superior Court of the State of Delaware, in and for New Castle County, in actions by Cities Service Gas Company against petitioners involving contracts for the sale of natural gas by petitioners to Cities Service. The claim of petitioners is that the Natural Gas Act, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.,* has deprived state courts of jurisdiction over the subject matter of these cases. The sole question, both below and here, is whether the state courts had jurisdiction.[1] The impor-

[1] It is apparent from the opinion of the Delaware Supreme Court that this was the only question decided there. See also *Clendaniel* v. *Conrad,* 26 Del. 549, 598, 83 A. 1036, 1052.

"The writ of prohibition . . . issues only from a superior court to an inferior court, tribunal or judge, and only for the purpose of

tance of the problems thereby raised justified their disposition here, so we granted the petition for certiorari. 363 U. S. 818.

Cities Service is a natural gas pipeline company. Petitioners are producers of natural gas. Cities Service purchases natural gas from petitioners and transports it through its pipelines, in interstate commerce, for sale to local distributing companies. During the period 1949–1951 Cities Service entered into contracts for the purchase of natural gas produced by petitioners from the Hugoton Field in Kansas. In each instance the price agreed upon was less than eleven cents per thousand cubic feet (Mcf) measured on a pressure base of 14.65 pounds per square inch absolute (psia).

On December 2, 1953, the Corporation Commission of the State of Kansas promulgated an order, to take effect on January 1, 1954, fixing a minimum price of eleven cents per Mcf on a pressure base of 14.65 psia for gas taken from the Kansas Hugoton Field. The effect of this order was to require Cities Service to pay petitioners at a higher rate than those specified in the pre-existing contracts. Cities Service brought suit in the Kansas courts to obtain judicial review of the order.

On January 21, 1954, Cities Service advised each of the petitioners by letter of the Kansas minimum-rate order and of its suit for judicial review of that order, adding the following:

> "Pending final judicial determination of the said Order and beginning January 1, 1954, Cities Service Gas Company intends to pay for all gas purchased by it in the Kansas Hugoton Field in strict compliance with the terms and conditions of the said Order.

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keeping such inferior court within the limits of its jurisdiction. That is the sole purpose of the writ."

Accord, *Knight* v. *Haley*, 36 Del. 366, 374, 176 A. 461, 464; *Canaday* v. *Superior Court*, 49 Del. 332, 338–339, 116 A. 2d 678, 681–682.

> Such compliance with said Order by this Company, however, is made to avoid the penalties and actions provided by the Kansas statutes for a violation thereof, and the payments made to you in compliance with said Order pending its final judicial determination are to be considered and accepted by you as involuntary payments on our part, without prejudice to our rights in said litigation, and in no event as an acquiescence by us in the validity of said Order.
>
> "In the event the said Order is finally judicially modified or declared to be invalid in whole or in part, as a result of which you have been overpaid for gas purchased during the interim aforesaid, Cities Service Gas Company will expect you to refund to it the amount of said overpayment."

Thereafter, each voucher check sent by Cities Service to petitioners in payment for gas purchased bore a notation stating that it was tendered "subject to provisions" of the January 21, 1954, letter. Petitioners cashed these checks without objection to the conditions of their tender. Petitioner Pan American Petroleum Corporation (formerly Stanolind) wrote in reply to the Cities Service letter of January 21:

> "We construe the last paragraph of said letter to mean that Cities will expect Stanolind to refund to it the amount of over-payments, if any, without any interest thereon should the said Order of December 2, 1953 be finally judicially modified or declared to be invalid in whole or in part by an adjudication which would be binding and controlling on Stanolind. We will, therefore, accept payments on this basis."

Petitioner Texaco, Inc., acknowledged receipt of Cities Service's payment of February 25, 1954, by a letter dated March 2, 1954, without objection to the conditions of payment.

On June 7, 1954, this Court, in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672, held that the jurisdiction of the Federal Power Commission extended to "the rates of all wholesales of natural gas in interstate commerce, whether by a pipeline company or not and whether occurring before, during, or after transmission by an interstate pipeline company." 347 U. S., at 682. Following the *Phillips* decision, the Commission, in accordance with the provisions of the Natural Gas Act, on July 16, 1954, issued an order requiring independent producers to file with the Commission rate schedules setting forth the terms and conditions of service and all rates and charges for transportation or sales effective on June 7, 1954. "Rate schedule" was defined to mean "the basic contract and all supplements or agreements amendatory thereof, effective and applicable on and after June 7, 1954 . . . ." 18 CFR, 1960 Cum. Supp., § 154.93. In compliance with the Commission's directive, petitioner Texaco filed the basic contract between it and Cities Service, an amendatory letter, sample billing statements, the Kansas minimum-rate order, and the Cities Service letter of January 21, 1954. Petitioner Pan American filed its basic contract with Cities Service, a number of supplemental letters and agreements (not including the letter of January 21, 1954), a sample billing, and the Kansas order. With reference to that order, Pan American explained that it had been upheld by a court of competent jurisdiction and that therefore the gas sales contract had "in effect" been "amended thereby."

On December 8, 1956, the Supreme Court of Kansas sustained the validity of the Kansas Corporation Commission's minimum-rate order, *Cities Service Gas Co.* v. *State Corporation Comm'n,* 180 Kan. 454, 304 P. 2d 528, but on January 20, 1958, that decision was reversed here, *Cities Service Gas Co.* v. *State Corporation Comm'n,* 355 U. S. 391.

In complaints filed in the Superior Court of Delaware in June of 1958, Cities Service set forth the original contracts between the parties, the Kansas minimum-rate order and its bearing on the contractually determined prices, the letter of January 21, 1954, the voucher checks, other relevant correspondence, and this Court's reversal of the Kansas Supreme Court's decision upholding the order's validity. On the basis of these allegations Cities Service sued for overcharges by Texaco in the sum of $412,995.95 and Pan American of $10,324,468.67, paid under compulsion of the Kansas order for gas purchased at rates higher than those stipulated by contract. After intermediate procedural steps, the defendants moved for summary judgments, which were denied. There followed this petition for a writ of prohibition, attacking the jurisdiction of the Superior Court to entertain the actions brought by Cities Service.

The Supreme Court of Delaware sustained the jurisdiction of the Superior Court over these causes, stating that the claims of Cities Service "are not founded upon any liability *created* by the Natural Gas Act, but upon a private contract deriving its force from state law." (Emphasis in the original.) *Columbian Fuel Corp.* v. *Superior Court,* 52 Del. ——, ——, 158 A. 2d 478, 482.

> "It is certainly true that the adjudication of these claims does entail an examination of the provisions of the Natural Gas Act, the regulations of the Commission, and the applicable federal decisions. But these have been brought into the cases by way of defense to complaints which, on their face, are based on nothing more than contracts to refund amounts measured by the contract or 'filed' rate and the rate fixed by the Kansas order. The general rule is that in such a case the plaintiff's suit is not one arising under federal law. . . ." 52 Del., at ——, 158 A. 2d, at 483.

The argument against this conclusion runs as follows. Under the Natural Gas Act the prices to be paid for natural gas sold wholesale in interstate commerce must be in accordance with the rates filed with the Federal Power Commission. Since the suits instituted by Cities Service involve rates so filed, they must either be to enforce a filed rate or to challenge a filed rate. If the former, they are subject to § 22 of the Act, which provides, for present purposes, that "The District Courts of the United States . . . shall have exclusive jurisdiction of violations of this [statute] or the rules, regulations, and orders thereunder, and of all suits in equity and actions at law brought to enforce any liability or duty created by, or to enjoin any violation of, this [statute] or any rule, regulation, or order thereunder." 52 Stat. 833, 15 U. S. C. § 717u. If the latter, they lie within the purview of § 19 of the Act, which provides for review of Commission orders in the United States Courts of Appeals. 52 Stat. 831, 15 U. S. C. § 717r. In either case, the state courts are deprived of jurisdiction.

But questions of exclusive federal jurisdiction and ouster of jurisdiction of state courts are, under existing jurisdictional legislation, not determined by ultimate substantive issues of federal law. The answers depend on the particular claims a suitor makes in a state court—on how he casts his action. Since "the party who brings a suit is master to decide what law he will rely upon," *The Fair* v. *Kohler Die & Specialty Co.*, 228 U. S. 22, 25, the complaints in the Delaware Superior Court determine the nature of the suits before it. Their operative paragraphs demand recovery on alleged contracts to refund overpayments in the event of a judicial finding that the Kansas minimum-rate order was invalid, or for restitution of the overpayments by which petitioners have allegedly been unjustly enriched under the compulsion

of the invalid Kansas order. No right is asserted under the Natural Gas Act.

The suits are thus based upon claims of right arising under state, not federal, law. It is settled doctrine that a case is not cognizable in a federal trial court, in the absence of diversity of citizenship, unless it appears from the face of the complaint that determination of the suit depends upon a question of federal law. See, *e. g., Skelly Oil Co.* v. *Phillips Petroleum Co.,* 339 U. S. 667, 672, and cases cited. Apart from diversity jurisdiction, "a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. . . . and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal. . . ." *Gully* v. *First National Bank,* 299 U. S. 109, 112–113.

For this requirement it is no substitute that the defendant is almost certain to raise a federal defense. See *Skelly Oil Co.* v. *Phillips Petroleum, supra; Gully* v. *First National Bank, supra,* and authorities cited in those cases. Equally immaterial is it that the plaintiff could have elected to proceed on a federal ground. *Henry* v. *A. B. Dick Co.,* 224 U. S. 1, 14–17. If the plaintiff decides not to invoke a federal right, his claim belongs in a state court.

The rights as asserted by Cities Service are traditional common-law claims. They do not lose their character because it is common knowledge that there exists a scheme of federal regulation of interstate transmission of natural gas. What was said in *Gully* v. *First National Bank,* 299 U. S., at 116, is apposite:

> "We recur to the test announced in *Puerto Rico* v. *Russell & Co., supra*: 'The federal nature of the right to be established is decisive—not the source of the authority to establish it.' Here the right to be estab-

> lished is one created by the state. If that is so, it is unimportant that federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority, a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby. *Louisville & Nashville R. Co.* v. *Mottley, supra.* With no greater reason can it be said to arise thereunder because permitted thereby."

We are not called upon to decide the extent to which the Natural Gas Act reinforces or abrogates the private contract rights here in controversy. The fact that Cities Service sues in contract or quasi-contract, not the ultimate validity of its arguments, is decisive.

Nor does § 22 of the Natural Gas Act help petitioners. "Exclusive jurisdiction" is given the federal courts but it is "exclusive" only for suits that may be brought in the federal courts. Exclusiveness is a consequence of having jurisdiction, not the generator of jurisdiction because of which state courts are excluded. This was settled long ago in *Pratt* v. *Paris Gas Light & Coke Co.,* 168 U. S. 255, a case involving a grant of exclusive jurisdiction to the federal courts in all cases arising under the patent laws. Suit was brought in a state court on a common-law contract claim. The complaint contained no mention of a patent, but the invalidity of certain patents was set up in defense. In response to the argument that this deprived the state courts of jurisdiction, the Court said:

> "Section 711 [the jurisdictional provision] does not deprive the state courts of the power to determine *questions* arising under the patent laws, but only of assuming jurisdiction of *'cases'* arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening plead-

> ing—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals." (Emphasis in the original.) 168 U. S., at 259.[2]

Petitioners contend that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions. In *Great Northern R. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, the question before the Court was whether not merely the state courts but any court had jurisdiction to construe a tariff prior to consideration of the disputed question of construction by the Interstate Commerce Commission. It was argued in that case, as it is argued here, that to permit entry into the courts, without initial resort to the Commission, would destroy essential uniformity. The answer there given by Mr. Justice Brandeis, speaking for the Court, applies here:

> "This argument is unsound. It is true that uniformity is the paramount purpose of the Commerce Act. But it is not true that uniformity in construc-

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[2] The foregoing conclusions are not affected by want of explicit limitation to jurisdiction "arising under" the Natural Gas Act. Such limitation is clearly implied, as the authoritative Committee Reports indicate. "This section [referring to § 22] imposes appropriate jurisdiction upon the courts of the United States over cases arising under the act." H. R. Rep. No. 709, 75th Cong., 1st Sess., p. 9; S. Rep. No. 1162, 75th Cong., 1st Sess., p. 7.

> tion of a tariff can be attained only through a preliminary resort to the Commission to settle the construction in dispute. Every question of the construction of a tariff is deemed a question of law; and where the question concerns an interstate tariff it is one of federal law. If the parties properly preserve their rights, a construction given by any court, whether it be federal or state, may ultimately be reviewed by this court either on writ of error or on writ of certiorari; and thereby uniformity in construction may be secured. Hence, the attainment of uniformity does not require that in every case where the construction of a tariff is in dispute, there shall be a preliminary resort to the Commission." 259 U. S., at 290–291.

We hold that the state courts of Delaware do have jurisdiction to hear and decide the claims that Cities Service has formulated.

Affirmed.

Syllabus.

LOCAL 761, INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 321. Argued April 17–18, 1961.—Decided May 29, 1961.

In this case arising under § 8 (b) (4) (A) of the National Labor Relations Act, as amended by the Taft-Hartley Act, a manufacturer operated a plant in a large area to which a drainage ditch made ingress and egress impossible except over five roadways across culverts, which were called gates. Four of these gates were used by its own employees; but they were forbidden to use the fifth, which was reserved for the exclusive use of employees of independent contractors, some of whom did construction work on new buildings, some installed and repaired ventilating and heating equipment, some engaged in retooling and rearranging operations necessary for the manufacture of new models and others did "general maintenance work." Petitioner union, which represented most of the manufacturer's employees at the plant, called a strike and picketed all gates, including that reserved for the exclusive use of employees of independent contractors. The National Labor Relations Board held that the picketing at that gate was intended to enmesh those employees of neutral employers in a dispute with the manufacturer and that it violated § 8 (b) (4) (A). The Court of Appeals sustained this finding and granted enforcement of the Board's order. *Held:* The Board's order should be sustained, unless the gate in question was in fact used to a substantial extent by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of the manufacturer. Since the record shows some such mingled use but sheds no light on its extent, the judgment is reversed with directions that the case be remanded to the Board for determination of the extent of such mingled use. Pp. 668–682.

107 U. S. App. D. C. 402, 278 F. 2d 282, reversed and remanded.

Benjamin C. Sigal argued the cause for petitioner. With him on the brief were *David S. Davidson, Mozart G. Ratner* and *Herbert L. Segal.*

Norton J. Come argued the cause for the National Labor Relations Board, respondent. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Stuart Rothman* and *Dominick L. Manoli.*

Gerard D. Reilly argued the cause and filed a brief for the General Electric Co., respondent.

David E. Feller filed a brief for the United Steelworkers of America et al., as *amici curiae,* urging reversal.

MR. JUSTICE FRANKFURTER delivered the opinion of the Court.

Local 761 of the International Union of Electrical, Radio and Machine Workers, AFL–CIO, was charged with a violation of § 8 (b)(4)(A) of the National Labor Relations Act, as amended by the Taft-Hartley Act, 61 Stat. 136, 141, upon the following facts.

General Electric Corporation operates a plant outside of Louisville, Kentucky, where it manufactures washers, dryers, and other electrical household appliances. The square-shaped, thousand-acre, unfenced plant is known as Appliance Park. A large drainage ditch makes ingress and egress impossible except over five roadways across culverts, designated as gates.

Since 1954, General Electric sought to confine the employees of independent contractors, described hereafter, who work on the premises of the Park, to the use of Gate 3–A and confine its use to them. The undisputed reason for doing so was to insulate General Electric employees from the frequent labor disputes in which the contractors were involved. Gate 3–A is 550 feet away from the nearest entrance available for General Electric employees, suppliers, and deliverymen. Although anyone can pass the gate without challenge,[1] the

[1] During the strike in question a guard was stationed at the gate.

roadway leads to a guardhouse where identification must be presented. Vehicle stickers of various shapes and colors enable a guard to check on sight whether a vehicle is authorized to use Gate 3–A. Since January 1958, a prominent sign has been posted at the gate which states: "GATE 3–A FOR EMPLOYEES OF CONTRACTORS ONLY—G. E. EMPLOYEES USE OTHER GATES." On rare occasions, it appears, a General Electric employee was allowed to pass the guardhouse, but such occurrence was in violation of company instructions. There was no proof of any unauthorized attempts to pass the gate during the strike in question.

The independent contractors are utilized for a great variety of tasks on the Appliance Park premises. Some do construction work on new buildings; some install and repair ventilating and heating equipment; some engage in retooling and rearranging operations necessary to the manufacture of new models; others do "general maintenance work." These services are contracted to outside employers either because the company's employees lack the necessary skill or manpower, or because the work can be done more economically by independent contractors. The latter reason determined the contracting of maintenance work for which the Central Maintenance department of the company bid competitively with the contractors. While some of the work done by these contractors had on occasion been previously performed by Central Maintenance, the findings do not disclose the number of employees of independent contractors who were performing these routine maintenance services, as compared with those who were doing specialized work of a capital-improvement nature.

The Union, petitioner here, is the certified bargaining representative for the production and maintenance workers who constitute approximately 7,600 of the 10,500 employees of General Electric at Appliance Park. On

July 27, 1958, the Union called a strike because of 24 unsettled grievances with the company. Picketing occurred at all the gates, including Gate 3–A, and continued until August 9 when an injunction was issued by a Federal District Court. The signs carried by the pickets at all gates read: "LOCAL 761 ON STRIKE G. E. UNFAIR." Because of the picketing, almost all of the employees of independent contractors refused to enter the company premises.

Neither the legality of the strike or of the picketing at any of the gates except 3–A nor the peaceful nature of the picketing is in dispute. The sole claim is that the picketing before the gate exclusively used by employees of independent contractors was conduct proscribed by § 8 (b)(4)(A).

The Trial Examiner recommended that the Board dismiss the complaint. He concluded that the limitations on picketing which the Board had prescribed in so-called "common situs" cases were not applicable to the situation before him, in that the picketing at Gate 3–A represented traditional primary action which necessarily had a secondary effect of inconveniencing those who did business with the struck employer. He reasoned that if a primary employer could limit the area of picketing around his own premises by constructing a separate gate for employees of independent contractors, such a device could also be used to isolate employees of his suppliers and customers, and that such action could not relevantly be distinguished from oral appeals made to secondary employees not to cross a picket line where only a single gate existed.

The Board rejected the Trial Examiner's conclusion, 123 N. L. R. B. 1547. It held that, since only the employees of the independent contractors were allowed to use Gate 3–A, the Union's object in picketing there was

"to enmesh these employees of the neutral employers in its dispute with the Company," thereby constituting a violation of § 8 (b)(4)(A) because the independent employees were encouraged to engage in a concerted refusal to work "with an object of forcing the independent contractors to cease doing business with the Company." [2]

The Court of Appeals for the District of Columbia granted enforcement of the Board's order, 107 U. S. App. D. C. 402, 278 F. 2d 282. Although noting that a fine line was being drawn, it concluded that the Board was correct in finding that the objective of the Gate 3–A picketing was to encourage the independent-contractor employees to engage in a concerted refusal to perform services for their employers in order to bring pressure on General Electric. Since the incidence of the problem involved in this case is extensive and the treatment it has received calls for clarification, we brought the case here, 364 U. S. 869.

I.

Section 8 (b)(4)(A) of the National Labor Relations Act provides that it shall be an unfair labor practice for a labor organization

> ". . . to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles,

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[2] Member Fanning concurred in the result, reasoning that the common-situs criteria set out by the Board in *Sailors' Union of the Pacific* (*Moore Dry Dock*), 92 N. L. R. B. 547, could be applied to situations where the primary employer owned the premises, and that the requirement that the picketing take place reasonably close to the situs of the labor dispute had therefore been violated by the picketing around Gate 3–A.

> materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring . . . any employer or other person . . . to cease doing business with any other person. . . ."

This provision could not be literally construed; otherwise it would ban most strikes historically considered to be lawful, so-called primary activity. "While § 8 (b)(4) does not expressly mention 'primary' or 'secondary' disputes, strikes or boycotts, that section often is referred to in the Act's legislative history as one of the Act's 'secondary boycott sections.'" *Labor Board* v. *Denver Building Council,* 341 U. S. 675, 686. "Congress did not seek, by § 8 (b)(4), to interfere with the ordinary strike . . . ." *Labor Board* v. *International Rice Milling Co.,* 341 U. S. 665, 672. The impact of the section was directed toward what is known as the secondary boycott whose "sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it." *International Brotherhood of Electrical Workers* v. *Labor Board,* 181 F. 2d 34, 37. Thus the section "left a striking labor organization free to use persuasion, including picketing, not only on the primary employer and his employees but on numerous others. Among these were secondary employers who were customers or suppliers of the primary employer and persons dealing with them . . . and even employees of secondary employers so long as the labor organization did not . . . 'induce or encourage the employees of any employer to engage in a strike or a concerted refusal in the course of their employment' . . . ." *Labor Board* v. *Local 294, International Brotherhood of Teamsters,* 284 F. 2d 887, 889.

But not all so-called secondary boycotts were outlawed in § 8 (b)(4)(A). "The section does not speak generally of secondary boycotts. It describes and condemns specific union conduct directed to specific objectives. . . .

Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person. Thus, much that might argumentatively be found to fall within the broad and somewhat vague concept of secondary boycott is not in terms prohibited." *Local 1976, United Brotherhood of Carpenters* v. *Labor Board,* 357 U. S. 93, 98. See also *United Brotherhood of Carpenters* (*Wadsworth Building Co.*), 81 N. L. R. B. 802, 805.

Important as is the distinction between legitimate "primary activity" and banned "secondary activity," it does not present a glaringly bright line. The objectives of any picketing include a desire to influence others from withholding from the employer their services or trade. See *Sailors' Union of the Pacific* (*Moore Dry Dock*), 92 N. L. R. B. 547. "[I]ntended or not, sought for or not, aimed for or not, employees of neutral employers do take action sympathetic with strikers and do put pressure on their own employers." *Seafarers International Union* v. *Labor Board,* 265 F. 2d 585, 590. "It is clear that, when a union pickets an employer with whom it has a dispute, it hopes, even if it does not intend, that all persons will honor the picket line, and that hope encompasses the employees of neutral employers who may in the course of their employment (deliverymen and the like) have to enter the premises." *Id.,* at 591. "Almost all picketing, even at the situs of the primary employer and surely at that of the secondary, hopes to achieve the forbidden objective, whatever other motives there may be and however small the chances of success." *Local 294, supra,* at 890. But picketing which induces secondary employees to respect a picket line is not the equivalent of picketing which has an object of inducing those employees to engage in concerted conduct against their employer in order to force him to refuse to deal with the struck

employer. *Labor Board* v. *International Rice Milling, supra.*

However difficult the drawing of lines more nice than obvious, the statute compels the task. Accordingly, the Board and the courts have attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause. Although "[n]o rigid rule which would make . . . [a] few factors conclusive is contained in or deducible from the statute," *Sales Drivers* v. *Labor Board,* 229 F. 2d 514, 517,[3] "[i]n the absence of admissions by the union of an illegal intent, the nature of acts performed shows the intent." *Seafarers' International Union, supra,* at 591.

The nature of the problem, as revealed by unfolding variant situations, inevitably involves an evolutionary process for its rational response, not a quick, definitive formula as a comprehensive answer. And so, it is not surprising that the Board has more or less felt its way during the fourteen years in which it has had to apply § 8 (b)(4)(A), and has modified and reformed its standards on the basis of accumulating experience. "One of the purposes which lead to the creation of such boards is to have decisions based upon evidential facts under the particular statute made by experienced officials with an adequate appreciation of the complexities of the subject which is entrusted to their administration." *Republic Aviation Corp.* v. *Labor Board,* 324 U. S. 793, 800.

II.

The early decisions of the Board following the Taft-Hartley amendments involved activity which took place around the secondary employer's premises. For example, in *Wadsworth Building Co., supra,* the union set up a picket line around the situs of a builder who had con-

[3] See also *Labor Board* v. *General Drivers, Local 968,* 225 F. 2d 205.

tracted to purchase prefabricated houses from the primary employer. The Board found this to be illegal secondary activity. See also *Printing Specialties Union (Sealbright Pacific)*, 82 N. L. R. B. 271. In contrast, when picketing took place around the premises of the primary employer, the Board regarded this as valid primary activity. In *Oil Workers International Union (Pure Oil Co.)*, 84 N. L. R. B. 315, Pure had used Standard's dock and employees for loading its oil onto ships. The companies had contracted that, in case of a strike against Standard, Pure employees would take over the loading of Pure oil. The union struck against Standard and picketed the dock, and Pure employees refused to cross the picket line. The Board held this to be a primary activity, although the union's action induced the Pure employees to engage in a concerted refusal to handle Pure products at the dock. The fact that the picketing was confined to the vicinity of the Standard premises influenced the Board not to find that an object of the activity was to force Pure to cease doing business with Standard, even if such was a secondary effect.

> "A strike, by its very nature, inconveniences those who customarily do business with the struck employer. Moreover, any accompanying picketing of the employer's premises is necessarily designed to induce and encourage third persons to cease doing business with the picketed employer. It does not follow, however, that such picketing is therefore proscribed by Section 8 (b)(4)(A) of the Act." 84 N. L. R. B., at 318.

See also *Newspaper & Mail Deliverers' Union (Interborough News Co.)*, 90 N. L. R. B. 2135; *International Brotherhood of Teamsters (Di Giorgio Wine Co.)*, 87 N. L. R. B. 720; *International Brotherhood of Teamsters (Rice Milling Co.)*, 84 N. L. R. B. 360.

In *United Electrical Workers (Ryan Construction Corp.)*, 85 N. L. R. B. 417, Ryan had contracted to perform construction work on a building adjacent to the Bucyrus plant and inside its fence. A separate gate was cut through the fence for Ryan's employees which no employee of Bucyrus ever used. The Board concluded that the union—on strike against Bucyrus—could picket the Ryan gate, even though an object of the picketing was to enlist the aid of Ryan employees, since Congress did not intend to outlaw primary picketing.

> "When picketing is wholly at the premises of the employer with whom the union is engaged in a labor dispute, it cannot be called 'secondary' even though, as is virtually always the case, an object of the picketing is to dissuade all persons from entering such premises for business reasons. It makes no difference whether 1 or 100 other employees wish to enter the premises. It follows in this case that the picketing of Bucyrus premises, which was primary because in support of a labor dispute *with Bucyrus,* did not lose its character and become 'secondary' at the so-called Ryan gate because Ryan employees were the only persons regularly entering Bucyrus premises at that gate." 85 N. L. R. B., at 418. See also *General Teamsters (Crump, Inc.)*, 112 N. L. R. B. 311.

Thus, the Board eliminated picketing which took place around the situs of the primary employer—regardless of the special circumstances involved—from being held invalid secondary activity under § 8 (b)(4)(A).

However, the impact of the new situations made the Board conscious of the complexity of the problem by reason of the protean forms in which it appeared. This became clear in the "common situs" cases—situations where two employers were performing separate tasks on

common premises. The *Moore Dry Dock* case, *supra,* laid out the Board's new standards in this area. There, the union picketed outside an entrance to a dock where a ship, owned by the struck employer, was being trained and outfitted. Although the premises picketed were those of the secondary employer, they constituted the only place where picketing could take place; furthermore, the objectives of the picketing were no more aimed at the employees of the secondary employer—the dock owner—than they had been in the *Pure Oil* and *Ryan* cases. The Board concluded, however, that when the situs of the primary employer was "ambulatory" there must be a balance between the union's right to picket and the interest of the secondary employer in being free from picketing. It set out four standards for picketing in such situations which would be presumptive of valid primary activity: (1) that the picketing be limited to times when the situs of dispute was located on the secondary premises, (2) that the primary employer be engaged in his normal business at the situs, (3) that the picketing take place reasonably close to the situs, and (4) that the picketing clearly disclose that the dispute was only with the primary employer. These tests were widely accepted by reviewing federal courts. See, *e. g., Labor Board* v. *Service Trade Chauffeurs,* 191 F. 2d 65 (C. A. 2d Cir.); *Piezonki* v. *Labor Board,* 219 F. 2d 879 (C. A. 4th Cir.); *Labor Board* v. *Chauffeurs, Teamsters,* 212 F. 2d 216 (C. A. 7th Cir.); *Labor Board* v. *Local 55,* 218 F. 2d 226 (C. A. 10th Cir.). As is too often the way of law or, at least, of adjudications, soon the *Dry Dock* tests were mechanically applied so that a violation of one of the standards was taken to be presumptive of illegal activity. For example, failure of picket signs clearly to designate the employer against whom the strike was directed was held to be violative of § 8 (b)(4)(A). See *Superior Derrick Corp.* v. *Labor Board,* 273 F. 2d 891; *Truck*

Drivers v. *Labor Board*, 249 F. 2d 512; *Labor Board* v. *Local 728*, 228 F. 2d 791.[4]

In *Local 55* (*PBM*), 108 N. L. R. B. 363, the Board for the first time applied the *Dry Dock* test, although the picketing occurred at premises owned by the primary employer. There, an insurance company owned a tract of land that it was developing, and also served as the general contractor. A neutral subcontractor was also doing work at the site. The union, engaged in a strike against the insurance company, picketed the entire premises, characterizing the entire job as unfair, and the employees of the subcontractor walked off. The Court of Appeals for the Tenth Circuit enforced the Board's order which found the picketing to be illegal on the ground that the picket signs did not measure up to the *Dry Dock* standard that they clearly disclose that the picketing was directed against the struck employer only. 218 F. 2d 226.

The Board's application of the *Dry Dock* standards to picketing at the premises of the struck employer was made more explicit in *Retail Fruit & Vegetable Clerks* (*Crystal Palace Market*), 116 N. L. R. B. 856. The owner of a large common market operated some of the shops within, and leased out others to independent sellers. The union, although given permission to picket the owner's individual stands, chose to picket outside the entire market. The Board held that this action was violative of § 8 (b)(4)(A) in that the union did not attempt to minimize the effect of its picketing, as required in a common-situs case, on the operations of the neutral employers utilizing the market. "We believe . . . that the foregoing

[4] The *Dry Dock* criteria had perhaps their widest application in the trucking industry. There, unions on strike against truckers often staged picketing demonstrations at the places of pickup and delivery. Compare *International Brotherhood of Teamsters* (*Schultz Refrigerated Service, Inc.*), 87 N. L. R. B. 502, with *International Brotherhood of Teamsters* (*Sterling Beverages, Inc.*), 90 N. L. R. B. 401.

principles should apply to all common situs picketing, including cases where, as here, the picketed premises are owned by the primary employer." 116 N. L. R. B., at 859. The *Ryan* case, *supra,* was overruled to the extent it implied the contrary. The Court of Appeals for the Ninth Circuit, in enforcing the Board's order, specifically approved its disavowance of an ownership test. 249 F. 2d 591. The Board made clear that its decision did not affect situations where picketing which had effects on neutral third parties who dealt with the employer occurred at premises occupied solely by him. "In such cases, we adhere to the rule established by the Board . . . that more latitude be given to picketing at such separate primary premises than at premises occupied in part (or entirely) by secondary employers." 116 N. L. R. B., at 860, n. 10.

In rejecting the ownership test in situations where two employers were performing work upon a common site, the Board was naturally guided by this Court's opinion in *Rice Milling,* in which we indicated that the location of the picketing at the primary employer's premises was "not necessarily conclusive" of its legality. 341 U. S., at 671. Where the work done by the secondary employees is unrelated to the normal operations of the primary employer, it is difficult to perceive how the pressure of picketing the entire situs is any less on the neutral employer merely because the picketing takes place at property owned by the struck employer. The application of the *Dry Dock* tests to limit the picketing effects to the employees of the employer against whom the dispute is directed carries out the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their own." *Labor Board* v. *Denver Building Council, supra,* at 692.

III.

From this necessary survey of the course of the Board's treatment of our problem, the precise nature of the issue before us emerges. With due regard to the relation between the Board's function and the scope of judicial review of its rulings, the question is whether the Board may apply the *Dry Dock* criteria so as to make unlawful picketing at a gate utilized exclusively by employees of independent contractors who work on the struck employer's premises. The effect of such a holding would not bar the union from picketing at all gates used by the employees, suppliers, and customers of the struck employer. Of course an employer may not, by removing all his employees from the situs of the strike, bar the union from publicizing its cause, see *Local 618* v. *Labor Board,* 249 F. 2d 332. The basis of the Board's decision in this case would not remotely have that effect, nor any such tendency for the future.

The Union claims that, if the Board's ruling is upheld, employers will be free to erect separate gates for deliveries, customers, and replacement workers which will be immunized from picketing. This fear is baseless. The key to the problem is found in the type of work that is being performed by those who use the separate gate. It is significant that the Board has since applied its rationale, first stated in the present case, only to situations where the independent workers were performing tasks unconnected to the normal operations of the struck employer—usually construction work on his buildings.[5] In such situations, the indicated limitations on picketing activity respect the balance of competing interests that Congress has required the Board to enforce. On the other

[5] *United Steelworkers* (*Phelps Dodge Refining Corp.*), 126 N. L. R. B. 1367; *International Chemical Workers Union* (*Virginia-Carolina Chemical Corp.*), 126 N. L. R. B. 905; see *Union de Trabajadores* (*Gonzales Chemical Industries, Inc.*), 128 N. L. R. B. No. 116.

hand, if a separate gate were devised for regular plant deliveries, the barring of picketing at that location would make a clear invasion on traditional primary activity of appealing to neutral employees whose tasks aid the employer's everyday operations. The 1959 Amendments to the National Labor Relations Act, which removed the word "concerted" from the boycott provisions, included a proviso that "nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." 29 U. S. C. (Supp. I, 1959) § 158 (b)(4)(B). The proviso was directed against the fear that the removal of "concerted" from the statute might be interpreted so that "the picketing at the factory violates section 8 (b)(4)(A) because the pickets induce the truck drivers employed by the trucker not to perform their usual services where an object is to compel the trucking firm not to do business with the . . . manufacturer during the strike." Analysis of the bill prepared by Senator Kennedy and Representative Thompson, 105 Cong. Rec. 16589.

In a case similar to the one now before us, the Court of Appeals for the Second Circuit sustained the Board in its application of § 8 (b)(4)(A) to a separate-gate situation. "There must be a separate gate marked and set apart from other gates; the work done by the men who use the gate must be unrelated to the normal operations of the employer and the work must be of a kind that would not, if done when the plant were engaged in its regular operations, necessitate curtailing those operations." *United Steelworkers* v. *Labor Board,* 289 F. 2d 591, 595, decided May 3, 1961. These seem to us controlling considerations.

IV.

The foregoing course of reasoning would require that the judgment below sustaining the Board's order be affirmed but for one consideration, even though this con-

sideration may turn out not to affect the result. The legal path by which the Board and the Court of Appeals reached their decisions did not take into account that if Gate 3–A was in fact used by employees of independent contractors who performed conventional maintenance work necessary to the normal operations of General Electric, the use of the gate would have been a mingled one outside the bar of § 8 (b)(4)(A). In short, such mixed use of this portion of the struck employer's premises would not bar picketing rights of the striking employees. While the record shows some such mingled use, it sheds no light on its extent. It may well turn out to be that the instances of these maintenance tasks were so insubstantial as to be treated by the Board as *de minimis*. We cannot here guess at the quantitative aspect of this problem. It calls for Board determination. For determination of the questions thus raised, the case must be remanded by the Court of Appeals to the Board.

Reversed.

THE CHIEF JUSTICE and MR. JUSTICE BLACK concur in the result.

MR. JUSTICE DOUGLAS.

I did not vote to grant certiorari in this case because it seemed to me that the problem presented was in the keeping of the Courts of Appeals within the meaning of *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 490. Since the Court of Appeals followed the guidelines of that case (see 278 F. 2d 282, 286), I would leave the decision with it. I cannot say it made any egregious error, though I might have decided the case differently had I sat on the Labor Board or on the Court of Appeals.

Syllabus.

SAM FOX PUBLISHING CO., INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 56. Argued March 29–30, 1961.—Decided May 29, 1961.

Under the Expediting Act, 15 U. S. C. § 29, appellants, who were small music publishers, appealed directly to this Court from an order of a Federal District Court denying their motions under Rule 24 (a)(2) of the Federal Rules of Civil Procedure to intervene as of right in a proceeding by the Government to modify a consent decree previously entered in a government suit under § 1 of the Sherman Act against an unincorporated association of music writers and publishers (of which appellants were members), which took licenses to the works of its members, licensed such works for public performance and distributed the resulting revenues among its members. The Government had proposed modification of the decree to improve provisions for democratic elections of the governing board by membership vote and for an equitable distribution of revenues, and appellants contended that the modifications proposed did not go far enough towards ameliorating the position of the small publishers as against a few large publishers who allegedly dominated the association. *Held:* Appellants were not bound by the parts of the decree as to which they sought intervention; they were not entitled to intervene as of right; the order denying intervention was not appealable; and the appeal is dismissed. Pp. 684–695.

(a) If appellants' interests are deemed aligned with the public interest in this case, they would not be bound by the outcome of the government antitrust litigation or precluded from enforcing their rights through private litigation. Therefore, they were not entitled to intervene as of right, and the order denying intervention was not appealable. Pp. 688–690.

(b) Though the Government's suit was against the unincorporated association both as an entity and as a representative of its members, and appellants may be bound by the decree insofar as it deals with the *external* affairs of the association, they are not bound by its provisions pertaining to the *internal* affairs of the association, as to which their interests are adverse to those of the association's governing board and could not be adequately represented by it. Pp. 690–693.

(c) It was not necessary for the District Court to hold a hearing in order to determine to what extent appellants' interests diverged from those asserted by the association, since the record shows that appellants' interests could not be considered to be adequately represented by the association with respect to its internal affairs, and therefore they could not be bound by the decree. Pp. 693–694.

(d) A different conclusion is not required by the fact that, even if appellants are not legally precluded from bringing a private suit, nevertheless the very existence of the decree in the Government's suit might, as a matter of comity, limit the relief which some future equity court would decree. Pp. 694–695.

Appeal dismissed.

Charles A. Horsky argued the cause for appellants. With him on the brief was *Alvin Friedman.*

Daniel M. Friedman argued the cause for the United States. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Acting Assistant Attorney General Bicks, Acting Assistant Attorney General Kirkpatrick, Charles H. Weston, Richard A. Solomon* and *Irwin A. Seibel.*

John F. Dooling, Jr. argued the cause for the American Society of Composers, Authors and Publishers, appellee. On the brief were *Arthur H. Dean, Howard T. Milman, Herman Finkelstein, Lloyd N. Cutler, David H. Horowitz* and *Samuel A. Stern.*

Mr. Justice Harlan delivered the opinion of the Court.

The appellants, proceeding under the Expediting Act, 15 U. S. C. § 29, appeal directly to this Court from an order of the District Court for the Southern District of New York denying their motions to intervene as of right in a proceeding to modify a consent decree previously entered in a government antitrust suit. The appellants were not named as parties either in the suit or modifica-

tion proceeding.[1] The motions were made pursuant to Rule 24, subdivision (a)(2) of the Federal Rules of Civil Procedure.[2]

The matter arises in the following setting: In 1941 the United States brought suit under § 1 of the Sherman Act, 15 U. S. C. § 1, against the American Society of Composers, Authors and Publishers (ASCAP), an unincorporated association of which appellants are members, and certain of its officers. The Society and the defendant officers besides being named as an entity and individuals, respectively, were also sued as representatives of all members of the Society. The Society, comprising some 6,400 writers and publishers of musical compositions, was organized to take nonexclusive licenses to the works of its members, to license such works out for public performance, and to distribute among the members the revenues resulting therefrom. The three appellants are among the Society's publisher members.

The Government's complaint in the action was aimed at two distinct types of antitrust violation: (1) alleged restraint of trade arising out of ASCAP's mode of dealing with outsiders desiring licenses of compositions in the Society's catalogue; and (2) alleged restraint of competition among the Society's members *inter sese,* result-

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[1] Besides Sam Fox Publishing Company there are two other appellants, Pleasant Music Publishing Company and Jefferson Music Company, who, like Sam Fox, are music publishers. Although Movietone Music Corporation also appealed, it did not appear in this Court.

[2] "(a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: . . . (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action . . . ."

The appellants also moved below for permissive, or discretionary, intervention under subdivision (b) of Rule 24, but no appeal has been taken from that part of the District Court's order.

ing from the asserted domination of the Society's affairs by a few of its large publisher members who, it was claimed, were able to control the complexion of the Board of Directors and the apportionment of the Society's revenues. As to the latter type of restraint, the prayer for relief sought to insure (a) that Board elections be by no method "other than by a membership vote in which all . . . members shall have the right to vote," and (b) that the distribution of revenue to members should be on a "fair and non-discriminatory" basis. It is apparent from the record that appellants' particular interests in the suit related entirely to the second aspect of the Government's charges, that is those involving the Society's internal affairs, and that their motions to intervene were so directed.

During the same year in which the suit was brought it was settled by a consent decree, approved by the District Court. In addition to provisions dealing with what may be called the Society's external affairs, the decree, in broad terms, contained requirements for Board elections by membership vote and for revenue distributions on an equitable basis. Subsequent to the decree, both the vote of the members and their share of license revenues were accorded on a weighted basis relative to the particular member's contribution to the revenue-producing value of all members' contribution to the Society's catalogue, all as determined by the Board of Directors. In 1950, pursuant to a reservation-of-jurisdiction clause in the 1941 decree, a modification of the original decree was effected at the instance of the Government. The modified decree ordered, among other things, that "in order to insure a democratic administration of the affairs of defendant ASCAP . . . [the composition of the] Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions . . . ."

In 1959, this same concern for "democratic administration of the [internal] affairs" of ASCAP and for an equitable distribution of license revenues led the Government to press for further amendments to the decree. In 1960 this resulted in additional court-approved modifications which, it is apparent, represented a substantial improvement over the earlier provisions relating to Board elections and the apportionment of revenues. Contending that the proposed modifications did not go far enough towards ameliorating the position of the small publishers as against the few large publishers, appellants, prior to the adoption of the modified decree, brought the intervention motions now before us. The District Court denied leave to intervene without opinion, stating in its order:

> ". . . representation of the public and the applicants by the Department of Justice was adequate and in the public interest; . . . applicants are members of and are represented by the Society with their consent; . . . applicants have permitted this cause in which they are not named as parties to proceed to judgment; and . . . it would not promote the interests of the administration of justice to permit the requested intervention . . . ."

Thereafter the District Court entered a judgment approving the proposed modifications to the existing consent decree. Appellants do not appeal from that judgment, but only from the order denying their motions to intervene as of right. We postponed consideration of the question of jurisdiction to the hearing of the case on the merits. 362 U. S. 986.

As the Government and appellants correctly agree, the controlling question on the issue of jurisdiction, the answer to which also determines the merits of this appeal, is whether the appellants were entitled to intervene in

these proceedings as "of right." *Sutphen Estates, Inc.*, v. *United States*, 342 U. S. 19, where the Court said: "If appellant may intervene as of right, the order of the court denying intervention is appealable." *Id.*, p. 20. That case requires rejection of ASCAP's separate contention that the order below was not appealable because not final,[3] and also its further contention that appellate review of intervention has become moot, in that no appeal was taken from the judgment eventuating from the proceedings in which intervention was sought. The latter contention is based on the erroneous hypothesis that review of the intervention order was obtainable only in connection with an appeal from such judgment.

The determinative question—whether appellants were entitled to intervene as "of right"—depended upon their showing both that "the representation of" their "interest by existing parties" to the consent judgment modification proceeding was or might "be inadequate," and that they would or might "be bound by [the] judgment" in such proceeding. See note 2, *supra*.

I.

Appellants first contend that the representation of their interests by the Government has proven inadequate. Although the most recent decree reduced and limited the Board representation of the 10 largest publishers and provided for a method of revenue apportionment more favorable than that of the past to the smaller and less well-established Society members, appellants' contention is that this amelioration of their position is not adequate

[3] *Allen Calculators, Inc.*, v. *National Cash Register Co.*, 322 U. S. 137, need not be considered to the contrary, for it would seem that the significance of the appeal which was there taken from the judgment below related to this Court's jurisdiction to consider the District Court's denial of *permissive* intervention, and not to its jurisdiction to review the District Court's *order* denying intervention as of right.

to break the control of the larger publishers, and therefore the Government's representation was or may have been inadequate.

Apart from anything else, sound policy would strongly lead us to decline appellants' invitation to assess the wisdom of the Government's judgment in negotiating and accepting the 1960 consent decree, at least in the absence of any claim of bad faith or malfeasance on the part of the Government in so acting. However, we need not reach the question of the adequacy of the Government's representation of the appellants' interests because, as hereafter shown, it is in any event clear that appellants are not bound by the consent judgment in these proceedings, if their position in this litigation is deemed as aligned with that of the Government. See *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116, 119.

We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it. In *United States* v. *Borden Co.*, 347 U. S. 514, it was ruled that it was an abuse of discretion for the District Court to refuse the Government an injunction against certain acts held violative of the antitrust laws, even though the same acts had already been enjoined in a private suit. It was there stated in clearest terms that "private and public actions were designed to be cumulative, not mutually exclusive" (*id.*, at 518), and, quoting from *United States* v. *Bendix Home Appliances*, 10 F. R. D. 73, 77, " '. . . [T]he scheme of the statute is sharply to distinguish between Government suits, either criminal or civil, and private suits for injunctive relief or for treble damages. Different policy considerations govern each of these. They may proceed simultaneously or in disregard of each other.' " *Id.*, at 518–519.

This principle is certainly broad enough to make it clear that just as the Government is not bound by private antitrust litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation. See *United States* v. *General Electric Co.*, 95 F. Supp. 165; *United States* v. *Columbia Gas & Electric Corp., supra; United States* v. *Radio Corporation,* 3 F. Supp. 23; *United States* v. *Bendix Home Appliances, supra;* cf. *United States* v. *Loew's, Inc.*, 136 F. Supp. 13. Indeed § 5 of the Clayton Act, making an adjudication of liability in a government antitrust suit prima facie evidence of liability in a § 4 private suit, would seem to be a definitive legislative pronouncement that a government suit cannot be preclusive of private litigation, even though relating to the same subject matter.

Regarding appellants' position in the case from this aspect, we conclude that they were not entitled to intervene as of right. See *Allen Calculators, Inc.*, v. *National Cash Register Co.*, 322 U. S. 137, 140–141.

II.

The contention of the appellants that they are entitled to intervene because as members of ASCAP they might be bound by ASCAP's representation of their interests presents a more difficult question. Their claim is that the Society, acting through its Board of Directors, could not adequately represent their interests as small publishers, whose very claim is that they are caught between the practical need to remain in the Society and the impossibility of obtaining adequate representation on the Board of Directors which determines both the weighting of votes in Board elections and the distribution of Society revenues. Since the Board, which negotiated the present consent judgment with the United States, represents, in the words of the Government's complaint, the core of

the very "unlawful combination and conspiracy" against which appellants seek antitrust relief, it is hardly doubtful, taking, as we think we should, the record before us at face value, that ASCAP, acting through its Board, cannot in law be deemed adequately to represent appellants' discrete interests asserted against the Board.

But before the inadequacy of ASCAP's representation of appellants' interests in the consent decree negotiations can give rise to a right of intervention, appellants must further demonstrate that they are or may be bound by the judgment on the litigation. On this score appellants argue that as "class" defendants they are bound by the consent judgment against ASCAP, an unincorporated association, which was sued both as an entity (Fed. Rules Civ. Proc., 17 (b)) and as representing all the Society's members (Fed. Rules Civ. Proc., 23 (a)(1)). See *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 148 F. 2d 403.

In so arguing, appellants, however, face this dilemma: the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation, *Hansberry* v. *Lee,* 311 U. S. 32; yet intervention as of right presupposes that an intervenor's interests are or may *not* be so represented. Thus appellants' argument as to a divergence of interests between themselves and ASCAP proves too much, for to the extent that it is valid appellants should not be considered as members of the same class as the present defendants, and therefore are not "bound." On the other hand, if appellants are bound by ASCAP's representation of the class, it can only be because that representation has been adequate, precluding any right to intervene. It would indeed be strange procedure to declare, on one hand, that ASCAP adequately represents the interests of the appellants and hence that this is properly a class suit, and then, on the other hand, to

require intervention in order to insure of this representation in fact. The cases establishing the principle of class suits, *Smith* v. *Swormstedt,* 16 How. 288; *Supreme Tribe of Ben-Hur* v. *Cauble,* 255 U. S. 356; and see *Hansberry* v. *Lee, supra,* present no such situation and require no such result.

Any doubt that may exist in this case is dispelled once it is recognized that the Government's original complaint alleged two different types of antitrust violations, two different illegal combinations. It is doubtless true that appellants, through their membership in ASCAP, are or "may be" bound by the consent judgment insofar as it deals with the *external* affairs of the Society; nor is there any claim on this score that ASCAP's representation was not fully adequate.[4] It does not follow from this, however, as to the other alleged antitrust violations, which are of an entirely different nature, involving the interests of the members *inter sese,* that the Society itself is a valid unitary representative for this purpose also, containing as it does the principal factions in the internecine dispute. Cf. *Owen* v. *Paramount Productions,* 41 F. Supp. 557. Or, put differently, as to any claims or defenses which appellants have *against the Government* the representation of ASCAP is entirely adequate, and as to any claims which they may have *against ASCAP* there is nothing to require appellants to bring them into this litigation, simply because they are "bound" for other purposes. Cf. Fed. Rules Civ. Proc., 13 (g).

Turning to the order of the District Court, its remarks that the appellants as "members of the defendant

[4] The issue of inadequacy of representation could arise on this phase of the case only on some showing that ASCAP, which ostensibly has the same interests as appellants on this aspect of the litigation, was in fact conducting the litigation in bad faith, collusively, or negligently. No such contention has been made.

Society . . . surrendered . . . (their) right to intervene as individuals," (R. 295) and that they "are members of and are represented by the Society with their consent," are susceptible of two interpretations. If the Court was referring simply to the assertedly representative nature of the suit, its view was no different from the appellants' contention discussed above, and the answer to it is also the same. The purport of the order, however, appears to have been, as the District Court elsewhere intimated, that quite apart from the actual divergence of interest and position between ASCAP and appellants, the contractual and associational relation between the Society and its members, into which they were free to enter and from which they were free to withdraw, at least so far as the law is concerned, both bound appellants as privies to this judgment and precluded any claim of inadequate representation. With respect, we think this begs the question, for appellants' antitrust claim is precisely that, on the one hand, they have no practical choice but to remain in the Society and, on the other, that the dominance of the large publishers within the Society restricts the competitive opportunities in the industry.

In sum, there is nothing in the relationship of appellants to ASCAP to require us to subvert here the unquestionably sound policy of not permitting private antitrust plaintiffs to press their claims against alleged violators in the same suit as the Government: there is no claim or defense which appellants have against the Government as to which they are not adequately represented by ASCAP, and no rule or policy requiring them to press their claim *against* ASCAP in this government litigation.

III.

There are two remaining arguments which may be disposed of more briefly. First, it is said that the District

Court should at least have held a hearing in order to determine to what extent appellants' interests diverged from those asserted here by ASCAP. We perceive no occasion for such a procedure, for we think that the present record already shows that as respects the phase of this case which relates to the Society's internal affairs, the position which the appellants assert in favor of an expanded decree cannot be deemed in law to be adequately represented by ASCAP or any of the other defendants, and hence that the consent judgment in this respect can have no binding effect against appellants.

Second, appellants argue that even should they not be legally precluded from bringing a private action, nevertheless the very existence of the outstanding decree would as a matter of comity either preclude further relief or operate to limit the relief some future equity court might decree. Although there is no reason why such a court need consider the present decree as anything but a minimum towards insuring broader representation and more favorable income distribution should a claim for further relief be made out, there is considerable weight to the argument that the court will feel constrained as a matter of comity at least to build on the foundations of the present decree. Cf. *United States* v. *Radio Corporation,* 3 F. Supp. 23. However, it is abundantly clear that this effect is not at all the equivalent of being legally bound, which is what must be made out before a party may intervene as of right. See *Credits Commutation Co.* v. *United States,* 177 U. S. 311; *Sutphen Estates, Inc.,* v. *United States, supra; Cameron* v. *President and Fellows of Harvard College,* 157 F. 2d 993; *Jewell Ridge Coal Corp.* v. *Local No. 6167,* 3 F. R. D. 251. Indeed, appellants' contention on this score is indistinguishable from that of any private litigant whose interests are involved in government anti-

trust litigation. As we have already said, no right of intervention as a party plaintiff exists in that instance.

Inasmuch as the appellants are not, nor may be, bound by the judgment below in the aspects of the case with respect to which they sought intervention, their application to intervene as of right was properly denied and the appeal is

Dismissed.

MR. JUSTICE CLARK took no part in the consideration or decision of this case.

UNITED STATES *v.* NEUSTADT ET UX.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

No. 533. Argued May 2, 1961.—
Decided May 29, 1961.

Under the Federal Tort Claims Act, the United States may not be held liable to a purchaser of a home who has been furnished a statement reporting the results of a negligently inaccurate inspection and appraisal of the property made by the Federal Housing Administration for mortgage insurance purposes pursuant to the National Housing Act of 1934, as amended, and who, in reliance upon such statement, has been induced to pay a purchase price in excess of the fair market value of the property, since such a claim is one "arising out of . . . misrepresentation," within the meaning of 28 U. S. C. § 2680 (h), which precludes recovery on claims arising out of negligent, as well as willful, misrepresentation. Pp. 696–711.

281 F. 2d 596, reversed.

Assistant Attorney General Orrick argued the cause for the United States. With him on the briefs were *Solicitor General Cox,* former *Solicitor General Rankin, Assistant Attorney General Doub, Morton Hollander, John G. Laughlin, Jr.* and *Sherman L. Cohn.*

Lawrence J. Latto argued the cause and filed a brief for respondents.

MR. JUSTICE WHITTAKER delivered the opinion of the Court.

Pursuant to the provisions of the National Housing Act of 1934,[1] as amended, the Federal Housing Administration (FHA) is authorized, in certain instances, to insure the partial repayment of loans secured by mortgages executed

[1] 48 Stat. 1246, 12 U. S. C. §§ 1701 *et seq.*

to finance the purchase of private residential properties.[2] When duly requested to do so by a qualified lender, the FHA, through its appraisal staff, makes an inspection of property offered for sale in order to determine whether the property is eligible for FHA mortgage insurance, and to assign an appraised value establishing the maximum amount of mortgage insurance obtainable.[3]

The question for decision in this case is whether the United States may be held liable, under the Federal Tort Claims Act, 28 U. S. C. § 1346 (b),[4] to a purchaser of residential property who has been furnished a statement reporting the results of an inaccurate FHA inspection and appraisal, and who, in reliance thereon, has been induced by the seller to pay a purchase price in excess

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[2] Section 203 of the National Housing Act of 1934, as amended, 12 U. S. C. § 1709, provided at the times here pertinent that:

"(a) . . . The [Federal Housing] Commissioner is authorized, upon application by the mortgagee, to insure as hereinafter provided any mortgage offered to him which is eligible for insurance as hereinafter provided, and, upon such terms as the Commissioner may prescribe, to make commitments for the insuring of such mortgages prior to the date of their execution or disbursement thereon . . . .

. . . . . .

"(b) . . . To be eligible for insurance under this section a mortgage shall—

. . . . . .

"(2) Involve a principal obligation . . . not to exceed an amount equal to the sum of (i) 95 per centum . . . of $9,000 of the [FHA] appraised value (as of the date the mortgage is accepted for insurance), and (ii) 75 per centum of such value in excess of $9,000 . . . ."

[3] 24 CFR §§ 200.145, 200.146, 200.148 (1959 ed.).

[4] "[T]he district courts . . . shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages . . . for injury or loss of property . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

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of the property's fair market value. The answer turns upon the correct interpretation of 28 U. S. C. § 2680 (h), which precludes recovery under the Tort Claims Act upon "[a]ny claim arising out of . . . misrepresentation." The material facts giving rise to the controversy are not in dispute, and may be summarized as follows.

Early in 1957, the property in question, consisting of a 16-year-old single-family brick house and lot located in Alexandria, Virginia, was offered for sale by its owners. To assure that FHA mortgage insurance would be available to secure a loan in the event that the purchaser, when ascertained, might desire to finance the purchase by that method, the owners requested a qualified lending institution to take the necessary steps to have the property inspected and appraised by the FHA; and pursuant to the lending agent's application,[5] an FHA appraiser visited and inspected the premises. On the basis of that inspection, which disclosed no defects that would disqualify the property for mortgage insurance, the FHA issued to the lending agency a "conditional commitment," [6] stating that the property had been approved for mortgage insurance and, for that purpose, had been assigned an appraised value of $22,750. Under § 203 (b) (2) of the National Housing Act,[7] the maximum amount of

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[5] An application for FHA mortgage insurance may be made only by a financial institution approved as a mortgagee by the FHA. § 203 (a), National Housing Act, *supra*, 12 U. S. C. § 1709 (a). Applications may be, and commonly are, made in advance of actual sale and execution of the mortgage, 24 CFR § 221.9 (1959 ed.), in order that the seller may have the property inspected, approved, and appraised for mortgage insurance while the purchaser is still unknown.

[6] The commitment to insure a mortgage is conditioned upon the mortgagor's being found financially able to carry the mortgage. 24 CFR §§ 200.147, 200.148 (1) (1959 ed.).

[7] Note 2, *supra*.

mortgage insurance obtainable on an appraised value of $22,750 was $18,800.[8]

Shortly thereafter, the respondents, Mr. and Mrs. Stanley S. Neustadt, examined the property and became interested in buying it. After negotiations extending over the period of a month, in the course of which respondents were advised by the sellers that the property had been appraised by the FHA at a value of $22,750 for mortgage insurance purposes, respondents entered into a conditional contract to purchase the property at a price of $24,000. The contract was conditioned upon the respondents' obtaining a loan secured by an FHA-insured mortgage in the amount of $18,800. In accordance with § 226 of the National Housing Act,[9] the contract also provided that the sellers would deliver to respondents, prior to the sale of the property, a written statement setting forth the FHA-appraised value. Both conditions were fulfilled, and on the settlement date, July 2, 1957, respondents took title to the property, and acknowledged by their signatures that they had been furnished with a written "Statement of FHA Appraisal." This was an official FHA document, stating that the FHA "has appraised the property identified . . . and

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[8] Under § 203 (b) (2), the maximum insurable amount was $18,862.50 (95% of $9,000, plus 75% of $13,750). By FHA regulations, mortgages were insurable only in multiples of $100. 24 CFR § 221.17 (a) (1958 Supp.).

[9] Section 226 was enacted in 1954 (68 Stat. 607, 12 U. S. C. § 1715q) and provides in pertinent part as follows:

"The Commissioner is hereby authorized and directed to require that, in connection with any property . . . approved for mortgage insurance . . . the seller or builder . . . shall agree to deliver, prior to the sale of the property, to the person purchasing such dwelling for his own occupancy, a written statement setting forth the amount of the appraised value of the property as determined by the Commissioner. . . ."

for mortgage insurance purposes has placed an FHA-appraised value of $22,750 on such property as of the date of this statement. (*The FHA appraised value does not establish sales price.*)" (Emphasis in original.)

Respondents moved into the house on July 10, 1957. According to their testimony, they had previously inspected the house "quite carefully," and had found "absolutely nothing which would indicate the necessity for any redecoration at all." The house was "immaculately clean" and the walls and ceilings "looked fine." However, within a month after respondents moved in, substantial cracks developed in the ceilings and in the interior and exterior walls throughout the house. When building repair contractors were unable to ascertain the cause of the cracks, the original builder of the house and four FHA field inspectors were summoned, and a thorough investigation was made by them. By drilling a hole through the concrete floor of the basement, it was discovered that the subsoil was composed of a type of clay which becomes pliable when moist. Due to poor drainage conditions on the surface, water had seeped into the clay, causing it to shift beneath the foundations of the house and to produce the cracks which had appeared in the walls and ceilings.

Ten months thereafter, respondents commenced this action against the Government, under the Federal Tort Claims Act, in the United States District Court for the Eastern District of Virginia, seeking recovery of the difference between the fair market value of the property and the purchase price of $24,000. The complaint alleged that the FHA's inspection and appraisal of the property for mortgage insurance purposes had been conducted negligently; that respondents were justified in relying upon the results of that inspection and appraisal; and that they "would not have purchased the property for

$24,000 but for the carelessness and negligence of [FHA]."

After trial, the District Court found [10] that respondents "in good faith relied upon the [FHA's] appraisal in consummating their contract of purchase," and that "reasonable care by a qualified appraiser would have warned" respondents of the "serious structural defects" in the house which had been "preponderantly proved." On that basis, the court adjudged the Government liable in the amount of $8,000, which it found to be the difference between the property's fair market value at the time of sale ($16,000) and the purchase price ($24,000).

On appeal, the judgment was affirmed by the Court of Appeals for the Fourth Circuit, 281 F. 2d 596, over the Government's sedulous objection that recovery was barred by 28 U. S. C. § 2680 (h), which excepts from the coverage of the Tort Claims Act "[a]ny claim arising out of . . . misrepresentation." Because of the importance of the question, and to resolve an apparent conflict between the Fourth Circuit's decision and the holdings of other Circuits uniformly construing the "misrepresentation" exception of § 2680 (h) to preclude recovery on closely analogous facts,[11] we granted certiorari. 364 U. S. 926. We have concluded that the interpretation adopted by the Fourth Circuit is erroneous, and that the Government must be absolved from liability.

In its complete form, § 2680 (h) excludes recovery under the Federal Tort Claims Act upon "[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, *misrepresentation, deceit,* or interference with contract rights." (Emphasis added.) The Government's

[10] There is no right to a jury trial under the Tort Claims Act. 28 U. S. C. § 2402.

[11] The cases are cited and discussed at pp. 702–705, *infra.*

position is that, since Congress employed both the terms "misrepresentation" and "deceit" in § 2680 (h), it clearly meant to exclude claims arising out of negligent, as well as deliberate, misrepresentation; and therefore, even assuming that the District Court correctly found that the inaccurate FHA appraisal in this case resulted from a negligent inspection, and that respondents relied upon that appraisal to their detriment,[12] the claim must nevertheless fail as one "arising out of . . . [negligent] misrepresentation."

We are in accord with the view urged by the Government, and unanimously adopted by all Circuits which have previously had occasion to pass on the question, that § 2680 (h) comprehends claims arising out of negligent, as well as willful, misrepresentation.

The leading precedent has been the Second Circuit's decision in *Jones* v. *United States,* 207 F. 2d 563, which involved a statement issued to the plaintiffs by the United States Geological Survey erroneously estimating the oil-producing capacity of certain land. In reliance upon that statement, plaintiffs sold securities representing oil and gas rights in the land for less than their actual value, and later sought to recoup their loss from the Government under the Tort Claims Act on a complaint alleging negligent misrepresentation. Affirming a dismissal of the complaint, the Second Circuit tersely pointed out that § 2680 (h) applies to both "misrepresentation" and "deceit," and, "[a]s 'deceit' means fraudulent misrepresentation, 'misrepresentation' must have been meant to include negligent misrepresentation, since otherwise the word 'misrepresentation' would be duplicative." 207 F. 2d, at 564. Following this interpretation, in an unbroken line, are the cases of *National Mfg. Co.* v. *United States,*

[12] Neither in the Court of Appeals, nor in this Court, has the Government chosen to contest these findings.

210 F. 2d 263 (C. A. 8th Cir.); *Clark* v. *United States,* 218 F. 2d 446 (C. A. 9th Cir.); *Miller Harness Co.* v. *United States,* 241 F. 2d 781 (C. A. 2d Cir.); *Anglo-American Corp.* v. *United States,* 242 F. 2d 236 (C. A. 2d Cir.); *Hall* v. *United States,* 274 F. 2d 69 (C. A. 10th Cir.). In accord also are *Social Security Adm'n* v. *United States,* 138 F. Supp. 639 (D. C. D. Md.), and *United States* v. *Van Meter,* 149 F. Supp. 493 (D. C. N. D. Cal.).

Throughout this line of decisions, the argument has been made by plaintiffs, and consistently rejected by the courts, until this case, that the bar of § 2680 (h) does not apply when the gist of the claim lies in *negligence* underlying the inaccurate representation, *i. e.,* when the claim is phrased as one "arising out of" negligence rather than "misrepresentation." But this argument, as was forcefully demonstrated by the Tenth Circuit in *Hall* v. *United States, supra,* is nothing more than an attempt to circumvent § 2680 (h) by denying that it applies to negligent misrepresentation. In the *Hall* case, it was alleged that agents of the Department of Agriculture had negligently inspected the plaintiff's cattle and, as a result, mistakenly reported that the cattle were diseased. Relying upon that report, plaintiff sold the cattle at less than their fair value, and sought recovery from the Government of his loss on the ground that it had been caused by the negligent inspection underlying the agents' report, rather than by the report itself. The Tenth Circuit rejected the claim, stating:

> "We must then look beyond the literal meaning of the language to ascertain the real cause of complaint. . . . Plaintiff's loss came about when the Government agents misrepresented the condition of the cattle, telling him they were diseased when, in fact, they were free from disease. . . . This stated a cause of action predicated on a misrepresentation.

> Misrepresentation as used in the exclusionary provision [of § 2680 (h)] was meant to include negligent misrepresentation." 274 F. 2d, at 71.[13]

In the instant case, the Fourth Circuit took the opposite view, and held that respondents could recover on the sole basis of the underlying negligence. Although it agreed that § 2680 (h) embraces both "negligent" and "willful" misrepresentation, and that respondents' claim "might form the basis of an action for misrepresentation under general common-law principles," 281 F. 2d, at 601, it deemed § 2680 (h) inapplicable here for the reason that the misrepresentation was "merely incidental" to the "gravamen" of the claim, *i. e.*, "the careless making of an excessive appraisal so that [respondents were] . . . deceived and suffered substantial loss." *Id.*, at 602.

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[13] In *Anglo-American & Overseas Corp.* v. *United States*, 242 F. 2d 236, the Second Circuit analyzed a similar claim and exposed its true basis: "[Plaintiff] contracted to sell tomato paste to the United States, which required as a condition precedent to its acceptance of the paste that it satisfy the standards of the Food and Drug Administration. The paste was imported; and the Food and Drug Administration, after sampling it, issued 'release notices' that notified Customs officers that the tomato paste could enter the country. [Plaintiff] then accepted delivery. When it in turn delivered the paste to the government, federal officials once again inspected the paste, found that it did not satisfy the standards of the Food and Drug Administration, and ordered it destroyed. [Plaintiff] sues now on the ground that the negligence of officials of the Food and Drug Administration in sampling the tomato paste and in issuing the 'release notices' induced it to accept the paste and thus suffer damages.

"This claim, it is clear, 'arose out of' the assertedly negligent representation of the quality of the tomato paste by federal employees. Such a claim is barred by . . . Section 2680 (h) . . . [which excepts] from liability negligent as well as intentional misrepresentation." *Id.*, at 237.

Since § 226 of the National Housing Act [14] requires that a seller of property approved for FHA mortgage insurance "shall agree to deliver, prior to the sale of the property, to the person purchasing such [property], a written statement setting forth the amount of the [FHA] appraised value . . . ," the Fourth Circuit reasoned that the FHA appraisal procedure was designed to protect prospective home purchasers; that the Government (through the FHA) therefore "owed a specific duty" to respondents to make a careful appraisal; and that "if the government assumes a duty and negligently performs it, a party injured thereby may recover damages from the United States even though the careless performance of the duty may have been accompanied by some misrepresentation of fact." *Id.*, at 599.

Whether or not this analysis accords with the law of States which have seen fit to allow recovery under analogous circumstances,[15] it does not meet the question of

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[14] Note 9, *supra*.

[15] The Fourth Circuit sought primary support from the New York Court of Appeals' decision in *Glanzer* v. *Shepard*, 233 N. Y. 236, 135 N. E. 275, in which the defendants, who were public weighers, were requested by a vendor to weigh certain goods and to issue a certificate of weight to the buyer. The goods were weighed inaccurately, and on the strength of the erroneous weight certificate, the buyer paid an excessive purchase price. In allowing the buyer to recover from defendants, the New York court looked primarily to the negligence in performing the act of weighing, and stated that defendants were liable both for their "careless words" and their "careless performance of a service." The case has been widely discussed by tort authorities as epitomizing "negligent misrepresentation." See, *e. g.*, 1 Harper and James, Torts, 546–548 (1956); Prosser, Torts, 734, 737 (1941 ed.); Bohlen, Should Negligent Misrepresentations Be Treated as Negligence or Fraud? 18 Va. L. Rev. 703, 708 (1932). *Glanzer* has been followed in a number of States which have broken from the earlier, virtually unanimous, American

whether this claim is outside the intended scope of the Federal Tort Claims Act, which depends solely upon what Congress meant by the language it used in § 2680 (h).

To say, as the Fourth Circuit did, that a claim arises out of "negligence," rather than "misrepresentation," when the loss suffered by the injured party is caused by the breach of a "specific duty" owed by the Government to him, *i. e.*, the duty to use due care in obtaining and communicating information upon which that party may reasonably be expected to rely in the conduct of his economic affairs, is only to state the traditional and commonly understood legal definition of the tort of "negligent misrepresentation," as is clearly, if not conclusively, shown by the authorities set forth in the margin,[16] and

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view subscribing to the English case of *Derry* v. *Peek*, L. R. 14 App. Cas. 337, 58 L. J. Rep. Ch. 864 (1889) (refusing to allow recovery for negligent misrepresentation). See cases cited in 1 Harper and James, Torts, 546, n. 5 (1956). Cf. *Ultramares Corp.* v. *Touche*, 255 N. Y. 170, 174 N. E. 441.

Under the Federal Tort Claims Act, when a claim is not barred by one of the Act's exclusionary provisions, the liability of the Government must be determined "in accordance with the law of the place where the act or omission occurred." 28 U. S. C. § 1346 (b). The Fourth Circuit's opinion, although it concluded that § 2680 (h) did not bar respondents' claim, did not indicate whether Virginia law follows the New York rule of *Glanzer* v. *Shepard*, *supra*. In view of our conclusion that § 2680 (h) applies, we need not explore this question.

[16] The American Law Institute's Restatement of Torts (1938), c. 22, "Deceit: Business Transactions," Topic 3, "Negligent Misrepresentations," states as follows:

"§ 552. Information Negligently Supplied for the Guidance of Others.

"One who in the course of his business or profession supplies information for the guidance of others in their business transactions is

which there is every reason to believe Congress had in mind when it placed the word "misrepresentation" before the word "deceit" in § 2680 (h). As the Second Circuit observed in *Jones* v. *United States, supra,* "deceit" alone would have been sufficient had Congress intended only to except deliberately false representations.[17] Certainly there is no warrant for assuming that Congress was unaware of established tort definitions when it enacted the Tort Claims Act in 1946, after spending "some twenty-eight years of congressional drafting and redrafting, amendment and counter-amendment." *United States*

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subject to liability for harm caused to them by their reliance upon the information if

"(a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and

"(b) the harm is suffered

"(i) by the person or one of the class of persons for whose guidance the information was supplied, and

"(ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith."

Prosser, Torts (1941 ed.), c. 16, "Misrepresentation," § 87, "Basis of Responsibility," states:

"Responsibility for misrepresentation may be divided into the usual tort classifications. It may rest upon:

"a. An intent to deceive, consisting of belief that the representation is false . . . . [S]uch an intent is required for the action of deceit.

"b. Negligence in obtaining information or in making the representation. . . .

"c. A policy holding the maker strictly responsible for the truth of the representation . . . ."

See also Bohlen, Misrepresentation as Deceit, Negligence, or Warranty, 42 Harv. L. Rev. 733, 735–739 (1929); 23 Am. Jur., Fraud and Deceit, § 126, "Negligent Representations" (1939).

[17] See 2 Harper and James, Torts, § 29.13, The Federal Tort Claims Act: Exceptions to Liability, p. 1655 (1956).

v. *Spelar*, 338 U. S. 217, 219–220. Moreover, as we have said in considering other aspects of the Act: "There is nothing in the Tort Claims Act which shows that Congress intended to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Indian Towing Co.* v. *United States*, 350 U. S. 61, 68.

Regarding the Court of Appeals' assertion that the Government owed respondents a "specific duty" to make and communicate an accurate appraisal of the property, by virtue of the provisions of the National Housing Act, we have carefully examined the rather extensive legislative history of that statute, giving particular attention to § 226 thereof,[18] and have found nothing from which we may reasonably infer that Congress intended, in a case such as this, to limit or suspend the application of the "misrepresentation" exception of the Tort Claims Act. Long before § 226 was added to the National Housing Act, in 1954, requiring sellers to inform prospective buyers of FHA-appraised value, it had been recognized in Congress that FHA appraisals would be a matter of public record, and would thus inure, incidentally, to the benefit of prospective home purchasers, by affording them the "benefit of knowing the appraised value set upon the property . . . by a trained valuator acting in accordance with a procedure designed to reduce to a minimum, errors that might result from casual or hasty conclusions." [19]

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[18] 78 Cong. Rec. 11980 *et seq.;* 1st Annual Report of FHA (1935) (*passim*); 100 Cong. Rec. 12349–12360; S. Rep. No. 1472, 83d Cong., 2d Sess.; H. R. Rep. No. 1429, 83d Cong., 2d Sess.; H. R. Conf. Rep. No. 2271, 83d Cong., 2d Sess.; Hearings Before the Senate Committee on Banking and Currency on the Housing Act of 1954, 83d Cong., 2d Sess.; Hearings Before the House Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess.

[19] First Annual Report of FHA 17 (1935). See also 90 Cong. Rec. A2985; 78 Cong. Rec. 11981.

But at the same time, it was repeatedly emphasized that the primary and predominant objective of the appraisal system was the "protection of the Government and its insurance funds"; [20] that the mortgage insurance program was not designed to insure anything other than the repayment of loans made by lender-mortgagees; [21] and that "there is no legal relationship between the FHA and the individual mortgagor." [22] Never once was it even intimated that, by an FHA appraisal, the Government would, in any sense, represent or guarantee to the purchaser that he was receiving a certain value for his money.

Nor is there any indication that Congress intended, by its 1954 addition of § 226, to modify the legislation's fundamental design from a system of mortgage repayment insurance to one of guaranty or warranty to the purchaser of value received. On its face, § 226 goes no further than to require that a seller of property approved for FHA mortgage insurance shall furnish to the buyer, prior to sale, a written statement disclosing the FHA-appraised value.[23] That Congress did not thereby intend to convert the FHA appraisal into a warranty of value, or otherwise to extend to the purchaser any actionable right of redress against the Government in the event of a faulty appraisal, was made irrefutably clear in the Committee Hearings in both Houses of Congress, the pertinent excerpts from which are set forth in the margin.[24]

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[20] H. R. Conf. Rep. No. 2271, 83d Cong., 2d Sess., p. 66.

[21] 78 Cong. Rec. 11981; 1st Annual Report of FHA 15 (1935).

[22] H. R. Conf. Rep. No. 2271, 83d Cong., 2d Sess., pp. 66–67.

[23] Note 9, *supra*.

[24] It was stated by Representative Dollinger, in the Hearings before the Subcommittee on Housing of the House Committee on Banking and Currency on "Housing Constructed Under VA and FHA Programs," 82d Cong., 2d Sess., at 163:

"The Government did not guarantee, on your getting the home, that the home would be in good condition. As I pointed out before,

Moreover, it is not unreasonable to suppose that, at the time § 226 was adopted, Congress was aware of the "misrepresentation" exception in the Tort Claims Act, and that it had been construed by the courts to include "negligent misrepresentation." [25]

The compulsory disclosure provision of § 226 is but one of numerous instances in which Congress has relegated to a governmental agency the duty either to disclose directly, or to require private persons to disclose, information for the assistance and guidance of other persons in the conduct of their economic and commercial affairs. In practically all such instances, it may be said that the Government owes a "specific duty" to obtain and communicate information carefully, lest the intended recipient be misled to his financial harm. While we do not condone carelessness by government employees in gathering and promulgating such information, neither

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there has been a misconception of the idea. The Government never approved the building. All it says is that the FHA loans are guaranteed to the builder or to the bank."

In the Hearings before the Senate Committee on Banking and Currency on Housing Act of 1954, 83d Cong., 2d Sess., at 1402–1403, the following colloquy was recorded between Senator Bennett and Home Finance Administrator Cole:

"Mr. COLE: . . . I agree with the Senator that the home buyer should understand that the Federal Government is not guaranteeing his home.

"Senator BENNETT: That is correct. . . . The idea of the inspection service under title II is to protect the Federal Government, which undertakes to insure the loan. The fact that the inspection is made, provides collateral benefits to the property owner. There is no question about that. But in the last analysis the property owner cannot say to the Federal Government, 'Well, your inspector inspected my house, and now look what's happened; therefore, you are responsible; therefore, you must come down here and fix it up.'"

[25] *Jones* v. *United States, supra,* and *National Mfg. Co.* v. *United States, supra,* had both been decided, by the Second and Eighth Circuits, respectively, when Congress enacted § 226 in 1954.

can we justifiably ignore the plain words Congress has used in limiting the scope of the Government's tort liability.[26]

It follows that respondents' claim is one "arising out of . . . misrepresentation," within the meaning of § 2680 (h), and hence is not actionable against the Government under the Tort Claims Act. Accordingly, the judgment below must be

Reversed.

MR. JUSTICE DOUGLAS dissents.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

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[26] Our conclusion neither conflicts with nor impairs the authority of *Indian Towing Co.* v. *United States,* 350 U. S. 61, which held cognizable a Torts Act claim for property damages suffered when a vessel ran aground as a result of the Coast Guard's allegedly negligent failure to maintain the beacon lamp in a lighthouse. Such a claim does not "arise out of . . . misrepresentation," any more than does one based upon a motor vehicle operator's negligence in giving a misleading turn signal. As Dean Prosser has observed, many familiar forms of negligent conduct may be said to involve an element of "misrepresentation," in the generic sense of that word, but "[s]o far as misrepresentation has been treated as giving rise in and of itself to a distinct cause of action in tort, it has been identified with the common law action of deceit," and has been confined "very largely to the invasion of interests of a financial or commercial character, in the course of business dealings." Prosser, Torts, § 85, "Remedies for Misrepresentation," at 702–703 (1941 ed.). See also 2 Harper and James, Torts, § 29.13, at 1655 (1956).

LURK *v.* UNITED STATES.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 669. Argued May 4–5, 1961.—Decided May 29, 1961.

Petitioner applied to a Federal Court of Appeals for leave to appeal *in forma pauperis* from his robbery conviction, on the ground, *inter alia*, that it was unconstitutional because his trial in a Federal District Court was presided over by a retired judge of the Court of Customs and Patent Appeals, who had retired before 1958. Leave was denied by the Court of Appeals without opinion. *Held:* The judgment is reversed and the case is remanded on the authority of *Ellis* v. *United States*, 356 U. S. 674.

Reversed and remanded.

Eugene Gressman argued the cause and filed a brief for petitioner.

Oscar H. Davis argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Philip R. Monahan.*

By special leave of Court, *Francis M. Shea* argued the cause for the Judges of the Court of Claims, as *amici curiae.* With him on the brief was *Richard T. Conway.*

Bennett Boskey filed a brief for Mark Coppedge, Jr., as *amicus curiae,* urging reversal.

PER CURIAM.

The judgment of the Court of Appeals is reversed and the case is remanded to that court. *Ellis* v. *United States*, 356 U. S. 674.

MR. JUSTICE FRANKFURTER, whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

In my view *Ellis* v. *United States*, 356 U. S. 674, on the basis of which the case is sent back to the Court of

Appeals, does not fit the facts and circumstances of this case.

In support of his contention that he was wrongfully denied the right to appeal *in forma pauperis*, petitioner presents for our consideration two grounds for reversal of his conviction of robbery in the United States District Court for the District of Columbia. The first contention, concerning the admission at his trial of allegedly prejudicial evidence, is so lacking in merit as to be plainly frivolous. It would not justify an appeal *in forma pauperis*. But petitioner also raises a jurisdictional question, *viz.*, whether he could constitutionally be tried by a court presided over by a retired judge of the Court of Customs and Patent Appeals. This question, therefore, would have warranted review by the Court of Appeals.

Solution of this problem will call into consideration a number of subsidiary questions. What are the characteristics of an Article III court? Is the Court of Customs and Patent Appeals an Article III court? If so, when did it become such a court? Assuming *arguendo* that the Court of Customs and Patent Appeals has been an Article III court only since 1958 (when Congress enacted legislation conferring that status), what is the bearing of this fact on the status of a judge who retired from the court prior to that time?

These are not questions on which, with all due respect, a lower court can be of effective assistance to this Court. They do not involve the evaluation of evidence or the application of rules of local law or special familiarity and experience with the materials and the underlying considerations on which judgment must be based. On the contrary, the constitutional history and the cases upon which the decision ultimately must turn are the special concern of this Court. Indeed, the questions posed would be entirely suitable for certification to this Court by a lower

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appellate court. See 28 U. S. C. § 1254. Cf. *United States* v. *Mayer*, 235 U. S. 55. Furthermore, the administration of justice in the federal courts demands a speedy disposition of this dispute. Until it is settled, assignment of retired judges to help clear dockets in federal courts under a litigious cloud will be hampered by uncertainty.

Nothing could be more obvious than that the Court of Appeals, no matter how it may decide the question now put in its keeping, will have it only temporarily. The inevitable final destination of the case is this Court. Decision here should not be delayed by wastefully time-consuming remand to the Court of Appeals of a question that is already before us.

HERRON *v.* UNITED STATES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON.

No. 791. Decided May 29, 1961.

Appeal dismissed.
Reported below: —— F. Supp. ——.

Appellant *pro se*.

Solicitor General Cox, Assistant Attorney General Orrick and *Alan S. Rosenthal* for the United States.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

HOLEKAMP ET AL. *v.* HOLEKAMP LUMBER CO. ET AL.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 870. Decided May 29, 1961.

Appeal dismissed for want of a substantial federal question.
Reported below: 340 S. W. 2d 678.

Donald E. Fahey for appellants.

Eugene H. Buder for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

HOLT ET AL. *v.* OKLAHOMA.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF OKLAHOMA.

No. 821. Decided May 29, 1961.

Appeal dismissed and certiorari denied.

Reported below: 357 P. 2d 574.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

JANKO *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 380, Misc. Decided May 29, 1961.

Certiorari granted; judgment reversed; and case remanded for new trial.

Reported below: 281 F. 2d 156.

Norman S. London and *Sidney M. Glazer* for petitioner.

Solicitor General Rankin, Assistant Attorney General Rice and *Meyer Rothwacks* for the United States.

PER CURIAM.

Upon consideration of the confession of error by the Solicitor General and an examination of the entire record, the motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed and the case is remanded to the District Court for a new trial.

Syllabus.

IRVIN *v.* DOWD, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 41. Argued November 9, 1960.—
Decided June 5, 1961.

Petitioner was tried in an Indiana State Court, convicted of murder, and sentenced to death. Six murders had been committed in the vicinity of Evansville, Ind., and they were extensively covered by news media in the locality, which aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County. Shortly after petitioner was arrested, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases, which were intensively publicized, stating that petitioner had confessed to the six murders. When petitioner was indicted in Vanderburgh County, counsel appointed to defend him immediately sought a change of venue, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against petitioner, his counsel sought a change of venue from that County to a county sufficiently removed from the Evansville locality to permit an unprejudiced and fair trial; but this was denied. At the trial, the jury panel consisted of 430 persons; 268 of these were excused for cause as having fixed opinions as to the guilt of petitioner; and 8 of the 12 who finally served on the jury admitted that they thought petitioner was guilty, but each indicated that, notwithstanding his opinion, he could render an impartial verdict. After petitioner's conviction had been sustained by the State Supreme Court, he applied to a Federal District Court for a writ of habeas corpus, which was denied. *Held:* Petitioner was not accorded a fair and impartial trial, to which he was entitled under the Due Process Clause of the Fourteenth Amendment; his conviction is void; the judgment denying habeas corpus is vacated; and the case is remanded to the District Court for further proceedings affording the State a reasonable time to retry petitioner. Pp. 718–729.

(a) Since the State Supreme Court has held that, where an attempt has been made to secure an impartial jury by a change in venue but it appears that such a jury could not be obtained in the

county to which the venue was changed, it is the duty of the court to grant a second change of venue in order to afford the accused a trial by an impartial jury, a state statute purporting to permit only one change of venue is not, on its face, subject to attack on due process grounds. Pp. 720–721.

(b) Failure of a State to accord a fair hearing to one accused of a crime violates the Due Process Clause of the Fourteenth Amendment; and a trial by jury is not fair unless the jury is impartial. Pp. 721–722.

(c) In the circumstances of this case, it was the duty of the Federal Court of Appeals to evaluate independently the *voir dire* testimony of the impaneled jurors. Pp. 722–723.

(d) On the record in this case, it cannot be said that petitioner was accorded a fair trial by an impartial jury. Pp. 723–728.

(e) Petitioner is entitled to be freed from detention and sentence of death pursuant to the void judgment; but he is still subject to custody under the indictment; he may be retried under this or another indictment; and the District Court should allow the State a reasonable time in which to retry him. Pp. 728–729.

271 F. 2d 552, judgment vacated and cause remanded.

James D. Lopp and *Theodore Lockyear, Jr.* argued the cause for petitioner. With them on the brief was *James D. Nafe.*

Richard M. Givan, Assistant Attorney General of Indiana, argued the cause for respondent. With him on the brief was *Edwin K. Steers,* Attorney General.

Mr. Justice Clark delivered the opinion of the Court.

This is a habeas corpus proceeding, brought to test the validity of petitioner's conviction of murder and sentence of death in the Circuit Court of Gibson County, Indiana. The Indiana Supreme Court affirmed the conviction in *Irvin* v. *State,* 236 Ind. 384, 139 N. E. 2d 898, and we denied direct review by certiorari "without prejudice to filing for federal habeas corpus after exhausting state remedies." 353 U. S. 948. Petitioner immediately

sought a writ of habeas corpus, under 28 U. S. C. § 2241,[1] in the District Court for the Northern District of Indiana, claiming that his conviction had been obtained in violation of the Fourteenth Amendment in that he did not receive a fair trial. That court dismissed the proceeding on the ground that petitioner had failed to exhaust his state remedies. 153 F. Supp. 531. On appeal, the Court of Appeals for the Seventh Circuit affirmed the dismissal. 251 F. 2d 548. We granted certiorari, 356 U. S. 948, and remanded to the Court of Appeals for decision on the merits or remand to the District Court for reconsideration. 359 U. S. 394. The Court of Appeals retained jurisdiction and decided the claim adversely to petitioner. 271 F. 2d 552. We granted certiorari, 361 U. S. 959.

As stated in the former opinion, 359 U. S., at 396–397:

> "The constitutional claim arises in this way. Six murders were committed in the vicinity of Evansville, Indiana, two in December 1954, and four in March 1955. The crimes, extensively covered by news media in the locality, aroused great excitement and indignation throughout Vanderburgh County, where Evansville is located, and adjoining Gibson County, a rural county of approximately 30,000 inhabitants. The petitioner was arrested on April 8, 1955. Shortly thereafter, the Prosecutor of Vanderburgh County and Evansville police officials issued press releases,

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[1] Section 2241 provides in pertinent part:

"(a) Writs of habeas corpus may be granted by the . . . district courts . . . within their respective jurisdictions. . . .

. . . . . .

"(c) The writ of habeas corpus shall not be extended to a prisoner unless . . .

. . . . . .

"(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."

> which were intensively publicized, stating that the petitioner had confessed to the six murders. The Vanderburgh County Grand Jury soon indicted the petitioner for the murder which resulted in his conviction. This was the murder of Whitney Wesley Kerr allegedly committed in Vanderburgh County on December 23, 1954. Counsel appointed to defend petitioner immediately sought a change of venue from Vanderburgh County, which was granted, but to adjoining Gibson County. Alleging that the widespread and inflammatory publicity had also highly prejudiced the inhabitants of Gibson County against the petitioner, counsel, on October 29, 1955, sought another change of venue, from Gibson County to a county sufficiently removed from the Evansville locality that a fair trial would not be prejudiced. The motion was denied, apparently because the pertinent Indiana statute allows only a single change of venue."

During the course of the *voir dire* examination, which lasted some four weeks, petitioner filed two more motions for a change of venue and eight motions for continuances. All were denied.

At the outset we are met with the Indiana statute providing that only one change of venue shall be granted "from the county" wherein the offense was committed.[2] Since petitioner had already been afforded one change of venue, and had been denied further changes solely on the basis of the statute, he attacked its constitutionality. The

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[2] Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9–1305, provides in pertinent part: "When affidavits for a change of venue are founded upon excitement or prejudice in the county against the defendant, the court, in all cases not punishable by death, may, in its discretion, and in all cases punishable by death, shall grant a change of venue to the most convenient county. . . . Provided, however, That only one [1] change of venue from the judge and only one [1] change from the county shall be granted."

Court of Appeals upheld its validity. However, in the light of *Gannon* v. *Porter Circuit Court,* 239 Ind. 637, 159 N. E. 2d 713, we do not believe that argument poses a serious problem. There the Indiana Supreme Court held that if it was "made to appear after attempt has actually been made to secure an impartial jury that such jury could not be obtained in the county of present venue . . . it becomes the duty of the judiciary to provide to every accused a public trial by an impartial jury, even though to do so the court must grant a second change of venue and thus contravene [the statute] . . . ." 239 Ind., at 642, 159 N. E. 2d, at 715. The prosecution attempts to distinguish that case on the ground that the District Attorney there conceded that a fair trial could not be had in La Porte County and that the court, therefore, properly ordered a second change of venue despite the language of the statute. Inasmuch as the statute says nothing of concessions, we do not believe that the Indiana Supreme Court conditions the duty of the judiciary to transfer a case to another county solely upon the representation by the prosecutor—regardless of the trial court's own estimate of local conditions—that an impartial jury may not be impaneled. As we read *Gannon,* it stands for the proposition that the necessity for transfer will depend upon the totality of the surrounding facts. Under this construction the statute is not, on its face, subject to attack on due process grounds.

England, from whom the Western World has largely taken its concepts of individual liberty and of the dignity and worth of every man, has bequeathed to us safeguards for their preservation, the most priceless of which is that of trial by jury. This right has become as much American as it was once the most English. Although this Court has said that the Fourteenth Amendment does not demand the use of jury trials in a State's criminal procedure, *Fay* v. *New York,* 332 U. S. 261; *Palko* v. *Connecticut,* 302 U. S. 319, every State has constitutionally provided trial by

jury. See Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions, 578–579 (1959). In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process. *In re Oliver,* 333 U. S. 257; *Tumey* v. *Ohio,* 273 U. S. 510. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison,* 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as "indifferent as he stands unsworne." Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville,* 362 U. S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 (1807).[3] "The theory of the law is that a juror who has formed an opinion cannot be impartial." *Reynolds* v. *United States,* 98 U. S. 145, 155.

It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vicinity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case.

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[3] "[L]ight impressions which may fairly be supposed to yield to the testimony that may be offered; which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions, which will close the mind against the testimony that may be offered in opposition to them; which will combat that testimony and resist its force, do constitute a sufficient objection to him."

This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court. *Spies* v. *Illinois,* 123 U. S. 131; *Holt* v. *United States,* 218 U. S. 245; *Reynolds* v. *United States, supra.*

The adoption of such a rule, however, "cannot foreclose inquiry as to whether, in a given case, the application of that rule works a deprivation of the prisoner's life or liberty without due process of law." *Lisenba* v. *California,* 314 U. S. 219, 236. As stated in *Reynolds,* the test is "whether the nature and strength of the opinion formed are such as in law necessarily . . . raise the presumption of partiality. The question thus presented is one of mixed law and fact . . . ." At p. 156. "The affirmative of the issue is upon the challenger. Unless he shows the actual existence of such an opinion in the mind of the juror as will raise the presumption of partiality, the juror need not necessarily be set aside . . . . If a positive and decided opinion had been formed, he would have been incompetent even though it had not been expressed." At p. 157. As was stated in *Brown* v. *Allen,* 344 U. S. 443, 507, the "so-called mixed questions or the application of constitutional principles to the facts as found leave the duty of adjudication with the federal judge." It was, therefore, the duty of the Court of Appeals to independently evaluate the *voir dire* testimony of the impaneled jurors.

The rule was established in *Reynolds* that "[t]he finding of the trial court upon that issue [the force of a prospective juror's opinion] ought not be set aside by a reviewing court, unless the error is manifest." 98 U. S., at

156. In later cases this Court revisited *Reynolds,* citing it in each instance for the proposition that findings of impartiality should be set aside only where prejudice is "manifest." *Holt* v. *United States, supra; Spies* v. *Illinois, supra; Hopt* v. *Utah,* 120 U. S. 430. Indiana agrees that a trial by jurors having a fixed, preconceived opinion of the accused's guilt would be a denial of due process, but points out that the *voir dire* examination discloses that each juror qualified under the applicable Indiana statute.[4] It is true that the presiding judge personally examined those members of the jury panel whom petitioner, having no more peremptory challenges, insisted should be excused for cause, and that each indicated that notwithstanding his opinion he could render an impartial verdict. But as Chief Justice Hughes observed in *United States* v. *Wood,* 299 U. S. 123, 145–146: "Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests and

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[4] "Challenges for cause.—The following shall be good causes for challenge to any person called as a juror in any criminal trial:

. . . . . .

"Second. That he has formed or expressed an opinion as to the guilt or innocence of the defendant. But if a person called as a juror states that he has formed or expressed an opinion as to the guilt or innocence of the defendant, the court or the parties shall thereupon proceed to examine such juror on oath as to the ground of such opinion; and if it appears to have been founded upon reading newspaper statements, communications, comments or reports, or upon rumors or hearsay, and not upon conversation with witnesses of the transaction, or reading reports of their testimony, or hearing them testify, and the juror states on oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case." Burns' Ind. Stat. Ann., 1956 Replacement Vol., § 9–1504.

procedure is not chained to any ancient and artificial formula."

Here the build-up of prejudice is clear and convincing. An examination of the then current community pattern of thought as indicated by the popular news media is singularly revealing. For example, petitioner's first motion for a change of venue from Gibson County alleged that the awaited trial of petitioner had become the *cause célèbre* of this small community—so much so that curbstone opinions, not only as to petitioner's guilt but even as to what punishment he should receive, were solicited and recorded on the public streets by a roving reporter, and later were broadcast over the local stations. A reading of the 46 exhibits which petitioner attached to his motion indicates that a barrage of newspaper headlines, articles, cartoons and pictures was unleashed against him during the six or seven months preceding his trial. The motion further alleged that the newspapers in which the stories appeared were delivered regularly to approximately 95% of the dwellings in Gibson County and that, in addition, the Evansville radio and TV stations, which likewise blanketed that county, also carried extensive newscasts covering the same incidents. These stories revealed the details of his background, including a reference to crimes committed when a juvenile, his convictions for arson almost 20 years previously, for burglary and by a court-martial on AWOL charges during the war. He was accused of being a parole violator. The headlines announced his police line-up identification, that he faced a lie detector test, had been placed at the scene of the crime and that the six murders were solved but petitioner refused to confess. Finally, they announced his confession to the six murders and the fact of his indictment for four of them in Indiana. They reported petitioner's offer to plead guilty if promised a

99-year sentence, but also the determination, on the other hand, of the prosecutor to secure the death penalty, and that petitioner had confessed to 24 burglaries (the *modus operandi* of these robberies was compared to that of the murders and the similarity noted). One story dramatically relayed the promise of a sheriff to devote his life to securing petitioner's execution by the State of Kentucky, where petitioner is alleged to have committed one of the six murders, if Indiana failed to do so. Another characterized petitioner as remorseless and without conscience but also as having been found sane by a court-appointed panel of doctors. In many of the stories petitioner was described as the "confessed slayer of six," a parole violator and fraudulent-check artist. Petitioner's court-appointed counsel was quoted as having received "much criticism over being Irvin's counsel" and it was pointed out, by way of excusing the attorney, that he would be subject to disbarment should he refuse to represent Irvin. On the day before the trial the newspapers carried the story that Irvin had orally admitted the murder of Kerr (the victim in this case) as well as "the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County, and the slaughter of three members of the Duncan family in Henderson County, Ky."

It cannot be gainsaid that the force of this continued adverse publicity caused a sustained excitement and fostered a strong prejudice among the people of Gibson County. In fact, on the second day devoted to the selection of the jury, the newspapers reported that "strong feelings, often bitter and angry, rumbled to the surface," and that "the extent to which the multiple murders—three in one family—have aroused feelings throughout the area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions. . . ." A few days later the feeling was

described as "a pattern of deep and bitter prejudice against the former pipe-fitter." Spectator comments, as printed by the newspapers, were "my mind is made up"; "I think he is guilty"; and "he should be hanged."

Finally, and with remarkable understatement, the headlines reported that "impartial jurors are hard to find." The panel consisted of 430 persons. The court itself excused 268 of those on challenges for cause as having fixed opinions as to the guilt of petitioner; 103 were excused because of conscientious objection to the imposition of the death penalty; 20, the maximum allowed, were peremptorily challenged by petitioner and 10 by the State; 12 persons and two alternates were selected as jurors and the rest were excused on personal grounds, *e. g.*, deafness, doctor's orders, etc. An examination of the 2,783-page *voir dire* record shows that 370 prospective jurors or almost 90% of those examined on the point (10 members of the panel were never asked whether or not they had any opinion) entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty. A number admitted that, if they were in the accused's place in the dock and he in theirs on the jury with their opinions, they would not want him on a jury.

Here the "pattern of deep and bitter prejudice" shown to be present throughout the community, cf. *Stroble* v. *California,* 343 U. S. 181, was clearly reflected in the sum total of the *voir dire* examination of a majority of the jurors finally placed in the jury box. Eight out of the 12 thought petitioner was guilty. With such an opinion permeating their minds, it would be difficult to say that each could exclude this preconception of guilt from his deliberations. The influence that lurks in an opinion once formed is so persistent that it unconsciously fights detachment from the mental processes of the average man. See *Delaney* v. *United States,* 199 F. 2d 107. Where one's life is at stake—and accounting for the frail-

ties of human nature—we can only say that in the light of the circumstances here the finding of impartiality does not meet constitutional standards. Two-thirds of the jurors had an opinion that petitioner was guilty and were familiar with the material facts and circumstances involved, including the fact that other murders were attributed to him, some going so far as to say that it would take evidence to overcome their belief. One said that he "could not . . . give the defendant the benefit of the doubt that he is innocent." Another stated that he had a "somewhat" certain fixed opinion as to petitioner's guilt. No doubt each juror was sincere when he said that he would be fair and impartial to petitioner, but the psychological impact requiring such a declaration before one's fellows is often its father. Where so many, so many times, admitted prejudice, such a statement of impartiality can be given little weight. As one of the jurors put it, "You can't forget what you hear and see." With his life at stake, it is not requiring too much that petitioner be tried in an atmosphere undisturbed by so huge a wave of public passion and by a jury other than one in which two-thirds of the members admit, before hearing any testimony, to possessing a belief in his guilt. *Stroble* v. *California,* 343 U. S. 181; *Shepherd* v. *Florida,* 341 U. S. 50 (concurring opinion); *Moore* v. *Dempsey,* 261 U. S. 86.

Petitioner's detention and sentence of death pursuant to the void judgment is in violation of the Constitution of the United States and he is therefore entitled to be freed therefrom. The judgments of the Court of Appeals and the District Court are vacated and the case remanded to the latter. However, petitioner is still subject to custody under the indictment filed by the State of Indiana in the Circuit Court of Gibson County charging him with murder in the first degree and may be tried on this or another indictment. The District Court has power, in a habeas corpus proceeding, to "dispose of the

matter as law and justice require." 28 U. S. C. § 2243. Under the predecessors of this section, "this Court has often delayed the discharge of the petitioner for such reasonable time as may be necessary to have him taken before the court where the judgment was rendered, that defects which render discharge necessary may be corrected." *Mahler* v. *Eby,* 264 U. S. 32, 46. Therefore, on remand, the District Court should enter such orders as are appropriate and consistent with this opinion, cf. *Grandsinger* v. *Bovey,* 153 F. Supp. 201, 240, which allow the State a reasonable time in which to retry petitioner. Cf. *Chessman* v. *Teets,* 354 U. S. 156; *Dowd* v. *Cook,* 340 U. S. 206; *Tod* v. *Waldman,* 266 U. S. 113.

Vacated and remanded.

MR. JUSTICE FRANKFURTER, concurring.

Of course I agree with the Court's opinion. But this is, unfortunately, not an isolated case that happened in Evansville, Indiana, nor an atypical miscarriage of justice due to anticipatory trial by newspapers instead of trial in court before a jury.

More than one student of society has expressed the view that not the least significant test of the quality of a civilization is its treatment of those charged with crime, particularly with offenses which arouse the passions of a community. One of the rightful boasts of Western civilization is that the State has the burden of establishing guilt solely on the basis of evidence produced in court and under circumstances assuring an accused all the safeguards of a fair procedure. These rudimentary conditions for determining guilt are inevitably wanting if the jury which is to sit in judgment on a fellow human being comes to its task with its mind ineradicably poisoned against him. How can fallible men and women reach a disinterested verdict based exclusively on what they heard in court when, before they entered the jury box, their

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minds were saturated by press and radio for months preceding by matter designed to establish the guilt of the accused. A conviction so secured obviously constitutes a denial of due process of law in its most rudimentary conception.

Not a Term passes without this Court being importuned to review convictions, had in States throughout the country, in which substantial claims are made that a jury trial has been distorted because of inflammatory newspaper accounts—too often, as in this case, with the prosecutor's collaboration—exerting pressures upon potential jurors before trial and even during the course of trial, thereby making it extremely difficult, if not impossible, to secure a jury capable of taking in, free of prepossessions, evidence submitted in open court. Indeed such extraneous influences, in violation of the decencies guaranteed by our Constitution, are sometimes so powerful that an accused is forced, as a practical matter, to forego trial by jury. See *Maryland* v. *Baltimore Radio Show,* 338 U. S. 912, 915. For one reason or another this Court does not undertake to review all such envenomed state prosecutions. But, again and again, such disregard of fundamental fairness is so flagrant that the Court is compelled, as it was only a week ago, to reverse a conviction in which prejudicial newspaper intrusion has poisoned the outcome. *Janko* v. *United States, ante,* p. 716; see, *e. g., Marshall* v. *United States,* 360 U. S. 310. See also *Stroble* v. *California,* 343 U. S. 181, 198 (dissenting opinion); *Shepherd* v. *Florida,* 341 U. S. 50 (concurring opinion). This Court has not yet decided that the fair administration of criminal justice must be subordinated to another safeguard of our constitutional system—freedom of the press, properly conceived. The Court has not yet decided that, while convictions must be reversed and miscarriages of justice result because the minds of jurors or potential jurors were poisoned, the poisoner is constitutionally protected in plying his trade.

Syllabus.

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

No. 284. Argued April 17, 1961.—
Decided June 5, 1961.

In the bona fide but mistaken belief that a majority of the employees in the appropriate bargaining unit had authorized petitioner union to represent their interests, the union and the employer entered into an agreement under which the employer recognized the union as the exclusive bargaining representative of certain of its employees, although in fact only a minority of those employees had authorized the union to represent their interests. The National Labor Relations Board found that, by extending such recognition, the employer interfered with the organizational rights of its employees in violation of § 8 (a) (1) of the National Labor Relations Act and gave unlawful support to a labor organization in violation of § 8 (a) (2), and that the union violated § 8 (b) (1) (A) by its acceptance of exclusive bargaining authority. The Board ordered the unfair labor practices discontinued and directed the holding of a representation election. The Court of Appeals granted enforcement of the Board's order. *Held:* The Board and the Court of Appeals correctly held that such extension and acceptance of recognition constituted unfair labor practices; the remedy provided was appropriate; and the judgment is affirmed. Pp. 732–740.

(a) A different conclusion is not required by the fact that the union subsequently obtained authorization from a majority of the employees to represent their interests, since the earlier recognition of the minority union was a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative. P. 736.

(b) The agreement was void in its entirety, and it cannot be held valid and enforcible as to those employees who consented to it. Pp. 736–737.

(c) By granting exclusive bargaining status to a union selected by a minority of its employees, thereby impressing that union upon

the nonconsenting majority, the employer violated both § 8 (a) (1) and § 8 (a) (2). Pp. 737–738.

(d) The employer's bona fide belief in the majority status of the union is no defense. Pp. 738–739.

(e) The remedy provided by the Board's order was proper. Pp. 739–740.

108 U. S. App. D. C. 68, 280 F. 2d 616, affirmed.

Charles J. Morris and *Morris P. Glushien* argued the cause for petitioner. With them on the brief were *L. N. D. Wells, Jr.* and *Ruth Weyand.*

Dominick L. Manoli argued the cause for the National Labor Relations Board, respondent. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Stuart Rothman, Norton J. Come, Frederick U. Reel* and *Herman M. Levy.*

Mr. Justice Clark delivered the opinion of the Court.

We are asked to decide in this case whether it was an unfair labor practice for both an employer and a union to enter into an agreement under which the employer recognized the union as exclusive bargaining representative of certain of his employees, although in fact only a minority of those employees had authorized the union to represent their interests. The Board found[1] that by extending such recognition, even though done in the good-faith belief that the union had the consent of a majority of employees in the appropriate bargaining unit, the employer interfered with the organizational rights of his employees in violation of § 8 (a) (1) of the National Labor Relations Act and that such recognition also constituted unlawful support to a labor organization in vio-

[1] Except for filing an answer, the employer, Bernhard-Altmann Texas Corporation, did not resist enforcement of the Board's order and has not sought review in this Court.

lation of § 8 (a)(2).[2] In addition, the Board found that the union violated § 8 (b)(1)(A)[3] by its acceptance of exclusive bargaining authority at a time when in fact it did not have the support of a majority of the employees, and this in spite of its bona fide belief that it did. Accordingly, the Board ordered the unfair labor practices discontinued and directed the holding of a representation election. The Court of Appeals, by a divided vote, granted enforcement, 108 U. S. App. D. C. 68, 280 F. 2d 616. We granted certiorari. 364 U. S. 811. We agree with the Board and the Court of Appeals that such extension and acceptance of recognition constitute unfair labor practices, and that the remedy provided was appropriate.

In October 1956 the petitioner union initiated an organizational campaign at Bernhard-Altmann Texas Corporation's knitwear manufacturing plant in San Antonio, Texas. No other labor organization was similarly engaged at that time. During the course of that campaign, on July 29, 1957, certain of the company's Topping Department employees went on strike in protest against a wage reduction. That dispute was in no way related to the union campaign, however, and the organizational efforts were continued during the strike. Some of the

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[2] Section 8 (a)(1) and (2), insofar as pertinent, provide:

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it. . . ." 61 Stat. 140, 29 U. S. C. § 158 (a)(1), (2).

[3] Section 8 (b)(1)(A) provides in pertinent part:

"It shall be an unfair labor practice for a labor organization or its agents—

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7. . . ." 61 Stat. 141, 29 U. S. C. § 158 (b)(1).

striking employees had signed authorization cards solicited by the union during its drive, and, while the strike was in progress, the union entered upon a course of negotiations with the employer. As a result of those negotiations, held in New York City where the home offices of both were located, on August 30, 1957, the employer and union signed a "memorandum of understanding." In that memorandum the company recognized the union as exclusive bargaining representative of "all production and shipping employees." The union representative asserted that the union's comparison of the employee authorization cards in its possession with the number of eligible employees representatives of the company furnished it indicated that the union had in fact secured such cards from a majority of employees in the unit. Neither employer nor union made any effort at that time to check the cards in the union's possession against the employee roll, or otherwise, to ascertain with any degree of certainty that the union's assertion, later found by the Board to be erroneous,[4] was founded on fact rather than upon good-faith assumption. The agreement, containing no union security provisions, called for the ending of the strike and for certain improved wages and conditions of employment. It also provided that a "formal agreement containing these terms" would "be promptly drafted . . . and signed by both parties within the next two weeks."

Thereafter, on October 10, 1957, a formal collective bargaining agreement, embodying the terms of the August 30 memorandum, was signed by the parties. The bargaining unit description set out in the formal contract,

[4] The Board found that as of August 30 the union in fact had authority to represent either 70 employees out of a relevant total of 280, or 158 out of 368, depending upon the criteria used in determining employee eligibility. "Accordingly, the Union could not, under any circumstances, have represented a majority of the employees involved on August 30, 1957." 122 N. L. R. B. 1289, 1291–1292.

although more specific, conformed to that contained in the prior memorandum. It is not disputed that as of execution of the formal contract the union in fact represented a clear majority of employees in the appropriate unit.[5] In upholding the complaints filed against the employer and union by the General Counsel, the Board decided [6] that the employer's good-faith belief that the union in fact represented a majority of employees in the unit on the critical date of the memorandum of understanding was not a defense, "particularly where, as here, the Company made no effort to check the authorization cards against its payroll records." 122 N. L. R. B. 1289, 1292. Noting that the union was "actively seeking recognition at the time such recognition was granted," and that "the Union was [not] the passive recipient of an unsolicited gift bestowed by the Company," the Board found that the union's execution of the August 30 agreement was a "direct deprivation" of the nonconsenting majority employees' organizational and bargaining rights. At pp. 1292, 1293, note 9. Accordingly, the Board ordered the employer to withhold all recognition from the union and to cease giving effect to agreements entered into with the union; [7] the union was ordered to cease acting as bargaining representative of any of the employees until such time as a Board-conducted election demonstrated its majority status, and to refrain from seeking to enforce the agreements previously entered.

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[5] The Court of Appeals considered irrelevant the achievement of majority status during the period that the union maintained the unlawful agreement. 280 F. 2d 616, 619, note 3.

[6] Member Fanning agreed with a majority of the Board that the employer violated § 8 (a) (1) and (2), but dissented as to the finding of union violation of § 8 (b) (1) (A). 122 N. L. R. B. 1289, 1297.

[7] However, the terms and conditions of employment fixed by the agreement were not required to be varied or abandoned. We take it that the Board's order restraining the union and employer from dealing will, in any event, terminate after the election is held.

The Court of Appeals found it difficult to "conceive of a clearer restraint on the employees' right of self-organization than for their employer to enter into a collective-bargaining agreement with a minority of the employees." 280 F. 2d, at 619. The court distinguished our decision in *Labor Board* v. *Drivers Local Union No. 639*, 362 U. S. 274, on the ground that there was involved here neither recognitional nor organizational picketing. The court held that the bona fides of the parties was irrelevant except to the extent that it "was arrived at through an adequate effort to determine the true facts of the situation." At p. 622.

At the outset, we reject as without relevance to our decision the fact that, as of the execution date of the formal agreement on October 10, petitioner represented a majority of the employees. As the Court of Appeals indicated, the recognition of the minority union on August 30, 1957, was "a *fait accompli* depriving the majority of the employees of their guaranteed right to choose their own representative." 280 F. 2d, at 621. It is, therefore, of no consequence that petitioner may have acquired by October 10 the necessary majority if, during the interim, it was acting unlawfully. Indeed, such acquisition of majority status itself might indicate that the recognition secured by the August 30 agreement afforded petitioner a deceptive cloak of authority with which to persuasively elicit additional employee support.

Nor does this case directly involve a strike. The strike which occurred was in protest against a wage reduction and had nothing to do with petitioner's quest for recognition. Likewise, no question of picketing is presented. Lastly, the violation which the Board found was the grant by the employer of exclusive representation status to a minority union, as distinguished from an employer's bargaining with a minority union for its members only. Therefore, the exclusive representation provision is the

vice in the agreement, and discussion of "collective bargaining," as distinguished from "exclusive recognition," is pointless.[8] Moreover, the insistence that we hold the agreement valid and enforceable as to those employees who consented to it must be rejected. On the facts shown, the agreement must fail in its entirety. It was obtained under the erroneous claim of majority representation. Perhaps the employer would not have entered into it if he had known the facts. Quite apart from other conceivable situations, the unlawful genesis of this agreement precludes its partial validity.

In their selection of a bargaining representative, § 9 (a) of the Wagner Act guarantees employees freedom of choice and majority rule. *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332, 339. In short, as we said in *Brooks* v. *Labor Board,* 348 U. S. 96, 103, the Act placed "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers." Here, however, the reverse has been shown to be the case. Bernhard-Altmann granted exclusive bargaining status to an agency selected by a minority of its employees, thereby impressing that agent upon the nonconsenting majority. There could be no clearer abridgment of § 7 of the Act, assuring employees the right "to bargain collectively through representatives of their own choosing" or "to refrain from" such activity.[9] It follows, without need

[8] Relying upon reference to § 9 decertification proceedings, petitioner contends that such a contract with a minority union does not prevent employees from exercising complete freedom. The availability of such a remedy is doubtful in view of the Board's position that the "contract bar" defense prevents a showing of lack of majority status at the time a contract was made. See *In re Columbia River Salmon & Tuna Packers Assn.*, 91 N. L. R. B. 1424, and cases cited therein.

[9] Section 7 provides:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through repre-

of further demonstration, that the employer activity found present here violated § 8 (a)(1) of the Act which prohibits employer interference with, and restraint of, employee exercise of § 7 rights. Section 8 (a)(2) of the Act makes it an unfair labor practice for an employer to "contribute . . . support" to a labor organization. The law has long been settled that a grant of exclusive recognition to a minority union constitutes unlawful support in violation of that section, because the union so favored is given "a marked advantage over any other in securing the adherence of employees," *Labor Board* v. *Pennsylvania Greyhound Lines,* 303 U. S. 261, 267. In the Taft-Hartley Law, Congress added § 8 (b)(1)(A) to the Wagner Act, prohibiting, as the Court of Appeals held, "unions from invading the rights of employees under § 7 in a fashion comparable to the activities of employers prohibited under § 8 (a)(1)." 280 F. 2d, at 620. It was the intent of Congress to impose upon unions the same restrictions which the Wagner Act imposed on employers with respect to violations of employee rights.[10]

The petitioner, while taking no issue with the fact of its minority status on the critical date, maintains that both Bernhard-Altmann's and its own good-faith beliefs in petitioner's majority status are a complete defense. To countenance such an excuse would place in permissibly careless employer and union hands the power to completely frustrate employee realization of the premise of

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sentatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a)(3)." 61 Stat. 140, 29 U. S. C. § 157.

[10] See S. Rep. No. 105, 80th Cong., 1st Sess. 50 (Supp. Views), I Leg. Hist. (1947) 456; II Leg. Hist. (1947) 1199, 1204, 1207.

the Act—that its prohibitions will go far to assure freedom of choice and majority rule in employee selection of representatives.[11] We find nothing in the statutory language prescribing *scienter* as an element of the unfair labor practices here involved. The act made unlawful by § 8 (a)(2) is employer support of a minority union. Here that support is an accomplished fact. More need not be shown, for, even if mistakenly, the employees' rights have been invaded. It follows that prohibited conduct cannot be excused by a showing of good faith.[12]

This conclusion, while giving the employee only the protection assured him by the Act, places no particular hardship on the employer or the union. It merely requires that recognition be withheld until the Board-conducted election results in majority selection of a representative. The Board's order here, as we might infer from the employer's failure to resist its enforcement, would apparently result in similarly slight hardship upon it. We do not share petitioner's apprehension that holding such conduct unlawful will somehow induce a breakdown, or seriously impede the progress of collective bargaining. If an employer takes reasonable steps to verify union claims, themselves advanced only after careful estimate—precisely what Bernhard-Altmann and petitioner failed to do here—he can readily ascertain their validity and obviate a Board election. We fail to see any onerous burden involved in requiring responsible negotiators to be careful, by cross-checking, for example, well-analyzed employer records with union listings or

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[11] Although it is of no significance to our holding, we note that there was made no reasonable effort to determine whether in fact petitioner represented a majority of the employees.

[12] See *Labor Board* v. *Perfect Circle Co.*, 162 F. 2d 566; *Labor Board* v. *Illinois Tool Works*, 153 F. 2d 811; *McQuay-Norris Mfg. Co.* v. *Labor Board*, 116 F. 2d 748; and cf. *Labor Board* v. *Industrial Cotton Mills*, 208 F. 2d 87.

authorization cards. Individual and collective employee rights may not be trampled upon merely because it is inconvenient to avoid doing so. Moreover, no penalty is attached to the violation. Assuming that an employer in good faith accepts or rejects a union claim of majority status, the validity of his decision may be tested in an unfair labor practice proceeding.[13] If he is found to have erred in extending or withholding recognition, he is subject only to a remedial order requiring him to conform his conduct to the norms set out in the Act, as was the case here. No further penalty results. We believe the Board's remedial order is the proper one in such cases. *Labor Board* v. *District 50, U. M. W.*, 355 U. S. 453.

Affirmed.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting in part.

I agree that, under the statutory scheme, a minority union does not have the standing to bargain for all employees. That principle of representative government extends only to the majority. But where there is no majority union, I see no reason why the minority union should be disabled from bargaining for the minority of the members who have joined it.[1] Yet the order of the Board, now approved, enjoins petitioner union from acting as the exclusive bargaining representative "of any of the employees," and it enjoins the employer from recog-

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[13] Section 8 (a) (5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." 61 Stat. 141, 29 U. S. C. § 158 (a) (5).

[1] The collective bargaining agreement in the present case undertakes to make the union "the sole and exclusive bargaining representative" for all workers in the bargaining unit. Article II. But the agreement also contains a separability clause—that if "any provision" is held "invalid," the remainder of the agreement is not affected. Article XXIX.

nizing the union as the representative of "any of its employees."

We have indicated over and again that, absent an exclusive agency for bargaining created by a majority of workers, a minority union has standing to bargain for its members. In *Virginian R. Co.* v. *Federation,* 300 U. S. 515, 549, note 6, the Court quoted with approval a concession that "If the majority of a craft or class has not selected a representative, the carrier is free to make with anyone it pleases and for any group it pleases contracts establishing rates of pay, rules, or working conditions."

That case was under the Railway Labor Act. But it has been followed under the National Labor Relations Act. In *Edison Co.* v. *Labor Board,* 305 U. S. 197, a union, the Brotherhood of Electrical Workers, was allowed to act as a bargaining representative for the employees who were its members, even though they were a minority. The Court said, ". . . in the absence of such an exclusive agency the employees represented by the Brotherhood, even if they were a minority, clearly had the right to make their own choice." *Id.,* 237. Maintenance of the status of a minority union, until an election was held, might well serve the purpose of protecting commerce "from interruptions and obstructions caused by industrial strife." *Id.,* 237. A decree requiring the employer to cease recognizing the Brotherhood as the exclusive representative of its members was modified:

> "The contracts do not claim for the Brotherhood exclusive representation of the companies' employees but only representation of those who are its members, and the continued operation of the contracts is necessarily subject to the provision of the law by which representatives of the employees for the purpose of collective bargaining can be ascertained in case any question of 'representation' should arise. We construe [the order] as having no more effect

> than to provide that there shall be no interference with an exclusive bargaining agency if one other than the [union] should be established in accordance with . . . the Act." *Id.*, 239.

It was in that tradition that we recently sustained the right of a minority union to picket peacefully to compel recognition. *Labor Board* v. *Drivers Local Union,* 362 U. S. 274. There a minority union sought to compel exclusive representation rights. To be sure, this Court recognized in that case that "tension exists between . . . [the] right to form, join or assist labor organizations and [the] right to refrain from doing so." *Id.*, 280. But when a minority union seeks only to represent its own, what provision of the Act deprives it of its right to represent them, where a majority have not selected another union to represent them?

Judge Learned Hand in *Douds* v. *Local 1250,* 173 F. 2d 764, 770, stated that "the right to bargain collectively and the right to strike and induce others to do so, are derived from the common-law; it is only in so far as something in the Act forbids their exercise that their exercise becomes unlawful." In that case a minority union was recognized as having standing in a grievance proceeding outside the collective bargaining agreement, even where a majority had chosen another union. See *American Foundries* v. *Tri-City Council,* 257 U. S. 184.

Honoring a minority union—where no majority union exists or even where the activities of the minority union do not collide with a bargaining agreement—is being respectful of history. Long before the Wagner Act, employers and employees had the right to discuss their problems. In the early days the unions were representatives of a minority of workers.[2] The aim—at least the hope—

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[2] Twentieth Century Fund, How Collective Bargaining Works (1942), p. 24; U. S. Dept. of Labor Information Bulletin, Vol. 5, No. 6 (1938), pp. 5–8. For examples of such "members only" contracts,

of the legislation was that majority unions would emerge and provide stabilizing influences. Yet I have found nothing in the history of the successive measures, starting with the Wagner Act, that indicates any purpose on the part of Congress to deny a minority union the right to bargain for its members when a majority have not in fact chosen a bargaining representative.[3]

I think the Court is correct insofar as it sets aside the exclusive recognition clause in the contract. I think it is incorrect in setting aside the entire contract. *First,* that agreement secured valuable benefits for the union's members regarding wages and hours, work standards and distribution, discharge and discipline, holidays, vacations, health and welfare fund, and other matters. Since there was no duly selected representative for all the employees authorized in accordance with the Act, it certainly was the right of the employee union members to designate the union or any other appropriate person to make this contract they desired. To hold the contract void as to the union's voluntary members seems to me to go beyond

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see, *e. g.*, 2 Lab. Rel. Rep. Man. 964, 967. See also Union Recognition as Shown in Contracts, 1A Lab. Rel. Rep. Man. 781–787: "The beginning point of collective bargaining in labor relations is the recognition by an employer of the other party to any contract entered into as the party representing employees . . . . [U]nion-recognition clauses, as embodied in most recent contracts generally fall into two different patterns. In some contracts, the union is recognized as the exclusive bargaining agent for all employees. In others, the union is recognized as bargaining agent for those employees only who are or may become members of the union."

[3] The Board has frequently recognized that recognition of a minority union as representative of its members only was not an unfair labor practice, absent the choice by a majority of a different bargaining representative. See *Solvay Process Co.,* 5 N. L. R. B. 330, 340; *Hoover Co.,* 90 N. L. R. B. 1614, 1618. And see *Cleveland Worsted Mills Co.,* 43 N. L. R. B. 545; *Black Diamond S. S. Corp.* v. *Labor Board,* 94 F. 2d 875.

the competency of the Board under the Act and to be unsupported by any principle of contract law. Certainly there is no principle of justice or fairness with which I am familiar that requires these employees to be stripped of the benefits they acquired by the good-faith bargaining of their designated agent. Such a deprivation gives no protection to the majority who were not members of the union and arbitrarily takes from the union members their contract rights.

Second, the result of today's decision is to enjoin the employer from dealing with the union as the representative of its own members in any manner, whether in relation to grievances or otherwise, until it is certified as a majority union. A case for complete disestablishment of the union cannot be sustained under our decisions. While the power of the Board is broad, it is "not limitless." *Labor Board* v. *Mine Workers,* 355 U. S. 453, 458. Thus a distinction has been taken between remedies in situations where a union has been dominated by the employer and where unions have been assisted but not dominated. *Id.,* 458–459.

The present case is unique. The findings are that both the employer and the union were in "good faith" in believing that the union represented a majority of the workers. Good-faith violations of the Act are nonetheless violations; and the present violation warrants disestablishment of the union as a majority representative. But this good-faith mistake hardly warrants full and complete disestablishment, heretofore reserved for flagrant violations of the Act. Its application here smacks more of a penalty than of a remedial measure.

I think this union is entitled to speak for its members until another union is certified as occupying the bargaining field. That is its common-law right in no way diluted or impaired by the Act.

CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD CO. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WISCONSIN.

No. 306. Argued May 2, 1961.—Decided June 5, 1961.*

Appellant railroad applied to the Interstate Commerce Commission for an order requiring the Spokane, Portland & Seattle Railway and its two wholly owned subsidiaries (collectively referred to as the "S. P. & S. System") to join appellant in through routes and joint rates via Spokane, Wash., as extensive as those the S. P. & S. System participates in with its two owners, the Great Northern Railway and the Northern Pacific. The Commission found that, with limited exceptions, no through routes existed for the movement of freight by the S. P. & S. System and the appellant railroad via Spokane. It held that the "short-haul protection" provided in § 15 (4) of the Interstate Commerce Act applied, because the S. P. & S. System was operated in conjunction with and under common management of its parents, each of which owned 50% of the S. P. & S. It also found that the refusal of the S. P. & S. System to grant the through routes and joint rates requested did not result in discrimination against appellant or in undue preference or prejudice between shippers and localities and that they were not "needed in order to provide adequate and more efficient or more economic transportation." Accordingly, it dismissed the application. The District Court held that the findings of the Commission were supported by substantial evidence and affirmed its ruling as to the application of § 15 (d). *Held:* The judgment is affirmed. Pp. 746–756.

(a) The Commission's findings were supported by substantial evidence. P. 749.

(b) Section 15 (4) of the Interstate Commerce Act, which prohibits the Commission from establishing any through route which would require a railroad to include in such route substantially less than its entire length and that of any intermediate railroad "operated in conjunction and under a common management or control

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*Together with No. 307, *Benson, Secretary of Agriculture,* v. *United States et al.,* also on appeal from the same Court.

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therewith," applies to a railroad like the S. P. & S. which is operated in conjunction with and under the joint common management and control of *two* railroads. Pp. 749–756.

182 F. Supp. 81, affirmed.

Raymond K. Merrill argued the cause for appellants in both cases. With him on the briefs for appellant in No. 306 were *Edwin R. Eckersall, Edwin O. Schiewe* and *Byron E. Lutterman.* On the briefs for appellant in No. 307 were *Carl J. Stephens, Neil Brooks* and *Donald A. Campbell.*

Robert W. Ginnane argued the cause for the United States et al. With him on the briefs were former *Solicitor General Rankin, Solicitor General Cox, Assistant Attorney General Loevinger, Assistant Attorney General Bicks, Richard A. Solomon* and *Charlie H. Johns, Jr.*

Fletcher Rockwood argued the cause for the railroad company appellees. With him on the briefs were *Marcellus L. Countryman, Jr., Anthony Kane, Louis E. Torinus, Jr., Charles A. Hart, Martin L. Cassell, Jordan J. Hillman* and *Richard Musenbrock.*

Mr. Justice Clark delivered the opinion of the Court.

These are direct appeals from an order of a three-judge District Court dismissing appellants' complaint seeking to set aside an Interstate Commerce Commission decision which refused to prescribe through routes and joint rates for traffic moving between appellant railroad and the Spokane, Portland and Seattle Railway (the "S. P. & S.") system [1] via Spokane, Washington. The Commission found, contrary to appellants' contention, that, with limited exceptions, no through routes existed for the movement of freight by the S. P. & S. system and

[1] The S. P. & S. system is composed of the Spokane, Portland and Seattle Railway Co. and two wholly owned subsidiaries, the Oregon Trunk Railway and the Oregon Electric Railway Co.

appellant railroad (the "Milwaukee") via Spokane. It also held that the short-haul protection provided in § 15 (4) of the Interstate Commerce Act [2] applied because the S. P. & S. was operated in conjunction with and under common management of its parents, the Great Northern Railway Co. and the Northern Pacific Railway Co. (the "Northern Lines"), each of which owned 50% of the S. P. & S. Finally, it entered a finding that the refusal of the S. P. & S. system to grant the through routes [3] and joint rates [4] requested did not result in discrimination against the Milwaukee or in undue preference or prejudice between shippers and localities and further found that they were not "needed in order to provide adequate and more efficient or more economic transportation." 300 I. C. C. 453. The District Court held that the findings of the Commission were supported by substantial evidence and affirmed its ruling as to the application of § 15 (4). 182 F. Supp. 81. We noted probable jurisdiction. 364 U. S. 860. We affirm the judgment.

The factual situation is described in detail in the Commission's report and we will, therefore, set it out only

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[2] 49 U. S. C. § 15 (4) provides in pertinent part:

"In establishing any such through route the Commission shall not . . . require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route . . . ."

[3] "A 'through route' is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another." *St. Louis Southwestern R. Co.* v. *United States,* 245 U. S. 136, 139, note 2 (1917).

[4] "[T]he essential feature of a joint rate is that connecting roads have agreed or mutually consented to carry traffic from points on one road to points on another road for an aggregate charge which is less than the sum of their local charges between the same points." *New York, N. H. & H. R. Co.* v. *Platt,* 7 I. C. C. 323, 333 (1897).

briefly. It appears that the S. P. & S. was built by the Northern Lines for the purpose of relieving congestion, avoiding double mountain trackage, and obtaining low grade road facilities to the West Coast. Its lines—approximately 950 miles in length—run along the Snake and Columbia Rivers westward between Spokane, Washington, and the Pacific Coast via Portland, Oregon. The lines of its parents, the Northern Lines, operate between Minneapolis-St. Paul, Minnesota, and the head of the Great Lakes on the east and Portland, Oregon, and coastal points in Washington on the west. They serve the larger cities in northern Idaho, Montana, North and South Dakota and Minnesota. The Milwaukee operates some 10,600 miles of line from Chicago, Illinois, and Westport, Indiana, on the east and Longview, Washington, on the west. While it serves many of the same cities in Idaho, Montana, the Dakotas and Minnesota from which the Northern Lines receive traffic, appellant railroad serves no point in Oregon directly. If it could establish through routes and joint rates with the S. P. & S. system, the Milwaukee might secure, on interchange at Spokane, much of the traffic that originates or terminates on the S. P. & S. system. On the other hand, the Northern Lines seek to obtain as much of this haul as possible and have published joint rates on all important commodities interchanged between the S. P. & S. system and the Northern Lines at Spokane. These rates are lower than the combination of the local rates of the S. P. & S. and the appellant railroad now applicable to traffic which could be interchanged at the same point, Spokane, between these carriers. It appears that the S. P. & S. system and the Northern Lines are not opposed to the publication of joint rates by the S. P. & S. system and the Milwaukee for traffic to or from points served only by the latter (local points) but refuse to establish

through routes and joint rates via appellant's line to points which are also served by the Northern Lines.

We find, as did the District Court, that substantial evidence does support the factual findings of the Commission. We shall, therefore, forego a discussion of the appellants' contentions based on the findings. We are left with only the principal issue, namely, whether the protection of § 15 (4) of the Act extends to two railroads owning a third in the relationship existing here.

The Northern Lines compete with each other but own in equal shares all of the bonds and stock of the S. P. & S. Their presidents alternate yearly as president and vice president of, and personally pass upon the executive problems of, the S. P. & S., which, however, has an operating vice president of its own. As to equipment, the Northern Lines furnish a substantial amount of the car supply of the S. P. & S. system. The traffic policies of the latter are directed and controlled jointly by the traffic departments of the Northern Lines. Transcontinental traffic matters are handled by representatives of the Northern Lines but local traffic problems—under the general policies aforementioned—are left to the S. P. & S. officials. In short, except when the Northern Lines disagree between themselves, they entirely control the operation of the S. P. & S.

Section 1 (4) of the Interstate Commerce Act requires railroads "to establish reasonable through routes" with each other. Where such routes are not established voluntarily, the Commission has the power, under § 15 (3) of the Act, to prescribe them "whenever deemed by it to be necessary or desirable in the public interest." This authority is restricted against short hauling, however, by § 15 (4) which provides that the Commission "shall not . . . require any carrier by railroad . . . to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad

operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route . . . ." Appellants contend that since the eastern terminus of the S. P. & S. is Spokane, the establishment of the through routes via that point would not short haul the S. P. & S. If, however, the S. P. & S. is under the "common management or control" of the Northern Lines and the short-haul protection of § 15 (4) is available to them, the through routes sought would, if granted, result in the latter being short hauled in contravention of this section.

The findings of the Commission, approved by the District Court, indicate clearly that neither of the Northern Lines individually controls the S. P. & S. However, it is equally clear that jointly they do manage and control it as effectively as if it were part of their own lines. This is particularly true of its traffic policy, which is the heart of the problem here. However, appellants contend that, regardless of the factual circumstances, as a matter of law only a single railroad can operate or control another line within the meaning of the short-haul protection of § 15 (4).

The short-haul exception of § 15 (4) originated in the Mann-Elkins Act of 1910. 36 Stat. 539, 552. The crucial words "common management or control" were not defined and the subsequent legislative history of the provision is of little assistance to our inquiry. However, the overriding purpose of the Congress seems to have been the protection of the traffic of the controlling line. As Senator Elkins, a coauthor of the measure, stated to the Senate, the exception "is one which has always been recognized in the transportation business of the country. The road that initiates the freight and starts it on its movement in interstate commerce should not be required . . . to transfer its business from its own road to that of a competitor . . . when the commerce initiated by it can be as

promptly and safely transported . . . by its road as by the line of its competitor." 45 Cong. Rec. 3475–3476. The same reasoning would equally apply here. Moreover, the Senate Report on the provision emphasizes the same purpose.[5]

While the language of the section is framed in the singular, it appears to us that the reason for this exception is as valid and necessary in the case of two railroads owning a third as it is when only a single railroad and its subsidiary are involved. See *Louisville & N. R. Co.* v. *United States,* 242 U. S. 60 (1916), where this Court, in construing the discrimination provisions of the predecessor of § 3 (4) of the Act, stated, "[t]herefore, if either carrier owned and used this terminal alone it could not be found to discriminate against the Tennessee Central by merely refusing to switch for it . . . . We conceive that what is true of one owner would be equally true of two joint owners . . . ." At p. 73.

Appellants rely heavily on the fact that the Congress, in enacting the Transportation Act of 1940, broadened the definition of the term "control" in many of the sections of the Interstate Commerce Act[6] but did not do so in § 15 (4), thereby indicating an intention to restrict the scope of the exception. This definition, however, was enacted as the result of this Court's holding in *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125 (1939), which gave a broad construction to "control" as used in § 2 (b) of the Communications Act. 47

[5] "It would seem to be unreasonable to empower the commission to require a railroad company having a line of its own between two designated termini to allow a portion only of that line to be taken and linked up with other lines for the purpose of creating another through route in competition with it, thus depriving it of the natural advantage of possessing a direct line between the termini . . . ." S. Rep. No. 355, 61st Cong., 2d Sess. 10.

[6] 49 U. S. C. § 1 (3) (b).

U. S. C. § 152 (b). It appears that the Congress decided to extend this broad definition to certain sections of the Interstate Commerce Act to insure Commission jurisdiction over persons in indirect control of carriers. See H. R. Rep. No. 2016, 76th Cong., 3d Sess. 58. If, however, that definition were applied to § 15 (4), the opposite result would obtain and the Commission's power would be restricted, for the short-haul exception would then be afforded to carriers having only an indirect control of another line. For this reason, the Congress "thought [it] undesirable to make any change in the interpretation of present law, . . . notably . . . section 15 (4)." H. R. Rep. No. 2832, 76th Cong, 3d Sess. 63.

Apparently the phrase "operated in conjunction and under a common management or control" has received no prior judicial interpretation, as we have been unable to find any cases in point and have been referred to none by counsel. However, the decisions of the Interstate Commerce Commission support the view that control of the traffic policy of an affiliate is sufficient to constitute "control" or "management" within the meaning of § 15 (4). The Commission's conception of these terms was first expressed in a rate case, *Blackshear Mfg. Co.* v. *Atlantic Coast Line R. Co.*, 87 I. C. C. 654 (1924), in which the Commission stated that "the term 'carriers under the same management and control' . . . refers to carriers generally controlled through ownership, lease, or otherwise *to the extent of controlling traffic policy,* even though separate corporate entity may be maintained." At p. 664. (Emphasis added.) In subsequent rate cases the Commission has continued to apply this criterion to determine whether or not lines are under the same "management" or "control." [7]

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[7] *Rates on Chert, Clay, Sand, and Gravel,* 197 I. C. C. 215 (1933); *Humbard Construction Co.* v. *Southern R. Co.,* 161 I. C. C. 38 (1930); *Justice Co.* v. *Holton Interurban R. Co.,* 153 I. C. C. 673 (1929);

In another line of rate-making cases, the Commission has held that there can be joint management and control of a third railroad.[8] In rate cases, the Commission generally prescribes a higher scale of distance rates for traffic moving over a combination of independent lines than it does for goods carried over a single line or over a parent-subsidiary system. The distinction is made because the latter are expected to result in economies of operation which should be passed on to the public. *Livestock To, From, and Between Points in the Southeast,* 101 I. C. C. 105 (1925). For the same reason, short or "weak" lines are allowed arbitraries, *i. e.,* differentially higher rates in addition to rate scales prescribed for general application, whereas small railroads under the "management" or "control" of larger lines are not permitted the additional rates. *Rate Structure Investigation, Part 13, Salt,* 197 I. C. C. 115 (1933).

Unless the long haul of railroads, under joint management and control as interpreted by the rate-making cases, is protected by § 15 (4), the advantages which the Commission assumed existed, *i. e.,* economies of operation, will be taken from them. The very reasons for applying the

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Raleigh Freight Traffic Bureau v. *Atlantic Coast Line R. Co.,* 107 I. C. C. 156 (1926); *Livestock To, From, and Between Points in the Southeast,* 101 I. C. C. 105 (1925); *Livestock To, From, and Between Points in the Southeast,* 91 I. C. C. 292 (1924).

[8] This group of cases is bottomed on *Chicago, M. & St. P. R. Co.* v. *Minneapolis Civic & Commerce Assn.,* 247 U. S. 490 (1918), wherein this Court found that two competitive railroads owning a subsidiary coequally did, for rate purposes, each "directly control and operate" the subsidiary and that the latter must be treated as a part of each of the two owning carriers. See *Des Moines Union Ry. Switching,* 231 I. C. C. 631 (1939); *Blum Packing Co.* v. *Southern Pacific R. Co.,* 204 I. C. C. 93 (1934); *Russ Market Co.* v. *Northwestern Pacific R. Co.,* 171 I. C. C. 117 (1930); *Eriksen* v. *Ann Arbor R. Co.,* 102 I. C. C. 374 (1925); *Pacific Lumber Co.* v. *Northwestern Pacific R. Co.,* 51 I. C. C. 738 (1918).

higher distance rates and denying arbitraries would cease to exist. Such a result, flowing from the failure to construe § 15 (4) as including joint control, would be clearly inconsistent with Commission policy in the rate-making cases. Therefore, the Commission has relied upon the same criteria in § 15 (4) cases. In *Alabama, T. & N. R. Co.* v. *Southern R. Co.,* 148 I. C. C. 708 (1928), the Commission specifically referred to its definition in *Blackshear, supra,* and applied the limitation of § 15 (4) to the three roads there involved. See also *Georgia & F. R. Co.* v. *Atlantic Coast Line R. Co.,* 191 I. C. C. 489 (1933). In fact, in seven separate proceedings involving the S. P. & S.,[9] the Commission has noted that for rate-making purposes it must be considered as part of the Northern Lines. In one of these proceedings, *West Coast Lumbermen's Assn.* v. *Chicago, M. & St. P. R. Co.,* 129 I. C. C. 363 (1927), joint through rates via Canada were sought to destinations served by the Milwaukee and the Northern Lines. It was urged that the joint rates, if they were prescribed, should be made over routes that would secure the long haul of these railroads. The Commission refused to establish the joint rates via the Canadian routes, holding, *inter alia,* that the S. P. & S. "is considered for rate-making purposes a part of the Northern Pacific and Great Northern." At p. 364.

Likewise, the case of *Seaboard Air Line R. Co.* v. *Carolina & N. R. Co.,* 204 I. C. C. 416 (1934), applied the *Blackshear* definition to discrimination cases under

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[9] *Helix Milling Co.* v. *Great Northern R. Co.,* 287 I. C. C. 77 (1952); *Pillsbury-Astoria Flour Mills Co.* v. *Great Northern R. Co.,* 198 I. C. C. 642 (1934); *Spokane, P. & S. R. Co.,* 41 I. C. C. Valuation Reports 1 (1932); *West Coast Lumbermen's Assn.* v. *Chicago, M. & St. P. R. Co.,* 129 I. C. C. 363 (1927); *Inland Empire Shippers League* v. *Director General,* 59 I. C. C. 321 (1920); *Astoria* v. *Spokane, P. & S. R. Co.,* 38 I. C. C. (1916); *Portland Chamber of Commerce* v. *Oregon Railroad & Navigation Co.,* 19 I. C. C. 265 (1910).

§ 3 (4) of the Act.[10] The Commission held that under § 3 (3), the predecessor of § 3 (4), there could be no discrimination where the roads involved were under a common management and control. The Commission found that the Carolina & Northwestern officials "determine the policy to be adopted with regard to traffic matters local to that carrier, but in matters of common interest between the Southern and the Carolina & Northwestern, the policy determined by the Southern prevails. It is apparent, therefore, that both carriers are operated under a common management and control." At p. 420. Although not a § 15 (4) case, it is significant, as pointed out by the District Court, because the Commission applied the *Blackshear* test and, upon finding the roads under common management and control, permitted them to retain the long haul as protected by § 15 (4). The interrelationship between the two sections as applied by the Commission indicates the necessity for the use of the same criteria as to control in each.

We do not consider the cases,[11] relied upon by the appellants, to the contrary. Common management and control was not established. They were concerned with ownership, as distinguished from control, and even that by more than two railroads. There is nothing in these cases holding that such control cannot exist under the joint ownership and active management of two carriers. Nor do we feel that appellants' other Commission cases are apposite.

Summarizing, we find that the Commission has for many years followed the *Blackshear* criteria as to what

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[10] 49 U. S. C. § 3 (4) provides in part that carriers "shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper."

[11] *Manufacturers R. Co.* v. *Ahnapee & W. R. Co.*, 172 I. C. C. 554 (1931); *Absorption of Switching Charges*, 157 I. C. C. 129 (1929).

constitutes "common management" or "control." Likewise, it has since permitted such management and control to be jointly exercised by more than one railroad. We believe that the Congress took note of these cases in 1940 when it decided not "to make any change in the interpretation" of the limitation provision of § 15 (4) of the Act. The judgment is therefore

Affirmed.

MR. JUSTICE STEWART took no part in the consideration or decision of this case.

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE BLACK concurs, dissenting.

Four lines pass through the Spokane gateway to the West Coast: The Milwaukee, the Northern Pacific, and the Great Northern, that reach Puget Sound, and the S. P. & S., that reaches Portland, Oregon. The "triangle" referred to by the Commission has its apex in Spokane and its two base points in Portland and Seattle-Tacoma. The S. P. & S. is owned 50% by the Great Northern and 50% by the Northern Pacific.

The Milwaukee is at present under a disadvantage in shipments via the Spokane gateway. The disadvantage is not in service or facilities for service, but in the rate structure. When the Milwaukee—a road that reaches to Chicago—wants to ship goods to Portland over the shortest route—the S. P. & S.—it must quote combination rates. When the Great Northern and the Northern Pacific make those shipments, they get a preferred joint rate on a through route via Spokane. The result is to "close the Spokane gateway in a commercial sense" so far as the Milwaukee is concerned. 300 I. C. C. 453, 457. The advantage which the S. P. & S. affords the Great Northern and Northern Pacific was stated by the Commission in *Portland Chamber of Commerce* v. *Oregon R.*

& N. Co., 19 I. C. C. 265, 283, "It is used by the Great Northern and Northern Pacific in the transportation of all business between coast and interior points which can be handled more cheaply over it than over the existing lines of the Great Northern or Northern Pacific." That is a monopolistic advantage; it is control over traffic which the two lines are not entitled to exploit to the exclusion of the Milwaukee.

"Through routes" are the rule, § 1 (4), and the maintenance of discriminatory "combination rates," the exception. Under the terms of § 15 (3), the Commission is to establish the former whenever "necessary or desirable in the public interest." Only in § 15 (4) do we have an exception to this policy. Since 1910, Congress has recognized a railroad's limited right not to be "short-hauled," that is, not to have to carry over its lines traffic originating on, or destined to, another line when the entire carriage could as well have taken place on its own line. Here, the Northern Lines claim that they together with the jointly owned S. P. & S. make up a single system which the Milwaukee wants to short-haul.

The question presented concerns the meaning of the words "common management or control" as they are used in § 15 (4) of the Act.

First. If the Great Northern and Northern Pacific are to be granted the special monopolistic protection now extended, § 15 (4) needs to be rewritten. It says that the Commission shall not "require any carrier . . . to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith." The section is framed in the singular. When the short-haul protection was first given, the amended § 15 referred to "carrier or carriers" seven times (36 Stat. 551–553) and "line or lines" twice (36 Stat. 553). So it seems apparent that when the plural was intended, the plural

was used. Senator Elkins, in explaining the provision, spoke in the singular: "*The road* that initiates the freight and starts it on its movement in interstate commerce should not be required, where *it* is a line not unreasonably long, to transfer its business *from its own road* to that of a competitor, especially when the commerce initiated *by it* can be as promptly and safely transported from the point of shipment to the point of destination by *its road* as by the line of *its* competitor." 45 Cong. Rec. 3476. (Emphasis added.)

The Senate Report spoke of the short-haul protection as extending to a railroad "having a line of its own between two designated termini." S. Rep. No. 355, 61st Cong., 2d Sess., p. 10. While the Transportation Act of 1940 greatly expanded the meaning of "control," the new definition was not made applicable to § 15 (4) because it was thought "undesirable to make any change in the interpretation of present law" in that regard.[1] H. R. Rep. No. 2832, 76th Cong., 3d Sess., p. 63.

Second. Prior to the 1940 legislation the Commission had held that joint ownership by two or more railroads was not sufficient to create "common management or control" within the meaning of § 15 (4). *Absorption of Switching Charges,* 157 I. C. C. 129, 132; *Manufacturers R. Co.* v. *Ahnapee & W. R. Co.,* 172 I. C. C. 554, 564. Those two cases involved a terminal railroad jointly owned by 15 connecting roads. On oral argument counsel for the Commission conceded that those decisions are out of line with the present one. If control by 15 roads is not "common" control within the meaning of § 15 (4), I fail

[1] The Court admits that Congress refused to broaden the protection of § 15 (4) in 1940. Yet it seems to think this refusal of no relevance. If Congress has refused "short-haul" protection to indirectly controlled lines, is it to be lightly assumed that that protection extends to *both* owners who jointly control a third line?

to see how control by two railroads is.[2] The other cases relied upon by the Court did not involve § 15 (4).

Cases such as *Blackshear Mfg. Co.* v. *Atlantic Coast Line R. Co.*, 87 I. C. C. 654, are irrelevant. There the Commission was concerned with what rates to fix that were "single-line" and what rates that were "joint-line." It defined "single-line rates" as those applicable over "single lines of railway or over two or more lines under the same general management and control"; and it defined "joint-line rates" as those applicable "only when the lines embraced in the route are not under common ownership or control." *Id.*, 664. It defined the term "carriers under the same management and control" as carriers "generally controlled through ownership, lease, or otherwise to the extent of controlling traffic policy, even though separate corporate entity may be maintained." *Id.*, 664. "Common ownership and control" for rate-making purposes was an innovation of the Commission, not a statutory term. The same is true of the other line of rate-making cases to which the Court refers—the ones represented by *Chicago, M. & St. P. R. Co.* v. *Minneapolis C. & C. Assn.*, 247 U. S. 490. There two railroads owning a third which in turn owned terminal tracks made no charge for use of the terminal against traffic moving over its lines

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[2] In *Helix Milling Co.* v. *Great Northern R. Co.*, 287 I. C. C. 77, shippers wanted through routes and joint rates on the Great Northern, the Northern Pacific, and the S. P. & S. *via* the Spokane gateway. The Great Northern objected on the basis of the short-haul protection afforded by § 15 (4) of the Act. The Commission recognized that the short-haul issue was involved and made the findings as to the need for through routes on the assumption that the through routes would short-haul the objecting road. But no analysis or discussion of the present problem was made. Cf. *West Coast Lumbermen's Assn.* v. *Chicago, M. & St. P. R. Co.*, 129 I. C. C. 363, 364. It should be noted that *Alabama, T. & N. R. Co.* v. *Southern R. Co.*, 148 I. C. C. 708, 711, cited by the Court, does not involve *joint* control under § 15 (4).

but did not charge for its use by a competitor. This line of cases—like those involving "single-line" rates—is concerned with just rates and rates that are non-discriminatory. Economies of operation will not disappear merely because a carrier has competition. Of course, a monopoly position may make an affiliated short line more profitable, but I do not think that that is the sole reason for denying such short lines "arbitraries."

Section 15 (4) deals with the highly specialized problem of the short-haul. The "short-haul" protection needs to be narrowly construed, lest it too end up as a device to discriminate against competitors and foreclose them from a market. That is why, I think, it was closely confined by Congress and put in the singular not the plural and not extended to group activities of railroads such as are involved here and in the terminal cases.

I would reverse the judgment below and remand the case to the Commission for further proceedings.

PAYNE *v.* MADIGAN, WARDEN.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 180. Argued February 27, 1961.—Decided June 5, 1961.*

274 F. 2d 702, 698, affirmed by an equally divided Court.

Frederick M. Rowe, acting under appointment by the Court, 364 U. S. 807, argued the cause for petitioners in both cases. With him on the briefs was *Howard P. Willens*.

Harold H. Greene argued the cause for respondents in both cases. With him on the brief were *Solicitor General Cox, Acting Assistant Attorney General Doar* and *David Rubin*.

PER CURIAM.

The judgments are affirmed by an equally divided Court.

MR. JUSTICE FRANKFURTER took no part in the consideration or decision of these cases.

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* Together with No. 184, *Young* v. *United States*, on certiorari to the United States Court of Appeals for the Eighth Circuit.

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GIANT TIGER DRUGS, INC., *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 807. Decided June 5, 1961.

Appeal dismissed and certiorari denied.
Reported below: 171 Ohio St. 294, 170 N. E. 2d 71.

H. H. Felsman for appellant.

John F. Ray, Jr. for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

LOCAL 553, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, *v.* NATIONAL LABOR RELATIONS BOARD.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 844. Decided June 5, 1961.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 284 F. 2d 861.

Samuel J. Cohen for petitioner.

Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come and *Herman M. Levy* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted and the judgment is vacated. The case is remanded to the United States Court of Appeals with instructions to remand to the National Labor Relations Board for consideration in light of *Local 357, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America,* v. *National Labor Relations Board,* 365 U. S. 667.

MOHEGAN INTERNATIONAL CORPORATION *v.* CITY OF NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 902. Decided June 5, 1961.

Appeal dismissed and certiorari denied.
Reported below: 9 N. Y. 2d 69, 172 N. E. 2d 546.

Gerald H. Ullman for appellant.

Leo A. Larkin and *Morris L. Heath* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

MR. JUSTICE DOUGLAS is of the opinion that probable jurisdiction should be noted.

SIMCOX *v.* MADIGAN, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 699, Misc. Decided June 5, 1961.

Certiorari granted; judgment reversed; and case remanded.

Petitioner *pro se.*

Solicitor General Cox, Acting Assistant Attorney General Doar, Harold H. Greene and *David Rubin* for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is reversed and the case remanded for a hearing as suggested by the Solicitor General. *Ellis* v. *United States,* 356 U. S. 674.

REPORTER'S NOTE.

The next page is purposely numbered 901. The numbers between 765 and 901 were purposely omitted, in order to make it possible to publish the orders in the current advance sheets or "preliminary prints" of the United States Reports with *permanent* page numbers, thus making the official citations available immediately.

ORDERS FROM APRIL 24 THROUGH JUNE 19, 1961.

APRIL 24, 1961.

Miscellaneous Orders.

No. 187. DUNCAN *v.* CALIFORNIA. Certiorari, 363 U. S. 840, to the Supreme Court of California. The motion of the National Lawyers Guild, Los Angeles-Hollywood-Beverly Hills Chapters, for leave to file brief, as *amici curiae,* is granted. *Ben Margolis* and *Charles B. Stewart, Jr.* on the motion.

No. 315. POWER REACTOR DEVELOPMENT CO. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, ET AL.; and

No. 454. UNITED STATES ET AL. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL–CIO, ET AL. Certiorari, 364 U. S. 889, to the United States Court of Appeals for the District of Columbia Circuit. The motion of Adolph J. Ackerman for leave to file brief, as *amicus curiae,* is granted. *R. M. Stroud* on the motion.

No. 165, Misc. AKERS *v.* ADAMS, WARDEN. On petition for writ of certiorari to the Supreme Court of Appeals of West Virginia. The motion to substitute Otto C. Boles in the place of D. E. Adams as the party respondent is granted.

No. 215, Misc. DELONG *v.* ADAMS, WARDEN. On petition for writ of certiorari to the Supreme Court of Appeals of West Virginia. The motion to substitute Otto C. Boles in the place of D. E. Adams as the party respondent is granted.

No. 236, Misc. SCALF *v.* ADAMS, WARDEN. On petition for writ of certiorari to the Supreme Court of Appeals of West Virginia. The motion to substitute Otto C. Boles in the place of D. E. Adams as the party respondent is granted.

No. 953, Misc. BROWN *v.* INDIANA. On petition for writ of certiorari to the Supreme Court of Indiana. The motion for stay of execution presented to MR. JUSTICE CLARK, and by him referred to the Court, is granted, pending the disposition of the petition for writ of certiorari by this Court. In the event the petition for writ of certiorari is denied, this stay is to terminate automatically. If the petition for writ of certiorari is granted, the stay is to continue in effect pending the issuance of the mandate of this Court.

Certiorari Granted.

No. 810. BLAU *v.* LEHMAN ET AL. C. A. 2d Cir. Certiorari granted. *Morris J. Levy* for petitioner. *Robert S. Carlson* for respondents. *Solicitor General Cox, Walter P. North, David Ferber* and *Ellwood L. Englander* for the Securities and Exchange Commission, as *amicus curiae,* in support of the petition. Reported below: 286 F. 2d 786.

Certiorari Denied. (*See also No. 683, ante, p. 167, and No. 750, ante, p. 168.*)

No. 710. UNITED FINANCE & THRIFT CORP. OF TULSA ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *Robert Ash* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Baum* for respondent. Reported below: 282 F. 2d 919.

No. 765. Estate of May *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *Manley Fleischmann* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Robert N. Anderson* for respondent. Reported below: 283 F. 2d 853.

No. 786. Hunter Mills Corp. et al. *v.* Federal Trade Commission. C. A. 2d Cir. Certiorari denied. *Alex Akerman, Jr.* and *Thomas A. Ziebarth* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, PGad B. Morehouse* and *Alan B. Hobbes* for respondent. Reported below: 284 F. 2d 70.

No. 800. International Hod Carriers, Building & Common Laborers' Union of America, Local No. 1140, AFL–CIO, *v.* National Labor Relations Board. C. A. 8th Cir. Certiorari denied. *David D. Weinberg* and *Mozart G. Ratner* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 285 F. 2d 397.

No. 801. Bankers Trust Co., Executor, *v.* United States. C. A. 2d Cir. Certiorari denied. *Gerald Donovan* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *L. W. Post* for the United States. Reported below: 284 F. 2d 537.

No. 814. Schepp et al. *v.* Producers, Inc., et al. C. A. 7th Cir. Certiorari denied. *Paul Y. Davis* for petitioners. *John E. Early, Michael Gesas, John L. Carroll, Charles B. Feibleman* and *Charles H. Sparrenberger* for respondents. Reported below: 286 F. 2d 65.

No. 792. CRONAN *v.* FEDERAL COMMUNICATIONS COMMISSION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Lawrence Speiser* and *Shirley Fingerhood* for petitioner. *Solicitor General Cox, Max D. Paglin* and *Ruth V. Reel* for respondent. Reported below: 109 U. S. App. D. C. 208, 285 F. 2d 288.

No. 794. COLLINS *v.* KLINGER. Supreme Court of California. Certiorari denied. *Russell E. Parsons* for petitioner.

No. 795. COLLINS *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Russell E. Parsons* for petitioner. Reported below: 186 Cal. App. 2d 329, 9 Cal. Rptr. 33.

No. 797. MASON *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Russell E. Parsons* for petitioner. Reported below: 184 Cal. App. 2d 182, 7 Cal. Rptr. 525.

No. 798. MASON ET UX. *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Russell E. Parsons* for petitioners. Reported below: 184 Cal. App. 2d 317, 7 Cal. Rptr. 627.

No. 799. ZAHNER *v.* BENSON, SECRETARY OF AGRICULTURE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Donald M. Murtha* and *Herbert S. Thatcher* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for respondents. Reported below: —— U. S. App. D. C. ——, 289 F. 2d 756.

No. 804. NAVIOS CORPORATION ET AL. *v.* NATIONAL MARITIME UNION OF AMERICA ET AL.; and

No. 805. GLOBAL SEAMEN'S UNION *v.* NATIONAL MARITIME UNION OF AMERICA ET AL. Supreme Court of Pennsylvania. Certiorari denied. *Herbert Brownell, Earle K. Shawe, Samuel B. Fortenbaugh, Jr.* and *Wendell W. Lang* for petitioners in No. 804. *Israel Packel* for petitioner in No. 805. *Abraham E. Freedman, Herman E. Cooper, H. Howard Ostrin* and *Richard P. Long* for respondents. Reported below: 402 Pa. 325, 166 A. 2d 625.

No. 715. CLAWSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Russell E. Parsons* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 284 F. 2d 360.

No. 336, Misc. CAMPOS DE JEREZ *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Claude Henry Kleefield* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for respondent. Reported below: 281 F. 2d 182.

No. 881, Misc. MASON *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 883, Misc. SOLLAZZO *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Nathan Kestnbaum* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for respondent. Reported below: 285 F. 2d 341.

No. 803. SAUBER *v.* GLIEDMAN. C. A. 7th Cir. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Barnabas F. Sears* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Alan S. Rosenthal* and *Kathryn H. Baldwin* for respondent. Reported below: 283 F. 2d 941.

No. 926, Misc. ADAMS *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 957, Misc. SHANNON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

Rehearing Denied.

No. 509, Misc. PROPHET *v.* INDIANA, 365 U. S. 848; and

No. 762, Misc. FLANAGAN *v.* UNITED STATES, 365 U. S. 862. Petitions for rehearing denied.

APRIL 28, 1961.

Dismissal Under Rule 60.

No. 822. CULINARY & HOTEL SERVICE WORKERS UNION, LOCAL 226, ET AL. *v.* HAUGEN. On petition for writ of certiorari to the Supreme Court of Nevada. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Harold P. Lasker* for petitioners. Reported below: 76 Nev. 424, 357 P. 2d 113.

MAY 1, 1961.

Miscellaneous Orders.

No. 669. LURK *v.* UNITED STATES. Certiorari, 365 U. S. 802, to the United States Court of Appeals for the District of Columbia Circuit. Motion of *Francis M. Shea,*

Esquire, for leave to participate in oral argument for the Judges of the United States Court of Claims, as *amici curiae,* granted.

No. 103. BAKER ET AL. *v.* CARR ET AL. Appeal from the United States District Court for the Middle District of Tennessee. (Probable jurisdiction noted, 364 U. S. 898.) Argued April 19–20, 1961. It is ordered that this case be set for reargument on October 9, 1961. *Charles S. Rhyne* and *Z. T. Osborn, Jr.* argued the cause for appellants. With them on the briefs were *Hobart F. Atkins, Robert H. Jennings, Jr., J. W. Anderson, C. R. McClain, Harris A. Gilbert, E. K. Meacham* and *Herzel H. E. Plaine. James M. Glasgow* and *Jack Wilson,* Assistant Attorneys General of Tennessee, argued the cause for appellees. With them on the briefs were *George F. McCanless,* Attorney General, and *Milton P. Rice,* Assistant Attorney General. By special leave of the Court, *Solicitor General Cox* argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Acting Assistant Attorney General Doar, Bruce J. Terris, Harold H. Greene, David Rubin* and *Howard A. Glickstein.* Briefs of *amici curiae,* urging reversal, were filed by *Roger Arnebergh, Henry P. Kucera, J. Elliott Drinard, Barnett I. Shur, Alexander G. Brown, Nathaniel H. Goldstick* and *Charles S. Rhyne* for the National Institute of Municipal Law Officers; *W. Scott Miller, Jr.* and *George J. Long* for the City of St. Matthews, Kentucky; *Upton Sisson, Clare S. Hornsby, Walter L. Nixon, Jr.* and *John Sekul* for Marvin Fortner et al.; and *Eugene H. Nickerson* and *David M. Levitan* for John F. English et al. Reported below: 179 F. Supp. 824.

No. 941, Misc. MARINO *v.* NEW YORK. Motion for leave to file petition for writ of certiorari denied.

Certiorari Granted. (*See No. 695, ante, p. 209.*)

Certiorari Denied.

No. 89. NATIONAL LABOR RELATIONS BOARD *v.* LOCAL UNION No. 85, SHEET METAL WORKERS' INTERNATIONAL ASSOCIATION, AFL–CIO. C. A. 5th Cir. Certiorari denied. *Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Edwin M. Pearce* for respondent. Reported below: 274 F. 2d 344.

No. 123. NATIONAL LABOR RELATIONS BOARD *v.* AMERICAN DREDGING CO. C. A. 3d Cir. Certiorari denied. *Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *A. V. Cherbonnier* for respondent. Reported below: 276 F. 2d 286.

No. 211. NATIONAL LABOR RELATIONS BOARD *v.* E. & B. BREWING CO., INC., ET AL. C. A. 6th Cir. Certiorari denied. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Duane B. Beeson* for petitioner. *David F. Feller* for Drivers and Helpers Local 38, International Union of United Brewery Workers of America, AFL–CIO, respondent. Reported below: 276 F. 2d 594.

No. 228. NATIONAL LABOR RELATIONS BOARD *v.* UNITED STATES STEEL CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Standau E. Weinbrecht* for petitioner. Reported below: 278 F. 2d 896.

No. 229. NATIONAL LABOR RELATIONS BOARD *v.* MILLWRIGHTS' LOCAL 2232, DISTRICT COUNCIL OF HOUSTON AND VICINITY, ET AL. C. A. 5th Cir. Certiorari denied. *Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. Reported below: 277 F. 2d 217.

No. 120. NATIONAL LABOR RELATIONS BOARD *v.* MORRISON-KNUDSEN CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *O. P. Easterwood, Jr.* and *Seth W. Morrison* for respondents. Reported below: 275 F. 2d 914.

No. 285. NATIONAL LABOR RELATIONS BOARD *v.* LOCAL 1566, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION. C. A. 3d Cir. Certiorari denied. *Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Standau E. Weinbrecht* for petitioner. Reported below: 278 F. 2d 883.

No. 311. UNITED STATES STEEL CORP. ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *John C. Bane, Jr., Charles A. Wolfe* and *J. Albert Woll* for petitioners. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Standau E. Weinbrecht* for respondent. Reported below: 278 F. 2d 896.

No. 467. NATIONAL LABOR RELATIONS BOARD *v.* LOCAL UNION 450, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO, ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. Reported below: 281 F. 2d 313.

No. 820. NATIONAL LABOR RELATIONS BOARD *v.* LASSING ET AL. C. A. 6th Cir. Certiorari denied. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Frederick U. Reel* for petitioner. *D. L. Lansden* for respondents. Reported below: 284 F. 2d 781.

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No. 75. National Labor Relations Board *v.* Hod Carriers, Building and Common Laborers Union of America, Local No. 324, AFL–CIO, et al. C. A. 9th Cir. Certiorari denied. *Solicitor General Rankin, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Duane B. Beeson* for petitioner. *Charles P. Scully* for respondents. Reported below: —— F. 2d ——.

No. 724. Hazelton, Administrator, *v.* City of San Diego et al. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. *Manuel Ruiz, Jr.* for petitioner. *J. F. DuPaul* for respondents. Reported below: 183 Cal. App. 2d 131, 6 Cal. Rptr. 723.

No. 816. Goddard et al. *v.* District of Columbia Redevelopment Land Agency et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Daniel Partridge III* and *Franklin P. Gould* for petitioners. *Solicitor General Cox* and *Roger P. Marquis* for respondents. Reported below: 109 U. S. App. D. C. 304, 287 F. 2d 343.

No. 826. Buckley, doing business as F. J. Buckley & Co., *v.* Savage, Real Estate Commissioner of California. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Alan Y. Cole* for petitioner. *Stanley Mosk,* Attorney General of California, and *Arthur C. de Goede,* Deputy Attorney General, for respondent. Reported below: 184 Cal. App. 2d 18, 7 Cal. Rptr. 328.

No. 857. Hall *v.* United States. C. A. 5th Cir. Certiorari denied. *Cecil A. Morgan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 286 F. 2d 676; —— F. 2d ——.

No. 775. BRATTON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Walter P. Armstrong, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *A. F. Prescott* for respondent. Reported below: 283 F. 2d 257.

No. 790. MARCELLA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 285 F. 2d 322.

No. 818. COLD METAL PROCESS CO. ET AL. *v.* E. W. BLISS CO. ET AL. C. A. 6th Cir. Certiorari denied. *William H. Webb* and *Howard F. Burns* for petitioners. *Charles H. Walker* and *Henry J. Zafian* for respondents. Reported below: 285 F. 2d 231.

No. 828. UPTON ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Everett S. Layman* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Carolyn R. Just* for respondent. Reported below: 283 F. 2d 716.

No. 830. DOOLEY BROS., INC., *v.* MITCHELL, SECRETARY OF LABOR. C. A. 1st Cir. Certiorari denied. *Reuben Goodman* and *Joseph Fisher* for petitioner. *Solicitor General Cox, Bessie Margolin* and *Beate Bloch* for respondent. Reported below: 286 F. 2d 40.

No. 836. BENNETT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Daniel Y. Garbern* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 285 F. 2d 567.

No. 890. CRACHY *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied. *Julius Lucius Echeles* for petitioner.

No. 599. CALIFORNIA ET AL. *v.* FEDERAL POWER COMMISSION. Motion of El Paso Natural Gas Company to be designated as a party respondent and to amend the title and caption accordingly granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that certiorari should be granted. *William M. Bennett* and *J. Calvin Simpson* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, John G. Laughlin, Jr., Kathryn H. Baldwin, John C. Mason, Howard E. Wahrenbrock* and *Arthur H. Fribourg* for respondent. *Gregory A. Harrison, Malcolm T. Dungan* and *George D. Horning, Jr.* for El Paso Natural Gas Co. *Anne X. Alpern,* Attorney General of Pennsylvania, *David Stahl, Russell Leach, Charles S. Rhyne* and *Herzel H. E. Plaine* filed a brief for the Commonwealth of Pennsylvania et al., as *amici curiae,* in support of the petition. Reported below: 281 F. 2d 567.

No. 827. PORTLAND WEB PRESSMEN'S UNION, LOCAL No. 17, *v.* OREGONIAN PUBLISHING CO. ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Clifford D. O'Brien, Richard R. Carney* and *Ruth Weyand* for petitioner. *Manley B. Strayer* for Journal Publishing Co., respondent. Reported below: 286 F. 2d 4.

No. 534, Misc. WILSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 823. DINKINS ET AL. *v.* ROGERS, ATTORNEY GENERAL, ET AL.; and

No. 824. ALABAMA EX REL. GALLION, ATTORNEY GENERAL OF ALABAMA, *v.* ROGERS, ATTORNEY GENERAL OF THE UNITED STATES, ET AL. Motions to substitute Robert F. Kennedy in the place of William P. Rogers as party respondent granted. Petitions for writs of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *MacDonald Gallion,* Attorney General of Alabama, *Willard W. Livingston,* Chief Assistant Attorney General, and *Leslie Hall* and *Gordon Madison,* Assistant Attorneys General, for petitioners. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents. Reported below: 285 F. 2d 430.

No. 690, Misc. OTTEN *v.* MARYLAND. Criminal Court of Baltimore. Certiorari denied. Petitioner *pro se. Thomas B. Finan,* Attorney General of Maryland, and *Thomas W. Jamison III,* Assistant Attorney General, for respondent.

No. 764, Misc. KINCAID *v.* ADAMS, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Petitioner *pro se. C. Donald Robertson,* Attorney General of West Virginia, and *Fred H. Caplan* and *Andrew J. Goodwin,* Assistant Attorneys General, for respondent.

No. 816, Misc. LANGHAM *v.* COCHRAN, CORRECTIONS DIRECTOR, ET AL. Criminal Court of Appeals of Oklahoma. Certiorari denied. Reported below: 357 P. 2d 583.

No. 899, Misc. FERGUSON *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *H. Garland Pavy* for petitioner. Reported below: 240 La. 593, 124 So. 2d 558.

No. 831. F. M. Reeves & Sons, Inc., *v.* National Labor Relations Board. C. A. 10th Cir. Certiorari denied. *Scott Toothaker* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: —— F. 2d ——.

No. 807, Misc. Coates *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Lawrence Speiser* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 109 U. S. App. D. C. 200, 285 F. 2d 280.

No. 900, Misc. Kiefer *v.* Indiana. Supreme Court of Indiana. Certiorari denied. Reported below: 241 Ind. ——, 169 N. E. 2d 723.

No. 911. Rinaldi *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied.

No. 928, Misc. Cater *v.* Pennsylvania. Supreme Court of Pennsylvania. Certiorari denied. *W. Bradley Ward* for petitioner. *Stanley M. Schwarz* for respondent. Reported below: 402 Pa. 48, 166 A. 2d 44.

No. 930, Misc. Nicol *v.* National Savings & Trust Co. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jessie P. Grandy* for petitioner.

No. 932, Misc. Wilson *v.* United States. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 943, Misc. BANKS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 951, Misc. RIVERS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. Petitioner *pro se*. *Stanley M. Schwarz* for respondent. Reported below: 402 Pa. 48, 166 A. 2d 44.

Rehearing Denied.

No. 552, Misc. WINN *v.* UNITED STATES, 365 U. S. 848;

No. 686, Misc. ZENGER *v.* EAGER, NEW YORK STATE JUDGE, ET AL., 365 U. S. 851;

No. 713, Misc. COSTELLO *v.* NEW YORK, 365 U. S. 852; and

No. 723, Misc. MARTIN *v.* UNITED STATES, 365 U. S. 853. Petitions for rehearing denied.

MAY 8, 1961.

Miscellaneous Orders.

No. 141. KILLIAN *v.* UNITED STATES. Certiorari, 365 U. S. 810, to the United States Court of Appeals for the Seventh Circuit. The motion to dispense with printing of the record is granted. *M. Michael Essin* on the motion.

No. 635. MARTIN *v.* DAVIS, PROBATE JUDGE OF JOHNSON COUNTY, KANSAS. Appeal from the Supreme Court of Kansas. (Probable jurisdiction noted, 365 U. S. 857.) The motion to substitute Herbert Walton in the place of Joseph S. Davis as the party appellee is granted. *F. L. Hagaman* on the motion. Reported below: 187 Kan. 473, 357 P. 2d 782.

No. 705. VAN HOOK *v.* UNITED STATES, 365 U. S. 609. The motion for clarification and to settle order is denied. *Francis Heisler* on the motion.

No. 681. Brotherhood of Maintenance of Way Employes et al. *v.* United States et al., *ante*, p. 169. The motion to vacate the stay order is granted. *Ralph L. McAfee, John H. Pickering* and *Richard D. Rohr* for the Erie-Lackawanna Railroad Co., appellee-movant. *Solicitor General Cox* for the United States et al., in support of the motion. *William Grattan Mahoney* for appellants, in opposition.

No. 399, Misc. Nunes *v.* Ragen, Warden;

No. 455, Misc. In re Perroni; and

No. 588, Misc. In re Preston. Motions for leave to file petitions for writs of habeas corpus denied.

No. 2, Misc. Mathews *v.* Colorado. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Mr. Justice Douglas is of the opinion that certiorari should be granted.

Question as to Juridiction Postponed.

No. 778. United Gas Pipe Line Co. *v.* Ideal Cement Co. et al. Appeal from the United States Court of Appeals for the Fifth Circuit. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *E. Dixie Beggs* for appellant. *S. P. Gaillard, Jr.* for Scott Paper Co., and *Marion R. Vickers* for Ideal Cement Co., appellees. Reported below: 282 F. 2d 574.

Certiorari Granted.

No. 753. Richards et al. *v.* United States et al. C. A. 10th Cir. Certiorari granted. *Edward M. O'Brien* and *Truman B. Rucker* for petitioners. *Solicitor General Cox* for the United States, and *W. B. Patterson* and *Fred M. Mock* for American Airlines, Inc., respondents. Reported below: 285 F. 2d 521.

No. 835. GIBSON *v.* FLORIDA LEGISLATIVE INVESTIGATION COMMITTEE. Supreme Court of Florida. Certiorari granted. *Robert L. Carter* for petitioner. Reported below: 126 So. 2d 129.

No. 850. RETAIL CLERKS INTERNATIONAL ASSOCIATION, LOCAL UNIONS NOS. 128 AND 633, *v.* LION DRY GOODS, INC., ET AL. C. A. 6th Cir. Certiorari granted. *Joseph E. Finley* and *S. G. Lippman* for petitioners. *Eugene F. Howard* for respondents. Reported below: 286 F. 2d 235.

Certiorari Denied. (See also No. 829, ante, p. 212, and No. 2, Misc., supra.)

No. 773. SHIELDS *v.* SHARP, SECRETARY OF THE AIR FORCE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Francis J. Kelly* and *Elizabeth C. Kelly* for petitioner. *Solicitor General Cox, Assistant Atttorney General Orrick* and *Morton Hollander* for respondent. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 851. YELLOWSTONE PIPE LINE CO. ET AL. *v.* STATE BOARD OF EQUALIZATION OF MONTANA ET AL. Supreme Court of Montana. Certiorari denied. *Samuel W. McIntosh* and *Arthur Thad Smith* for petitioners. *Forrest H. Anderson,* Attorney General of Montana, *Sidney O. Smith,* Special Assistant Attorney General, and *Donald A. Garrity,* Assistant Attorney General, for respondents. Reported below: 136 Mont. ——, 358 P. 2d 55.

No. 832. SALYER LAND CO. *v.* COUNTY OF KINGS. C. A. 9th Cir. Certiorari denied. *Thomas Keister Greer* for petitioner. *Edwin S. Pillsbury* for respondent. Reported below: 285 F. 2d 481.

No. 838. WHDH, INC., *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *William J. Dempsey, William C. Koplovitz* and *Harry J. Ockershausen* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Max D. Paglin, Daniel R. Ohlbaum* and *Ruth V. Reel* for the Federal Communications Commission; *J. Joseph Maloney, Jr.* for Greater Boston Television Corp.; and *Lewis H. Weinstein* for Massachusetts Bay Telecasters, Inc., respondents. Reported below: 104 U. S. App. D. C. 226, 261 F. 2d 55; —— U. S. App. D. C. ——, —— F. 2d ——.

No. 845. MISSISSIPPI VALLEY ELECTRIC CO. ET AL. *v.* LOCAL 130, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL–CIO. C. A. 5th Cir. Certiorari denied. *Conrad Meyer III* for petitioners. Reported below: 285 F. 2d 229.

No. 813. UTAH ET AL. *v.* UNITED STATES ET AL. C. A. 10th Cir. Certiorari denied. *Walter L. Budge,* Attorney General of Utah, and *Ronald N. Boyce,* Assistant Attorney General, for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for the United States and the Civil Service Commission. Reported below: 286 F. 2d 30.

No. 852. ROEBLING *v.* DILLON, SECRETARY OF THE TREASURY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John K. Pickens, Jerry N. Griffith, M. Joseph Stoutenburgh* and *Harry Heher* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin, Jr.* for respondent. Reported below: 109 U. S. App. D. C. 402, 288 F. 2d 386.

No. 853. Green Fuel Economizer Co., Inc., et al. *v.* Arc & Gas Welder Associates, Inc. C. A. 4th Cir. Certiorari denied. *Byron N. Scott* and *Robert D. Scott* for petitioners. *John Henry Lewin* for respondent. Reported below: 285 F. 2d 863.

No. 854. Los Angeles Trust Deed & Mortgage Exchange et al. *v.* Securities and Exchange Commission. C. A. 9th Cir. Certiorari denied. *Morgan Cuthbertson* for petitioners. *Solicitor General Cox, Walter P. North* and *David Ferber* for respondent. Reported below: 285 F. 2d 162.

No. 855. City of Madison Heights *v.* Drainage Board for the Twelve Towns Relief Drains et al. Supreme Court of Michigan. Certiorari denied. *H. Eugene Field* and *Harry N. Dell* for petitioner. *Norman R. Barnard* and *Claude H. Stevens* for respondents. Reported below: 361 Mich. 522, 106 N. W. 2d 126.

No. 848. Helm et al. *v.* United States. C. A. 6th Cir. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *Charles G. Neese* and *Morton B. Howell, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 287 F. 2d 42.

No. 136, Misc. Duncan *v.* Madigan, Warden. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Tyler* and *Harold H. Greene* for respondent. Reported below: 278 F. 2d 695.

No. 692, Misc. Romano *v.* Murphy, Warden. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Isidore Dollinger* and *Walter E. Dillon* for respondent.

No. 550, Misc. CUEVAS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: —— F. 2d ——.

No. 744, Misc. VITORATOS, ALIAS VICTOR, *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *John S. Ballard* for respondent.

No. 868, Misc. CATHCART *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 287 F. 2d 563.

No. 882, Misc. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: —— F. 2d ——.

No. 889, Misc. SLATER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 354, 164 A. 2d 715.

No. 903, Misc. KREMER *v.* CLARKE, TRUSTEE, ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Oldham Clarke pro se,* and *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for the United States, respondents. Reported below: 285 F. 2d 735.

No. 906, Misc. STRAUSBAUGH *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 961, Misc. AIKEN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 890, Misc. WILSON *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit and for other relief denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 286 F. 2d 197.

No. 966, Misc. JOHNSON *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 402 Pa. 451, 167 A. 2d 295.

No. 527, Misc. BISTRAM *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 1.

No. 529, Misc. GRAHAM *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 593, Misc. KESEL *v.* REID, JAIL SUPERINTENDENT, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard Arens* and *Lawrence Speiser* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *Julia P. Cooper* for respondents. Reported below: 109 U. S. App. D. C. 1, 283 F. 2d 365.

No. 707, Misc. PERRINE *v.* ADAMS, WARDEN. The motion to substitute Otto C. Boles in the place of D. E. Adams as the party respondent is granted. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. Petitioner *pro se*. *C. Donald Robertson,* Attorney General of West Virginia, and *Andrew J. Goodwin* and *Fred H. Caplan,* Assistant Attorneys General, for respondent.

No. 895, Misc. CUMMINGS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 606, 165 A. 2d 886.

Rehearing Denied.

No. 532. DICKSON, WARDEN, *v.* CHAVEZ ET AL., 364 U. S. 934; and

No. 711. GASTELUM-QUINONES *v.* KENNEDY, ATTORNEY GENERAL, 365 U. S. 871. Petitions for rehearing denied.

No. —, Original, October Term, 1933. EX PARTE PORESKY, 290 U. S. 30. Motion for leave to file petition for rehearing denied.

MAY 15, 1961.

Miscellaneous Order.

No. 535, Misc. IN RE EASON. Motion for leave to file petition for writ of mandamus denied.

Certiorari Granted. (*See also No. 105, ante, p. 259, and No. 1, Misc., ante, p. 271.*)

No. 865. VENUS *v.* UNITED STATES. C. A. 9th Cir. Certiorari granted. *Hayden C. Covington* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 287 F. 2d 304.

No. 777. TURNBOW ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari granted. *Francis R. Kirkham, Harry R. Horrow* and *Francis N. Marshall* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, A. F. Prescott* and *Arthur I. Gould* for respondent. Reported below: 286 F. 2d 669.

No. 864. FEDERAL TRADE COMMISSION *v.* HENRY BROCH & Co. C. A. 7th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Loevinger, Charles H. Weston, PGad B. Morehouse* and *Alan B. Hobbes* for petitioner. *Frederick M. Rowe, Joseph DuCoeur* and *Harold Orlinsky* for respondent.

Certiorari Denied. (*See also No. 825, ante, p. 269; No. 842, ante, p. 270; and No. 846, ante, p. 270.*)

No. 769. FINKLE, EXECUTOR, ET AL. *v.* HOUSING AUTHORITY OF TRENTON. Supreme Court of New Jersey. Certiorari denied. *John A. Hartpence* and *John Wattawa* for petitioners. *Jules J. Kelsey* and *Arthur S. Kelsey* for respondent. Reported below: 33 N. J. 332, 164 A. 2d 382.

No. 858. COLLINS *v.* SOUTHERN PACIFIC CO. C. A. 9th Cir. Certiorari denied. *Thomas C. Ryan* and *Daniel V. Ryan* for petitioner. *Louis L. Phelps* for respondent. Reported below: 286 F. 2d 813.

No. 860. HIGH *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Myron G. Ehrlich* and *Joseph Sitnick* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: —— U. S. App. D. C. ——, 288 F. 2d 427.

No. 861. UNITED STATES *v.* MIAMI TRIBE OF OKLAHOMA ET AL.;

No. 862. UNITED STATES *v.* CROW TRIBE OF INDIANS; and

No. 863. UNITED STATES *v.* ABSENTEE SHAWNEE TRIBE OF OKLAHOMA ET AL. Court of Claims. Certiorari denied. *Solicitor General Cox* and *Roger P. Marquis* for the United States. *Edwin A. Rothschild, Edward P. Morse* and *Walter H. Maloney* for respondents in No. 861. *John W. Cragun* and *John M. Schiltz* for respondent in No. 862. *Jack Joseph* and *Louis L. Rochmes* for respondents in No. 863. Reported below: — Ct. Cl. —, 281 F. 2d 202; — Ct. Cl. —, 284 F. 2d 361; — Ct. Cl. —, — F. 2d —.

No. 866. DYER ET AL. *v.* PUBLIC SERVICE COMMISSION OF MISSOURI ET AL. The motion to dispense with the printing of the appendix to the petition is granted. Petition for writ of certiorari to the Supreme Court of Missouri denied. *J. Raymond Dyer* for petitioners. *Robert J. Keefe* for Union Electric Co., respondent. Reported below: 341 S. W. 2d 795.

No. 871. CHERETON *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Louis M. Hopping* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 286 F. 2d 409.

No. 923. WIENER, EXECUTRIX, ET AL. *v.* UNITED AIR LINES, INC. C. A. 9th Cir. Certiorari denied. *Frank B. Belcher, Ben Margolis, William A. Norris, Algerdas Cheleden, Francis J. Garvey, Harold R. Spence, Augustus F. Mack, Samuel A. Miller, Bertrand Rhine, George H. Pratt* and *Richard McLeod* for petitioners. *Ransom W. Chase* for respondent. Reported below: 286 F. 2d 302.

No. 924. ASTORE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *David M. Markowitz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 288 F. 2d 26.

No. 856. ANDERSON ET AL. *v.* SWART ET AL. The motion to substitute Thomas M. Debevoise in the place of Frederick M. Reed as a party respondent is granted. Petition for writ of certiorari to the Supreme Court of Vermont denied. *Paul M. Butler* and *Alfred L. Scanlan* for petitioners. *Thomas M. Debevoise,* Attorney General of Vermont, for respondents. Reported below: 122 Vt. 177, 167 A. 2d 514.

No. 867. COMER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Gerald Robin Griffin* and *Harry B. Miller* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 288 F. 2d 174.

No. 876. PEREZ-VARELA *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *George Halpern* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for respondent. Reported below: 285 F. 2d 723.

No. 869, Misc. BARBER *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied.

No. 885, Misc. KENNEDY *v.* WILKINS, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied.

No. 870, Misc. BUSH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 893, Misc. CECIL ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 894, Misc. WINTER *v.* WARDEN, MARYLAND PENITENTIARY. Circuit Court of Howard County, Maryland. Certiorari denied.

No. 924, Misc. CUMMINGS *v.* BENNETT, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 935, Misc. CRUIKSHANK *v.* SACKS, WARDEN. Supreme Court of Ohio. Certiorari denied.

No. 939, Misc. SPRINGFIELD *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 960, Misc. STULTZ *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1022, Misc. LEWIS *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 1023, Misc. OWENS *v.* ELLIS, CORRECTIONS DIRECTOR. Petition for writ of certiorari to the Court of Criminal Appeals of Texas and for other relief denied.

Rehearing Denied.

No. 696. ALLISON *v.* INDIANA, 365 U. S. 608; and

No. 798, Misc. OUGHTON *v.* UNITED STATES, 365 U. S. 889. Petitions for rehearing denied.

MAY 17, 1961.

Dismissal Under Rule 60.

No. 734. GAS SERVICE CO. ET AL. *v.* FEDERAL POWER COMMISSION. On petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *J. David Mann, Jr., William W. Ross, Irvin Fane* and *Richard S. Righter* for petitioners. *Solicitor General Cox* for respondent. Reported below: 108 U. S. App. D. C. 334, 282 F. 2d 496.

MAY 22, 1961.

Miscellaneous Orders.

No. 746. OYLER *v.* ADAMS, WARDEN; and

No. 747. CRABTREE *v.* ADAMS, WARDEN. Certiorari, 365 U. S. 810, to the Supreme Court of Appeals of West Virginia. The motions to substitute Otto C. Boles in the place of D. E. Adams as the party respondent are granted. *David Ginsburg* on the motions.

No. 993, Misc. EX PARTE LIPSCOMB. Motion for leave to file petition for writ of habeas corpus denied.

Certiorari Denied.

No. 841. O'TOOLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *C. Joseph Danahy* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for the United States. Reported below: 284 F. 2d 792.

No. 872. Navajo Tribe et al. *v.* National Labor Relations Board et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Norman M. Littell, Frederick Bernays Wiener* and *Charles J. Alexander* for petitioners. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli, Norton J. Come* and *Herman M. Levy* for the National Labor Relations Board; *J. Albert Woll, Theodore J. St. Antoine, Gerard F. Treanor* and *Joseph M. Stone* for International Hod Carriers', Building and Common Laborers' Union of America, AFL–CIO, et al.; and *David E. Feller* and *Emil Narick* for United Steelworkers of America, respondents. Reported below: 109 U. S. App. D. C. 378, 288 F. 2d 162.

No. 888. Ex parte Pierce et al. Supreme Court of Texas. Certiorari denied. *L. N. D. Wells, Jr.* and *Benjamin C. Sigal* for petitioners. *Jack W. Flock* for General Electric Co., respondent. Reported below: 161 Tex. 524, 342 S. W. 2d 424.

No. 896. Moreno *v.* New York Central Railroad Co. Supreme Court of Ohio. Certiorari denied. *Arthur Krause* for petitioner. *John F. Dolan* for respondent.

No. 873. New York, New Haven & Hartford Railroad Co. *v.* Calabritto. C. A. 2d Cir. Certiorari denied. *Robert M. Peet* for petitioner. *William Paul Allen* for respondent. Reported below: 287 F. 2d 394.

No. 880. McManus *v.* Civil Aeronautics Board et al. C. A. 2d Cir. Certiorari denied. *James F. McManus pro se. Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Joseph B. Goldman* and *O. D. Ozment* for the Civil Aeronautics Board, respondent. Reported below: 286 F. 2d 414.

No. 874. I. Leon Co., Inc., *v.* Reiner et al. C. A. 2d Cir. Certiorari denied. *Henry L. Burkitt* for petitioner. *Robert W. Fulwider* and *John M. Lee* for respondents. Reported below: 285 F. 2d 501.

No. 882. Showell et ux. *v.* Commissioner of Internal Revenue. C. A. 9th Cir. Certiorari denied. *W. Lee McLane, Jr.* and *Nola McLane* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Robert N. Anderson* and *Norman H. Wolfe* for respondent. Reported below: 286 F. 2d 245.

No. 883. Brotherhood of Locomotive Firemen & Enginemen et al. *v.* Butte, Anaconda & Pacific Railway Co. C. A. 9th Cir. Certiorari denied. *Harold C. Heiss, David L. Holland* and *Russell B. Day* for petitioners. *C. J. Hansen* for respondent. Reported below: 286 F. 2d 706.

No. 884. West Virginia Northern Railroad Co. *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari denied. *Allen S. Olmsted II* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for respondent. Reported below: 282 F. 2d 63.

No. 885. Wray Equipment Corp. *v.* Westinghouse Electric Corp. et al. C. A. 1st Cir. Certiorari denied. *James M. Malloy* and *Ralph Warren Sullivan* for petitioner. *John M. Hall* and *Douglas L. Ley* for respondents. Reported below: 286 F. 2d 491.

No. 887. American Guild of Variety Artists et al. *v.* Detroy. C. A. 2d Cir. Certiorari denied. *Aaron Benenson* for petitioners. *Henry M. Katz* for respondent. Reported below: 286 F. 2d 75.

No. 889. CARPENTER ET AL. *v.* GLOCK ET AL. C. A. 6th Cir. Certiorari denied. *Thomas D. Shumate* and *M. A. Rowady* for petitioners. *Troy D. Savage* for respondents. Reported below: 286 F. 2d 431.

No. 900. GOODMAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 285 F. 2d 378.

No. 901. TAXIN ET AL. *v.* FOOD FAIR STORES, INC., ET AL. C. A. 3d Cir. Certiorari denied. *Lester J. Schaffer* for petitioners. *Aaron M. Fine* and *Harold E. Kohn* for respondents. Reported below: 287 F. 2d 448.

No. 895. COLE *v.* DOOR COUNTY MEMORIAL HOSPITAL. Court of Appeals of Ohio, Eighth Appellate District. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE BLACK are of the opinion that certiorari should be granted. *Lucian Y. Ray* for petitioner. *Lex Kintner* for respondent. Reported below: 171 N. E. 2d 184.

No. 933, Misc. BRABSON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Reported below: 8 N. Y. 2d 913, 168 N. E. 2d 830.

No. 934, Misc. SMYLY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 287 F. 2d 760.

No. 850, Misc. SMART *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 903. GLENDALE DEVELOPMENT, INC., *v.* BOARD OF REGENTS OF THE UNIVERSITY OF WISCONSIN ET AL. Supreme Court of Wisconsin. Certiorari denied. *Ralph M. Immell* and *Jack R. De Witt* for petitioner. Reported below: 12 Wis. 2d 120, 106 N. W. 2d 430.

No. 587, Misc. ELDRIDGE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 589, Misc. FEELEY *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier* and *Raymond M. Momboisse*, Deputy Attorneys General, for respondents.

No. 830, Misc. LANGSTON *v.* LETTS, U. S. DISTRICT JUDGE. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Acting Assistant Attorney General Doar, Harold H. Greene* and *Howard A. Glickstein* for respondent.

No. 937, Misc. GUTH ET AL. *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 909, Misc. EVANS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 922, Misc. JOHNSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 898, Misc. CHAMBERS *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. Supreme Court of California. Certiorari denied.

No. 931, Misc. IN RE JONES. C. A. 9th Cir. Certiorari denied.

No. 936, Misc. CLINTON *v.* JOSHUA HENDY CORP. ET AL. C. A. 9th Cir. Certiorari denied.

No. 896, Misc. JONES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 946, Misc. FEATHER *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 949, Misc. HILDERBRAND *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: See 190 F. Supp. 283.

No. 950, Misc. RINALDO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 955, Misc. BRESSLER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 980, Misc. TAYLOR *v.* DISTRICT OF COLUMBIA UNEMPLOYMENT COMPENSATION BOARD ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *John Allen Weil* for respondents.

No. 982, Misc. BIRCHER *v.* KANSAS. Supreme Court of Kansas. Certiorari denied.

No. 967, Misc. JACKSON ET AL. *v.* COLEMAN. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Paul Lee Sweeny* for petitioners. *Dale L. Button* for respondent. Reported below: 109 U. S. App. D. C. 242, 286 F. 2d 98.

No. 981, Misc. LINDSAY *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. *George E. Trawick* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *Jerry L. Coe,* Assistant Attorney General, for respondent. Reported below: —— Ala. ——, 125 So. 2d 725.

No. 459, Misc. WEST VIRGINIA EX REL. SUBLETT *v.* ADAMS, WARDEN. Motion to substitute Otto C. Boles in the place of D. E. Adams as the party respondent granted. Petition for writ of certiorari to the Supreme Court of Appeals of West Virginia denied. THE CHIEF JUSTICE took no part in the consideration or decision of this motion and application. Reported below: —— W. Va. ——, 115 S. E. 2d 158.

No. 1029, Misc. WEAVER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

Rehearing Denied.

No. 864, Misc. STICKNEY *v.* ELLIS, CORRECTIONS DIRECTOR, 365 U. S. 888. Petition for rehearing denied.

No. 386, Misc., October Term, 1952. WATERMAN *v.* NEW YORK, 345 U. S. 945; and

No. 387, Misc., October Term, 1952. WATERMAN *v.* SCHATTEN ET AL., 345 U. S. 945. Motion for leave to file a second petition for rehearing denied.

MAY 29, 1961.

Miscellaneous Orders.

No. 551. GINSBURG *v.* GINSBURG ET AL., 364 U. S. 934. Motion to vacate order denying petition for writ of certiorari and for leave to file amendment to petition is denied.

No. 676, Misc. JORDAN *v.* MICHIGAN. Motion for leave to file petition for writ of habeas corpus and other relief denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 878, Misc. SMITH *v.* NEW MEXICO. Motion for leave to file petition for writ of habeas corpus denied.

Question as to Jurisdiction Postponed.

No. 849. CRAMP *v.* BOARD OF PUBLIC INSTRUCTION OF ORANGE COUNTY. Appeal from the Supreme Court of Florida. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. *Tobias Simon* for appellant. *J. R. Wells* for appellee. Reported below: 125 So. 2d 554.

Certiorari Granted. (*See No. 380, Misc., ante, p. 716.*)

Certiorari Denied. (*See also No. 821, ante, p. 716, and No. 676, Misc, supra.*)

No. 729. JOHNSON *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. *Clifford Hoof* and *David W. Harris* for petitioner. *William L. Paul, Jr.* for respondent. Reported below: 56 Wash. 2d 700, 355 P. 2d 13.

No. 806. DEPARTMENT & SPECIALTY STORE EMPLOYEES' UNION, LOCAL 1265, R. C. I. A., AFL–CIO, *v.* BROWN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS

BOARD. C. A. 9th Cir. Certiorari denied. *Roland C. Davis* and *S. G. Lippman* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 284 F. 2d 619.

No. 894. BATISTIC *v.* PILLIOD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 286 F. 2d 268.

No. 815. GROSS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Donald N. Murtha* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 286 F. 2d 59.

No. 897. KEARNEY ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Michael M. Kearney* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, 285 F. 2d 797.

No. 904. DEAUVILLE REALTY CO., INC., ET AL. *v.* TOBIN ET AL. Supreme Court of Florida. Certiorari denied. *Donald S. Dawson* for petitioners. Reported below: 127 So. 2d 678.

No. 819. CORY CORPORATION ET AL. *v.* SAUBER. C. A. 7th Cir. Motion to use the record in No. 436, October Term, 1959, granted. Certiorari denied. *Edwin A. Rothschild* and *Stanford Clinton* for petitioners. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for respondent. Reported below: 284 F. 2d 767.

No. 907. UNITED STATES *v.* KLEIN ET AL. Court of Claims. Certiorari denied. *Solicitor General Cox, Roger P. Marquis* and *S. Billingsley Hill* for the United States. *Frank J. Delaney* for respondents. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 925. GIRARD LODGE No. 100 ET AL. *v.* GRAND LODGE, BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, ET AL. Supreme Court of Pennsylvania. Certiorari denied. *Lawrence J. Richette* for petitioners. *Walter Biddle Saul, Allen S. Olmsted II* and *Ivar H. Peterson* for respondents. Reported below: 402 Pa. 523, 167 A. 2d 465.

No. 905. REED *v.* PENNSYLVANIA RAILROAD CO. Supreme Court of Ohio. Certiorari denied. *James C. Britt* for petitioner. *Robert L. Barton* for respondent. Reported below: 171 Ohio St. 433, 171 N. E. 2d 718.

No. 893. LICAVOLI *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Ivan E. Barris* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: —— U. S. App. D. C. ——, 294 F. 2d 207.

No. 912. PIERSON, WYOMING SUPERVISOR, BUREAU OF LAND MANAGEMENT, DEPARTMENT OF INTERIOR, ET AL. *v.* PAN AMERICAN PETROLEUM CORP. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Solicitor General Cox, Roger P. Marquis* and *A. Donald Mileur* for petitioners. *A. G. McClintock* for respondent. Reported below: 284 F. 2d 649.

No. 99, Misc. DEAN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Earl W. Allison* for respondent.

No. 303, Misc. RAY *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Arlo E. Smith*, Deputy Attorney General, for respondent. Reported below: 181 Cal. App. 2d 64, 5 Cal. Rptr. 113.

No. 333, Misc. POTTER *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk*, Attorney General of California, and *Doris H. Maier* and *Edsel W. Haws*, Deputy Attorneys General, for respondent.

No. 479, Misc. JARVIS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 568, Misc. PARKER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Wilkey* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 862.

No. 601, Misc. FULLEN *v.* WYOMING. C. A. 10th Cir. Certiorari denied. Reported below: 283 F. 2d 116.

No. 612, Misc. MCDOWELL *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Rankin, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 867.

No. 625, Misc. CITO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Acting Assistant Attorney General Foley* and *Beatrice Rosenberg* for the United States. Reported below: 283 F. 2d 49.

No. 675, Misc. MILLER *v.* HAND, WARDEN. Supreme Court of Kansas. Certiorari denied. Petitioner *pro se.* *William H. Ferguson,* Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent. Reported below: 187 Kan. 352, 356 P. 2d 837.

No. 734, Misc. THOMAS *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se.* *MacDonald Gallion,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent.

No. 751, Misc. PHILLIPS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se.* *William G. Clark,* Attorney General of Illinois, and *William C. Wines,* Assistant Attorney General, for respondent.

No. 757, Misc. NASH *v.* RICHMOND, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 801, Misc. DELANEY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 806, Misc. GRIFFIN *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 847, Misc. KORTUM *v.* SIGLER, WARDEN. Supreme Court of Nebraska. Certiorari denied.

No. 846, Misc. ALEXANDER *v.* DAUGHERTY, WARDEN, ET AL. C. A. 10th Cir. Certiorari denied. Reported below: 286 F. 2d 645.

No. 836, Misc. BRYANT *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Reported below: 171 Ohio St. 411, 171 N. E. 2d 513.

No. 925, Misc. ADAMES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 927, Misc. JUDY *v.* PEPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 938, Misc. NEAL ET AL. *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 948, Misc. MEADERDS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 963, Misc. SLIVA *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 954, Misc. REEDER *v.* DIRECTOR, PATUXENT INSTITUTION. Court of Appeals of Maryland. Certiorari denied.

No. 965, Misc. BANKS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 968, Misc. STONEKING *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 975, Misc. HENSON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 994, Misc. WESTPHAL *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 682, Misc. SCHLETTE *v.* CALIFORNIA ET AL. C. A. 9th Cir. Petition for writ of certiorari and for other relief denied. Reported below: 284 F. 2d 827.

No. 1044, Misc. GREENWOOD *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 1055, Misc. RYAN *v.* PENNSYLVANIA ET AL. C. A. 3d Cir. Certiorari denied.

No. 346, Misc. HILL *v.* SETTLE, WARDEN. C. A. 8th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Rankin, Assistant Attorney General Tyler* and *Harold H. Greene* for respondent. Reported below: 283 F. 2d 518.

No. 384, Misc. MICHAELS *v.* CHAPPELL ET AL. C. A. 9th Cir. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *A. L. Wirin* and *Fred Okrand* for petitioner. *Martin H. Webster* and *Louis Lee Abbott* for respondents. Reported below: 279 F. 2d 600.

No. 996, Misc. SEGRIFF, ADMINISTRATOR, *v.* JOHNSTON. Supreme Court of Pennsylvania. Certiorari denied. *Edward O. Spotts* for petitioner. *Donald W. Bebenek* for respondent. Reported below: 402 Pa. 109, 166 A. 2d 496.

No. 804, Misc. JACKSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. THE CHIEF JUSTICE and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *William B. Bryant* and *William C. Gardner* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 109 U. S. App. D. C. 233, 285 F. 2d 675.

Rehearing Denied.

No. 96. KOSSICK *v.* UNITED FRUIT CO., 365 U. S. 731;

No. 313. SMITH *v.* BUTLER ET AL., TRUSTEES, *ante*, p. 161;

No. 553. ARMOUR RESEARCH FOUNDATION OF ILLINOIS INSTITUTE OF TECHNOLOGY ET AL. *v.* C. K. WILLIAMS & CO., INC., ET AL., 365 U. S. 811;

No. 770. GOSS *v.* ILLINOIS, 365 U. S. 881;

No. 804. NAVIOS CORPORATION ET AL. *v.* NATIONAL MARITIME UNION OF AMERICA ET AL., *ante*, p. 905;

No. 398, Misc. KIGER *v.* UNITED STATES, 365 U. S. 846; and

No. 692, Misc. ROMANO *v.* MURPHY, WARDEN, *ante*, p. 919. Petitions for rehearing denied.

No. 340. INTERNATIONAL TYPOGRAPHICAL UNION, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, 365 U. S. 705. Petition for rehearing or to remand judgment denied. MR. JUSTICE HARLAN and MR. JUSTICE

WHITTAKER would call for a response. See Rule 58 (3). MR. JUSTICE FRANKFURTER took no part in the consideration or decision of this case.

JUNE 2, 1961.

Certiorari Denied.

No. 1000. WILLIAMS *v.* MOORE, WARDEN. C. A. 5th Cir. Certiorari denied. *Thos. H. Dent* for petitioner. *Will Wilson,* Attorney General of Texas, and *Riley Eugene Fletcher* and *Leon F. Pesek,* Assistant Attorneys General, for respondent. Reported below: 285 F. 2d 590.

JUNE 5, 1961.

Miscellaneous Orders.

No. 983, Misc. STANLEY *v.* JOHNSTON, STATE HOSPITAL DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied.

No. 1089, Misc. CARLSON *v.* IOWA ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 910, Misc. HILL *v.* BOLDT, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied.

Probable Jurisdiction Noted.

No. 881. GOLDBLATT ET AL. *v.* TOWN OF HEMPSTEAD. Appeal from the Court of Appeals of New York. Probable jurisdiction noted. *Milton I. Newman* and *Edward M. Miller* for appellants. *Richard P. Charles, John A. Morhous* and *William C. Mattison* for appellee. Reported below: 9 N. Y. 2d 101, 172 N. E. 2d 562.

Certiorari Granted. (*See also No. 844, ante, p. 763, and No. 699, Misc., ante, p. 765.*)

No. 919. SIMONSON, TRUSTEE IN BANKRUPTCY, ET AL. *v.* GRANQUIST, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 9th Cir. Certiorari granted. *Arthur E. Simon* and *John F. Cramer, Jr.* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for respondents. Reported below: 287 F. 2d 489.

No. 910. GRIGGS *v.* COUNTY OF ALLEGHENY. Supreme Court of Pennsylvania. Certiorari granted. *D. Malcolm Anderson* for petitioner. *Maurice Louik, Francis A. Barry* and *Philip Baskin* for respondent. Reported below: 402 Pa. 411, 168 A. 2d 123.

No. 313, Misc. GOJACK *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to the appellate docket. *Frank J. Donner* and *David Rein* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for the United States. Reported below: 108 U. S. App. D. C. 130, 280 F. 2d 678.

Certiorari Denied. (*See also No. 1089, Misc., supra; No. 807, ante, p. 762; and No. 902, ante, p. 764.*)

No. 974, Misc. FLEMING *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 993. COHAN ET AL. *v.* CITY OF NEW YORK. Court of Appeals of New York. Certiorari denied. *Sidney S. Levine* for petitioners. *Leo A. Larkin* and *Seymour B. Quel* for respondent.

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No. 908. Carlo *v.* United States. C. A. 2d Cir. Certiorari denied. *George J. Todaro* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 286 F. 2d 841.

No. 909. Cavell, Warden, *v.* Fletcher. C. A. 3d Cir. Certiorari denied. *Anne X. Alpern,* Attorney General of Pennsylvania, and *Frank P. Lawley, Jr.,* Deputy Attorney General, for petitioner. Reported below: 287 F. 2d 792.

No. 911. First National Oil Corp. *v.* Florida Molasses Co. Appellate Division, Supreme Court of New York, Second Judicial Dept. Certiorari denied. *Frank M. Rashap* for petitioner. Reported below: 11 App. Div. 2d 1027, 207 N. Y. S. 2d 998.

No. 917. Spheeris et ux. *v.* Commissioner of Internal Revenue. C. A. 7th Cir. Certiorari denied. *Edward H. Meldman* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for respondent. Reported below: 284 F. 2d 928.

No. 920. Millet et al. *v.* United States. C. A. 2d Cir. Certiorari denied. *Louis Granick* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander* and *Herbert E. Morris* for the United States. Reported below: 287 F. 2d 409.

No. 921. Leavell & Ponder, Inc., et al. *v.* United States. C. A. 5th Cir. Certiorari denied. *Eugene T. Edwards* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *A. Donald Mileur* for the United States. Reported below: 286 F. 2d 398.

No. 926. ORME *v.* ORME ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Carl L. Shipley* and *Thomas A. Ziebarth* for petitioner. *Bernard I. Nordlinger* and *Ward H. Oehmann* for respondents. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 916. HUCKINS ET AL. *v.* DUVAL COUNTY ET AL. The motion to substitute Farris Bryant in the place of Leroy Collins and Doyle Conner in the place of Nathan Mayo as parties respondent is granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Herman Ulmer* for petitioners. *Richard W. Ervin,* Attorney General of Florida, *Fred M. Burns* and *Robert C. Parker,* Assistant Attorneys General, and *Sid J. White,* Special Assistant Attorney General, for respondents. Reported below: 286 F. 2d 46.

No. 929. MURRAY *v.* NEW YORK CENTRAL RAILROAD CO. C. A. 2d Cir. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Nathan Baker, Bernard Chazen* and *Milton Garber* for petitioner. *Gerald E. Dwyer* for respondent. Reported below: 287 F. 2d 152.

No. 430, Misc. PENNSYLVANIA EX REL. DION *v.* BANMILLER, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 888, Misc. EASTMAN *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. C. A. 4th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 1011, Misc. MATTOON *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 905, Misc. SMITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 287 F. 2d 270.

No. 964, Misc. SLIVA *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 976, Misc. MARTINEZ *v.* UDALL, SECRETARY OF THE INTERIOR. C. A. 10th Cir. Certiorari denied. *Bentley M. McMullin* for petitioner. *Solicitor General Cox* and *Roger P. Marquis* for respondent. Reported below: 285 F. 2d 587.

No. 984, Misc. BYARS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 997, Misc. SOLOMON *v.* GILLIS, RECORDER'S COURT JUDGE. Supreme Court of Michigan. Certiorari denied.

No. 1006, Misc. JOHNSON *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 504, Misc. HEATH *v.* SMYTH, PENITENTIARY SUPERINTENDENT. Motion to substitute W. K. Cunningham, Jr. in the place of W. F. Smyth, Jr. as the party respondent granted. Petition for writ of certiorari to the Supreme Court of Appeals of Virginia denied MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Reno S. Harp III*, Assistant Attorney General of Virginia, for respondent.

Rehearing Denied.

No. 212. MOSES LAKE HOMES, INC., ET AL. *v.* GRANT COUNTY, 365 U. S. 744;

No. 584. YALE TRANSPORT CORP. ET AL. *v.* UNITED STATES ET AL., 365 U. S. 566;

No. 715. CLAWSON *v.* UNITED STATES, *ante*, p. 905;

No. 726. CODUTO *v.* UNITED STATES, 365 U. S. 881;

No. 136, Misc. DUNCAN *v.* MADIGAN, WARDEN, *ante*, p. 919;

No. 655, Misc. LOUISIANA EX REL. ALLEN *v.* WALKER, WARDEN, 365 U. S. 567; and

No. 890, Misc. WILSON *v.* UNITED STATES, *ante*, p. 921. Petitions for rehearing denied.

No. 616, Misc. WILLIAMS *v.* UNITED STATES, 365 U. S. 883. Motion for leave to file petition for rehearing denied.

JUNE 12, 1961.

Miscellaneous Orders.

No. 1038, Misc. ECKMAN *v.* ALASKA. Motion for leave to file petition for writ of certiorari denied.

No. 1098, Misc. MYERS *v.* NEW MEXICO; and

No. 1170, Misc. LYONS *v.* CALIFORNIA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1010, Misc. MCDONALD *v.* RHAY, PENITENTIARY SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 1121, Misc. GARRISON *v.* NEW MEXICO ET AL. Motion for leave to file petition for writ of habeas corpus and other relief denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 752, Misc. LEDFORD *v.* CURRAN, U. S. DISTRICT JUDGE. Motion for leave to file petition for writ of mandamus denied. *Frederick Bernays Wiener* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for respondent.

Certiorari Granted. (*See No. 685, 367 U. S. 486.*)

Certiorari Denied. (*See also Nos. 1010, Misc., and 1121, Misc., supra; Nos. 877 and 886, 367 U. S. 487.*)

No. 859. COMPANIA NACIONAL DE NAVEGACAO CASTEIRO PATRIMONIO *v.* CABINS TANKER INDUSTRIES, INC., ET AL. C. A. 4th Cir. Certiorari denied. *Hugh S. Meredith* for petitioner. *Samuel B. Fortenbaugh, Jr.* and *Leon T. Seawell* for respondents. Reported below: 285 F. 2d 592.

No. 879. G. A. RAFEL & Co., INC., *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *Howard R. Slater* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *Bernard M. Mamet* for Local No. 9, International Brotherhood of Electrical Workers, AFL–CIO, et al., respondents. Reported below: —— F. 2d ——.

No. 932. ROCHA ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Willard Whittinghill* and *John S. Rhoades* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 288 F. 2d 545.

No. 933. PHILIP CAREY MANUFACTURING CO. ET AL. *v.* TAYLOR, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied. *John B. Hollister, Burton Y. Weitzenfeld* and *Cyrus Austin* for petitioners. *Peyton Ford* for respondent. Reported below: 286 F. 2d 782.

No. 934. FIELD ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Burton W. Kanter* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for respondent. Reported below: 286 F. 2d 960.

No. 936. CLARK *v.* ZIMMERER, COMMISSIONER OF PUBLIC HEALTH OF IOWA. Supreme Court of Iowa. Certiorari denied. *H. S. Life* for petitioner. Reported below: 252 Iowa 578, 107 N. W. 2d 726.

No. 938. PEABODY COAL CO. *v.* NATIONAL LABOR RELATIONS BOARD; and

No. 939. UNITED MINE WORKERS OF AMERICA ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *V. Lee McMahon* for petitioner in No. 938. *Edmund Burke, Welly K. Hopkins, Harrison Combs* and *M. E. Boiarsky* for petitioners in No. 939. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 284 F. 2d 910.

No. 940. KINOSHITA & CO., LTD., *v.* LIBERTY NAVIGATION & TRADING CO. C. A. 2d Cir. Certiorari denied. *Robert S. Blanc, Jr.* for petitioner. *John V. Lindsay* for respondent. Reported below: 285 F. 2d 343.

No. 680. LOCAL 36, INTERNATIONAL CHEMICAL WORKERS UNION, AFL–CIO, *v.* NATIONAL LABOR RELATIONS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. THE CHIEF JUSTICE is of the opinion that certiorari should be granted. *David E. Feller, Robert L. Mitchell* and *Elliott Bredhoff* for petitioner. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 942. WITT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Russell E. Parsons* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 287 F. 2d 389.

No. 1004. BOLLETTIERI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Robert E. Fischer* and *Maxwell B. Spoont,* Special Assistant Attorneys General, for respondent. Reported below: 9 N. Y. 2d 629, 172 N. E. 2d 83.

No. 941. BLAZINA *v.* BOUCHARD, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 3d Cir. Certiorari denied. *Robert J. Carluccio* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 286 F. 2d 507.

No. 708. LOCAL NO. 520, INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL–CIO, *v.* GLENDALE MANUFACTURING CO. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Morris P. Glushien* and *Ruth Weyand* for petitioner. Reported below: 283 F. 2d 936.

No. 937. STATE TAX COMMISSION OF ARIZONA *v.* MURRAY CO. OF TEXAS, INC. Motion for leave to use record in No. 168, October Term, 1960, granted. Petition for writ of certiorari to the Supreme Court of Arizona denied. *Robert W. Pickrell,* Attorney General of Arizona, *Philip M. Haggerty,* Assistant Attorney General, and *Leslie C. Hardy,* Special Assistant Attorney General, for petitioner. *Denison Kitchel* for respondent. Reported below: 87 Ariz. 268, 350 P. 2d 674.

No. 927. ROGERS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion certiorari should be granted. *William R. Bagby* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Joseph Kovner* for the United States. Reported below: 286 F. 2d 277.

No. 512, Misc. SMITH EX REL. SHERWOOD *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Petitioner *pro se*. *Robert Y. Thornton,* Attorney General of Oregon, and *Harold W. Adams,* Assistant Attorney General, for respondent.

No. 773, Misc. SULLIVAN *v.* DICKSON, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, and *Arlo E. Smith,* Deputy Attorney General, for respondent. Reported below: 283 F. 2d 725.

No. 918, Misc. CONERLY *v.* MCGEE, CORRECTIONS DIRECTOR, ET AL. C. A. 9th Cir. Certiorari denied.

No. 972, Misc. ELLINGER *v.* PEPERSACK, WARDEN. Court of Appeals of Maryland. Certiorari denied.

No. 977, Misc. HARRIS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1000, Misc. KELLY *v.* MANNING, PENITENTIARY SUPERINTENDENT. Supreme Court of South Carolina. Certiorari denied.

No. 979, Misc. MOKUS *v.* KENTON, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 978, Misc. EDMONDS *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 988, Misc. HOPKINS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 1004, Misc. ADAMS *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1007, Misc. KEARSE *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1017, Misc. CRAWFORD *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 1019, Misc. CIUCCI *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. *George N. Leighton* for petitioner. Reported below: 21 Ill. 2d 81, 171 N. E. 2d 34.

No. 1024, Misc. SOLOMON *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1025, Misc. COHEN *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1028, Misc. BIRDEN ET AL. *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1035, Misc. MARCO *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 1031, Misc. REINA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner.

No. 1045, Misc. FOGGY *v.* EYMAN, WARDEN, ET AL. Supreme Court of Arizona. Certiorari denied.

No. 1049, Misc. SEAGRAVE *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1058, Misc. WILLIS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1069, Misc. MURDOCK *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1071, Misc. ANDERSON *v.* KENTUCKY ET AL. Court of Appeals of Kentucky and United States Court of Appeals for the Sixth Circuit. Certiorari denied. Reported below: —— S. W. 2d ——; 288 F. 2d 333.

No. 1130, Misc. WOLFE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. *Bernard J. Mellman* for petitioner. *Thomas F. Eagleton,* Attorney General of Missouri, and *Ben Ely, Jr.*, Assistant Attorney General, for respondent.

No. 1114, Misc. GREEN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1077, Misc. HATFIELD *v.* BUCHKOE, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 524, Misc. GOODLOW *v.* BUCHKOE, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Paul L. Adams,* Attorney General of Michigan, and *Samuel J. Torina,* Solicitor General, for respondent. Reported below: —— F. 2d ——.

No. 953, Misc. BROWN *v.* INDIANA. Petition for writ of certiorari to the Supreme Court of Indiana denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court, it appearing from the papers submitted that the State is prepared to concede that petitioner has exhausted state remedies. MR. JUSTICE DOUGLAS would grant the petition for certiorari and reverse the judgment below on the authority of *Smith* v. *Bennett,* 365 U. S. 708. Petitioner *pro se.* *Edwin K. Steers,* Attorney General of Indiana, for respondent. Reported below: 241 Ind. ——, 171 N. E. 2d 825.

No. 1041, Misc. SEALS *v.* ALABAMA. Petition for writ of certiorari to the Supreme Court of Alabama denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court. *Thurgood Marshall* for petitioner. *MacDonald Gallion,* Attorney General of Alabama, and *George D. Mentz* and *Jerry L. Coe,* Assistant Attorneys General, for respondent. Reported below: 271 Ala. 622, 126 So. 2d 474.

Rehearing Granted. (*See No. 685, 367 U. S. 486.*)

Rehearing Denied.

No. 703. SMITH ET AL. *v.* FORDHAM UNIVERSITY, 365 U. S. 846; and

No. 758, Misc., October Term, 1959. DRAKE *v.* UNITED STATES, 362 U. S. 981. Motions for leave to file petitions for rehearing denied.

No. 599. California et al. *v.* Federal Power Commission et al., *ante*, p. 912;

No. 681. Brotherhood of Maintenance of Way Employes et al. *v.* United States et al., *ante*, p. 169;

No. 695. Chaifetz *v.* United States, *ante*, p. 209; and

No. 505, Misc. Hanna *v.* Home Insurance Co., 365 U. S. 838. Petitions for rehearing denied.

June 13, 1961.

Dismissal Under Rule 60.

No. 995, Misc. King *v.* Ellis, Corrections Director. Motion for leave to file petition for writ of habeas corpus dismissed pursuant to Rule 60 of the Rules of this Court. Movant *pro se*. *Riley Eugene Fletcher*, Assistant Attorney General of Texas, for respondent.

June 16, 1961.

Miscellaneous Orders.

No. ——. Britt *v.* South Carolina; and

No. ——. Westbury *v.* South Carolina. The applications for stays of execution presented to The Chief Justice, and by him referred to the Court, are denied. *Henry R. Sims II* for petitioner Westbury. *Daniel R. McLeod*, Attorney General of South Carolina, *Everett N. Brandon*, Assistant Attorney General, and *Julian S. Wolfe* for respondent.

June 19, 1961.

Miscellaneous Orders.

No. 1194, Misc. Taylor *v.* Floete, Director, General Services Administration, et al. Motion for leave to file petition for writ of certiorari denied.

No. 55. UNITED STATES *v.* E. I. DU PONT DE NEMOURS & CO. ET AL., *ante*, p. 316. The motion of E. I. du Pont de Nemours and Company to modify the opinion is denied. MR. JUSTICE FRANKFURTER, MR. JUSTICE WHITTAKER, and MR. JUSTICE STEWART are of the opinion that the motion should be granted. MR. JUSTICE CLARK and MR. JUSTICE HARLAN took no part in the consideration or decision of this motion. *John Lord O'Brian, Hugh B. Cox, Charles A. Horsky* and *Daniel M. Gribbon* on the motion. *Solicitor General Cox, Assistant Attorney General Loevinger, John F. Davis, Richard A. Solomon* and *Bill G. Andrews* in opposition.

No. 97. CAFETERIA & RESTAURANT WORKERS UNION, LOCAL 473, AFL–CIO, ET AL. *v.* MCELROY ET AL. Certiorari, 364 U. S. 813, to the United States Court of Appeals for the District of Columbia Circuit. The motion of petitioners to substitute Robert S. McNamara in the place of Thomas S. Gates as a party respondent is denied. The motion of respondent to dismiss as to the respondent, Thomas S. Gates, individually and as Secretary of Defense, is denied. *Bernard Dunau* for petitioners. *Solicitor General Cox* for respondents.

No. 689. NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE *v.* HARRISON, ATTORNEY GENERAL OF VIRGINIA, ET AL. Certiorari, 365 U. S. 842, to the Supreme Court of Appeals of Virginia. The motion to substitute Frederick T. Gray in the place of Albertis S. Harrison, Jr., Henry D. Garnett in the place of William J. Carlton, and Alfred W. Whitehurst in the place of Linwood B. Tabb, Jr., as the parties respondent is granted. *Robert L. Carter* on the motion.

No. 713. STILL *v.* NORFOLK & WESTERN RAILWAY CO. Certiorari, 365 U. S. 877, to the Supreme Court of Appeals of West Virginia. The motion of petitioner for leave to proceed further herein *in forma pauperis* is granted. *Sidney S. Sachs* and *Lewis Jacobs* on the motion.

No. 864. FEDERAL TRADE COMMISSION *v.* HENRY BROCH & Co. Certiorari, *ante*, p. 923, to the United States Court of Appeals for the Seventh Circuit. The joint motion for leave to use record in No. 61, October Term, 1959, is granted. *Solicitor General Cox* for petitioner, and *Frederick M. Rowe* for respondent.

No. 1138, Misc. BENSINGER *v.* STEINER, WARDEN;
No. 1154, Misc. SAM *v.* RHAY, PENITENTIARY SUPERINTENDENT;
No. 1162, Misc. TAYLOR ET AL. *v.* VIRGINIA;
No. 1174, Misc. IN RE BOGISH; and
No. 1204, Misc. KONCHICK *v.* CERAUL, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1073, Misc. DIMOND *v.* WYOMING ET AL. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 992, Misc. ARMSTRONG *v.* DISTRICT COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT, ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 1101, Misc. BOARD OF PUBLIC INSTRUCTION OF DUVAL COUNTY, FLORIDA, ET AL. *v.* SIMPSON, U. S. DISTRICT JUDGE, ET AL. Motion for leave to file petition for writ of mandamus and/or prohibition denied. *Fred H. Kent* and *Elliot Adams* for petitioners.

Certiorari Granted. (*See also No. 843, 367 U. S. 906, and No. 629, 367 U. S. 911.*)

No. 892. LEHIGH VALLEY COOPERATIVE FARMERS, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 3d Cir. Certiorari granted. *Willis F. Daniels* and *Donn L. Snyder* for peti-

tioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States et al. *Walter F. Mondale,* Attorney General of Minnesota, and *Sydney Berde,* Deputy Attorney General, filed a brief for the State of Minnesota, as *amicus curiae,* in support of the petition. Reported below: 287 F. 2d 726.

No. 947. MANAGED FUNDS, INC., *v.* BROUK ET AL. C. A. 8th Cir. Certiorari granted. *R. Walston Chubb* for petitioner. *Forrest M. Hemker* and *William Stix* for respondents. *Solicitor General Cox, Walter P. North* and *Ellwood L. Englander* filed a brief for the Securities and Exchange Commission, as *amicus curiae,* in support of the petition. Reported below: 286 F. 2d 901.

No. 1020, Misc. LYNCH *v.* OVERHOLSER, HOSPITAL SUPERINTENDENT. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to the appellate docket. *Richard Arens* and *Lawrence Speiser* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall, Richard J. Medalie, Harold H. Greene* and *David Rubin* for respondent. Reported below: 109 U. S. App. D. C. 404, 288 F. 2d 388.

No. 641, Misc. CARNLEY *v.* COCHRAN, CORRECTIONS DIRECTOR. Motion for leave to proceed *in forma pauperis* granted. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari to the Supreme Court of Florida granted. Case transferred to the appellate docket. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *B. Clarke Nichols,* Assistant Attorney General, for respondent. Reported below: 123 So. 2d 249.

No. 331. PRICE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Harry I. Rand* and *Leonard B. Boudin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley, Kevin T. Maroney, George B. Searls* and *Lee B. Anderson* for the United States. Reported below: 108 U. S. App. D. C. 167, 280 F. 2d 715.

No. 788. FONG FOO ET AL. *v.* UNITED STATES; and

No. 789. STANDARD COIL PRODUCTS CO., INC., *v.* UNITED STATES. C. A. 1st Cir. Certiorari granted. *David E. Feller* for petitioners in No. 788. *Arthur Richenthal* for petitioner in No. 789. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 286 F. 2d 556.

No. 539, Misc. COPPEDGE *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to appellate docket. *Bennett Boskey* for petitioner. *Solicitor General Rankin, Assistant Attorney General Wilkey, Beatrice Rosenberg* and *J. F. Bishop* for the United States.

No. 300. WHITMAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. *Thurman Arnold* and *Gerhard P. Van Arkel* for petitioner. *Solicitor General Rankin* and *Assistant Attorney General Yeagley* for the United States. Reported below: 108 U. S. App. D. C. 226, 281 F. 2d 59.

No. 239. RUSSELL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Joseph A. Fanelli* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *George B. Searls* for the United States. Reported below: 108 U. S. App. D. C. 140, 280 F. 2d 688.

No. 328. LIVERIGHT *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Harry I. Rand* and *Leonard B. Boudin* for petitioner. *Solicitor General Rankin, Assistant Attorney General Yeagley* and *George B. Searls* for the United States. Reported below: 108 U. S. App. D. C. 160, 280 F. 2d 708.

Certiorari Denied. (*See also No. 1073, Misc., supra; No. 424, 367 U. S. 904; No. 554, 367 U. S. 905; No. 754, 367 U. S. 911; No. 808, 367 U. S. 905; No. 847, 367 U. S. 907; No. 906, 367 U. S. 910; No. 914, 367 U. S. 904; and No. 954, 367 U. S. 909.*)

No. 731. CARMINATI *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *I. William Stempil* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 281 F. 2d 908.

No. 891. SCHUBERT *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 4th Cir. Certiorari denied. *LeRoy R. Cohen, Jr.* and *John F. Kelly* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett* and *Fred E. Youngman* for respondent. Reported below: 286 F. 2d 573.

No. 948. CLIETT *v.* HAMMONDS ET AL. C. A. 5th Cir. Certiorari denied. *Raymond Hill* and *O. John Rogge* for petitioner. *W. H. Betts* for respondents.

No. 931. WESTERN HEARING AID CENTER, LTD., ET AL. *v.* DAHLBERG COMPANY. Supreme Court of Minnesota. Certiorari denied. *Joseph Robbie* for petitioners. *John M. Palmer* for respondent. Reported below: 259 Minn. 330, 107 N. W. 2d 381.

No. 945. DUPUIS *v.* CENTRAL AND SOUTHERN FLORIDA FLOOD CONTROL DISTRICT. Supreme Court of Florida. Certiorari denied. *B. E. Hendricks* for petitioner. *Charles H. Gautier* for respondent. Reported below: 127 So. 2d 679.

No. 946. BERNARD ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Maurice J. Walsh* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 287 F. 2d 715.

No. 930. CARLUCCI ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *V. J. Rich, Vincent M. Casey* and *Michael von Moschzisker* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 288 F. 2d 691.

No. 949. ROTH *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 286 F. 2d 635.

No. 955. THOMAS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Herbert Garon* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 287 F. 2d 527.

No. 951. In re Mellen Manufacturing Co. C. A. 3d Cir. Certiorari denied. *Arthur Markowitz* for petitioner. *Paul W. Reeder* for respondents. Reported below: 287 F. 2d 37.

No. 950. Local 984, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, AFL–CIO, et al. *v.* Humko Co., Inc., et al. C. A. 6th Cir. Certiorari denied. *L. N. D. Wells, Jr., Charles J. Morris, David Previant* and *Anthony J. Sabella* for petitioners. *Clarence Clifton* for Humko Co., and *John L. Franklin* for Kuhne-Simmons Co., respondents. Reported below: 287 F. 2d 231.

No. 957. Hoover *v.* Oklahoma Turnpike Authority. Supreme Court of Oklahoma. Certiorari denied. *Charles R. Nesbitt* for petitioner. *Ned Looney* for respondent. Reported below: 359 P. 2d 680.

No. 958. Bank Voor Handel en Scheepvaart, N. V., et al. *v.* Kennedy, Attorney General, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Robert L. Augenblick* and *Lawrence C. Moore* for petitioners. *Solicitor General Cox, Paul V. Myron* and *Ralph S. Spritzer* for respondents. *Henry P. de Vries* filed a memorandum for J. H. van Roijen, Netherlands Ambassador, as *amicus curiae,* in support of the petition. Reported below: 109 U. S. App. D. C. 391, 288 F. 2d 375.

No. 959. Air Line Pilots Association, International, et al. *v.* Quesada, Administrator, Federal Aviation Agency. C. A. 2d Cir. Certiorari denied. *Samuel J. Cohen* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Morton Hollander* for respondent. Reported below: 286 F. 2d 319.

No. 960. DeJesus *v.* United States. C. A. 2d Cir. Certiorari denied. *Barry Golomb* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 289 F. 2d 37.

No. 962. Farace, Consul General of Italy, *v.* D'Amico. C. A. 2d Cir. Certiorari denied. *David A. Botwinik* for petitioner. *Harold Harper* for respondent. Reported below: 286 F. 2d 320.

No. 963. Schneider *v.* Rusk, Secretary of State. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Milton V. Freeman, Robert E. Herzstein, Horst Kurnik* and *Charles A. Reich* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for respondent.

No. 964. Sinclair Refining Co. *v.* Osborn. C. A. 4th Cir. Certiorari denied. *Milton Handler* and *David R. Owen* for petitioner. *John S. McDaniel, Jr., John W. Cable III* and *Calhoun Bond* for respondent. Reported below: 286 F. 2d 832.

No. 976. Gatlin et al. *v.* Mitchell, Secretary of Labor. C. A. 5th Cir. Certiorari denied. *J. C. Floyd* for petitioners. *Solicitor General Cox, Charles Donahue, Bessie Margolin* and *Jacob I. Karro* for respondent. Reported below: 287 F. 2d 76.

No. 992. Day-Brite Lighting, Inc., *v.* Sandee Manufacturing Co. C. A. 7th Cir. Certiorari denied. *Roy A. Lieder* and *Owen J. Ooms* for petitioner. *Charles B. Spangenberg* for respondent. Reported below: 286 F. 2d 596.

No. 965. SING ET AL. *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *A. K. Black* for petitioners.

No. 996. BATA *v.* BATA ET AL. Supreme Court of Delaware. Certiorari denied. *Harold E. Stassen, Amos J. Peaslee, Gerald J. McMahon, A. Evans Kephart* and *George Tyler Coulson* for petitioner. *Inzer B. Wyatt* and *Robert H. Richards, Jr.* for respondents. Reported below: —— Del. ——, 163 A. 2d 493.

No. 634. FIFTH AVENUE COACH LINES, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Paul R. Russell* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Harry Baum* for respondent. Reported below: 281 F. 2d 556.

No. 140. NEW JERSEY AUTOMOBILE CLUB *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Alcide J. Fournier* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *George F. Lynch* for the United States. Reported below: —— Ct. Cl. ——, 181 F. Supp. 259.

No. 913. PRANGER *v.* BREAK ET AL. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Lewis Garrett* and *Herbert M. Ansell* for petitioner. *Stanford D. Herlick* and *Waldo Willhoft* for respondents. *A. L. Wirin* and *Fred Okrand* filed a brief for American Civil Liberties Union of Southern California, as *amicus curiae,* in support of the petition. Reported below: 186 Cal. App. 2d 551, 9 Cal. Rptr. 293.

No. 1005. SUPERIOR OIL CO. *v.* UNITED GAS IMPROVEMENT CO. C. A. 5th Cir. Certiorari denied. *F. P. Jones, Jr., R. B. Voight* and *H. W. Varner* for petitioner. *J. David Mann, Jr., William W. Ross* and *John E. Holtzinger, Jr.* for respondent. Reported below: 290 F. 2d 147.

No. 928. MILWAUKEE & SUBURBAN TRANSPORT CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Richard R. Teschner* and *Warren W. Browning* for petitioner. *Solicitor General Cox* for respondent. Reported below: 283 F. 2d 279.

No. 507. STREIGHT RADIO & TELEVISION, INC., *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Alfred L. Scanlan* and *John H. O'Hara* for petitioner. *Solicitor General Rankin, Assistant Attorney General Rice, Harry Baum* and *George F. Lynch* for respondent. Reported below: 280 F. 2d 883.

No. 918. GREAT LAKES AIRLINES, INC., ET AL. *v.* CIVIL AERONAUTICS BOARD. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. MR. JUSTICE BRENNAN took no part in the consideration or decision of this application. *Thurman Arnold, Charles H. Older* and *Albert F. Beitel* for petitioners. *Solicitor General Cox, Assistant Attorney General Loevinger, Richard A. Solomon, Robert A. Hammond III, Joseph B. Goldman, O. D. Ozment* and *Robert L. Toomey* for respondent. Reported below: —— U. S. App. D. C. ——, —— F. 2d ——.

No. 760, Misc. EASTMAN *v.* LAVALLEE, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, and *Paxton Blair,* Solicitor General, for respondent. Reported below: 9 N. Y. 2d 609, —— N. E. 2d ——.

No. 979. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* DENVER & RIO GRANDE WESTERN RAILROAD CO. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Wayland K. Sullivan, James L. Highsaw, Jr.* and *Philip Hornbein, Jr.* for petitioners. *Ray Garrett* and *Howard J. Trienens* for respondent. Reported below: 290 F. 2d 266.

No. 966. PRASSINOS *v.* DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. Motion to dispense with printing the petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for respondent.

No. 953. FOLEY LUMBER INDUSTRIES, INC., *v.* BUCKEYE CELLULOSE CORP. C. A. 5th Cir. Certiorari denied. MR. JUSTICE STEWART took no part in the consideration or decision of this application. *Chester Bedell* for petitioner. *Richard W. Barrett* and *J. Lewis Hall* for respondent. Reported below: 286 F. 2d 697.

No. 666, Misc. WALKER *v.* MCGINNIS, COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, and *Irving Galt,* Assistant Attorney General, for respondents.

No. 683, Misc. WILLIAMS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, and *Elizabeth Miller,* Deputy Attorney General, for respondent.

No. 698, Misc. NICKERSON *v.* GOODMAN, WARDEN. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se.* *Ralph De Vita* for respondent.

No. 735, Misc. MYERS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Acting Assistant Attorney General Doar* and *Harold H. Greene* for the United States.

No. 794, Misc. BATES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 765, Misc. GALGANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 281 F. 2d 908.

No. 779, Misc. POLLINO *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Joseph J. Rose,* Assistant Attorney General, for respondent.

No. 783, Misc. HAMILTON *v.* ELLIS, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Will Wilson,* Attorney General of Texas, and *Riley Eugene Fletcher, B. H. Timmons, Jr.* and *Sam R. Wilson,* Assistant Attorneys General, for respondent.

No. 786, Misc. MALLINSON *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *Thomas F. Eagelton,* Attorney General of Missouri, and *Ben Ely, Jr.,* Assistant Attorney General, for respondent.

No. 952. MCDANIELS *v.* HEINZE, WARDEN. Motion to dispense with printing the petition for writ of certiorari granted. Petition for writ of certiorari to the Supreme Court of California denied.

No. 809, Misc. FISHER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Petitioner *pro se*. *William G. Clark,* Attorney General of Illinois, for respondent. Reported below: 21 Ill. 2d 142, 171 N. E. 2d 617.

No. 823, Misc. BAXTER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 223 Md. 495, 165 A. 2d 469.

No. 832, Misc. JAMES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 875, Misc. MERCER *v.* BANMILLER, PENITENTIARY SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 874, Misc. MEDRANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 285 F. 2d 23.

No. 859, Misc. SANDERS *v.* HAGAN, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 879, Misc. IN RE WELLS, ALIAS GUSTIN. Supreme Court of Montana. Certiorari denied. Reported below: 137 Mont. —, 362 P. 2d 420.

No. 886, Misc. WHITE *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. Petitioner *pro se*. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent. Reported below: — Tenn. —, — S. W. 2d —.

No. 887, Misc. DOBSON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 284 F. 2d 878.

No. 904, Misc. SMITH *v.* SETTLE, WARDEN, ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondents. Reported below: 286 F. 2d 420.

No. 929, Misc. KILLILEA ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *John M. Hall* and *Jackson J. Holtz* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 287 F. 2d 912.

No. 923, Misc. WASHINGTON *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

No. 921, Misc. BROWN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 55 Cal. 2d 64, 357 P. 2d 1072.

No. 956, Misc. BROWN *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 958, Misc. YOUNG *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 286 F. 2d 13.

No. 969, Misc. GARCIA *v.* UTAH. Supreme Court of Utah and District Court of Third Judicial District of Utah. Certiorari denied. *Phil L. Hansen* for petitioner. Reported below: 11 Utah 2d 67, 355 P. 2d 57.

No. 973, Misc. WASHINGTON *v.* HAGAN, WARDEN. C. A. 3d Cir. Certiorari denied. *Michael von Moschzisker* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent. Reported below: 287 F. 2d 332.

No. 985, Misc. DANIEL *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 999, Misc. CHRISTIAN *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *Alan S. Rosenthal* for the United States. Reported below: —— Ct. Cl. ——, —— F. 2d ——.

No. 990, Misc. ALLEN *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 991, Misc. DENTO *v.* URBANIAK ET AL. C. A. 3d Cir. Certiorari denied.

No. 1002, Misc. BAYLESS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 288 F. 2d 794.

No. 1003, Misc. ASHLEY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 286 F. 2d 512.

No. 1005, Misc. MORICONI *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 1009, Misc. PRICE *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1012, Misc. PENNSYLVANIA EX REL. HOUGH *v.* MARONEY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. *Marjorie Hanson Matson* for petitioner. Reported below: 402 Pa. 371, 167 A. 2d 303.

No. 1013, Misc. WEY HIM FONG, ALIAS WAYNE FONG, *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 287 F. 2d 525.

No. 1014, Misc. HAYNESWORTH *v.* OHIO. Supreme Court of Ohio. Certiorari denied.

No. 1027, Misc. CORBIN *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1030, Misc. HOUSTON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1032, Misc. DUARTE ET AL. *v.* BANK OF HAWAII. C. A. 9th Cir. Certiorari denied. *O. P. Soares* for petitioners. Reported below: 287 F. 2d 51.

No. 1033, Misc. IN RE HINES. Supreme Court of Wyoming. Certiorari denied.

No. 1034, Misc. SMITH *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied.

No. 1036, Misc. SKANTZE *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *T. Emmett McKenzie* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: —— U. S. App. D. C. ——, 288 F. 2d 416.

No. 1037, Misc. LEE *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion,* Attorney General of Alabama, and *George D. Mentz,* Assistant Attorney General, for respondent.

No. 1039, Misc. BOWEN *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1040, Misc. BLADES *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1043, Misc. FOREST *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 1046, Misc. DAVIS *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. Reported below: 171 Neb. 333, 106 N. W. 2d 490.

No. 1047, Misc. DEAL *v.* STEINER, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 1050, Misc. PALAME *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1051, Misc. MORRIS *v.* ROUSOS. Supreme Court of Texas. Certiorari denied.

No. 1052, Misc. KIRSCH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1053, Misc. SIZEMORE *v.* COCHRAN, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 1059, Misc. FRENCH *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Reported below: 171 Ohio St. 501, 172 N. E. 2d 613.

No. 1056, Misc. NEW YORK EX REL. DAVIDSON *v.* MURPHY, WARDEN, ET AL. Court of Appeals of New York. Certiorari denied. *Jacques M. Schiffer* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondents. Reported below: 9 N. Y. 2d 640, 172 N. E. 2d 574.

No. 1054, Misc. PRESTON *v.* WARDEN, MARYLAND HOUSE OF CORRECTION. Court of Appeals of Maryland. Certiorari denied. Reported below: 225 Md. 628, 169 A. 2d 407.

No. 1062, Misc. SHEA *v.* LAVALLEE, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Winifred C. Stanley,* Assistant Attorney General, for respondent. Reported below: 9 N. Y. 2d 611, —— N. E. 2d ——.

No. 1064, Misc. ELLIOTT *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 285 F. 2d 428.

No. 1065, Misc. MENARD *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 1068, Misc. MATTINGLY *v.* TEXAS ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1072, Misc. ARMSTRONG *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: —— F. 2d ——.

No. 1095, Misc. DYSON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States.

No. 1074, Misc. BROOKS *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Reported below: 226 Ore. 191, 358 P. 2d 1055.

No. 1076, Misc. GAMBLE *v.* SACKS, WARDEN. Supreme Court of Ohio. Certiorari denied.

No. 1078, Misc. JOHNSON *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1080, Misc. WILLIAMS *v.* TAHASH, WARDEN. C. A. 8th Cir. Certiorari denied.

No. 1081, Misc. HAWKINS *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Jack Z. Krigel* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 288 F. 2d 537.

No. 1082, Misc. SHANNON *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 1075, Misc. STEVENS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1100, Misc. NOEL *v.* ISBRANDTSEN CO., INC., ET AL. C. A. 4th Cir. Certiorari denied. *Henry E. Howell, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Morton Hollander* and *David L. Rose* for the United States, respondent. Reported below: 287 F. 2d 783.

No. 1117, Misc. ODDO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1110, Misc. SHORTER *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States.

No. 1111, Misc. GENCO *v.* GENCO. Supreme Court of Ohio. Certiorari denied. Reported below: 171 Ohio St. 450, 172 N. E. 2d 9.

No. 1113, Misc. HARDEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William W. Henderson, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States.

No. 1115, Misc. THOMAS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 1116, Misc. BRYANT *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 1107, Misc. WATSON *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 814, Misc. HERNANDEZ *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Henry Rothblatt* for petitioner. *Isidore Dollinger* and *Walter E. Dillon* for respondent. Reported below: 8 N. Y. 2d 1103, 171 N. E. 2d 464.

No. 1136, Misc. GREENE *v.* MICHIGAN DEPARTMENT OF CORRECTIONS ET AL. Supreme Court of Michigan. Certiorari denied.

No. 1158, Misc. DEFINO *v.* MCNAMARA, SECRETARY OF DEFENSE, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Orrick* and *John G. Laughlin* for respondents. Reported below: 109 U. S. App. D. C. 300, 287 F. 2d 339.

No. 1207, Misc. OUTEN *v.* SOUTH CAROLINA. Supreme Court of South Carolina. Certiorari denied. Reported below: 237 S. C. 514, 118 S. E. 2d 175.

No. 693, Misc. WHEELDIN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *A. L. Wirin* and *Fred Okrand* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley, George B. Searls* and *Lee B. Anderson* for the United States. Reported below: 283 F. 2d 535.

No. 1133, Misc. MURGIA *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 285 F. 2d 14.

No. 740, Misc. MILES *v.* SETTLE, WARDEN. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied without prejudice to another application under 28 U. S. C. § 2255 to the appropriate District Court, which application should be considered on its merits and not as a successive application. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondent. Reported below: 283 F. 2d 520.

No. 825, Misc. WIGFALL *v.* ELLIS, CORRECTIONS DIRECTOR. Petition for writ of certiorari to the Court of Criminal Appeals of Texas denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Will Wilson,* Attorney General of Texas, and *Riley Eugene Fletcher, B. H. Timmins, Jr.* and *Sam R. Wilson,* Assistant Attorneys General, for respondent.

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No. 1198, Misc. BAKER *v.* COLORADO. Supreme Court of Colorado. Certiorari denied.

No. 944, Misc. MUNOZ PEREZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States.

Rehearing Denied.

No. 1. SCALES *v.* UNITED STATES, 367 U. S. 203;

No. 203. ELI LILLY & CO. *v.* SAV-ON-DRUGS, INC., ET AL., *ante*, p. 276;

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No. 874. I. LEON CO., INC., *v.* REINER ET AL., *ante*, p. 929;

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No. 730, Misc. TRENT *v.* UNITED STATES, 365 U. S. 889;

No. 903, Misc. KREMER *v.* CLARKE, TRUSTEE, ET AL., *ante*, p. 920;

No. 922, Misc. JOHNSON *v.* UNITED STATES, *ante*, p. 931;

No. 933, Misc. BRABSON *v.* NEW YORK, *ante*, p. 930;

No. 980, Misc. TAYLOR *v.* DISTRICT OF COLUMBIA UNEMPLOYMENT COMPENSATION BOARD ET AL., *ante*, p. 932; and

No. 981, Misc. LINDSAY *v.* ALABAMA, *ante*, p. 933. Petitions for rehearing denied.

No. 871. CHERETON *v.* UNITED STATES, *ante* p. 924. Petition for rehearing and for other relief denied.

AMENDMENT OF RULES.

ORDER.

IT IS ORDERED that paragraph 3 of Rule 48 of the Rules of this Court be amended to read as follows:

"When a public officer is a party to a proceeding here in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution."

IT IS FURTHER ORDERED that a new paragraph 4 be added to Rule 48, reading as follows:

"When a public officer is a party in a proceeding here in his official capacity, he may be described as a party by his official title rather than by name; but the Court may require his name to be added."

IT IS FURTHER ORDERED that these amendments to Rule 48 shall take effect on July 19, 1961.

JUNE 19, 1961.

[REPORTER'S NOTE: On April 17, 1961, the Court entered orders amending the Federal Rules of Civil Procedure, certain forms used in connection therewith and the Rules of Practice in Admiralty and Maritime Cases. On May 29, 1961, it entered an order amending the General Orders in Bankruptcy and certain forms used in connection therewith. All of these amendments became effective on July 19, 1961. They will be published in 368 U. S.]

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