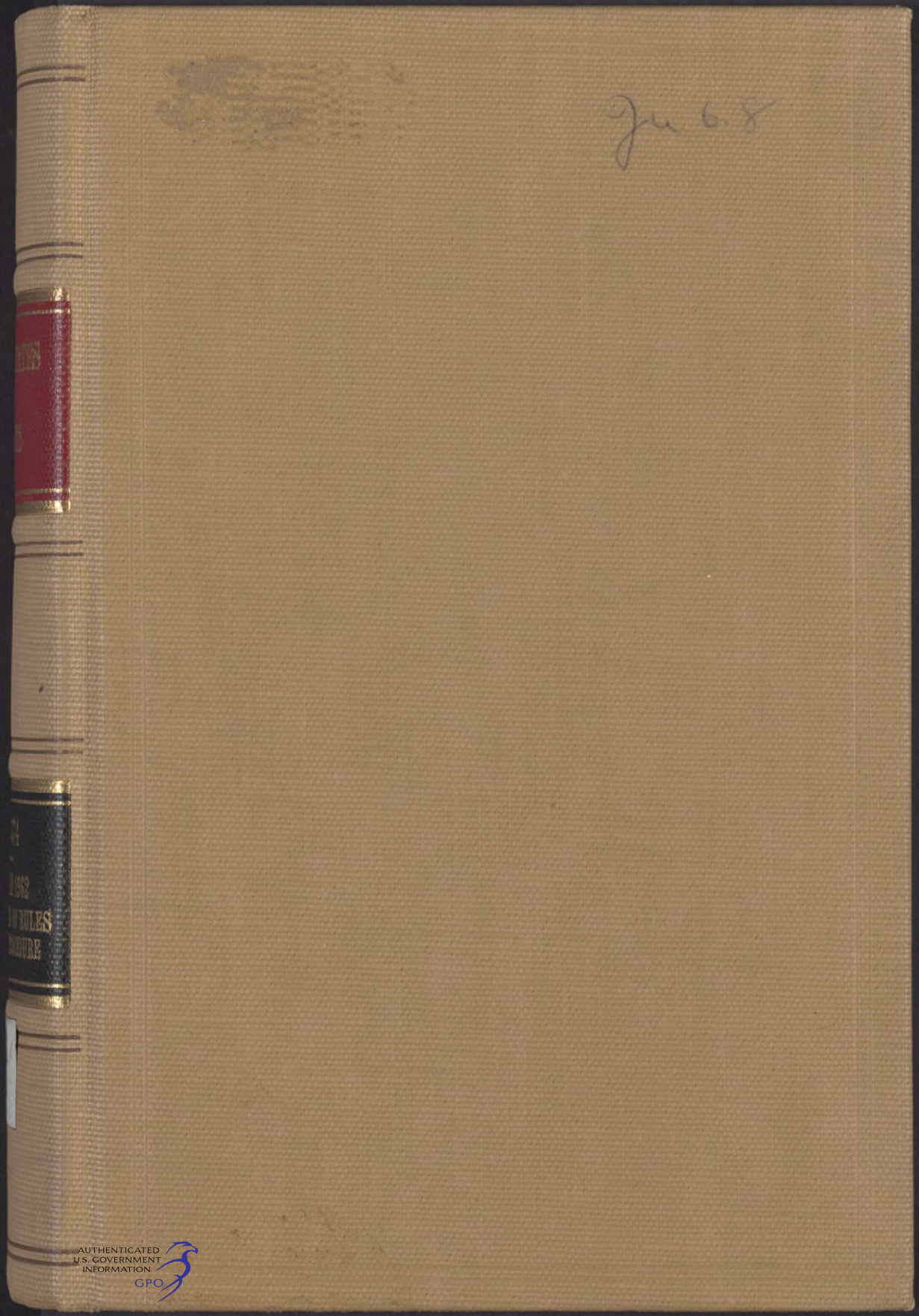

UNITED STATES REPORTS

VOLUME 374

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1962

JUNE 10 THROUGH JUNE 17, 1963
(END OF TERM)

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.
WILLIAM O. DOUGLAS, Associate Justice.
TOM C. CLARK, Associate Justice.
JOHN M. HARLAN, Associate Justice.
WILLIAM J. BRENNAN, Jr., Associate Justice.
POTTER STEWART, Associate Justice.
BYRON R. WHITE, Associate Justice.
ARTHUR J. GOLDBERG, Associate Justice.

RETIRED

STANLEY REED, Associate Justice.
FELIX FRANKFURTER, Associate Justice.
HAROLD H. BURTON, Associate Justice.
SHERMAN MINTON, Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.

ROBERT F. KENNEDY, Attorney General.
ARCHIBALD COX, Solicitor General.
JOHN F. DAVIS, 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, Arthur J. Goldberg, 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, Byron R. White, Associate Justice.

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

For the Tenth Circuit, Byron R. White, Associate Justice.

October 15, 1962.

(For next previous allotment, see 370 U. S., p. iv.)

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1962.

SHENKER *v.* BALTIMORE & OHIO RAILROAD CO.

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

No. 414. Argued April 17, 1963.—Decided June 10, 1963.

1. The Federal District Court awarded petitioner a judgment for damages. The Court of Appeals for the Third Circuit reversed. Petitioner moved for a rehearing *en banc* under 28 U. S. C. § 46 (c). There were then eight active judges on the Court of Appeals. Four voted to grant the rehearing, two voted to deny it, two abstained, and a rehearing was denied. Under the uniform practice of that Court, every petition for rehearing is submitted to every active member of the Court, a judge is not required to enter a formal vote on the petition, and a rehearing is not granted unless a majority of the active members of the Court vote for it. *Held:* Such a procedure is clearly within the scope of the discretion of the Court of Appeals under 28 U. S. C. § 46 (c), as interpreted in *Western Pac. R. Corp.* v. *Western Pac. R. Co.*, 345 U. S. 247. Pp. 4–5.

2. Petitioner, an employee of respondent railroad, who was paid by it and acted solely under the supervision of its employees, sued respondent under the Federal Employers' Liability Act to recover damages for injuries sustained while loading mail onto a mail car of another railroad at a station of the latter which was managed and operated solely by respondent. The injury resulted from a defective door on the mail car in a train of the other railroad which had just arrived at the station. Under instructions that it was respondent's duty to exercise ordinary care to furnish its employees with cars on which they work equipped with reasonably safe doors, even if the cars are owned by another railroad, the

jury awarded damages to petitioner. The District Court denied a motion for a judgment notwithstanding the verdict and entered judgment for petitioner. *Held:* The case was submitted to the jury under proper instructions; there was reasonable basis in the evidence for the jury's verdict; and the judgment for petitioner should have been sustained. Pp. 5–11.

(a) On the evidence, petitioner was clearly an employee of respondent, even under the common law loaned-servant doctrine, and it is not necessary to consider the extent to which that doctrine applies to cases under the Federal Employers' Liability Act. Pp. 5–7.

(b) Although the mail car with the defective door was on a train of the other railroad which had just arrived at the station, it was respondent's duty to inspect the car before permitting its employees to work with it. Pp. 7–11.

303 F. 2d 596, reversed.

Charles Alan Wright argued the cause for petitioner. With him on the brief were *John Ruffalo* and *James E. McLaughlin.*

Alexander H. Hadden argued the cause and filed a brief for respondent.

Mr. Chief Justice Warren delivered the opinion of the Court.

The petitioner brought an action under the Federal Employers' Liability Act, 45 U. S. C. §§ 51–60, in the Federal District Court for the Western District of Pennsylvania to recover for injuries caused by the alleged negligence of the respondent Baltimore & Ohio Railroad (B&O) and the Pittsburgh & Lake Erie Railroad (P&LE). At the close of the evidence, the District Court directed a verdict in favor of the P&LE on the ground that the evidence failed to establish that the petitioner was an employee of that company as required by § 1 of the Act (45 U. S. C. § 51). The case against the B&O, however, was submitted to the jury which returned a verdict of $40,000 for the petitioner. The District Court denied a

motion for judgment n. o. v. and entered judgment as found by the jury. On appeal, the Third Circuit Court of Appeals, one judge dissenting, reversed, holding that the petitioner failed to establish negligence on the part of the B&O. 303 F. 2d 596. A rehearing *en banc* was denied. We granted certiorari. 371 U. S. 908.

The petitioner was employed by the B&O at its Mahoningtown station in New Castle, Pennsylvania. The railroad complex at Mahoningtown consisted of four sets of tracks, two owned and operated by the B&O and two by the P&LE. On the B&O side, the B&O maintained a station and station facilities. Although the P&LE maintained a station, it kept no employees, all necessary services for the two stations being provided by B&O employees. The B&O ticket agent issued tickets in the B&O station for the P&LE trains. The petitioner provided janitor work for both stations and assisted the loading and unloading of mail cars for the trains of both railroads. The petitioner was paid by the B&O and was under the sole supervision of the B&O ticket agent.

On the date of the accident, October 15, 1956, the petitioner handled the mail for the P&LE train scheduled to depart Mahoningtown at 12:25 a. m. The petitioner loaded 20 to 25 bags of mail on a B&O wagon at the B&O station. He crossed the B&O and P&LE tracks to the P&LE platform and, when the P&LE train pulled up, brought the wagon alongside the mail car door. On this occasion, in spite of the efforts of the petitioner and the P&LE baggageman, one Beck, the sliding door on the P&LE car would not open more than 18 or 20 inches. According to the petitioner, Beck commented that he had reported the defective door to the P&LE which had yet to fix it and that they would have to get the mail on and off as best they could. The petitioner, standing on the wagon, had no difficulty throwing the smaller bags in the restricted opening. The larger ones, however, weighing

from 80 to 100 pounds, required the petitioner "to twist around," and "to keep pushing and forcing them" to get them in the opening. In the process of this unusual exertion, the petitioner felt something snap in his back. He reported the injury immediately to the B&O ticket agent. Treatment of the injury eventually required the removal of a ruptured intervertebral disc and resulted in the petitioner's permanent disability. On the basis of this evidence, the jury found for the petitioner.

Before considering the merits of the decision below, the petitioner raises a procedural point, claiming that he was denied a rehearing *en banc* in the Third Circuit Court of Appeals in violation of his rights under 28 U. S. C. § 46 (c). At the time the petitioner filed his motion for rehearing *en banc* there were eight active judges serving on the Third Circuit. Four judges voted to grant the rehearing, two voted to deny, and two abstained. The rehearing was denied. The petitioner claims that to grant a rehearing *en banc,* the statute requires only a majority of those present. The Third Circuit requires an absolute majority of the active members of the court. Section 46 (c) provides:

> "Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in active service. A court in banc shall consist of all active circuit judges of the circuit."

The Court had occasion to consider this section at length in *Western Pac. R. Corp.* v. *Western Pac. R. Co.,* 345 U. S. 247. It there said:

> "In our view, § 46 (c) is not addressed to litigants. It is addressed to the Court of Appeals. It is a grant of power. It vests in the court the power to order

> hearings *en banc*. It goes no further. It neither forbids nor requires each active member of a Court of Appeals to entertain each petition for a hearing or rehearing *en banc*. The court is left free to devise its own administrative machinery to provide the means whereby a majority may order such a hearing." *Id.*, at 250.

The Court went on to say that the rights of the litigant go no further than the right to know the administrative machinery that will be followed and the right to suggest that the *en banc* procedure be set in motion in his case. The practice of the Third Circuit has been fully revealed by Judge Maris in Hearing and Rehearing Cases In Banc, 14 F. R. D. 91, which was referred to with approval by this Court in *United States* v. *American-Foreign S. S. Corp.*, 363 U. S. 685, 688, n. 5. Although every petition for rehearing is submitted to every member of the court, a judge is not required to enter a formal vote on the petition. Such a procedure is clearly within the scope of the court's discretion as we spoke of it in *Western Pacific*. For this Court to hold otherwise would involve it unnecessarily in the internal administration of the Courts of Appeals.

Turning to the merits, there can be no question that the petitioner is an employee of the B&O as required by § 1 of the F. E. L. A. Although the B&O suggests that the petitioner may have been the employee of the P&LE within the meaning of the common law loaned-servant doctrine, *Standard Oil Co.* v. *Anderson*, 212 U. S. 215; *Linstead* v. *Chesapeake & Ohio R. Co.*, 276 U. S. 28, 32–34, there is no evidence in the record to support such a conclusion. In describing the loaned-servant doctrine, the Court in *Anderson* stated that when the nominal employer furnishes a third party "with men to do the work and places them under his exclusive control in the performance of it, [then] those men become *pro hac vice*

the servants of him to whom they are furnished." 212 U. S., at 221. The Court concluded that under the common law loaned-servant doctrine immediate control and supervision is critical in determining for whom the servants are performing services. In the present case, the undisputed facts show that the petitioner was at all times paid by the B&O and under the sole supervision of B&O employees.[1] The intimations of the B&O that the petitioner might have been given directions by the P&LE baggageman is at most an example of the minimum cooperation necessary to carry out a coordinated undertaking, and, as noted in *Anderson,* cannot amount to control or supervision. 212 U. S., at 226. The whole tenor of the services the B&O provides for the P&LE speaks of an agreement by the B&O to manage and operate the P&LE station at Mahoningtown. On such evidence, the petitioner is clearly an employee of the B&O even under the common law loaned-servant doctrine, and we therefore need not consider the extent to which that doctrine

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[1] The testimony of the B&O ticket agent on duty at the time of the petitioner's injury stands undisputed in the record:

"Q. [By the Court] Did the P&LE have any boss there that night?

"A. No, sir, the P&LE didn't have any employees whatsoever connected with that operation there.

"Q. Under whose supervision was Mr. Shenker?

"A. He was under the ticket agent, Mr. Boyd.

"Q. On that turn when he got hurt?

"A. On that turn he was under my supervision.

"Q. During the four months you say he worked there, did any P&LE employee give directions or orders to the plaintiff?

"A. No, sir.

"Q. From whom did he receive direction and orders, instructions?

"A. From me or Mr. Boyd would let me know what he wanted done and I would tell Mr. Shenker.

"Q. And you and Mr. Boyd were exclusively Baltimore & Ohio Railroad employees?

"A. Yes, sir."

applies to cases under the F. E. L. A. See *Linstead* v. *Chesapeake & Ohio R. Co., supra;* compare *Sinkler* v. *Missouri Pac. R. Co.,* 356 U. S. 326, 329–330.

The only remaining issue is the negligence, if any, of the respondent B&O. The trial judge instructed the jury that

> ". . . a railroad is under a duty to exercise ordinary prudence, caution and care to inspect and to furnish its employees with cars on which they work equipped with reasonably safe doors, even though the cars are owned by another railroad. A failure of the B&O Railroad to do so is negligence, providing that the railroad can foresee that one of its employees may be injured in performing his work in connection with that car and its equipment which are not reasonably safe."

No exception was taken to this charge. In his opinion denying the B&O's motion for judgment n. o. v., the trial judge relied on a series of court of appeals decisions standing for the more broad proposition that a railroad has the nondelegable duty to provide its employees with a safe place to work even when they are required to go onto the premises of a third party over which the railroad has no control. See *Kooker* v. *Pittsburgh & Lake Erie R. Co.,* 258 F. 2d 876; *Chicago Great Western R. Co.* v. *Casura,* 234 F. 2d 441; *Beattie* v. *Elgin, J. & E. R. Co.,* 217 F. 2d 863. These decisions are in accord with the opinions of this Court in *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350; *Ellis* v. *Union Pac. R. Co.,* 329 U. S. 649; *Harris* v. *Pennsylvania R. Co.,* 361 U. S. 15, reversing 168 Ohio St. 582, 156 N. E. 2d 822. The present case has been argued to us on the basis of these same decisions and the safe-place-to-work doctrine. The respondent admits the general statements of the doctrine in these cases. It bases its defense solely on the proposition that because the P&LE train had just pulled into the station, the B&O

did not have sufficient opportunity to obtain actual or constructive notice of the defective mail car door. The respondent relies on two lower court cases holding that where the defect in the premises of the third party arose within minutes or hours of the accident, there was insufficient time as a matter of law for the railroad to be held to have notice. *Kaminski* v. *Chicago R. & I. R. Co.*, 200 F. 2d 1; *Wetherbee* v. *Elgin, J. & E. R. Co.*, 191 F. 2d 302, subsequent appeal reported in 204 F. 2d 755, cert. denied, 346 U. S. 867.

Whatever the validity of these last two cases, they do not have relevance here. We hold that the B&O had a duty to inspect P&LE cars before permitting its employees to work with them. The standard of care applicable to the use of cars belonging to a foreign railroad was settled long before the accident in this case. In *Baltimore & Potomac R. Co.* v. *Mackey*, 157 U. S. 72, an employee of the Baltimore & Potomac was killed when a defective brake did not hold on a freight car hauled by the Baltimore & Potomac, but belonging to another railroad. Relying on the language of an earlier New York decision, *Gottlieb* v. *New York & Lake Erie R. Co.*, 100 N. Y. 462, 467, 3 N. E. 344, 345, the Court concluded that a railroad

> ". . . is bound to inspect foreign cars just as it would inspect its own cars. It owes the duty of inspection as master . . . . When cars come to it which have defects visible or discoverable by ordinary inspection, it must either remedy such defects or refuse to take such cars; so much at least is due from it to its employés." 157 U. S., at p. 90.

The Court did not have to look far for the "sound reason and public policy" behind this principle. Relying on the language of the lower court, the Court said:

> "It would be most unreasonable and cruel to declare, that, while the faithful workman may obtain com-

> pensation from a company for defective arrangement of its own cars, he would be without redress against the same company if the damaged car that occasioned the injury happened to belong to another company." 157 U. S., at p. 89.

This decision was reaffirmed and extended a short time later in *Texas & Pac. R. Co.* v. *Archibald,* 170 U. S. 665. In that case, the Texas & Pacific accepted a car of the Cotton Belt Railway for loading at a cottonseed oil mill on a spur off the Texas & Pacific track. In the process of switching, an employee of the Texas & Pacific was seriously injured due to a defective coupling on the foreign car. The Texas & Pacific attempted to distinguish the *Baltimore & Potomac* case on the ground that the duty to inspect did not apply when a railroad accepted a foreign car only for loading rather than for hauling over its line in one of its trains. The Court dismissed the argument summarily:

> "The argument wants foundation in reason and is unsupported by any authority. In reason, because, as the duty of the company to use reasonable diligence to furnish safe appliances is ever present, and applies to its entire business, it is beyond reason to attempt by a purely arbitrary distinction to take a particular part of the business of the company out of the operation of the general rule, and thereby to exempt it, as to the business so separated, from any obligation to observe reasonable precautions to furnish appliances which are in good condition." 170 U. S., at p. 670.[2]

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[2] The Court in *Texas & Pacific* went on to hold that the railroad will not be held to its duty to inspect where the employee himself becomes aware of the defect yet continues to work with the car with knowledge of its defect. This exception to the rule was based on the belief that the employee assumes the risk of handling appli-

See generally, Annotation, 41 L. R. A. 101. The rules adopted in these two cases are unavoidably applicable to the present case. The B&O required the petitioner to work with cars belonging to the P&LE, taking no precautions whatsoever to protect him from possible defects in these cars, defects for which it would be liable should they appear in its own cars. As *Texas & Pacific* makes abundantly clear, there is no *de minimis* rule called into play on account of the brevity of the sojourn of the P&LE train in Mahoningtown station, since the length of the sojourn is irrelevant to the duty owed to the employee working with the car. Nor is it an answer to claim that the B&O lacked control or supervision over the P&LE car. Such arguments have never supported an exception to the employer's duty to provide a safe place to work, *Chicago Great Western R. Co.* v. *Casura, supra,* p. 447; *Beattie* v. *Elgin, J. & E. R. Co., supra,* p. 865; *Terminal R. Assn. of St. Louis* v. *Fitzjohn,* 165 F. 2d 473, 476–477, and have no greater relevance here with respect to the duty to provide reasonably safe cars, see Annotation, 41 L. R. A. 101. The B&O may adequately protect itself by refusing to permit its employees to service the car. Since the instructions to the jury adequately reflect the holdings in these cases and since the B&O's failure to inspect is uncontested, the jury verdict should have been affirmed.

Although recovery in this case is supported by the common law, it is also required by any reasonable construction of the Federal Employers' Liability Act itself. As we stated in *Sinkler* v. *Missouri Pac. R. Co.,* 356 U. S.

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ances which are known to be defective. 170 U. S., at pp. 672–673. This exception, of course, is no longer relevant under the F. E. L. A., since § 4 of the Act expressly eliminates assumption of risk as a defense to negligence on the part of the employer. In its place, the railroad may raise contributory negligence on the part of the employee in mitigation of damages, a defense that was raised in this case and on which the jury was properly charged.

326, 330: "it was the conception of this legislation that the railroad was a unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." If recovery were denied in this case, the railroads, by the simple expedient of doing each other's work, could tie their employees up in legal technicalities over the proper railroad to sue for injuries and perhaps remove from coverage of the Act a significant area of railroad activity. It would subject the employee once more to the stricter negligence standards of the common law and such debilitating doctrines as assumption of risk. Cf. *Texas & Pac. R. Co.* v. *Archibald,* 170 U. S. 665, 673.

In our opinion the case was submitted to the jury under proper instructions, and there was a reasonable basis in the evidence for the verdict which the jury returned.

Reversed.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

With all deference, I must respectfully dissent. We are not here dealing with a situation in which a lower court has so disregarded applicable law as to require correction here. This is simply a case in which the evidence is insufficient to sustain liability of the respondent B&O and in which a perhaps more substantial claim against the P&LE was abandoned by the petitioner below. Any hiatus in protection of the petitioner exists not because of inadequacies in the law, but solely because of inadequacies in the evidence.

Normally, in a case such as this in which the defendant's own negligence did not create the hazardous condition, actual or constructive notice to the defendant of the injury-producing defect is a prerequisite to negli-

gence and, therefore, to liability. See, *e. g., Sano* v. *Pennsylvania R. Co.*, 282 F. 2d 936, 938; *Dobson* v. *Grand Trunk W. R. Co.*, 248 F. 2d 545, 548; *Atlantic C. L. R. Co.* v. *Collins*, 235 F. 2d 805, 808, cert. denied 352 U. S. 942; *Kaminski* v. *Chicago R. & I. R. Co.*, 200 F. 2d 1, 4. See also *Ringhiser* v. *Chesapeake & O. R. Co.*, 354 U. S. 901; *Wetherbee* v. *Elgin, J. & E. R. Co.*, 191 F. 2d 302, subsequent appeal reported in 204 F. 2d 755, cert. denied, 346 U. S. 867. Thus, given the failure of the petitioner to introduce evidence tending to show that the respondent B&O knew, or in the exercise of reasonable care should have known, of the defective door, the judgment entered below in favor of the B&O should be sustained.[1]

The Court seeks to avoid the application of these ordinarily controlling principles by invoking several cases, decided prior to enactment of the F. E. L. A., which, it holds, require that, in order to discharge its duty "to use reasonable care in furnishing [the petitioner] . . . with a safe place to . . . work," *Bailey* v. *Central Vermont R. Co.*, 319 U. S. 350, 352,[2] the B&O must inspect the P&LE cars before B&O employees are allowed or directed to work on them. Even accepting, *arguendo*, the general applicability here of the principle imposing on the B&O the duty to inspect the cars which it services for the P&LE, the result reached by the Court does not follow. Such a duty may exist, to be sure, but the ob-

[1] The petitioner does not here argue that notice of the defect to the P&LE was also sufficient notice to respondent B&O.

[2] Although language in its opinion suggests the contrary, see pp. 7, 10, *ante*, I do not understand the Court today to be directly declaring an absolute duty to provide a safe place to work without regard to negligence, since the very cases cited by the Court indicate that the duty is to exercise reasonable care with respect thereto. Instead, the Court ignores the statutory concept of negligence in setting out the duty of inspection it imposes, a result which, for the reasons stated *infra*, is erroneous and violates the clear language of the governing statute.

ligation can be no more than to conduct reasonable, nonnegligent inspections, and the liability which would accrue from breach of such a duty would be responsibility for damages occurring *as a result* of the negligent performance or the nonperformance of that duty. In a meaningful sense, then, imposition of a duty to inspect is no more than a specific application of the concept of constructive knowledge, since it is implicit in the principle that one is chargeable with knowledge of that which in the exercise of reasonable care he should have known. Here, that would mean that in the exercise of reasonable care the B&O should have inspected the P&LE cars and is chargeable with knowledge of that which a reasonable inspection would have shown.

The Court, however, says merely that the B&O had a duty to inspect and that, having failed to inspect, it is liable to the petitioner for the defect which apparently caused his injury. I find this reasoning unconvincing.

While the Court declares that it is undisputed that the B&O did not inspect, there is simply no evidence in the record with regard to inspection. Moreover, even if an inference of failure to inspect were supportable, there is no basis for assuming, as the Court does and must do to sustain its result, that a reasonable, nonnegligent inspection procedure would, in fact, have disclosed the defect which is the basis of the petitioner's claim. Even when there does exist a duty of inspection, the mere existence of a defect does not itself create liability; it must also be shown that reasonable, nonnegligent inspection procedures would have disclosed the defect.[3]

[3] This, in fact, is the apparent rule of the very cases relied upon by the Court to subject the B&O to liability here. In *Baltimore & Potomac R. Co.* v. *Mackey*, 157 U. S. 72, cited by the majority at p. 8, *ante*, the Court based liability on the operative "principle that a railroad company is under a legal duty not to expose its employés to dangers arising from such defects in foreign cars *as may be dis-*

Evidence of this liability-producing factor was not introduced by the petitioner. The record is devoid of evidence as to the length of time the defect existed prior to the petitioner's injury,[4] and as to whether, even under an extremely careful and nonnegligent inspection procedure, the defect would have been discovered prior to the time of petitioner's injury.

Under the rationale and result of this case, a railroad would be liable for a defect which first appeared immediately prior to the injury for which recovery is sought and which even the most scrupulous kind of inspection procedure could neither have avoided nor detected. What the Court appears to have done is to create not simply a duty of inspection, but an absolute duty of discovery of all defects; in short, it has made the B&O the insurer of the condition of all premises and equipment, whether its own or others, upon which its employees may work. This is the wholly salutary principle of compensation for industrial injury incorporated by workmen's

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covered by reasonable inspection before such cars are admitted into its train." 157 U. S., at 91 (emphasis supplied). The second case upon which the majority bases its result here, see pp. 8–9, *ante*, simply applies this same principle to a somewhat different set of facts, again declaring liability for injury-producing defects "*discoverable by proper inspection.*" *Texas & Pac. R. Co.* v. *Archibald*, 170 U. S. 665, 672 (emphasis supplied). The nature and timing of the required inspection—but probably not, as the Court here declares, the duty of inspection itself—presumably depend, as a function of its reasonableness, on a number of factors, including the duration of the time the car is available to the defendant for inspection and the manner in which it is received. In both of the cited cases, the "foreign" car was in the possession and on the tracks of the named defendant upon which liability was imposed.

[4] The statement attributed to the P&LE baggageman by the petitioner that the defective door had been reported to the P&LE does not, of course, shed any light on the length of time the defect had continued to exist. The report may well have been made only shortly before the petitioner was injured.

compensation statutes, but it is not the one created by the F. E. L. A., which premises liability upon negligence of the employing railroad. It is my view that, as a matter of policy, employees such as the petitioner, who are injured in the course of their employment, should be entitled to prompt and adequate compensation regardless of the employer's negligence and free from traditional common-law rules limiting recovery. But Congress has elected a different test of liability which, until changed, courts are obligated to apply.

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FITZGERALD, PUBLIC ADMINISTRATOR, *v.* UNITED STATES LINES CO.

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

No. 463. Argued April 18, 1963.—Decided June 10, 1963.

Claiming that he had twisted and strained his back while working for respondent on its ship, a seaman sued respondent for damages based on the negligence of respondent and the unseaworthiness of the ship and for a smaller amount based on respondent's failure to provide him with medical attention, maintenance and cure and wages. He demanded a jury trial on all the claims. The trial judge granted a jury trial on the Jones Act and unseaworthiness claims; but he held the question of recovery under maintenance and cure in abeyance to try himself after jury trial of the other issues. The jury returned a verdict for respondent on the negligence and unseaworthiness claims. After hearing testimony in addition to that presented to the jury, the judge awarded the seaman a small amount for maintenance and cure. Sitting *en banc*, the Court of Appeals affirmed by a divided vote. *Held:* A maintenance and cure claim joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts. In this case, the seaman is entitled to a jury trial as of right on his maintenance and cure claim, even though the Jones Act claim was decided against him and this Court declined to review that claim on certiorari. Pp. 16–22.

306 F. 2d 461, reversed.

Theodore H. Friedman argued the cause for petitioner. With him on the briefs was *Jacob Rassner*.

Matthew L. Danahar argued the cause for respondent. With him on the brief was *Charles N. Fiddler*.

MR. JUSTICE BLACK delivered the opinion of the Court.

Andres San Martin, a seaman, brought this action in the District Court for the Southern District of New York against the respondent United States Lines Company.

His complaint alleged that he had twisted and strained his back while working for respondent on its ship. He claimed $75,000 damages based on the negligence of respondent and on the unseaworthiness of the ship and $10,000 based on respondent's failure to provide him with medical attention, maintenance and cure, and wages as required by law.[1] Martin's negligence claim invoked a remedy created by Congress in § 33 of the Jones Act, 46 U. S. C. § 688, which explicitly provides that a seaman can have a jury trial as of right; but the actions for unseaworthiness and for maintenance and cure are traditional admiralty remedies which in the absence of a statute do not ordinarily require trial by jury. The complainant here did demand a jury, however, for all the issues growing out of the single accident. The trial judge granted a jury trial for the Jones Act and the unseaworthiness issues but held the question of recovery under maintenance and cure in abeyance to try himself after jury trial of the other two issues. The jury returned a verdict for United States Lines on the negligence and unseaworthiness issues; the court then, after hearing testimony in addition to that presented to the jury, awarded Martin $224 for maintenance and cure. Sitting *en banc,* the Court of Appeals for the Second Circuit affirmed, four judges stating that it would be improper to submit a maintenance and cure claim to the jury, two believing it to be permissible but not required, and three maintaining that a seaman is entitled, as of right, to a jury trial of a maintenance and cure claim joined with a Jones Act claim. 306 F. 2d 461. The lower courts are at odds on this issue.[2] We granted certiorari to decide it.[3] 371 U. S. 932.

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[1] Martin died while his appeal was pending and a public administrator was substituted for him.

[2] See notes 4 and 5, *infra.*

[3] Because of our limited grant of certiorari, we do not consider petitioner's argument that the complaint and trial record show diver-

For years it has been a common, although not uniform,[4] practice of District Courts to grant jury trials to plaintiffs who join in one complaint their Jones Act, unseaworthiness, and maintenance and cure claims when all the claims, as here, grow out of a single transaction or accident.[5] This practice of requiring issues arising out of a single accident to be tried by a single tribunal is by no means surprising. Although remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures, they nevertheless, when based on one unitary set of circumstances, serve the same purpose of indemnifying a seaman for damages caused by injury, depend in large part upon the same evidence, and involve some identical elements of recovery. Requiring a sea-

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sity of citizenship jurisdiction and that therefore plaintiff was entitled to a jury trial. See *Atlantic & Gulf Stevedores, Inc.*, v. *Ellerman Lines*, 369 U. S. 355, 360 (1962). Nor do we find it necessary to reach petitioner's argument that we should reconsider that part of the holding of *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354 (1959), which concluded that claims based upon general maritime law cannot be brought in federal courts under the federal question jurisdiction of 28 U. S. C. § 1331.

[4] See, *e. g.*, *Jesonis* v. *Oliver J. Olson & Co.*, 238 F. 2d 307 (C. A. 9th Cir. 1956); *Stendze* v. *The Boat Neptune, Inc.*, 135 F. Supp. 801 (D. C. Mass. 1955); cf. *Jordine* v. *Walling*, 185 F. 2d 662 (C. A. 3d Cir. 1950).

[5] See, *e. g.*, *Nolan* v. *General Seafoods Corp.*, 112 F. 2d 515 (C. A. 1st Cir. 1940); *Lykes Bros. S. S. Co.* v. *Grubaugh*, 128 F. 2d 387, modified on rehearing, 130 F. 2d 25 (C. A. 5th Cir. 1942); *Bay State Dredging & Contracting Co.* v. *Porter*, 153 F. 2d 827 (C. A. 1st Cir. 1946); *Gonzales* v. *United Fruit Co.*, 193 F. 2d 479 (C. A. 2d Cir. 1951); *Rosenquist* v. *Isthmian S. S. Co.*, 205 F. 2d 486 (C. A. 2d Cir. 1953); *Mitchell* v. *Trawler Racer, Inc.*, 265 F. 2d 426 (C. A. 1st Cir. 1959), rev'd on other grounds, 362 U. S. 539 (1960); *McDonald* v. *Cape Cod Trawling Corp.*, 71 F. Supp. 888, 891 (D. C. Mass. 1947); Gilmore and Black, The Law of Admiralty (1957), 262.

man to split up his lawsuit, submitting part of it to a jury and part to a judge, unduly complicates and confuses a trial, creates difficulties in applying doctrines of *res judicata* and collateral estoppel, and can easily result in too much or too little recovery.[6] The problems are particularly acute in determining the amount of damages. For example, all lost earnings and medical expenses are recoverable on a negligence count, but under the Jones Act they are subject to reduction by the jury if the seaman has been contributorily negligent. These same items are recoverable in part on the maintenance and cure count, but the damages are measured by different standards[7] and are not subject to reduction for any contributory negligence. It is extremely difficult for a judge in trying a maintenance and cure claim to ascertain, even with the use of special interrogatories, exactly what went into the damages awarded by a jury—how loss of earning power was calculated, how much was allowed for medical expenses and pain and suffering, how much was allowed for actual lost wages, and how much, if any, each of the recoveries was reduced by contributory negligence. This raises needless problems of who has the burden of proving

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[6] For an illuminating discussion of the practical problems, see *Jenkins* v. *Roderick,* 156 F. Supp. 299, 304–306 (D. C. Mass. 1957) (Wyzanski, J.).

This Court has held that recovery of maintenance and cure does not bar a subsequent action under the Jones Act, *Pacific S. S. Co.* v. *Peterson,* 278 U. S. 130 (1928), but of course, where such closely related claims are submitted to different triers of fact, questions of *res judicata* and collateral estoppel necessarily arise, particularly in connection with efforts to avoid duplication of damages.

[7] Maintenance and cure allows recovery for wages only to the end of the voyage on which a seaman is injured or becomes ill. *The Osceola,* 189 U. S. 158, 175 (1903). Medical expenses need not be provided beyond the point at which a seaman becomes incurable. *Farrell* v. *United States,* 336 U. S. 511 (1949).

exactly what the jury did.[8] And even if the judge can find out what elements of damage the jury's verdict actually represented, he must still try to solve the puzzling problem of the bearing the jury's verdict should have on recovery under the different standards of the maintenance and cure claim. In the absence of some statutory or constitutional obstacle, an end should be put to such an unfortunate, outdated, and wasteful manner of trying these cases.[9] Fortunately, there is no such obstacle.

While this Court has held that the Seventh Amendment does not require jury trials in admiralty cases,[10] neither that Amendment nor any other provision of the Constitution forbids them.[11] Nor does any statute of Congress or Rule of Procedure, Civil or Admiralty, forbid jury trials in maritime cases. Article III of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and, since that time, the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to

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[8] See, *e. g., Bartholomew* v. *Universe Tankships, Inc.*, 279 F. 2d 911, 915–916 (C. A. 2d Cir. 1960); *Stendze* v. *The Boat Neptune, Inc.*, 135 F. Supp. 801 (D. C. Mass. 1955). For another example of some of the difficulties involved in separate trials, compare *Claudio* v. *Sinclair Ref. Co.*, 160 F. Supp. 3 (D. C. E. D. N. Y. 1958), with *Lazarowitz* v. *American Export Lines*, 87 F. Supp. 197 (D. C. E. D. Pa. 1949).

[9] See generally Currie, The Silver Oar and All That: A Study of the Romero Case, 27 U. of Chi. L. Rev. 1 (1959); Kurland, The Romero Case and Some Problems of Federal Jurisdiction, 73 Harv. L. Rev. 817, 850 (1960); Note, 73 Harv. L. Rev. 138 (1959).

[10] *Waring* v. *Clarke*, 5 How. 441, 460 (1847).

[11] *The Genesee Chief* v. *Fitzhugh*, 12 How. 443, 459–460 (Dec. Term, 1851) (upholding constitutionality of jury trial provision in Great Lakes Act).

do so.[12] Where, as here, a particular mode of trial being used by many judges is so cumbersome, confusing, and time consuming that it places completely unnecessary obstacles in the paths of litigants seeking justice in our courts, we should not and do not hesitate to take action to correct the situation. Only one trier of fact should be used for the trial of what is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments. And since Congress in the Jones Act has declared that the negligence part of the claim shall be tried by a jury, we would not be free, even if we wished, to require submission of all the claims to the judge alone. Therefore, the jury, a time-honored institution in our jurisprudence, is the only tribunal competent under the present congressional enactments to try all the claims. Accordingly, we hold that a maintenance and cure claim joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts. The seaman in this case was therefore entitled to a jury trial as of right on his maintenance and cure claim.

Judgment against the seaman on the Jones Act claim was affirmed by the Court of Appeals, and we declined to review it on certiorari. The shipowner points out that on remand the maintenance and cure claim would no longer be joined with a Jones Act claim and therefore, he argues, could be tried by a judge without a jury. We cannot agree. Our holding is that it was error to deprive

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[12] See, *e. g.*, *The John G. Stevens*, 170 U. S. 113 (1898); *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S. A.*, 339 U. S. 684, 690, 691 (1950); *Warren* v. *United States*, 340 U. S. 523, 527 (1951); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310, 314 (1955); *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 360–361 (1959); *The Tungus* v. *Skovgaard*, 358 U. S. 588, 597, 611 (1959) (opinion of BRENNAN, J., concurring in part and dissenting in part); *Mitchell* v. *Trawler Racer, Inc.*, 362 U. S. 539 (1960).

the seaman of the jury trial he demanded, and he is entitled to relief from this error by having the kind of trial he would have had in the absence of error.

Reversed.

MR. JUSTICE HARLAN, dissenting.

I am wholly in sympathy with the result reached by the Court. It is, I believe, a result that is consistent with sound judicial administration and that will greatly simplify the conduct of suits in which a claim for maintenance and cure is joined with a Jones Act claim arising out of the same set of facts.

But the rule that the Court announces is in my view entirely procedural in character, and the manner in which such rules must be promulgated has been specified by Congress in 28 U. S. C. § 2073. This statute provides that rules of procedure in admiralty

> "shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof . . . and until the expiration of ninety days after they have been thus reported."

Believing that we are governed by this provision, and that the method there prescribed for the declaration of procedural rules, which are to be applicable in all Federal District Courts, is exclusive, I am unable to subscribe to the opinion of the Court.* I think the appropriate way to achieve what in this instance is obviously a desirable procedural reform is to deal with the matter through the Judicial Conference of the United States. Cf. *Miner* v. *Atlass*, 363 U. S. 641. Meanwhile, substantially for the reasons given in Judge Friendly's opinion, I consider that the judgment below must be affirmed.

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*The course taken by the Court is not, in my view, supported by any of the cases cited in note 12 of the Court's opinion. None of them involved a *procedural* rule.

KER ET UX. *v.* CALIFORNIA.

CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 53. Argued December 11, 1962.—Decided June 10, 1963.

1. The prohibition of the Fourth Amendment against unreasonable searches and seizures, which forbids the Federal Government to convict a man of crime by using evidence obtained from him by unreasonable search and seizure, is enforceable against the States through the Fourteenth Amendment by the same sanction of exclusion and by the application of the same constitutional standard prohibiting "unreasonable searches and seizures," as defined in the Fourth Amendment. *Mapp* v. *Ohio,* 367 U. S. 643. Pp. 30–34.

   (a) This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. P. 33.

   (b) The reasonableness of a search is, in the first instance, a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in the opinions of this Court applying that Amendment, as distinguished from the exercise of its supervisory powers over federal courts; but findings of reasonableness by a trial court are respected only insofar as they are consistent with federal constitutional guarantees. P. 33.

   (c) The States are not precluded from developing working rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement," provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. P. 34.

2. Having reason to believe that one of the petitioners was selling marijuana and had just purchased some from a person who was known to be a dealer in marijuana, California police officers, without a search warrant, used a passkey to enter the apartment occu-

pied by petitioners, husband and wife, arrested them on suspicion of violating the State Narcotic Law, searched their apartment, and found three packages of marijuana, which they seized. At petitioners' trial, these packages of marijuana were admitted in evidence over petitioners' objection, and they were convicted. In affirming the convictions, the California District Court of Appeal found that there was probable cause for the arrests; that the entry into the apartment was for the purpose of arrest and was not unlawful; and that the search, being incident to the arrests, was likewise lawful and its fruits admissible in evidence against petitioners. *Held:* The judgment is affirmed. Pp. 34–44.

195 Cal. App. 2d 246, 15 Cal. Rptr. 767, affirmed.

Robert W. Stanley argued the cause and filed a brief for petitioners.

Gordon Ringer, Deputy Attorney General of California, argued the cause for respondent. With him on the brief were *Stanley Mosk,* Attorney General, and *William E. James,* Assistant Attorney General.

A. L. Wirin, Fred Okrand and *Paul Cooksey* filed a brief for the American Civil Liberties Union of Southern California, as *amicus curiae,* urging reversal.

MR. JUSTICE CLARK delivered the opinion of the Court with reference to the standard by which state searches and seizures must be evaluated (Part I), together with an opinion applying that standard, in which MR. JUSTICE BLACK, MR. JUSTICE STEWART and MR. JUSTICE WHITE join (Parts II–V), and announced the judgment of the Court.

This case raises search and seizure questions under the rule of *Mapp* v. *Ohio,* 367 U. S. 643 (1961). Petitioners, husband and wife, were convicted of possession of marijuana in violation of § 11530 of the California Health and Safety Code. The California District Court of Appeal affirmed, 195 Cal. App. 2d 246, 15 Cal. Rptr. 767, despite the contention of petitioners that their arrests in their

apartment without warrants lacked probable cause [1] and the evidence seized incident thereto and introduced at their trial was therefore inadmissible. The California Supreme Court denied without opinion a petition for hearing. This being the first case arriving here since our opinion in *Mapp* which would afford suitable opportunity for further explication of that holding in the light of intervening experience, we granted certiorari. 368 U. S. 974. We affirm the judgment before us.

The state courts' conviction and affirmance are based on these events, which culminated in the petitioners' arrests. Sergeant Cook of the Los Angeles County Sheriff's Office, in negotiating the purchase of marijuana from one Terrhagen, accompanied him to a bowling alley about 7 p. m. on July 26, 1960, where they were to meet Terrhagen's "connection." Terrhagen went inside and returned shortly, pointing to a 1946 DeSoto as his "connection's" automobile and explaining that they were to meet him "up by the oil fields" near Fairfax and Slauson Avenues in Los Angeles. As they neared that location, Terrhagen again pointed out the DeSoto traveling ahead of them, stating that the "connection" kept his supply of narcotics "somewhere up in the hills." They parked near some vacant fields in the vicinity of the intersection of Fairfax and Slauson, and, shortly thereafter, the DeSoto reappeared and pulled up beside them. The deputy then recognized the driver as one Roland Murphy, whose "mug" photograph he had seen and whom he knew from other narcotics officers to be a large-scale seller of marijuana currently out on bail in connection with narcotics charges.

[1] This contention was initially raised prior to the trial. Section 995, California Penal Code, provides for a motion to set aside the information on the ground that the defendant has been committed without probable cause. Evidence on that issue was presented out of the presence of the jury, and, following the court's denial of the motion, the petitioners were tried and convicted by the jury.

Terrhagen entered the DeSoto and drove off toward the oil fields with Murphy, while the Sergeant waited. They returned shortly, Terrhagen left Murphy's car carrying a package of marijuana and entered his own vehicle, and they drove to Terrhagen's residence. There Terrhagen cut one pound of marijuana and gave it to Sergeant Cook, who had previously paid him. The Sergeant later reported this occurrence to Los Angeles County Officers Berman and Warthen, the latter of whom had observed the occurrences as well.

On the following day, July 27, Murphy was placed under surveillance. Officer Warthen, who had observed the Terrhagen-Murphy episode the previous night, and Officer Markman were assigned this duty. At about 7 p. m. that evening they followed Murphy's DeSoto as he drove to the same bowling alley in which he had met Terrhagen on the previous evening. Murphy went inside, emerged in about 10 minutes and drove to a house where he made a brief visit. The officers continued to follow him but, upon losing sight of his vehicle, proceeded to the vicinity of Fairfax and Slauson Avenues where they parked. There, immediately across the street from the location at which Terrhagen and Sergeant Cook had met Murphy on the previous evening, the officers observed a parked automobile whose lone occupant they later determined to be the petitioner George Douglas Ker.

The officers then saw Murphy drive past them. They followed him but lost sight of him when he extinguished his lights and entered the oil fields. The officers returned to their vantage point and, shortly thereafter, observed Murphy return and park behind Ker. From their location approximately 1,000 feet from the two vehicles, they watched through field glasses. Murphy was seen leaving his DeSoto and walking up to the driver's side of Ker's car, where he "appeared to have conversation with him." It was shortly before 9 p. m. and the distance in the

twilight was too great for the officers to see anything pass between Murphy and Ker or whether the former had anything in his hands as he approached.

While Murphy and Ker were talking, the officers had driven past them in order to see their faces closely and in order to take the license number from Ker's vehicle. Soon thereafter Ker drove away and the officers followed him but lost him when he made a U-turn in the middle of the block and drove in the opposite direction. Now, having lost contact with Ker, they checked the registration with the Department of Motor Vehicles and ascertained that the automobile was registered to Douglas Ker at 4801 Slauson. They then communicated this information to Officer Berman, within 15 to 30 minutes after observing the meeting between Ker and Murphy. Though officers Warthen and Markman had no previous knowledge of Ker, Berman had received information at various times beginning in November of 1959 that Ker was selling marijuana from his apartment and that "he was possibly securing this Marijuana from Ronnie Murphy who is the alias of Roland Murphy." In early 1960 Officer Berman had received a "mug" photograph of Ker from the Inglewood Police Department. He further testified that between May and July 27, 1960, he had received information as to Ker from one Robert Black, who had previously given information leading to at least three arrests and whose information was believed by Berman to be reliable. According to Officer Berman, Black had told him on four or five occasions after May 1960 that Ker and others, including himself, had purchased marijuana from Murphy.[2]

[2] During the hearing on the § 995 motion, see note 1, *supra*, Black testified for the defense, admitting that he knew the petitioners but denying that he gave Officer Berman information about George Ker. Black first denied but then admitted that he had met with Officer Berman and another officer in whose presence Berman said the information about Ker was given.

Armed with the knowledge of the meeting between Ker and Murphy and with Berman's information as to Ker's dealings with Murphy, the three officers and a fourth, Officer Love, proceeded immediately to the address which they had obtained through Ker's license number. They found the automobile which they had been following—and which they had learned was Ker's—in the parking lot of the multiple-apartment building and also ascertained that there was someone in the Kers' apartment. They then went to the office of the building manager and obtained from him a passkey to the apartment. Officer Markman was stationed outside the window to intercept any evidence which might be ejected, and the other three officers entered the apartment. Officer Berman unlocked and opened the door, proceeding quietly, he testified, in order to prevent the destruction of evidence,[3] and found petitioner George Ker sitting in the living room. Just as he identified himself, stating that "We are Sheriff's Narcotics Officers, conducting a narcotics investigation," petitioner Diane Ker emerged from the kitchen. Berman testified that he repeated his identification to her and immediately walked to the kitchen. Without entering, he observed through the open doorway a small scale atop the kitchen sink, upon which lay a "brick-like—brick-shaped package containing the green leafy substance" which he recognized as marijuana. He beckoned the petitioners into the kitchen where, following their denial of knowledge of the contents of the two-and-two-tenths-pound package and

[3] Arresting Officers Berman and Warthen had been attached to the narcotics detail of the Los Angeles County Sheriff's office for three and four years, respectively. Each had participated in hundreds of arrests involving marijuana. Warthen testified that on "many, many occasions" in his experience with narcotics arrests "persons have flushed narcotics down toilets, pushed them down drains and sinks and many other methods of getting rid of them prior to my entrance . . . ."

failure to answer a question as to its ownership, he placed them under arrest for suspicion of violating the State Narcotic Law. Officer Markman testified that he entered the apartment approximately "a minute, minute and a half" after the other officers, at which time Officer Berman was placing the petitioners under arrest. As to this sequence of events, petitioner George Ker testified that his arrest took place immediately upon the officers' entry and before they saw the brick of marijuana in the kitchen.

Subsequent to the arrest and the petitioners' denial of possession of any other narcotics, the officers, proceeding without search warrants, found a half-ounce package of marijuana in the kitchen cupboard and another atop the bedroom dresser. Petitioners were asked if they had any automobile other than the one observed by the officers, and George Ker replied in the negative, while Diane remained silent. On the next day, having learned that an automobile was registered in the name of Diane Ker, Officer Warthen searched this car without a warrant, finding marijuana and marijuana seeds in the glove compartment and under the rear seat. The marijuana found on the kitchen scale, that found in the kitchen cupboard and in the bedroom, and that found in Diane Ker's automobile [4] were all introduced into evidence against the petitioners.

The California District Court of Appeal in affirming the convictions found that there was probable cause for the arrests; that the entry into the apartment was for the purpose of arrest and was not unlawful; and that the search being incident to the arrests was likewise lawful and its fruits admissible in evidence against petitioners. These conclusions were essential to the affirmance, since the California Supreme Court in 1955 had held that evi-

[4] For the reasons discussed in § V of this opinion, we find that the validity of the search of the automobile is not before us and we therefore do not pass on it.

dence obtained by means of unlawful searches and seizures was inadmissible in criminal trials. *People* v. *Cahan*, 44 Cal. 2d 434, 282 P. 2d 905. The court concluded that in view of its findings and the implied findings of the trial court, this Court's intervening decision in *Mapp* v. *Ohio*, *supra*, did "not justify a change in our original conclusion." 195 Cal. App. 2d, at 257, 15 Cal. Rptr., at 773.

I.

In *Mapp* v. *Ohio*, at 646–647, 657, we followed *Boyd* v. *United States*, 116 U. S. 616, 630 (1886), which held that the Fourth Amendment,[5] implemented by the self-incrimination clause of the Fifth,[6] forbids the Federal Government to convict a man of crime by using testimony or papers obtained from him by unreasonable searches and seizures as defined in the Fourth Amendment. We specifically held in *Mapp* that this constitutional prohibition is enforceable against the States through the Fourteenth Amendment.[7] This means, as we said in *Mapp*, that the Fourth Amendment "is enforceable against them [the states] by the same sanction of exclusion as is used against the Federal Government," by the application of the same constitutional standard prohibiting "unreasonable

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[5] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[6] "No person . . . shall be compelled in any criminal case to be a witness against himself . . . ."

[7] Our holding as to enforceability of this federal constitutional rule against the States had its source in the following declaration in *Wolf* v. *Colorado*, 338 U. S. 25, 27–28 (1949):

"The security of one's privacy against arbitrary instrusion by the police—which is at the core of the Fourth Amendment—is . . . implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause."

searches and seizures." 367 U. S., at 655. We now face the specific question as to whether *Mapp* requires the exclusion of evidence in this case which the California District Court of Appeal has held to be lawfully seized. It is perhaps ironic that the initial test under the *Mapp* holding comes from California, whose decision voluntarily to adopt the exclusionary rule in 1955 has been commended by us previously. See *Mapp* v. *Ohio, supra,* at 651–652; *Elkins* v. *United States,* 364 U. S. 206, 220 (1960).

Preliminary to our examination of the search and seizures involved here, it might be helpful for us to indicate what was not decided in *Mapp.* First, it must be recognized that the "principles governing the admissibility of evidence in federal criminal trials have not been restricted . . . to those derived solely from the Constitution. In the exercise of its supervisory authority over the administration of criminal justice in the federal courts . . . this Court has . . . formulated rules of evidence to be applied in federal criminal prosecutions." *McNabb* v. *United States,* 318 U. S. 332, 341 (1943); cf. *Miller* v. *United States,* 357 U. S. 301 (1958); *Nardone* v. *United States,* 302 U. S. 379 (1937). *Mapp,* however, established no assumption by this Court of supervisory authority over state courts, cf. *Cleary* v. *Bolger,* 371 U. S. 392, 401 (1963), and, consequently, it implied no total obliteration of state laws relating to arrests and searches in favor of federal law. *Mapp* sounded no death knell for our federalism; rather, it echoed the sentiment of *Elkins* v. *United States, supra,* at 221, that "a healthy federalism depends upon the avoidance of needless conflict between state and federal courts" by itself urging that "[f]ederal-state cooperation in the solution of crime under constitutional standards will be promoted, if only by recognition of their now mutual obligation to respect *the same fundamental criteria* in their approaches." 367 U. S., at 658. (Emphasis added.) Second, *Mapp* did not attempt the impossible task of lay-

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ing down a "fixed formula" for the application in specific cases of the constitutional prohibition against unreasonable searches and seizures; it recognized that we would be "met with 'recurring questions of the reasonableness of searches' " and that, "at any rate, '[r]easonableness is in the first instance for the [trial court] . . . to determine,' " *id.*, at 653, thus indicating that the usual weight be given to findings of trial courts.

Mapp, of course, did not lend itself to a detailed explication of standards, since the search involved there was clearly unreasonable and bore no stamp of legality even from the Ohio Supreme Court. *Id.*, at 643–645. This is true also of *Elkins* v. *United States*, where all of the courts assumed the unreasonableness of the search in question and this Court "invoked" its "supervisory power over the administration of criminal justice in the federal courts," 364 U. S., at 216, in declaring that the evidence so seized by state officers was inadmissible in a federal prosecution. The prosecution being in a federal court, this Court of course announced that "[t]he test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." *Id.*, at 224. Significant in the *Elkins* holding is the statement, apposite here, that "it can fairly be said that in applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement." *Id.*, at 222.

Implicit in the Fourth Amendment's protection from unreasonable searches and seizures is its recognition of individual freedom. That safeguard has been declared to be "as of the very essence of constitutional liberty" the guaranty of which "is as important and as imperative as are the guaranties of the other fundamental rights of the individual citizen . . . ." *Gouled* v. *United States*, 255 U. S. 298, 304 (1921); cf. *Powell* v. *Alabama*, 287 U. S.

45, 65–68 (1932). While the language of the Amendment is "general," it "forbids every search that is unreasonable; it protects all, those suspected or known to be offenders as well as the innocent, and unquestionably extends to the premises where the search was made . . . ." *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344, 357 (1931). Mr. Justice Butler there stated for the Court that "[t]he Amendment is to be liberally construed and all owe the duty of vigilance for its effective enforcement lest there shall be impairment of the rights for the protection of which it was adopted." *Ibid.* He also recognized that "[t]here is no formula for the determination of reasonableness. Each case is to be decided on its own facts and circumstances." *Ibid.;* see *United States* v. *Rabinowitz,* 339 U. S. 56, 63 (1950); *Rios* v. *United States,* 364 U. S. 253, 255 (1960).

This Court's long-established recognition that standards of reasonableness under the Fourth Amendment are not susceptible of Procrustean application is carried forward when that Amendment's proscriptions are enforced against the States through the Fourteenth Amendment. And, although the standard of reasonableness is the same under the Fourth and Fourteenth Amendments, the demands of our federal system compel us to distinguish between evidence held inadmissible because of our supervisory powers over federal courts and that held inadmissible because prohibited by the United States Constitution. We reiterate that the reasonableness of a search is in the first instance a substantive determination to be made by the trial court from the facts and circumstances of the case and in the light of the "fundamental criteria" laid down by the Fourth Amendment and in opinions of this Court applying that Amendment. Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases in-

volving federal constitutional rights, findings of state courts are by no means insulated against examination here. See, *e. g., Spano* v. *New York,* 360 U. S. 315, 316 (1959); *Thomas* v. *Arizona,* 356 U. S. 390, 393 (1958); *Pierre* v. *Louisiana,* 306 U. S. 354, 358 (1939). While this Court does not sit as in *nisi prius* to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental—*i. e.,* constitutional—criteria established by this Court have been respected. The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet "the practical demands of effective criminal investigation and law enforcement" in the States, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain. See *Jones* v. *United States,* 362 U. S. 257 (1960). Such a standard implies no derogation of uniformity in applying federal constitutional guarantees but is only a recognition that conditions and circumstances vary just as do investigative and enforcement techniques.

Applying this federal constitutional standard we proceed to examine the entire record including the findings of California's courts to determine whether the evidence seized from petitioners was constitutionally admissible under the circumstances of this case.

II.

The evidence at issue, in order to be admissible, must be the product of a search incident to a lawful arrest, since the officers had no search warrant. The lawfulness of the arrest without warrant, in turn, must be based upon

probable cause, which exists "where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar* v. *United States,* 338 U. S. 160, 175–176 (1949), quoting from *Carroll* v. *United States,* 267 U. S. 132, 162 (1925); accord, *People* v. *Fischer,* 49 Cal. 2d 442, 317 P. 2d 967 (1957); *Bompensiero* v. *Superior Court,* 44 Cal. 2d 178, 281 P. 2d 250 (1955). The information within the knowledge of the officers at the time they arrived at the Kers' apartment, as California's courts specifically found, clearly furnished grounds for a reasonable belief that petitioner George Ker had committed and was committing the offense of possession of marijuana. Officers Markman and Warthen observed a rendezvous between Murphy and Ker on the evening of the arrest which was a virtual reenactment of the previous night's encounter between Murphy, Terrhagen and Sergeant Cook, which concluded in the sale by Murphy to Terrhagen and the Sergeant of a package of marijuana of which the latter had paid Terrhagen for one pound which he received from Terrhagen after the encounter with Murphy. To be sure, the distance and lack of light prevented the officers from seeing and they did not see any substance pass between the two men, but the virtual identity of the surrounding circumstances warranted a strong suspicion that the one remaining element—a sale of narcotics—was a part of this encounter as it was the previous night. But Ker's arrest does not depend upon this single episode with Murphy. When Ker's U-turn thwarted the officer's pursuit, they learned his name and address from the Department of Motor Vehicles and reported the occurrence to Officer Berman. Berman, in turn, revealed information from an informer whose reliability had been tested previously, as

well as from other sources, not only that Ker had been selling marijuana from his apartment but also that his likely source of supply was Murphy himself. That this information was hearsay does not destroy its role in establishing probable cause. *Brinegar* v. *United States, supra.* In *Draper* v. *United States*, 358 U. S. 307 (1959), we held that information from a reliable informer, corroborated by the agents' observations as to the accuracy of the informer's description of the accused and of his presence at a particular place, was sufficient to establish probable cause for an arrest without warrant.[8] The corroborative elements in *Draper* were innocuous in themselves, but here both the informer's tip and the personal observations connected Ker with specific illegal activities involving the same man, Murphy, a known marijuana dealer. To say that this coincidence of information was sufficient to support a reasonable belief of the officers that Ker was illegally in possession of marijuana is to indulge in understatement.

Probable cause for the arrest of petitioner Diane Ker, while not present at the time the officers entered the apartment to arrest her husband, was nevertheless present at the time of her arrest. Upon their entry and announcement of their identity, the officers were met not only by George Ker but also by Diane Ker, who was emerging from the kitchen. Officer Berman immediately walked to the doorway from which she emerged and, without entering, observed the brick-shaped package of marijuana in plain view. Even assuming that her presence in

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[8] In *Draper* the arrest upon probable cause was authorized under 26 U. S. C. § 7607, authorizing narcotics agents to make an arrest without warrant if they have "reasonable grounds to believe that the person to be arrested has committed or is committing such violation." Under § 836, California Penal Code, an officer may arrest without a warrant if he has "reasonable cause to believe that the person to be arrested has committed a felony . . . ."

a small room with the contraband in a prominent position on the kitchen sink would not alone establish a reasonable ground for the officers' belief that she was in joint possession with her husband, that fact was accompanied by the officers' information that Ker had been using his apartment as a base of operations for his narcotics activities. Therefore, we cannot say that at the time of her arrest there were not sufficient grounds for a reasonable belief that Diane Ker, as well as her husband, was committing the offense of possession of marijuana in the presence of the officers.

III.

It is contended that the lawfulness of the petitioners' arrests, even if they were based upon probable cause, was vitiated by the method of entry. This Court, in cases under the Fourth Amendment, has long recognized that the lawfulness of arrests for federal offenses is to be determined by reference to state law insofar as it is not violative of the Federal Constitution. *Miller* v. *United States, supra; United States* v. *Di Re,* 332 U. S. 581 (1948); *Johnson* v. *United States,* 333 U. S. 10, 15, n. 5 (1948). *A fortiori,* the lawfulness of these arrests by state officers for state offenses is to be determined by California law. California Penal Code, § 844,[9] permits peace officers to break into a dwelling place for the purpose of arrest after demanding admittance and explaining their purpose. Admittedly the officers did not comply with the terms of this statute since they entered quietly and without announcement, in order to prevent the destruction of contraband. The California District Court of Appeal,

[9] "To make an arrest, . . . in all cases a peace officer, may break open the door or window of the house in which the person to be arrested is, or in which . . . [he has] reasonable grounds for believing him to be, after having demanded admittance and explained the purpose for which admittance is desired."

however, held that the circumstances here came within a judicial exception which had been engrafted upon the statute by a series of decisions, see, *e. g., People* v. *Ruiz,* 146 Cal. App. 2d 630, 304 P. 2d 175 (1956); *People* v. *Maddox,* 46 Cal. 2d 301, 294 P. 2d 6, cert. denied, 352 U. S. 858 (1956), and that the noncompliance was therefore lawful.

Since the petitioners' federal constitutional protection from unreasonable searches and seizures by police officers is here to be determined by whether the search was incident to a lawful arrest, we are warranted in examining that arrest to determine whether, notwithstanding its legality under state law, the method of entering the home may offend federal constitutional standards of reasonableness and therefore vitiate the legality of an accompanying search. We find no such offensiveness on the facts here. Assuming that the officers' entry by use of a key obtained from the manager is the legal equivalent of a "breaking," see *Keiningham* v. *United States,* 109 U. S. App. D. C. 272, 276, 287 F. 2d 126, 130 (C. A. D. C. Cir. 1960), it has been recognized from the early common law that such breaking is permissible in executing an arrest under certain circumstances. See Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 798, 800–806 (1924). Indeed, 18 U. S. C. § 3109,[10] dealing with the execution of search warrants by federal officers, authorizes breaking of doors in words very similar to those of the California statute, both statutes including a requirement of notice of authority and purpose. In *Miller* v. *United States, supra,* this Court held unlawful an arrest, and therefore its accompanying search, on the ground that the District of

[10] "The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant."

Columbia officers before entering a dwelling did not fully satisfy the requirement of disclosing their identity and purpose. The Court stated that "the lawfulness of the arrest without warrant is to be determined by reference to state law. . . . By like reasoning the validity of the arrest of petitioner is to be determined by reference to the law of the District of Columbia." 357 U. S., at 305–306. The parties there conceded and the Court accepted that the criteria for testing the arrest under District of Columbia law were "substantially identical" to the requirements of § 3109. *Id.,* at 306. Here, however, the criteria under California law clearly include an exception to the notice requirement where exigent circumstances are present. Moreover, insofar as violation of a federal statute required the exclusion of evidence in *Miller,* the case is inapposite for state prosecutions, where admissibility is governed by constitutional standards. Finally, the basis of the judicial exception to the California statute, as expressed by Justice Traynor in *People* v. *Maddox,* 46 Cal. 2d, at 306, 294 P. 2d, at 9, effectively answers the petitioners' contention:

> "It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844. Moreover, since the demand and explanation require-

> ments of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. (*Read* v. *Case,* 4 Conn. 166, 170 [10 Am. Dec. 110]; see Rest., Torts, § 206, com. d.) Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these questions in the first instance."

No such exigent circumstances as would authorize noncompliance with the California statute were argued in *Miller,* and the Court expressly refrained from discussing the question, citing the *Maddox* case without disapproval. 357 U. S., at 309.[11] Here justification for the officers' failure to give notice is uniquely present. In addition to the officers' belief that Ker was in possession of narcotics, which could be quickly and easily destroyed, Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he might well have been expecting the police.[12] We therefore hold that in the par-

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[11] Nor has the Court rejected the proposition that noncompliance may be reasonable in exigent circumstances subsequent to *Miller.* In *Wong Sun* v. *United States,* 371 U. S. 471 (1963), the Court held that federal officers had not complied with § 3109 in executing an arrest. There the Court noted that in *Miller* it had reserved the question of an exception in exigent circumstances and stated that "[h]ere, as in *Miller,* the Government claims no extraordinary circumstances—such as the imminent destruction of vital evidence, or the need to rescue a victim in peril— . . . which excused the officer's failure truthfully to state his mission before he broke in." *Id.,* at 483–484.

[12] A search of the record with the aid of hindsight may lend some support to the conclusion that, contra the reasonable belief of the officers, petitioners may not have been prepared for an imminent visit from the police. It goes without saying that in determining the lawfulness of entry and the existence of probable cause we may

ticular circumstances of this case the officers' method of entry, sanctioned by the law of California, was not unreasonable under the standards of the Fourth Amendment as applied to the States through the Fourteenth Amendment.

IV.

Having held the petitioners' arrests lawful, it remains only to consider whether the search which produced the evidence leading to their convictions was lawful as incident to those arrests. The doctrine that a search without warrant may be lawfully conducted if incident to a lawful arrest has long been recognized as consistent with the Fourth Amendment's protection against unreasonable searches and seizures. See *Marron* v. *United States,* 275 U. S. 192 (1927); *Harris* v. *United States,* 331 U. S. 145 (1947); *Abel* v. *United States,* 362 U. S. 217 (1960); Kaplan, Search and Seizure: A No-Man's Land in the Criminal Law, 49 Cal. L. Rev. 474, 490–493 (1961). The cases have imposed no requirement that the arrest be under authority of an arrest warrant, but only that it be lawful. See *Marron* v. *United States, supra,* at 198–199; *United States* v. *Rabinowitz, supra,* at 61; cf. *Agnello* v. *United States,* 269 U. S. 20, 30–31 (1925). The question remains whether the officers' action here exceeded the recognized bounds of an incidental search.

Petitioners contend that the search was unreasonable in that the officers could practicably have obtained a search warrant. The practicability of obtaining a warrant is not the controlling factor when a search is sought to be justified as incident to arrest, *United States* v. *Rabinowitz,*

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concern ourselves only with what the officers had reason to believe *at the time of their entry. Johnson* v. *United States,* 333 U. S. 10, 17 (1948). As the Court said in *United States* v. *Di Re,* 332 U. S. 581, 595 (1948), "a search is not to be made legal by what it turns up. In law it is good *or bad* when it starts and does not change character from" what is dug up subsequently. (Emphasis added.)

supra; but we need not rest the validity of the search here on *Rabinowitz,* since we agree with the California court that time clearly was of the essence. The officers' observations and their corroboration, which furnished probable cause for George Ker's arrest, occurred at about 9 p. m., approximately one hour before the time of arrest. The officers had reason to act quickly because of Ker's furtive conduct and the likelihood that the marijuana would be distributed or hidden before a warrant could be obtained at that time of night.[13] Thus the facts bear no resemblance to those in *Trupiano* v. *United States,* 334 U. S. 699 (1948), where federal agents for three weeks had been in possession of knowledge sufficient to secure a search warrant.

The search of the petitioners' apartment was well within the limits upheld in *Harris* v. *United States, supra,* which also concerned a private apartment dwelling. The evidence here, unlike that in *Harris,* was the instrumentality of the very crime for which petitioners were arrested, and the record does not indicate that the search here was as extensive in time or in area as that upheld in *Harris.*

The petitioners' only remaining contention is that the discovery of the brick of marijuana cannot be justified as incidental to arrest since it preceded the arrest. This contention is of course contrary to George Ker's testimony, but we reject it in any event. While an arrest may not be used merely as the pretext for a search without warrant, the California court specifically found and the record supports both that the officers entered the apartment for

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[13] In cases in which a search could not be regarded as incident to arrest because the petitioner was not present at the time of the entry and search, the absence of compelling circumstances, such as the threat of destruction of evidence, supported the Court's holdings that searches without warrants were unconstitutional. See *Chapman* v. *United States,* 365 U. S. 610, 615 (1961); *United States* v. *Jeffers,* 342 U. S. 48, 52 (1951); *Taylor* v. *United States,* 286 U. S. 1, 5 (1932).

the purpose of arresting George Ker and that they had probable cause to make that arrest prior to the entry.[14] We cannot say that it was unreasonable for Officer Berman, upon seeing Diane Ker emerge from the kitchen, merely to walk to the doorway of that adjacent room. We thus agree with the California court's holding that the discovery of the brick of marijuana did not constitute a search, since the officer merely saw what was placed before him in full view. *United States* v. *Lee,* 274 U. S. 559 (1927); *United States* v. *Lefkowitz,* 285 U. S. 452, 465 (1932); *People* v. *West,* 144 Cal. App. 2d 214, 300 P. 2d 729 (1956). Therefore, while California law does not require that an arrest precede an incidental search as long as probable cause exists at the outset, *Willson* v. *Superior Court,* 46 Cal. 2d 291, 294 P. 2d 36 (1956), the California court did not rely on that rule and we need not reach the question of its status under the Federal Constitution.

V.

The petitioners state and the record bears out that the officers searched Diane Ker's automobile on the day subsequent to her arrest. The reasonableness of that search, however, was not raised in the petition for certiorari, nor was it discussed in the brief here. Ordinarily "[w]e do not reach for constitutional questions not raised by the parties," *Mazer* v. *Stein,* 347 U. S. 201, 206, n. 5 (1954), nor extend our review beyond those specific federal ques-

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[14] Compare *Johnson* v. *United States,* note 12, *supra,* at 40. There the Court held that a search could not be justified as incident to arrest since the officers, prior to their entry into a hotel room, had no probable cause for the arrest of the occupant. The Court stated that "[a]n officer gaining access to private living quarters under color of his office and of the law which he personifies must then have some valid basis in law for the intrusion." Here, of course, probable cause for the arrest of petitioner George Ker provided that valid basis.

tions properly raised in the state court. The record gives no indication that the issue was raised in the trial court or in the District Court of Appeal, the latter court did not adjudicate it and we therefore find no reason to reach it on the record.[15]

For these reasons the judgment of the California District Court of Appeal is

Affirmed.

MR. JUSTICE HARLAN, concurring in the result.

Heretofore there has been a well-established line of demarcation between the constitutional principles governing the standards for state searches and seizures and those controlling federal activity of this kind. Federal searches and seizures have been subject to the requirement of "reasonableness" contained in the Fourth Amendment, as that requirement has been elaborated over the years in federal litigation. State searches and seizures, on the other hand, have been judged, and in my view properly so, by the more flexible concept of "fundamental" fairness, of rights "basic to a free society," embraced in the Due Process Clause of the Fourteenth Amendment.

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[15] The record shows that petitioners made no objection to the admission of any of the evidence, thus failing to observe a state procedural requirement, *People* v. *Brittain*, 149 Cal. App. 2d 201, 308 P. 2d 38 (1957); see *Mapp* v. *Ohio*, *supra*, at 659, n. 9. However, the District Court of Appeal passed on the issue of the narcotics seized in the apartment, presumably on the ground that petitioners preserved that question by their motion under § 995, California Penal Code, which was directed toward the principal objection to that search—the alleged lack of probable cause. While "[t]here can be no question as to the proper presentation of a federal claim when the highest state court passes on it," *Raley* v. *Ohio*, 360 U. S. 423, 436 (1959), there is no indication in the court's opinion that it passed on the issue of the search of the automobile, nor is there any indication in the petitioners' briefs in that court that the issue was presented.

See *Wolf* v. *Colorado,* 338 U. S. 25, 27;* cf. *Rochin* v. *California,* 342 U. S. 165; *Palko* v. *Connecticut,* 302 U. S. 319. Today this distinction in constitutional principle is abandoned. Henceforth state searches and seizures are to be judged by the same constitutional standards as apply in the federal system.

In my opinion this further extension of federal power over state criminal cases, cf. *Fay* v. *Noia,* 372 U. S. 391; *Douglas* v. *California,* 372 U. S. 353; *Draper* v. *Washington,* 372 U. S. 487—all decided only a few weeks ago, is quite uncalled for and unwise. It is uncalled for because the States generally, and more particularly California, are increasingly evidencing concern about improving their own criminal procedures, as this Court itself has recently observed on more than one occasion (see *Gideon* v. *Wainwright,* 372 U. S. 335, 345; *ante,* p. 31), and because the Fourteenth Amendment's requirements of fundamental fairness stand as a bulwark against serious local shortcomings in this field. The rule is unwise because the States, with their differing law enforcement problems, should not be put in a constitutional strait jacket, and also because the States, more likely than not, will be placed in an atmosphere of uncertainty since this Court's decisions in the realm of search and seizure are hardly notable for their predictability. Cf. *Harris* v. *United States,* 331 U. S. 145, 175–181 (Appendix to dissenting opinion of Mr. Justice Frankfurter). (The latter point is indeed forcefully illustrated by the fact that in the first application of its new constitutional rule the majority finds itself equally divided.) And if the Court is prepared to relax Fourth Amendment standards in order to avoid unduly fettering the States, this would be in

**Mapp* v. *Ohio,* 367 U. S. 643, did not purport to change the standards by which state searches and seizures were to be judged; rather it held only that the "exclusionary" rule of *Weeks* v. *United States,* 232 U. S. 383, was applicable to the States.

derogation of law enforcement standards in the federal system—unless the Fourth Amendment is to mean one thing for the States and something else for the Federal Government.

I can see no good coming from this constitutional adventure. In judging state searches and seizures I would continue to adhere to established Fourteenth Amendment concepts of fundamental fairness. So judging this case, I concur in the result.

MR. JUSTICE BRENNAN, with whom THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS and MR. JUSTICE GOLDBERG join.

I join Part I of MR. JUSTICE CLARK'S opinion and the holding therein that "as we said in *Mapp* . . . the Fourth Amendment 'is enforceable against . . . [the States] by the same sanction of exclusion as is used against the Federal Government,' by the application of the same constitutional standard prohibiting 'unreasonable searches and seizures.' " Only our Brother HARLAN dissents from that holding; he would judge state searches and seizures "by the more flexible concept of 'fundamental' fairness, of rights 'basic to a free society,' embraced in the Due Process Clause of the Fourteenth Amendment."

However, MR. JUSTICE CLARK, MR. JUSTICE BLACK, MR. JUSTICE STEWART and MR. JUSTICE WHITE do not believe that the federal requirement of reasonableness contained in the Fourth Amendment was violated in this case. THE CHIEF JUSTICE, MR. JUSTICE DOUGLAS, MR. JUSTICE GOLDBERG and I have the contrary view. For even on the premise that there was probable cause by federal standards for the arrest of George Ker, the arrests of these petitioners were nevertheless illegal, because the unannounced intrusion of the arresting officers into their apartment violated the Fourth Amendment. Since the

arrests were illegal, *Mapp* v. *Ohio,* 367 U. S. 643, requires the exclusion of the evidence which was the product of the search incident to those arrests.

Even if probable cause exists for the arrest of a person within, the Fourth Amendment is violated by an unannounced police intrusion into a private home, with or without an arrest warrant, except (1) where the persons within already know of the officers' authority and purpose, or (2) where the officers are justified in the belief that persons within are in imminent peril of bodily harm, or (3) where those within, made aware of the presence of someone outside (because, for example, there has been a knock at the door), are then engaged in activity which justifies the officers in the belief that an escape or the destruction of evidence is being attempted.

I.

It was firmly established long before the adoption of the Bill of Rights that the fundamental liberty of the individual includes protection against unannounced police entries. "[T]he Fourth Amendment did but embody a principle of English liberty, a principle old, yet newly won, that finds another expression in the maxim 'every man's home is his castle.' " Fraenkel, Concerning Searches and Seizures, 34 Harv. L. Rev. 361, 365 (1921); *Frank* v. *Maryland,* 359 U. S. 360, 376–382 (dissenting opinion). As early as *Semayne's Case,* 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (1603), it was declared that "[i]n all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K[ing]'s process, if otherwise he cannot enter. *But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . .*" (Emphasis supplied.) Over a century later the leading commentators upon the English criminal law affirmed the continuing vitality of

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that principle. 1 Hale, Pleas of the Crown (1736), 583; see also 2 Hawkins, Pleas of the Crown (6th ed. 1787), c. 14, § 1; Foster, Crown Law (1762), 320–321.[1] Perhaps its most emphatic confirmation was supplied only 35 years before the ratification of the Bill of Rights. In *Curtis' Case,* Fost. 135, 168 Eng. Rep. 67, decided in 1756, the defendant, on trial for the murder of a Crown officer who was attempting an entry to serve an arrest warrant, pleaded that because the officer had failed adequately to announce himself and his mission before breaking the doors, forceful resistance to his entry was justified and the killing was therefore justifiable homicide. In recognizing the defense the court repeated the principle that "peace-officers, having a legal warrant to arrest for a breach of the peace, may break open doors, *after having demanded admittance and given due notice of their warrant";* the court continued that "no precise form of words is required in a case of this kind" because "[i]t is sufficient that the party hath notice, that the officer cometh not as a mere trespasser, but claiming to act under a proper authority . . . ." Fost., at 136–137, 168 Eng. Rep., at 68. (Emphasis supplied.) The principle was again confirmed not long after the Fourth Amendment became part of our Constitution. Abbott, C. J., said in *Launock* v. *Brown,* 2 B. & Ald. 592, 593–594, 106 Eng. Rep. 482, 483 (1819):

> ". . . I am clearly of opinion that, in the case of a misdemeanour, such previous demand is requisite . . . . It is reasonable that the law should be so; for if no

[1] Hale's view was representative: "A man, that arrests upon suspicion of felony, may break open doors, if the party refuse upon demand to open them . . . ." 1 Hale, Pleas of the Crown (1736), 583. See generally *Miller* v. *United States,* 357 U. S. 301, 306–310; *Accarino* v. *United States,* 85 U. S. App. D. C. 394, 398–402, 179 F. 2d 456, 460–464; Thomas, The Execution of Warrants of Arrest, [1962] Crim. L. Rev. 520, 597, 601–604.

> previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost." [2]

The protections of individual freedom carried into the Fourth Amendment, *Boyd* v. *United States,* 116 U. S. 616, 630, undoubtedly included this firmly established requirement of an announcement by police officers of purpose and authority before breaking into an individual's home. The requirement is no mere procedural nicety or formality attendant upon the service of a warrant. Decisions in both the federal and state courts have recognized, as did the English courts, that the requirement is of the essence of the substantive protections which safeguard individual liberty.[3] The Court of Appeals for the District of Columbia Circuit has said:

> ". . . there is no division of opinion among the learned authors . . . that even where an officer may

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[2] Compare also the statement of Bayley, J., in *Burdett* v. *Abbot,* 14 East. 1, 162–163, 104 Eng. Rep. 501, 563 (1811):

"Now in every breach of the peace the public are considered as interested, and the execution of process against the offender is the assertion of a public right: and in all such cases, I apprehend that the officer has a right to break open the outer door, provided there is a request of admission first made for the purpose, and a denial of the parties who are within."

See also *Ratcliffe* v. *Burton,* 3 Bos. & Pul. 223, 127 Eng. Rep. 123 (1802); *Kerbey* v. *Denby,* 1 M. & W. 336, 150 Eng. Rep. 463 (1836); cf. *Park* v. *Evans,* Hob. 62, 80 Eng. Rep. 211; *Penton* v. *Brown,* 1 Keble 698, 83 Eng. Rep. 1193; *Percival* v. *Stamp,* 9 Ex. 167, 156 Eng. Rep. 71 (1853).

[3] See generally *Gatewood* v. *United States,* 93 U. S. App. D. C. 226, 229, 209 F. 2d 789, 791; 1 Bishop, New Criminal Procedure (2d ed. 1913), § 201; 1 Varon, Searches, Seizures and Immunities (1961), 399–401; Day and Berkman, Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of Mapp v. Ohio, 13 West. Res. L. Rev. 56, 79–80 (1961).

> have power to break open a door without a warrant, he cannot lawfully do so unless he first notifies the occupants as to the purpose of his demand for entry." *Accarino* v. *United States,* 85 U. S. App. D. C. 394, 400, 179 F. 2d 456, 462.

Similarly, the Supreme Judicial Court of Massachusetts declared in 1852:

> "The maxim of law that every man's house is his castle . . . has not the effect to restrain an officer of the law from breaking and entering a dwelling-house for the purpose of serving a criminal process upon the occupant. In such case the house of the party is no sanctuary for him, and the same may be forcibly entered by such officer after a proper notification of the purpose of the entry, and a demand upon the inmates to open the house, and a refusal by them to do so." *Barnard* v. *Bartlett,* 10 Cush. (Mass.) 501, 502–503; cf. *State* v. *Smith,* 1 N. H. 346.

Courts of the frontier States also enforced the requirement. For example, Tennessee's high court recognized that a police officer might break into a home to serve an arrest warrant only "after demand for admittance and notice of his purpose," *McCaslin* v. *McCord,* 116 Tenn. 690, 708, 94 S. W. 79, 83; cf. *Hawkins* v. *Commonwealth,* 53 Ky. 395. Indeed, a majority of the States have enacted the requirement in statutes substantially similar to California Penal Code § 844 and the federal statute, 18 U. S. C. § 3109.[4]

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[4] Ala. Code, Tit. 15, § 155; Ariz. Rev. Stat. Ann. § 13–1411; Deering's Cal. Penal Code § 844; Fla. Stat. Ann. § 901.19 (1); Idaho Code § 19–611; Burns' Ind. Ann. Stat. § 9–1009; Iowa Code Ann. § 755.9; Kan. Gen. Stat. § 62–1819; Ky. Rev. Stat. § 70.078; Dart's La. Crim. Code, Art. 72; Mich. Stat. Ann. § 28.880; Minn. Stat. Ann. § 629.34; Miss. Code § 2471; Mo. Rev. Stat. § 544.200; Mont. Rev. Code § 94–6011; Neb. Rev. Stat. § 29–411; Nev. Rev. Stat. § 171.275; McKinney's N. Y. Crim. Code § 178; N. C. Gen. Stat. § 15–44; Page's

Moreover, in addition to carrying forward the protections already afforded by English law, the Framers also meant by the Fourth Amendment to eliminate once and for all the odious practice of searches under general warrants and writs of assistance against which English law had generally left them helpless. The colonial experience under the writs was unmistakably "fresh in the memories of those who achieved our independence and established our form of government." [5] *Boyd* v. *United States, supra,* at 625. The problem of entry under a general warrant was not, of course, exactly that of unannounced intrusion to arrest with a warrant or upon probable cause, but the two practices clearly invited common abuses. One of the grounds of James Otis' eloquent indictment of the writs bears repetition here:

> "Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well

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Ohio Rev. Code Ann. § 2935.15; Okla. Stat. Ann., Tit. 22, § 194; Ore. Rev. Stat. § 133.320; S. C. Code § 53–198; S. D. Code § 34.1606; Tenn. Code Ann. § 40–807; Utah Code Ann. 77–13–12; Wash. Rev. Code § 10.31.040; Wyo. Comp. Stat. § 10–309.

Compare Code of Crim. Proc., American Law Institute, Official Draft (1930), § 28:

"*Right of officer to break into building.* An officer, in order to make an arrest either by virtue of a warrant, or when authorized to make such arrest for a felony without a warrant, as provided in section 21, may break open a door or window of any building in which the person to be arrested is or is reasonably believed to be, if he is refused admittance after he has announced his authority and purpose."

[5] See also *Henry* v. *United States,* 361 U. S. 98, 100–101; Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937), c. II; Barrett, Personal Rights, Property Rights, and the Fourth Amendment, 1960 Supreme Court Review 46, 70–71; Comment, Search and Seizure in the Supreme Court: Shadows on the Fourth Amendment, 28 U. of Chi. L. Rev. 664, 678–679 (1961). Compare *East-India Co.* v. *Skinner,* Comb. 342, 90 Eng. Rep. 516.

> guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and every thing in their way: and whether they break through malice or revenge, no man, no court, can inquire. Bare suspicion without oath is sufficient." Tudor, Life of James Otis (1823), 66–67.

Similar, if not the same, dangers to individual liberty are involved in unannounced intrusions of the police into the homes of citizens. Indeed in two respects such intrusions are even more offensive to the sanctity and privacy of the home. In the first place service of the general warrants and writs of assistance was usually preceded at least by some form of notice or demand for admission. In the second place the writs of assistance by their very terms might be served only during daylight hours.[6] By significant contrast, the unannounced entry of the Ker apartment occurred after dark, and such timing appears to be common police practice, at least in California.[7]

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[6] Lasson, The History and Development of the Fourth Amendment to the United States Constitution (1937), 54.

[7] In these two respects, the practice of unannounced police entries by night is also considerably more offensive to the rights protected by the Fourth Amendment than the use of health-inspection and other administrative powers of entry, concerning the constitutionality of which this Court has divided sharply, *Frank* v. *Maryland, supra; Ohio ex rel. Eaton* v. *Price,* 364 U. S. 263. Since my Brother CLARK does not rely upon either of those decisions, I have no occasion to discuss further the applicability of either to the case at bar. For further consideration of problems raised by those cases, see generally, Waters, Rights of Entry in Administrative Officers, 27 U. of Chi. L. Rev. 79 (1959); Comment, State Health Inspections and "Unreasonable Search": The *Frank* Exclusion of Civil Searches, 44 Minn. L. Rev. 513 (1960).

It is much too late in the day to deny that a lawful entry is as essential to vindication of the protections of the Fourth Amendment as, for example, probable cause to arrest or a search warrant for a search not incidental to an arrest. This Court settled in *Gouled* v. *United States,* 255 U. S. 298, 305–306, that a lawful entry is the indispensable predicate of a reasonable search. We held there that a search would violate the Fourth Amendment if the entry were illegal whether accomplished "by force or by an illegal threat or show of force" or "obtained by stealth instead of by force or coercion." Similarly, rigid restrictions upon unannounced entries are essential if the Fourth Amendment's prohibition against invasion of the security and privacy of the home is to have any meaning.

It is true, of course, that the only decision of this Court which forbids federal officers to arrest and search after an unannounced entry, *Miller* v. *United States,* 357 U. S. 301, did not rest upon constitutional doctrine but rather upon an exercise of this Court's supervisory powers. But that disposition in no way implied that the same result was not compelled by the Fourth Amendment. *Miller* is simply an instance of the usual practice of the Court not to decide constitutional questions when a nonconstitutional basis for decision is available. See *International Assn. of Machinists* v. *Street,* 367 U. S. 740, 749–750. The result there drew upon analogy to a federal statute, similar in its terms to § 844, with which the federal officers concededly had not complied in entering to make an arrest. Nothing we said in *Miller* so much as intimated that, without such a basis for decision, the Fourth Amendment would not have required the same result. The implication, indeed, is quite to the contrary. For the history adduced in *Miller* in support of the nonconstitutional ground persuasively demonstrates that the Fourth Amendment's protections include the security of the householder against unannounced invasions by the police.

II.

The command of the Fourth Amendment reflects the lesson of history that "the breaking an outer door is, in general, so violent, obnoxious and dangerous a proceeding, that it should be adopted only in extreme cases, where an immediate arrest is requisite." 1 Burn, Justice of the Peace (28th ed. 1837), 275–276.

I have found no English decision which clearly recognizes any exception to the requirement that the police first give notice of their authority and purpose before forcibly entering a home. Exceptions were early sanctioned in American cases, *e. g., Read* v. *Case,* 4 Conn. 166, but these were rigidly and narrowly confined to situations not within the reason and spirit of the general requirement. Specifically, exceptional circumstances have been thought to exist only when, as one element, the facts surrounding the particular entry support a finding that those within actually knew or must have known of the officer's presence and purpose to seek admission. Cf. *Miller* v. *United States, supra,* at 311–313. For example, the earliest exception seems to have been that "[i]n the case of an *escape* after arrest, the officer, on fresh pursuit of the offender to a house in which he takes refuge, may break the doors to recapture him, in the case of felony, without a warrant, and without notice or demand for admission to the house of the offender." [8] Wilgus, Arrest Without a

[8] It is not clear whether the English law ever recognized such an exception to the requirement of notice or awareness. See, *e. g., Genner* v. *Sparks,* 6 Mod. 173, 87 Eng. Rep. 928. It is stated in an English annotator's note to *Semayne's Case, supra,* that "if a man being legally arrested, escapeth from the officer, and taketh shelter though in his own house, the officer may upon fresh suit break open doors in order to retake him, having first given due notice of his business and demanded admission, and been refused." 77 Eng. Rep., at 196. The views of other commentators are ambiguous on this point. See, *e. g.,* 2 Hawkins, Pleas of the Crown (6th ed. 1787),

Warrant, 22 Mich. L. Rev. 541, 798, 804 (1924). The rationale of such an exception is clear, and serves to underscore the consistency and the purpose of the general requirement of notice: Where such circumstances as an escape and hot pursuit by the arresting officer leave no doubt that the fleeing felon is aware of the officer's presence and purpose, pausing at the threshold to make the ordinarily requisite announcement and demand would be a superfluous act which the law does not require.[9] But no exceptions have heretofore permitted unannounced entries in the absence of such awareness on the part of the occupants—unless possibly where the officers are justified in the belief that someone within is in immediate danger of bodily harm.

Two reasons rooted in the Constitution clearly compel the courts to refuse to recognize exceptions in other situa-

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c. 14, § 8. Blackstone's view was that "in case of felony *actually* committed, or a dangerous wounding, whereby felony is like to ensue . . . [a constable] may upon probable suspicion arrest the felon; and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken . . . ." 4 Commentaries 292.

[9] See Professor Wilgus' comment: "Before doors are broken, there must be a necessity for so doing, and notice of the authority and purpose to make the arrest must be given and a demand and refusal of admission must be made, *unless this is already understood, or the peril would be increased.*" Wilgus, Arrest Without a Warrant, 22 Mich. L. Rev. 541, 798, 802 (1924). (Emphasis supplied.) Cf. *Accarino* v. *United States*, 85 U. S. App. D. C. 394, 398–402, 179 F. 2d 456, 460–464.

Compare Lord Mansfield's statement, in 1774, of the rationale for the requirement of announcement and demand for admission: "The ground of it is this; that otherwise the consequences would be fatal: for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law, that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences." *Lee* v. *Gansel*, 1 Cowp. 1, 6–7, 98 Eng. Rep. 935, 938.

tions when there is no showing that those within were or had been made aware of the officers' presence. The first is that any exception not requiring a showing of such awareness necessarily implies a rejection of the inviolable presumption of innocence. The excuse for failing to knock or announce the officer's mission where the occupants are oblivious to his presence can only be an almost automatic assumption that the suspect within will resist the officer's attempt to enter peacefully, or will frustrate the arrest by an attempt to escape, or will attempt to destroy whatever possibly incriminating evidence he may have. Such assumptions do obvious violence to the presumption of innocence. Indeed, the violence is compounded by another assumption, also necessarily involved, that a suspect to whom the officer first makes known his presence will further violate the law. It need hardly be said that not every suspect is in fact guilty of the offense of which he is suspected, and that not everyone who is in fact guilty will forcibly resist arrest or attempt to escape or destroy evidence.[10]

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[10] The comment of Rooke, J., in *Ratcliffe* v. *Burton*, 3 Bos. & Pul. 223, 230, 127 Eng. Rep. 123, 127 (1802), is relevant here: "What a privilege will be allowed to sheriffs' officers if they are permitted to effect their search by violence, without making that demand which possibly will be complied with, and consequently violence be rendered unnecessary!" This view of the requirement of notice or awareness has its parallel in the historic English requirement that an arresting officer must give notice of his authority and purpose to one whom he is about to arrest. In the absence of such notice, unless the person being arrested already knew of the officer's authority and mission, he was justified in resisting by force, and might not be charged with an additional crime if injury to the officer resulted. The origin of this doctrine appears to be *Mackalley's Case*, 9 Co. Rep. 65b, 69a, 77 Eng. Rep. 828, 835. See also *Rex* v. *George*, [1935] 2 D. L. R. 516 (B. C. Ct. App.); *Regina* v. *Beaudette*, 118 Can. Crim. Cases 295 (Ont. Ct. App.). Compare, *e. g.*, *People* v. *Potter*, 144 Cal. App. 2d 350, 300 P. 2d 889, in which noncompliance

The second reason is that in the absence of a showing of awareness by the occupants of the officers' presence and purpose, "loud noises" or "running" within would amount, ordinarily, at least, only to ambiguous conduct. Our decisions in related contexts have held that ambiguous conduct cannot form the basis for a belief of the officers that an escape or the destruction of evidence is being attempted. *Wong Sun* v. *United States,* 371 U. S. 471, 483–484; *Miller* v. *United States, supra,* at 311.

Beyond these constitutional considerations, practical hazards of law enforcement militate strongly against any relaxation of the requirement of awareness. First, cases of mistaken identity are surely not novel in the investigation of crime. The possibility is very real that the police may be misinformed as to the name or address of a suspect, or as to other material information. That possibility is itself a good reason for holding a tight rein against judicial approval of unannounced police entries into private homes. Innocent citizens should not suffer the shock, fright or embarrassment attendant upon an unannounced police intrusion.[11] Second, the require-

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with § 844 was excused because the defendant was known to have been convicted of three previous robberies and was suspected of a fourth—though in fact, upon entering his hotel room unannounced and by means of a key obtained from the manager, the officers found the defendant in bed, with the lights off, and unarmed. The entry occurred after midnight.

[11] The importance of this consideration was aptly expressed long ago by Heath, J., in *Ratcliffe* v. *Burton,* 3 Bos. & Pul. 223, 230, 127 Eng. Rep. 123, 126–127 (1802):

"The law of England, which is founded on reason, never authorises such outrageous acts as the breaking open every door and lock in a man's house without any declaration of the authority under which it is done. Such conduct must tend to create fear and dismay, and breaches of the peace by provoking resistance. This doctrine would not only be attended with great mischief to the persons against whom process is issued, but to other persons also, since it must equally hold

ment of awareness also serves to minimize the hazards of the officers' dangerous calling. We expressly recognized in *Miller* v. *United States, supra,* at 313, n. 12, that compliance with the federal notice statute "is also a safeguard for the police themselves who might be mistaken for prowlers and be shot down by a fearful householder." [12] Indeed, one of the principal objectives of the English requirement of announcement of authority and purpose was to protect the arresting officers from being shot as trespassers, ". . . for if no previous demand is made, how is it possible for a party to know what the object of the person breaking open the door may be? He has a right to consider it as an aggression on his private property, which he will be justified in resisting to the utmost." *Launock* v. *Brown,* 2 B. & Ald. 592, 594, 106 Eng. Rep. 482, 483 (1819).

These compelling considerations underlie the constitutional barrier against recognition of exceptions not predicated on knowledge or awareness of the officers' presence. State and federal officers have the common obligation to respect this basic constitutional limitation upon their police activities. I reject the contention that the courts, in enforcing such respect on the part of all officers, state or federal, create serious obstacles to effective law enforcement. Federal officers have operated for five years under

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good in cases of process upon escape, where the party has taken refuge in the house of a stranger. Shall it be said that in such case the officer may break open the outer door of a stranger's house without declaring the authority under which he acts, or making any demand of admittance? No entry from the books of pleading has been cited in support of this justification, and *Semayne's case* is a direct authority against it."

[12] See also *McDonald* v. *United States,* 335 U. S. 451, 460–461 (concurring opinion) for Mr. Justice Jackson's comment: "Many homeowners in this crime-beset city doubtless are armed. When a woman sees a strange man, in plain clothes, prying up her bedroom window and climbing in, her natural impulse would be to shoot."

the *Miller* rule with no discernible impairment of their ability to make effective arrests and obtain important narcotics convictions. Even if it were true that state and city police are generally less experienced or less resourceful than their federal counterparts (and the experience of the very police force involved in this case, under California's general exclusionary rule adopted judicially in 1955, goes very far toward refuting any such suggestion,[13] see *Elkins* v. *United States,* 364 U. S. 206, 220–221), the Fourth Amendment's protections against unlawful search and seizure do not contract or expand depending upon the relative experience and resourcefulness of different groups of law-enforcement officers. When we declared in *Mapp* that, because the rights of the Fourth Amendment were of no lesser dignity than those of the other liberties of the Bill of Rights absorbed in the Fourteenth, ". . . we can no longer permit . . . [them] to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend [their] . . . enjoyment," 367 U. S., at 660—I thought by these words we had laid to rest the very problems of constitutional dissonance which I fear the present case so soon revives.[14]

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[13] See, *e. g.,* Kamisar, Public Safety v. Individual Liberties: Some "Facts" and "Theories," 53 J. Crim. L., Criminology and Police Science 171, 188–190 (1962); Rogge, Book Review, 76 Harv. L. Rev. 1516, 1522–1523 (1963).

[14] Compare Justice Traynor's recent comment:

"Nevertheless the United States Supreme Court still confronts a special new responsibility of its own. Sooner or later it must establish ground rules of unreasonableness to counter whatever local pressures there might be to spare the evidence that would spoil the exclusionary rule. Its responsibility thus to exercise a restraining influence looms as a heavy one. It is no mean task to formulate farsighted constitutional standards of what is unreasonable that lend themselves readily to nation-wide application." Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L. J. 319, 328.

III.

I turn now to my reasons for believing that the arrests of these petitioners were illegal. My Brother CLARK apparently recognizes that the element of the Kers' prior awareness of the officers' presence was essential, or at least highly relevant, to the validity of the officers' unannounced entry into the Ker apartment, for he says, "Ker's furtive conduct in eluding them shortly before the arrest was ground for the belief that he *might well have been* expecting the police." (Emphasis supplied.) But the test under the "fresh pursuit" exception which my Brother CLARK apparently seeks to invoke depends not, of course, upon mere conjecture whether those within "might well have been" expecting the police, but upon whether there is evidence which shows that the occupants were in fact aware that the police were about to visit them. That the Kers were wholly oblivious to the officers' presence is the only possible inference on the uncontradicted facts; the "fresh pursuit" exception is therefore clearly unavailable. When the officers let themselves in with the passkey, "proceeding quietly," as my Brother CLARK says, George Ker was sitting in his living room reading a newspaper, and his wife was busy in the kitchen. The marijuana, moreover, was in full view on the top of the kitchen sink. More convincing evidence of the complete unawareness of an imminent police visit can hardly be imagined. Indeed, even the conjecture that the Kers "might well have been expecting the police" has no support in the record. That conjecture is made to rest entirely upon the unexplained U-turn made by Ker's car when the officers lost him after the rendezvous at the oil fields. But surely the U-turn must be disregarded as wholly ambiguous conduct; there is absolutely no proof that the driver of the Ker car knew that the officers were

following it. Cf. *Miller* v. *United States, supra,* at 311; *Wong Sun* v. *United States, supra,* at 483–484.

My Brother CLARK invokes chiefly, however, the exception allowing an unannounced entry when officers have reason to believe that someone within is attempting to destroy evidence. But the minimal conditions for the application of that exception are not present in this case. On the uncontradicted record, not only were the Kers completely unaware of the officers' presence, but, again on the uncontradicted record, there was absolutely no activity within the apartment to justify the officers in the belief that anyone within was attempting to destroy evidence. Plainly enough, the Kers left the marijuana in full view on top of the sink because they were wholly oblivious that the police were on their trail. My Brother CLARK recognizes that there is no evidence whatever of activity in the apartment, and is thus forced to find the requisite support for this element of the exception in the officers' testimony that, in their experience in the investigation of narcotics violations, *other* narcotics suspects had responded to police announcements by attempting to destroy evidence. Clearly such a basis for the exception fails to meet the requirements of the Fourth Amendment; if police experience in pursuing other narcotics suspects justified an unannounced police intrusion into a home, the Fourth Amendment would afford no protection at all.

The recognition of exceptions to great principles always creates, of course, the hazard that the exceptions will devour the rule. If mere police experience that some offenders have attempted to destroy contraband justifies unannounced entry in *any* case, and cures the total absence of evidence not only of awareness of the officers' presence but even of such an attempt in the *particular* case, I perceive no logical basis for distinguishing unannounced police entries into homes to make

arrests for *any* crime involving evidence of a kind which police experience indicates might be quickly destroyed or jettisoned. Moreover, if such experience, without more, completely excuses the failure of arresting officers before entry, at any hour of the day or night, either to announce their purpose at the threshold or to ascertain that the occupant already knows of their presence, then there is likewise no logical ground for distinguishing between the stealthy manner in which the entry in this case was effected, and the more violent manner usually associated with totalitarian police of breaking down the door or smashing the lock.[15]

My Brother CLARK correctly states that only when state law "is not violative of the Federal Constitution" may we defer to state law in gauging the validity of an arrest under the Fourth Amendment. Since the Cali-

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[15] The problems raised by this case are certainly not novel in the history of law enforcement. One of the very earliest cases in this field, decided more than three centuries ago, involved facts strikingly similar to those of the instant case. The case of *Waterhouse* v. *Saltmarsh*, Hob. 263, 80 Eng. Rep. 409, arose out of the service by a sheriff and several bailiffs of execution upon a bankrupt. These officers, having entered the outer door of the house by means not described, " 'ran up to the chamber, where the plaintiff and his wife were in bed and the doors lockt, and knocking a little, without telling what they were, or wherefore they came, brake open the door and took him . . . .' " The sheriff was fined the substantial sum of £200—for what the court later described in a collateral proceeding as "the unnecessary outrage and terror of this arrest, and for not signifying that he was sheriff, that the door might have been opened without violence . . . ." Hob., at 264, 80 Eng. Rep., at 409. Compare another early case involving similar problems, *Park* v. *Evans*, Hob. 62, 80 Eng. Rep. 211, in which the Star Chamber held unlawful an entry effected by force after the entering officers had knocked but failed to identify their authority or purpose. The Star Chamber concluded that "the opening of the door was occasioned by them by craft, and then used to the violence, which they intended."

fornia law of arrest here called in question patently violates the Fourth Amendment, that law cannot constitutionally provide the basis for affirming these convictions. This is not a case of conflicting testimony pro and con the existence of the elements requisite for finding a basis for the application of the exception. I agree that we should ordinarily be constrained to accept the state fact-finder's resolution of such factual conflicts. Here, however, the facts are uncontradicted: the Kers were completely oblivious of the presence of the officers and were engaged in no activity of any kind indicating that they were attempting to destroy narcotics. Our duty then is only to decide whether the officers' testimony—that in their general experience narcotics suspects destroy evidence when forewarned of the officers' presence—satisfies the constitutional test for application of the exception. Manifestly we should hold that such testimony does not satisfy the constitutional test. The subjective judgment of the police officers cannot constitutionally be a substitute for what has always been considered a necessarily objective inquiry,[16] namely, whether circumstances exist in the *particular* case which allow an unannounced police entry.[17]

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[16] Any doubt concerning the scope of the California test which may have survived *People* v. *Maddox*, 46 Cal. 2d 301, 294 P. 2d 6, must have been removed by the later case of *People* v. *Hammond*, 54 Cal. 2d 846, 854–855, 357 P. 2d 289, 294:

"When there is reasonable cause to make an arrest, and the facts known to the arresting officer before his entry are not inconsistent with a good faith belief on his part that compliance with the formal requirements of . . . section [844] is excused, a failure to comply therewith does not invalidate the search and seizure made as an incident to the ensuing arrest."

[17] I think it is unfortunate that this Court accepts the judgment of the intermediate California appellate court on a crucial question of California law—for it is by no means certain that the Supreme Court of California, the final arbiter of questions of California law,

We have no occasion here to decide how many of the situations in which, by the exercise of our supervisory power over the conduct of federal officers, we would exclude evidence, are also situations which would require the exclusion of evidence from state criminal proceedings under the constitutional principles extended to the States by *Mapp*. But where the conduct effecting an arrest so clearly transgresses those rights guaranteed by the Fourth Amendment as does the conduct which brought about the arrest of these petitioners, we would surely reverse the judgment if this were a federal prosecution involving federal officers. Since our decision in *Mapp* has made the guarantees of the Fourteenth Amendment coextensive with those of the Fourth we should pronounce precisely the same judgment upon the conduct of these state officers.

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would have condoned the willingness of the District Court of Appeal to excuse noncompliance with the California statute under the facts of this case. For the view of the California Supreme Court on the scope of the exception under § 844, see, *e. g., People* v. *Martin,* 45 Cal. 2d 755, 290 P. 2d 855; *People* v. *Carswell,* 51 Cal. 2d 602, 335 P. 2d 99; *People* v. *Hammond,* 54 Cal. 2d 846, 357 P. 2d 289.

An examination of the California decisions which have excused noncompliance with § 844 reveals the narrow scope of the exceptions heretofore recognized—confined for the most part to cases in which officers entered in response to cries of a victim apparently in imminent danger, *e. g., People* v. *Roberts,* 47 Cal. 2d 374, 303 P. 2d 721; or in which they first knocked at the door, or knew they had been seen at the door, and then actually heard or observed destruction of evidence of the very crime for which they had come to arrest the occupants, see, *e. g., People* v. *Moore,* 140 Cal. App. 2d 870, 295 P. 2d 969; *People* v. *Steinberg,* 148 Cal. App. 2d 855, 307 P. 2d 634; *People* v. *Williams,* 175 Cal. App. 2d 774, 1 Cal. Rptr. 44; *People* v. *Fisher,* 184 Cal. App. 2d 308, 7 Cal. Rptr. 461. See generally, for summary and discussion of California cases involving various grounds for noncompliance with § 844, Fricke, California Criminal Evidence (5th ed. 1960), 432–433; Comment, Two Years With the *Cahan* Rule, 9 Stan. L. Rev. 515, 528–529 (1957).

BRAUNSTEIN ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE.

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

No. 476. Argued April 29, 1963.—
Decided June 10, 1963.

In 1948, three taxpayers received a commitment from the Federal Housing Administration to insure loans for the construction of a multiple-dwelling apartment project. Two corporations were formed to carry out the project, and each of the three taxpayers was issued one-third of the stock in each corporation. After the costs of the construction had been paid, each of the corporations had an unused amount of mortgage loan funds remaining, and in 1950 the taxpayers sold their stock at a profit, receiving as part of the sale transaction distributions from the corporations which included the unused funds. *Held:* Under § 117 (m) of the Internal Revenue Code of 1939, the resulting gains to the taxpayers must be treated as ordinary income, instead of long-term capital gains, since the corporations were "collapsible" within the meaning of that section. Pp. 65–73.

305 F. 2d 949, affirmed.

Louis Eisenstein argued the cause for petitioners. With him on the briefs were *Thurman Arnold* and *Julius M. Greisman.*

Wayne G. Barnett argued the cause for respondent. With him on the brief were *Solicitor General Cox, Acting Assistant Attorney General Jones, Harry Baum* and *Gilbert E. Andrews.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

This case involves the applicability of the "collapsible corporation" provisions of the federal income tax laws which, during the period relevant here, were set forth in

§ 117 (m) of the Internal Revenue Code of 1939.[1] These provisions require that under certain circumstances, gain from the sale of stock which would otherwise be considered as long-term capital gain, and accordingly taxed at

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[1] Section 117 (m) was added to the Internal Revenue Code of 1939 by the Revenue Act of 1950, § 212 (a), 64 Stat. 934. The section was amended by the Revenue Act of 1951, § 326, 65 Stat. 502. It was reenacted without substantial change as § 341 of the Internal Revenue Code of 1954, 68A Stat. 107, and was amended by the Technical Amendments Act of 1958, § 20 (a), 72 Stat. 1615, and by the Act of October 16, 1962, § 13 (f) (4), 76 Stat. 1035. As originally enacted, and during the period relevant here, it provided:

"(1) TREATMENT OF GAIN TO SHAREHOLDERS.—Gain from the sale or exchange (whether in liquidation or otherwise) of stock of a collapsible corporation, to the extent that it would be considered (but for the provisions of this subsection) as gain from the sale or exchange of a capital asset held for more than 6 months, shall, except as provided in paragraph (3), be considered as gain from the sale or exchange of property which is not a capital asset.

"(2) DEFINITIONS.—

"(A) For the purposes of this subsection, the term 'collapsible corporation' means a corporation formed or availed of principally for the manufacture, construction, or production of property, or for the holding of stock in a corporation so formed or availed of, with a view to—

"(i) the sale or exchange of stock by its shareholders (whether in liquidation or otherwise), or a distribution to its shareholders, prior to the realization by the corporation manufacturing, constructing, or producing the property of a substantial part of the net income to be derived from such property, and

"(ii) the realization by such shareholders of gain attributable to such property.

. . . . .

"(3) LIMITATIONS ON APPLICATION OF SUBSECTION.—In the case of gain realized by a shareholder upon his stock in a collapsible corporation—

"(A) this subsection shall not apply unless, at any time after the commencement of the manufacture, construction, or production of the property, such shareholder (i) owned (or was considered as owning) more than 10 per centum in value of the outstanding stock of

a maximum rate of 25%, must be reported as ordinary income.

The three taxpayers who are petitioners here became associated in 1938 and have since participated in a number of construction projects, usually through corporations in which the stock was equally divided.[2] In 1948 the petitioners received a commitment from the Federal Housing Administration to insure loans for the construction of a multiple-dwelling apartment project in Queens County, New York. Two corporations were formed to carry out this project, and each petitioner was issued one-third of the stock in each corporation. After the costs of construction had been paid, the corporations each had an unused amount of mortgage loan funds remaining, and in 1950 the petitioners sold their stock at a profit, receiving as part of the sale transaction distributions from the corporations which included the unused funds. The petitioners reported the excess of the amounts received over their bases in the stock as long-term capital gains of $313,854.17 each.[3]

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the corporation, or (ii) owned stock which was considered as owned at such time by another shareholder who then owned (or was considered as owning) more than 10 per centum in value of the outstanding stock of the corporation;

"(B) this subsection shall not apply to the gain recognized during a taxable year unless more than 70 per centum of such gain is attributable to the property so manufactured, constructed, or produced; and

"(C) this subsection shall not apply to gain realized after the expiration of three years following the completion of such manufacture, construction, or production. . . ."

[2] Petitioners Benjamin and Harry Neisloss are builders; petitioner Braunstein, an architect. Their wives are parties only by virtue of the filing of joint returns.

[3] The parties have agreed that the distributions from the corporations and the amounts received directly from the buyers of the stock may be considered together, as if the entire amount had been received from the buyers.

The Commissioner asserted a deficiency, treating the gain as ordinary income on the ground that the corporations were "collapsible" within the meaning of § 117 (m). The Tax Court sustained the Commissioner, 36 T. C. 22, and the Court of Appeals affirmed the Tax Court, 305 F. 2d 949, holding that (1) the taxpayers had the requisite "view" during construction of the property (see note 1, *supra*); (2) more than 70% of the gain realized by the taxpayers was attributable to the constructed property (*id.*); and (3) § 117 (m) applies even if the constructed buildings would have produced capital gain on a sale by the taxpayers had no corporations been formed. This last holding was in response to an argument by the taxpayers based on a theory similar to that adopted by the Court of Appeals for the Fifth Circuit in *United States* v. *Ivey*, 294 F. 2d 799. In view of the conflict between the decision below and that in *Ivey* on this point, we granted certiorari, 371 U. S. 933, stating that the grant was limited to the following question:

> "Whether Section 117 (m) of the Internal Revenue Code of 1939, which provides that gain 'from the sale or exchange . . . of stock of a collapsible corporation' is taxable as ordinary income rather than capital gain, is inapplicable in circumstances where the stockholders would have been entitled to capital gains treatment had they conducted the enterprise in their individual capacities without utilizing a corporation."

Briefly summarized, petitioners' argument runs as follows: As the legislative history shows, the collapsible corporation provisions of the code were designed to close a loophole through which some persons had been able to convert ordinary income into long-term capital gain by use of the corporate form. For example, in the case of an individual who constructed a property which he held

primarily for sale to customers in the ordinary course of his trade or business, any gain from the sale of the asset would be ordinary income; [4] but if that same individual were to form a corporation to construct the property, intending to sell his stock on the completion of construction, it was at least arguable prior to the enactment of § 117 (m) that the proceeds of the ultimate sale of the stock were entitled to capital-gains treatment. It was this and similar devices that § 117 (m) was designed to frustrate, but it was *not* intended to have the inequitable effect of converting into ordinary income what would properly have been a capital gain prior to its enactment even in the absence of any corporate form. Thus, it is argued, the phrase "gain attributable to such property," as used in § 117 (m), must apply only to profit that would have constituted ordinary income if a corporation had not been utilized, for only in such cases is the corporation made to serve as a device for tax avoidance. In the present case, neither the corporation nor the individual petitioners were in the trade or business of selling apartment buildings, and thus the corporations were not used to convert ordinary income into capital gain and the provisions of § 117 (m) are inapplicable.[5]

We have concluded that petitioners' contentions must be rejected. Their argument is wholly inconsistent with the plain meaning of the language of § 117 (m), and we find nothing in the purpose of the statute, as indicated by its legislative history, to warrant any departure from that meaning in this case.

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[4] Int. Rev. Code, 1939, § 117 (a) (1) (A).

[5] The Government has assumed for purposes of its argument here, but does not concede, that petitioners would have been entitled to capital-gains treatment had they conducted the enterprise without utilizing a corporation.

I.

As to the language used, § 117 (m) defines a collapsible corporation as embracing one formed or availed of principally for the manufacture, construction, or production of property with a view to (1) the sale or exchange of stock prior to the realization by the corporation of a substantial part of the net income from the property *and* (2) the realization "of gain attributable to such property." The section is then expressly made inapplicable to gain realized during any year "unless more than 70 per centum of such gain is attributable to the property so manufactured, constructed, or produced." If used in their ordinary meaning, the word "gain" in these contexts simply refers to the excess of proceeds over cost or basis, and the phrase "attributable to" merely confines consideration to that gain caused or generated by the property in question. With these definitions, the section makes eminent sense, since the terms operate to limit its application to cases in which the corporation was availed of with a view to profiting from the constructed property by a sale or exchange of stock soon after completion of construction *and* in which a substantial part of the profit from the sale or exchange of stock in a given year was in fact generated by such property.

There is nothing in the language or structure of the section to demand or even justify reading into these provisions the *additional* requirement that the taxpayer must in fact have been using the corporate form as a device to convert ordinary income into capital gain. If a corporation owns but one asset, and the shareholders sell their stock at a profit resulting from an increase in the value of the asset, they have "gain attributable to" that asset in the natural meaning of the phrase regardless of their desire, or lack of desire, to avoid the bite of federal income taxes.

II.

Nor is there anything in the legislative history that would lead us to depart from the plain meaning of the statute as petitioners would have us do. There can of course be no question that the purpose of § 117 (m) was, as petitioners contend, to close a loophole that Congress feared could be used to convert ordinary income into capital gain. See H. R. Rep. No. 2319, 81st Cong., 2d Sess.; S. Rep. No. 2375, 81st Cong., 2d Sess. But the crucial point for present purposes is that the *method* chosen to close this loophole was to establish a carefully and elaborately defined category of transactions in which what might otherwise be a capital gain would have to be treated as ordinary income. There is no indication whatever of any congressional desire to have the Commissioner or the courts make a determination in each case as to whether the use of the corporation was for tax avoidance. Indeed, the drawing of certain arbitrary lines not here involved—such as making the section inapplicable to any shareholder owning 10% or less of the stock or to any gain realized more than three years after the completion of construction—tends to refute any such indication. It is our understanding, in other words, that Congress intended to define what it believed to be a tax avoidance device rather than to leave the presence or absence of tax avoidance elements for decision on a case-to-case basis.

We are reinforced in this conclusion by the practical difficulties—indeed the impossibilities—of considering without more legislative guidance than is furnished by § 117 (m) whether there has in fact been "conversion" of ordinary income into capital gains in a particular case. For example, if we were to inquire whether or not the profit would have been ordinary income had an enterprise been individually owned, would we treat each taxpaying shareholder differently and look only to *his* trade

or business or would we consider the matter in terms of the trade or business of *any* or at least a substantial number of the shareholders? There is simply no basis in the statute for a judicial resolution of this question, and indeed when Congress addressed itself to the problem in 1958, it approved an intricate formulation falling between these two extremes.[6]

As a further example, what if the individual in question is not himself engaged in any trade or business but owns stock in varying amounts in a number of corporate ventures other than the one before the court? Do we pierce *each* of the corporate veils, regardless of the extent and share of the individual's investment, and charge him with being in the trade or business of each such corporation? Again, there is no basis for a rational judicial answer; the judgment is essentially a legislative one and in the 1958 amendments Congress enacted a specific provision, designed to deal with this matter, that is far too complex to be summarized here.[7]

These examples should suffice to demonstrate the point: The question whether there has in fact been a "conversion" of ordinary income in a particular case is far easier to state than to answer, and involves a number of thorny issues that may not appear on the surface.[8] We find no

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[6] Int. Rev. Code, 1954, § 341 (e), added by the Technical Amendments Act of 1958, § 20 (a), 72 Stat. 1615.

[7] Int. Rev. Code, 1954, § 341 (e) (1) (C).

[8] The Government has emphasized in its argument here that the present case involves a particularly "blatant" conversion of ordinary income because by charging the corporations only for the out-of-pocket costs of construction "petitioners contributed their services to create a valuable property for the corporation[s] and then realized upon that value by selling their stock." Thus, the Government concludes, the petitioners claim as capital gain "what ought to have been (and, in an arm's-length transaction, would have been) taxed as compensation for services."

basis in either the terms or the history of § 117 (m) for concluding that Congress intended the Commissioner and the courts to enter this thicket and to arrive at *ad hoc* determinations for every taxpayer. Accordingly, the judgments below must be

Affirmed.

MR. JUSTICE DOUGLAS dissents.

DIVISION 1287, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA ET AL. *v.* MISSOURI.

APPEAL FROM THE SUPREME COURT OF MISSOURI.

No. 604. Argued April 24–25, 1963.—Decided June 10, 1963.

Proceeding under a Missouri statute, the Governor of Missouri proclaimed that the public interest, health and welfare were jeopardized by a threatened strike against a public transit company in the State and issued executive orders taking possession of the company and directing that it continue operations. However, the employees of the company did not become employees of the State; the State did not pay their wages nor supervise their work; the property of the company was not transferred to the State; and the State did not participate in the actual management of the company. Pursuant to the statute, a state court enjoined the strike, and the Supreme Court of Missouri affirmed. After an appeal to this Court had been initiated by the filing of a jurisdictional statement, the Governor issued an executive order terminating his seizure order but reciting that the labor dispute "remains unresolved." *Held:*

1. Termination of the Governor's seizure order did not render the case moot. *Harris* v. *Battle*, 348 U. S. 803, and *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, distinguished. Pp. 77–78.

2. The state statute involved here is in conflict with § 7 of the National Labor Relations Act, and it cannot stand under the Supremacy Clause of the Constitution. *Bus Employees* v. *Wisconsin Board*, 340 U. S. 383. Pp. 78–83.

(a) The State's actual involvement under the Governor's seizure order fell far short of creating a state owned and operated utility whose labor relations are by definition excluded from the coverage of the National Labor Relations Act. P. 81.

(b) Neither the designation of the state statute as "emergency legislation" nor the purported "seizure" by the State could make a peaceful strike against a public utility unlawful in direct conflict with § 7 of the National Labor Relations Act, which guarantees the right to strike against a public utility, as against any employer engaged in interstate commerce. Pp. 81–82.

361 S. W. 2d 33, reversed.

Bernard Dunau argued the cause for appellants. With him on the briefs were *Bernard Cushman* and *John Manning.*

Joseph Nessenfeld, Assistant Attorney General of Missouri, argued the cause for appellee. With him on the brief were *Thomas F. Eagleton,* Attorney General of Missouri, and *J. Gordon Siddens* and *John C. Baumann,* Assistant Attorneys General.

J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine and *Thomas E. Harris* filed a brief for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* urging reversal.

Briefs of *amici curiae,* urging affirmance, were filed by *Richmond C. Coburn* and *Alan C. Kohn* for the Chamber of Commerce of Metropolitan St. Louis; by *James M. Douglas* for the Laclede Gas Company; and by *Irvin Fane, Harry L. Browne* and *Howard F. Sachs* for the Kansas City Power & Light Company.

Opinion of the Court by MR. JUSTICE STEWART, announced by MR. JUSTICE WHITE.

The appellant union is the certified representative of a majority of the employees of Kansas City Transit, Inc., a Missouri corporation which operates a public transit business in Kansas and Missouri. A collective bargaining agreement between the appellant and the company was due to expire on October 31, 1961, and in August of that year, after appropriate notices, the parties commenced the negotiation of an amended agreement. An impasse in these negotiations was reached, and in early November the appellant's members voted to strike. The strike was called on November 13.

The same day the Governor of Missouri, acting under the authority of a state law known as the King-Thompson

Act,[1] issued a proclamation that the public interest, health and welfare were jeopardized by the threatened interruption of the company's operations, and by an executive order purported to take possession "of the plants, equipment, and all facilities of the Kansas City Transit, Inc., located in the State of Missouri, for the use and operation by the State of Missouri in the public interest." A second executive order provided in part that "All rules and regulations . . . governing the internal management and organization of the company, and its duties and responsibilities, shall remain in force and effect throughout the term of operation by the State of Missouri."

Pursuant to a provision of the Act which makes unlawful any strike or concerted refusal to work as a means of enforcing demands against the utility or the State after possession has been taken by the State, the State petitioned the Circuit Court of Jackson County for an injunction on November 15, 1961.[2] A temporary restraining order was issued on that day, and the strike and picketing were discontinued that evening. After a two-day trial, the order was continued in effect, and the Circuit Court later entered a permanent injunction barring the continuation of the strike "against the State of Missouri."

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[1] The King-Thompson Act is Chapter 295 of the Revised Statutes of Missouri, 1959. The section of the statute authorizing seizure is Mo. Rev. Stat., 1959, § 295.180.

[2] Missouri Rev. Stat., 1959, § 295.200, par. 1, provides:

"It shall be unlawful for any person, employee, or representative as defined in this chapter to call, incite, support or participate in any strike or concerted refusal to work for any utility or for the state after any plant, equipment or facility has been taken over by the state under this chapter, as means of enforcing any demands against the utility or against the state."

Section 295.200, par. 6, provides:

"The courts of this state shall have power to enforce by injunction or other legal or equitable remedies any provision of this chapter or any rule or regulation prescribed by the governor hereunder."

On appeal to the Supreme Court of Missouri, the appellants argued that the King-Thompson Act is in conflict with and is pre-empted by federal labor legislation, and that it abridges rights guaranteed by the First, Thirteenth, and Fourteenth Amendments. Reaffirming its earlier decisions in cases arising under the Act,[3] the Supreme Court of Missouri rejected these arguments and affirmed the issuance of the injunction. 361 S. W. 2d 33. We noted probable jurisdiction. 371 U. S. 961.

We are met at the threshold with the claim that this controversy has become moot, and that we are accordingly foreclosed from considering the merits of the appeal. The basis for this contention is the fact that, after the appellants' jurisdictional statement was filed in this Court, the Governor of Missouri issued an executive order which, although reciting that the labor dispute between Kansas City Transit, Inc., and the appellant union "remains unresolved," nevertheless terminated the outstanding seizure order, upon the finding that "continued exercise by me of such authority is not justified in the circumstances of the aforesaid labor dispute." Reliance for the claim of mootness is placed upon this Court's decisions in *Harris* v. *Battle,* 348 U. S. 803, and *Oil Workers Unions* v. *Missouri,* 361 U. S. 363. In the *Oil Workers* case the Court declined to consider constitutional challenges to the King-Thompson Act, and in the *Harris* case declined to rule on the constitutionality of a similar Virginia statute, on the ground that the controversies had become moot. In both of those cases, however, the underlying labor dispute had been settled and new collective bargaining agreements concluded by the time the litigation reached

[3] See *State ex rel. State Board of Mediation* v. *Pigg,* 362 Mo. 798, 244 S. W. 2d 75; *Rider* v. *Julian,* 365 Mo. 313, 282 S. W. 2d 484; *State* v. *Local No. 8–6, Oil, Chemical & Atomic Workers International Union,* AFL–CIO, 317 S. W. 2d 309, vacated as moot, 361 U. S. 363.

this Court. Here, by contrast, the labor dispute remains unresolved. There thus exists in the present case not merely the speculative possibility of invocation of the King-Thompson Act in some future labor dispute, but the presence of an existing unresolved dispute which continues subject to all the provisions of the Act. Cf. *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n,* 219 U. S. 498, 514–516; *United States* v. *W. T. Grant Co.,* 345 U. S. 629, 632. The situation here is thus quite different from that presented in the *Harris* and *Oil Workers Unions* cases, and we hold that the merits of this controversy are before us and must be decided.

The King-Thompson Act defines certain public utilities as "life essentials of the people" and declares it to be the policy of the State that "the possibility of labor strife in utilities operating under governmental franchise or permit or under governmental ownership and control is a threat to the welfare and health of the people." [4] The Act imposes requirements in connection with the duration and renewal of collective bargaining agreements,[5]

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[4] § 295.010. "It is hereby declared to be the policy of the state that heat, light, power, sanitation, transportation, communication, and water are life essentials of the people; that the possibility of labor strife in utilities operating under governmental franchise or permit or under governmental ownership and control is a threat to the welfare and health of the people; that utilities so operating are clothed with public interest, and the state's regulation of the labor relations affecting such public utilities is necessary in the public interest."

[5] § 295.090. "All collective bargaining labor agreements hereafter entered into between the management of a utility and its employees or any craft or class of employees shall be reduced to writing and continue for a period of not less than one year from the date of the expiration of the previous agreement entered into between the management of the utility and its employees or if there has been no such previous agreement then for a period of not less than one year from the date of the actual execution of the agreement. Such

and creates a State Board of Mediation and public hearing panels whose services are to be invoked whenever the parties cannot themselves agree upon the terms to be included in a new agreement.[6] And where, as here, the recommendations of these agencies are not accepted, and the continued operation of the utility is threatened as a result, the Governor is empowered to "take immediate possession of" the utility "for the use and operation by the state of Missouri in the public interest." [7]

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agreement shall be presumed to continue in force and effect from year to year after the date fixed for its original termination unless either or both parties thereto inform the other, in writing, of the specific changes desired to be made therein and shall also file a copy of such demands with the state board of mediation, at least sixty days before the original termination date or sixty days before the end of any yearly renewal period, or sixty days before any termination date desired thereafter."

[6] Mo. Rev. Stat., 1959, §§ 295.030, 295.070, 295.080, 295.120, 295.140, 295.160, 295.170.

[7] § 295.180. "1. Should either the utility or its employees refuse to accept and abide by the recommendations made pursuant to the provisions of this chapter and as a result thereof the effective operation of a public utility be threatened or interrupted, or should either party in a labor dispute between a utility and its employees, after having given sixty days' notice thereof, or failing to give such notice, engage in any strike, work stoppage or lockout which, in the opinion of the governor, will result in the failure to continue the operation of the public utility, and threatens the public interest, health and welfare, or in the event that neither side has given notice to the other of an intention to seek a change in working conditions, and there occurs a lockout, strike or work stoppage which, in the opinion of the governor, threatens to impair the operation of the utility so as to interfere with the public interest, health and welfare, then and in that case he is authorized to take immediate possession of the plant, equipment or facility for the use and operation by the state of Missouri in the public interest.

"2. Such power and authority may be exercised by the governor through such department or agency of the government as he may designate and may be exercised after his investigation and procla-

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In *Bus Employees* v. *Wisconsin Board,* 340 U. S. 383, this Court held that the Wisconsin Public Utility Anti-Strike Law, which made it a misdemeanor for public utility employees to engage in a strike which would cause an interruption of an essential public utility service, conflicted with the National Labor Relations Act and was therefore invalid under the Supremacy Clause of the Constitution. The Supreme Court of Missouri in the present case rejected the appellants' argument that the *Wisconsin Board* decision was determinative of the unconstitutionality of the Missouri statute here in issue. The court held that the provisions of the King-Thompson Act dealing with the mediation board and public hearing panels were severable from the remainder of the statute, and refused to pass on any but those provisions which authorize the seizure and the issuance of injunctions against strikes taking place after seizure has been imposed. These provisions, the court ruled, do not—as in the *Wisconsin Board* case—provide a comprehensive labor code conflicting with federal legislation, but rather represent "strictly emergency legislation" designed solely to authorize use of the State's police power to protect the public from threatened breakdowns in vital community serv-

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mation that there is a threatened or actual interruption of the operation of such public utility as the result of a labor dispute, a threatened or actual strike, a lockout or other labor disturbance, and that the public interest, health and welfare are jeopardized, and that the exercise of such authority is necessary to insure the operation of such public utility; provided, that whenever such public utility, its plant, equipment or facility has been or is hereafter so taken by reason of a strike, lockout, threatened strike, threatened lockout, work stoppage or slowdown, or other cause, such utility, plant, equipment or facility shall be returned to the owners thereof as soon as practicable after the settlement of said labor dispute, and it shall thereupon be the duty of such utility to continue the operation of the plant facility, or equipment in accordance with its franchise and certificate of public convenience and necessity."

ices. Emphasizing that the company was not a party to the injunction suit, the court concluded that, although the State did not actively participate in the management of the utility's operations, the Governor's executive order had been sufficient to convert the strike into one against the State, and that an injunction barring such a strike is therefore not barred by the provisions of federal labor legislation. 361 S. W. 2d, at 44, 46, 48–52.

We disagree. None of the distinctions drawn by the Missouri court between the King-Thompson Act and the legislation involved in *Wisconsin Board* seem to us to be apposite. First, whatever the status of the title to the properties of Kansas City Transit, Inc., acquired by the State as a result of the Governor's executive order, the record shows that the State's involvement fell far short of creating a state-owned and operated utility whose labor relations are by definition excluded from the coverage of the National Labor Relations Act.[8] The employees of the company did not become employees of Missouri. Missouri did not pay their wages, and did not direct or supervise their duties. No property of the company was actually conveyed, transferred, or otherwise turned over to the State. Missouri did not participate in any way in the actual management of the company, and there was no change of any kind in the conduct of the company's business. As summed up by the Chairman of the State Mediation Board: "So far as I know the company is operating now just as it was two weeks ago before the strike."

Secondly, the *Wisconsin Board* case decisively rejected the proposition that a state enactment affecting a public utility operating in interstate commerce could be saved from a challenge based upon a demonstrated conflict with

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[8] 29 U. S. C. § 152 (2), (3), 49 Stat. 450; 61 Stat. 137–138. Compare *United States* v. *United Mine Workers*, 330 U. S. 258.

the standards embodied in federal law simply by designating it as "emergency legislation." There the Court said that where "the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law." 340 U. S., at 394.

The short of the matter is that Missouri, through the fiction of "seizure" by the State, has made a peaceful strike against a public utility unlawful, in direct conflict with federal legislation which guarantees the right to strike against a public utility, as against any employer engaged in interstate commerce.[9] In forbidding a strike against an employer covered by the National Labor Relations Act, Missouri has forbidden the exercise of rights explicitly protected by § 7 of that Act.[10] Collective bargaining, with the right to strike at its core, is the essence of the federal scheme. As in *Wisconsin Board*, a state law which denies that right cannot stand under the Supremacy Clause of the Constitution.

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[9] In enacting the Taft-Hartley Act, Congress expressly rejected the suggestion that public utilities be treated differently from other employers. As explained by Senator Taft, "If we begin with public utilities, it will be said that coal and steel are just as important as public utilities. I do not know where we could draw the line. So far as the bill is concerned, we have proceeded on the theory that there is a right to strike and that labor peace must be based on free collective bargaining." 93 Cong. Rec. 3835.

[10] "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives 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 158 (a) (3)." 29 U. S. C. § 157, 49 Stat. 452; 61 Stat. 140.

It is hardly necessary to add that nothing we have said even remotely affects the right of a State to own or operate a public utility or any other business, nor the right or duty of the chief executive or legislature of a State to deal with emergency conditions of public danger, violence, or disaster under appropriate provisions of the State's organic or statutory law.

Reversed.

UNITED STATES *v.* PIONEER AMERICAN INSURANCE CO. ET AL.

CERTIORARI TO THE SUPREME COURT OF ARKANSAS.

No. 405. Argued April 17, 1963.—Decided June 10, 1963.

Federal tax liens are entitled to priority over the claim of a mortgagee for a "reasonable attorney's fee" in prosecuting a foreclosure suit where notice of the federal tax liens was recorded after recordation of the mortgage, after default thereon and after the institution of the foreclosure suit, but prior to the entry of the judicial decree which allowed and determined the amount of the attorney's fee. Pp. 84–92.

235 Ark. 267, 357 S. W. 2d 653, reversed.

Richard M. Roberts argued the cause for the United States. On the brief were *Solicitor General Cox, Acting Assistant Attorney General Jones, Daniel M. Friedman, Joseph Kovner* and *George F. Lynch.*

Owen C. Pearce argued the cause for respondents. With him on the brief was *Marcus Ginsburg.*

H. Cecil Kilpatrick, Samuel E. Neel and *William F. McKenna* filed a brief for the Mortgage Bankers Association of America et al., as *amici curiae,* urging affirmance.

MR. JUSTICE WHITE delivered the opinion of the Court.

The United States has sought review of a decision of the Supreme Court of Arkansas subordinating the federal tax lien (26 U. S. C. § 6321) to a lien for attorney's fees included in an antecedent mortgage contract. 235 Ark. 267, 357 S. W. 2d 653. Because of conflict between the Arkansas decision and *United States* v. *Bond,* 279 F. 2d 837 (C. A. 4th Cir.); *In re New Haven Clock & Watch Co.,* 253 F. 2d 577 (C. A. 2d Cir.), we granted certiorari. 371 U. S. 909.

When the taxpayers in 1958 acquired their interest in the parcel of real estate involved here, they assumed liability on a note and the deed of trust (first mortgage) securing it, which were held by respondent Pioneer American Insurance Company. The note obligated taxpayers "in the event of default herein and of the placing of this note in the hands of an attorney for collection, or this note is collected through any court proceedings, to pay a reasonable attorney's fee." [1] The taxpayers at the same time executed a note and second mortgage to their vendor, respondent The Development Company, and subsequently, in April 1960, the real estate became burdened again with a mechanic's lien in favor of Alfred J. Anderson.

In October of 1960, taxpayers defaulted on the first mortgage monthly installment and failed thereafter to

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[1] The deed of trust provided, in addition:

"That if either the party of the second part [trustee] or the party of the first part [mortgagor] shall become a party to any suit or proceeding at law or in equity in reference to its interest in the premises herein conveyed, the reasonable costs, charges and attorney's fees in such suit or proceeding shall be added to the principal sum then owing by the party of the first part and shall be secured by this instrument, and the note secured hereby shall, at the option of the holder, become due and collectible.

. . . . . .

"The proceeds of any sale under this deed of trust shall be applied . . . as follows:

"First: To pay the costs and expenses of executing this trust, and any and all sums expended on account of costs of litigation, attorney's fees, ground rents, taxes, insurance premiums, or any advances made or expenses incurred on account of the property sold, with interest thereon.

"Second: To retain as compensation, a commission as set forth by the laws of the State of Arkansas.

"Third: To pay off the debt secured hereby, including accrued interest thereon, as well as any other sums owing . . . pursuant to this instrument."

meet payments as they fell due. On March 24, 1961, Pioneer American filed a suit to foreclose its mortgage and sought, in addition to the principal and interest, a reasonable attorney's fee. The United States was named a party defendant because of two outstanding federal tax liens against the taxpayers which were filed on November 29, 1960, and January 30, 1961. The United States admitted its liens were subordinate to the principal and interest on the first and second mortgages but claimed that the liens were superior to the claim for the attorney's fee. Three additional federal tax liens subsequently were filed on April 14, July 17, and October 3, 1961.[2]

On November 15, 1961, the Chancery Court entered its decree of foreclosure which fixed the attorney's fee at $1,250 and determined the priority of the various claimants. After satisfaction of court and foreclosure sale costs, Pioneer American was accorded first priority for principal, interest and the attorney's fee; The Development Company took next on principal and interest under the second mortgage; Alfred J. Anderson shared thereafter on his mechanic's lien and the United States took last. The property was sold and proceeds were received which satisfied all claims except $3,615.28 of the federal tax liens.[3] The United States appealed to the Supreme Court of Arkansas asserting that it was entitled to priority

[2] The federal tax liens, as of the date of the order of distribution, November 15, 1961, were as follows:

Lien of November 29, 1960	$659.67
Lien of January 30, 1961	1,661.03
Lien of April 14, 1961	1,344.69
Lien of July 17, 1961	1,653.23
Lien of October 3, 1961	1,164.04

[3] The first two liens, November 29, 1960, and January 30, 1961, were satisfied in full. $546.68 was available for partial payment of the April 14, 1961, lien. The balance of the April lien and the full amounts of the July 17 and October 3, 1961, liens remained unsatisfied.

over the attorney's fees,[4] and that $1,250 more should have been applied to reduce the unpaid federal taxes.[5] With one judge dissenting, the Arkansas court rejected that contention and sustained the superiority of the claim for the attorney's fee.

It goes unchallenged that the claim for the attorney's fee, arising out of the obligations assumed by the taxpayer in 1958, became enforceable under Arkanas law as a contract of indemnity at the time of default in October 1960 before the filing of the first federal tax liens. Furthermore, it is evident that the suit in which this attorney's fee was earned was commenced on March 24, 1961, prior to the filing of the unpaid federal tax liens crucial to this suit, *i. e.*, the liens of April 14, July 17, and October 3, 1961. Nevertheless, because this fee had not been incurred and paid and could not be finally fixed in amount until November 15, 1961, after all the federal liens had been filed, we hold that the claim for attorney's fees remained inchoate at least until that date and that the federal tax liens are entitled to priority.

The priority of the federal tax lien provided by 26 U. S. C. § 6321 as against liens created under state law is governed by the common-law rule—"the first in time is the first in right." *United States* v. *New Britain*, 347 U. S. 81, 85–86. It is critical, therefore, to determine when competing liens, whether federal- or state-created, come into existence or become valid for the purpose of the rule.

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[4] The United States did not challenge the priority of the mechanic's lien or of any other distribution fixed by the decree.

[5] Once the attorney's fee is subordinated to the federal tax liens, the $1,250 would be borne by the other claimants in order of seniority among themselves under state law. On the basis of the present decree, the share of the mechanic's lienor Anderson would be eliminated and that of the second mortgagee, The Development Company, reduced by half.

The tax lien arises, according to § 6322, when the tax is assessed, but as against the specific interests mentioned in § 6323 (a)—mortgagees, pledgees, purchasers and judgment creditors—it is not valid until placed of public record, and insofar as the federal lien attaches to securities, mortgagees, pledgees and purchasers must have actual notice of the lien.[6] § 6323 (c).

As for a lien created by state law, its priority depends "on the time it attached to the property in question and became choate." *United States* v. *New Britain, supra,* at 86; *United States* v. *Security Tr. & Sav. Bank,* 340 U. S. 47. Choate state-created liens take priority over later federal tax liens, *United States* v. *New Britain, supra; Crest Finance Co.* v. *United States,* 368 U. S. 347, while inchoate liens do not. See *United States* v. *Liverpool & London Ins. Co.,* 348 U. S. 215; *United States* v. *Scovil,* 348 U. S. 218; *United States* v. *Colotta,* 350 U. S. 808. And it is a matter of federal law when such a lien has acquired sufficient substance and has become so perfected as to defeat a later-arising or later-filed federal tax lien.[7] "Otherwise,

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[6] "While it is true that the filing of the notice of the tax lien may constitute notice in the case of real property, it is inequitable for the statute to provide that it constitutes notice as regards securities. For example, when a broker purchases a security for his customer on the exchange, it is obviously impossible for him to check all the offices in which a notice of the tax lien may be duly filed to determine whether the security is subject to such lien. A like situation exists with respect to over-the-counter and direct transactions in securities. An attempt to enforce such liens on recorded notice would in many cases impair the negotiability of securities and seriously interfere with business transactions. The adoption of the amendment will remove an existing hardship without causing any undue loss of revenue." H. R. Rep. No. 855, 76th Cong., 1st Sess. 26 (1939).

[7] "The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to reexamination by this Court." *United States* v. *Security Tr. & Sav. Bank,*

a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined." *United States* v. *New Britain, supra,* at 86. The federal rule is that liens are "perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established." *Id.,* at 84.

We reject respondents' contention that the choateness rule has no place when a mortgage under § 6323 (a) is involved. The predecessor to § 6323 was first enacted by Congress in 1912 in order to protect mortgagees, purchasers and judgment creditors against a secret lien for assessed taxes and to postpone the effectiveness of the tax lien as against these interests until the tax lien was filed. H. R. Rep. No. 1018, 62d Cong., 2d Sess. The section dealt with the federal lien only and it did not purport to affect the time at which local liens were deemed to arise or to become choate or to subordinate the tax lien to tentative, conditional or imperfect state liens. Rather, we believe Congress intended that if out of the whole spectrum of state-created liens, certain liens are to enjoy the preferred status granted by § 6323, they should at least have attained the degree of perfection required of other liens and be choate for the purposes of the federal rule.

The Court has never held that mortgagees face a less demanding test of perfection than other interests when competing with the federal lien. Indeed *United States* v. *Ball Constr. Co.,* 355 U. S. 587, stands for just the contrary. There the state law creditor, asserting that the

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340 U. S. 47, 49–50; see also, *United States* v. *Acri,* 348 U. S. 211; *United States* v. *Vorreiter,* 355 U. S. 15. Thus the fact that, under Arkansas law, the claim for attorney's fees becomes enforceable upon default as a contract of indemnity does not foreclose inquiry by this Court into the degree the claim is choate at that time.

assignment under which he claimed was a mortgage within the predecessor to § 6323, insisted upon priority over the federal lien by virtue of the previously executed assignment. A majority of the Court, although not expressly declaring the assignment to be a mortgage, held that § 6323 (a) afforded the creditor no protection since his interest was "inchoate and unperfected." The four dissenters thought the assignment was a mortgage and that it was "completely perfected" and "in all respects choate." While disagreeing on the choateness of the particular assignment involved there, the Court was unanimous in applying the choateness test to those seeking the protection of § 6323 (a). We follow that lead here and therefore proceed to measure against the rule the choateness of the mortgagee's lien for reasonable attorney's fees before us.

Clearly the identity of the lienholder and the property subject to the lien are definite here, but it is equally apparent that the amount of the lien for attorney's fees was undetermined and indefinite when the federal tax liens in question were filed.[8] The mortgage held by respondents secured a promissory note which obligated the mortgagor maker to pay a "reasonable attorney's fee" "in the event of default" and "of the placing of this note in the hands of an attorney for collection." By the time the federal liens subordinated by the Arkansas courts were placed of public record, default had occurred, the mortgagee had elected to declare the note due and payable, an attorney had been engaged and a suit to foreclose the mortgage had been filed. But the "reasonable attorney's fee"—reasonable in relation to the service to be performed by the

[8] There is nothing in *Security Mortgage Co.* v. *Powers*, 278 U. S. 149, which compels us to hold the lien choate, since the issue there was the status of an attorney's fee clause, fixed in amount, in bankruptcy proceedings where the rigorous federal lien choateness test was not necessarily applicable.

attorney—had not been reduced to a liquidated amount. The final amount was to be established by court decree and the Chancery Court set the fee considerably below the sum requested. Moreover, there is no showing in this record that the mortgagee had become obligated to pay and had paid any sum of money for services performed prior to the filing of the federal tax lien.

Ball once again provides a parallel. Sums due the contractor-taxpayer under a particular construction contract were assigned to the surety as security for any future indebtedness of the contractor to the surety arising under that contract or any other. After the filing of the federal tax lien against the contractor, the surety made advances to complete another contract of the taxpayer, as the surety was obligated to do under its bond issued on that contract, and the taxpayer thereby became indebted to the surety. The majority held the surety's interest "inchoate and unperfected" at the time of the filing of the federal tax liens.[9] *Ball* therefore rejects as inchoate an assignee's or mortgagee's lien to secure future indebtedness of the taxpayer-debtor. The creditor holds merely "a *caveat* of a more perfect lien to come." *New York* v. *Maclay,* 288 U. S. 290, 294. Likewise, when a mortgagee has a lien for an attorney's fee which is uncertain in amount and yet to be incurred and paid, such a lien is inchoate and is subordinate to the intervening federal tax lien filed before the mortgagee's lien for the attorney's fee matures.[10]

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[9] Contrast *Crest Finance Co.* v. *United States,* 368 U. S. 347, where the assignment and the loans were consummated prior to the accrual and filing of the federal tax liens.

[10] See in accord, with respect to attorney's fees, *United States* v. *Bond,* 279 F. 2d 837 (C. A. 4th Cir.); *In re New Haven Clock & Watch Co.,* 253 F. 2d 577 (C. A. 2d Cir.); *Bank of America* v. *Embry,* 188 Cal. App. 2d 425, 10 Cal. Rptr. 602; with respect to payments of subsequently attaching local taxes, *United States* v. *Bond, supra; United States* v. *Christensen,* 269 F. 2d 624 (C. A. 9th Cir.); and

But, it is said, the principal and interest of the mortgage were definite in amount, the attorney's fee later became certain by court order [11] and if the tax lien were to prevail the preference of the mortgagee given by § 6323 will be frustrated since payment of the attorney's fee will reduce the net amount realized from the mortgage. Aside from the fact that the mortgagee here will experience no such reduction,[12] this argument would subordinate federal tax liens to inchoate liens and in both *United States* v. *New Britain, supra,* and *United States* v. *Buffalo Savings Bank,* 371 U. S. 228, the Court denied priority to local tax liens which were imperfect when the federal tax lien was filed even though the former had priority over the mortgage and would reduce the recovery of the mortgagee.[13]

The court below was in error and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

MR. JUSTICE DOUGLAS dissents.

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with respect to future advance clause transactions, *American Surety Co.* v. *Sundberg,* 58 Wash. 2d 337, 363 P. 2d 99; Rev. Rule 56–41, 1956–1 Cum. Bull. 562; cf. *United States* v. *Peoples Bank,* 197 F. 2d 898 (C. A. 5th Cir.); *Hoare* v. *United States,* 294 F. 2d 823 (C. A. 9th Cir.).

[11] This argument would require us to revitalize the long since rejected relation-back doctrine. See *United States* v. *Security Tr. & Sav. Bank,* 340 U. S. 47, 50.

[12] See note 5, *supra.*

[13] By the same token respondents' contention that the rules against "unjust enrichment" are violated by preferring the tax lien to the claim for attorney's fees is without merit. Both *New Britain* and *Buffalo Savings Bank* prefer the federal lien even though the mortgagee's interest in the proceeds will be reduced by later-arising local taxes having priority under state law over the mortgagee. The attorney's services, moreover, were rendered for the benefit of the mortgagee to protect his interest in the property, and the United States, holding an adverse interest, received no such benefit from them that its interest is to be charged therefor.

BALDWIN ET AL. *v.* MOSS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 864. Decided June 10, 1963.

Appeal dismissed.

Reported below: — F. Supp. —.

Walt Allen, Jim A. Rinehart, Leon S. Hirsh and *James C. Harkin* for appellants.

PER CURIAM.

The appeal is dismissed.

MR. JUSTICE HARLAN would postpone consideration of the question of jurisdiction until after argument on the merits.

ALLEN ET AL. *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF HOPEWELL, VIRGINIA.

No. 264, Misc. Decided June 10, 1963.

Certiorari granted; judgment vacated; and case remanded.

Leonard W. Holt and *Simon Lawrence Cain* for petitioners.

Sol Goodman 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 vacated and the case is remanded to the Circuit Court of Hopewell, Virginia, for reconsideration in light of *Griffin* v. *Illinois*, 351 U. S. 12.

W. R. ARTHUR & CO., INC., *v.* WISCONSIN DEPARTMENT OF TAXATION.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 1008. Decided June 10, 1963.

Appeal dismissed and certiorari denied.
Reported below: 18 Wis. 2d 225, 118 N. W. 2d 168.

Adolph J. Bieberstein, John C. Wickhem and *George L. Weisbard* for appellant.

George Thompson, Attorney General of Wisconsin, and *Harold H. Persons* and *E. Weston Wood,* Assistant Attorneys General, 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.

LUBLIN *v.* JAMES T. BARNES & CO. ET AL.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 1040. Decided June 10, 1963.

Appeal dismissed and certiorari denied.
Reported below: 368 Mich. 179, 117 N. W. 2d 785.

PER CURIAM.

The motion to dispense with printing the jurisdictional statement is granted.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

SLOAN'S MOVING & STORAGE CO., INC., *v.* UNITED STATES ET AL.

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

No. 880. Decided June 10, 1963.

208 F. Supp. 567, affirmed.

Herbert Burstein for appellant.

Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Robert W. Ginnane and *H. Neil Garson* for the United States and the Interstate Commerce Commission; and *Bernard G. Segal, Richmond C. Coburn, S. Harrison Kahn, Irving R. Segal* and *Robert L. Kendall, Jr.* for United Parcel Service, Inc., appellees.

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.

SCOTT *v.* PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 1003, Misc. Decided June 10, 1963.

Appeal dismissed for want of a substantial federal question.

Appellant *pro se.*

Walter E. Alessandroni, Attorney General of Pennsylvania, and *George G. Lindsay,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

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BRIGGS *v.* LOUISIANA STATE BAR ASSOCIATION, COMMITTEE ON BAR ADMISSIONS.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 1070, Misc. Decided June 10, 1963.

Appeal dismissed for want of a substantial federal question.

Appellant *pro se.*

Felicien Y. Lozes for appellee.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

BOLLETTIERI *v.* NEW YORK.

APPEAL FROM THE SUPREME COURT OF NEW YORK, ONEIDA COUNTY.

No. 1378, Misc. Decided June 10, 1963.

Appeal dismissed and certiorari denied.

Appellant *pro se.*

Louis J. Lefkowitz, Attorney General of New York, and *Robert E. Fischer* and *Maxwell B. Spoont,* Special Assistant Attorneys General, 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 BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

RANDOLPH ET AL. *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 20. Decided June 10, 1963.

Certiorari granted; judgments vacated; and case remanded.

Reported below: 202 Va. 661, 119 S. E. 2d 817.

Martin A. Martin, Clarence W. Newsome, Jack Greenberg, James M. Nabrit III and *Charles L. Black, Jr.* for petitioners.

Robert Y. Button, Attorney General of Virginia, and *R. D. McIlwaine III,* Assistant Attorney General, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted, the judgments are vacated and the case is remanded to the Supreme Court of Appeals of Virginia for reconsideration in light of *Peterson* v. *City of Greenville,* 373 U. S. 244.

MR. JUSTICE HARLAN concurs in the result on the premises stated in his separate opinion in *Peterson* v. *City of Greenville* and *Avent* v. *North Carolina,* 373 U. S., at 248.

HENRY ET AL. *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 29. Decided June 10, 1963.

Certiorari granted; judgments vacated; and case remanded.

Herbert O. Reid, Thurgood Marshall, Jack Greenberg and *James M. Nabrit III* for petitioners.

William J. Hassan and *Peter J. Kostik* for respondent.

PER CURIAM.

The petition for writ of certiorari is granted, the judgments are vacated and the case is remanded to the Supreme Court of Appeals of Virginia for reconsideration in light of *Peterson* v. *City of Greenville,* 373 U. S. 244.

MR. JUSTICE HARLAN concurs in the result on the premises stated in his separate opinion in *Peterson* v. *City of Greenville* and *Avent* v. *North Carolina,* 373 U. S., at 248.

THOMPSON *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 60. Decided June 10, 1963.

Certiorari granted; judgment vacated; and case remanded.

Jack Greenberg, Constance Baker Motley, James M. Nabrit III, S. W. Tucker and *Derrick A. Bell, Jr.* for petitioner.

Robert Y. Button, Attorney General of Virginia, and *R. D. McIlwaine III,* Assistant Attorney General, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted, the judgment is vacated and the case is remanded to the Supreme Court of Appeals of Virginia for reconsideration in light of *Peterson* v. *City of Greenville,* 373 U. S. 244.

MR. JUSTICE HARLAN concurs in the result on the premises stated in his separate opinion in *Peterson* v. *City of Greenville* and *Avent* v. *North Carolina,* 373 U. S., at 248.

WOOD ET AL. *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 79. Decided June 10, 1963.

Certiorari granted; judgment vacated; and case remanded.

Melvin L. Wulf, Leonard W. Holt, Henry Halvor Jones and *Simon Lawrence Cain* for petitioners.

Robert Y. Button, Attorney General of Virginia, and *R. D. McIlwaine III,* Assistant Attorney General, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted, the judgment is vacated and the case is remanded to the Supreme Court of Appeals of Virginia for reconsideration in light of *Peterson* v. *City of Greenville,* 373 U. S. 244.

MR. JUSTICE HARLAN concurs in the result on the premises stated in his separate opinion in *Peterson* v. *City of Greenville* and *Avent* v. *North Carolina,* 373 U. S., at 248.

MARCHESE *v.* UNITED STATES ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 362. Decided June 10, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 304 F. 2d 154.

Russell E. Parsons and *Sol C. Berenholtz* for petitioner.

Solicitor General Cox, Assistant Attorney General Miller and *Philip R. Monahan* for the United States et al.

PER CURIAM.

The petition for writ of certiorari is granted, the judgment is vacated and the case is remanded to the United States District Court for the Southern District of California for reconsideration in light of *Sanders* v. *United States,* 373 U. S. 1.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN would deny certiorari on the basis of their dissent in *Sanders* v. *United States,* 373 U. S., at 23.

KELLER *v.* WISCONSIN EX REL. STATE BAR OF WISCONSIN.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF WISCONSIN.

No. 429. Decided June 10, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 16 Wis. 2d 377, 114 N. W. 2d 796.

Frank M. Coyne for petitioner.

John W. Reynolds, Attorney General of Wisconsin, and *Warren H. Resh,* Assistant Attorney General, for respondent.

PER CURIAM.

The petition for writ of certiorari is granted, the judgment is vacated and the case is remanded to the Supreme Court of Wisconsin for reconsideration in light of *Sperry* v. *Florida ex rel. Florida Bar,* 373 U. S. 379.

PRICE ET AL. *v.* MOSS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA.

No. 688. Decided June 10, 1963.*

Appeals dismissed because the order of the District Court is not appealable under 28 U. S. C. § 1253.

Reported below: 207 F. Supp. 885.

Walt Allen, Jim A. Rinehart, Leon S. Hirsh and *James C. Harkin* for appellants in No. 688.

Frank Carter for appellants in No. 689.

Norman E. Reynolds, Jr. and *Sid White* for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeals are dismissed as the order of the District Court is not appealable under 28 U. S. C. § 1253.

MR. JUSTICE BLACK and MR. JUSTICE GOLDBERG concur in the result.

MR. JUSTICE HARLAN would postpone consideration of the question of jurisdiction until after argument on the merits.

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*Together with No. 689, *Oklahoma Farm Bureau et al.* v. *Moss et al.*, on appeal from the same Court.

LAINO *v.* NEW YORK.

APPEAL FROM THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FOURTH JUDICIAL DEPARTMENT.

No. 992. Decided June 10, 1963.

Appeal dismissed and certiorari denied.

Edward H. Levine and *Vernon C. Rossner* for appellant.

Louis J. Lefkowitz, Attorney General of New York, and *Robert E. Fischer* and *Maxwell B. Spoont,* Special Assistant Attorneys General, 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 BLACK and MR. JUSTICE DOUGLAS are of the opinion that probable jurisdiction should be noted.

HUGGINS *v.* RAINES, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF OKLAHOMA.

No. 251, Misc. Decided June 10, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 372 P. 2d 248.

Petitioner *pro se.*

Mac Q. Williamson, Attorney General of Oklahoma, and *Lewis A. Wallace* and *Hugh H. Collum,* Assistant Attorneys General, 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 vacated and the case is remanded to the Court of Criminal Appeals of Oklahoma for reconsideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335, and *Carnley* v. *Cochran,* 369 U. S. 506.

BENTLEY *v.* ALASKA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA.

No. 647, Misc. Decided June 10, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

George N. Hayes, Attorney General of Alaska, and *John K. Brubaker,* Assistant Attorney General, 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 vacated and the case is remanded to the Supreme Court of Alaska for reconsideration in light of *Douglas* v. *California,* 372 U. S. 353, *Lane* v. *Brown,* 372 U. S. 477, and *Draper* v. *Washington,* 372 U. S. 487.

BENTLEY *v.* ALASKA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALASKA.

No. 648, Misc. Decided June 10, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

George N. Hayes, Attorney General of Alaska, and *John K. Brubaker,* Assistant Attorney General, 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 vacated and the case is remanded to the Supreme Court of Alaska for reconsideration in light of *Brady* v. *Maryland,* 373 U. S. 83, and *Mooney* v. *Holohan,* 294 U. S. 103.

PETERSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 754, Misc. Decided June 10, 1963.

Certiorari granted; judgment vacated; and case remanded. Reported below: 145 So. 2d 857.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, 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 vacated and the case is remanded to the Supreme Court of Florida for a hearing on the issue of whether petitioner was denied the assistance of counsel at the time he entered his plea of guilty.

Syllabus.

YELLIN *v.* UNITED STATES.

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

No. 35. Argued April 18–19, 1962.—Restored to the calendar for reargument June 25, 1962.—Reargued December 6, 1962.—Decided June 17, 1963.

Petitioner was summoned to appear as a witness before the House Committee on Un-American Activities, which was investigating infiltration of Communists into the steel industry. Petitioner's counsel telegraphed the General Counsel of the Committee, requesting that petitioner be permitted to testify in an executive session, because that would avoid "exposing witnesses to publicity." Without authorization, the Committee's Staff Director replied by telegram that the request was denied. At the beginning of the hearing several days later, petitioner's counsel tried to have these telegrams read into the record; but this was denied and neither petitioner nor his counsel was permitted to discuss the subject. Without specifying this as the reason, petitioner refused to answer questions asked him by the Committee, and he was indicted for violating 2 U. S. C. § 192. At the trial, petitioner contended that the Committee had violated its Rule IV, which provides that witnesses shall be interrogated in executive session, if a majority of the Committee believes that his public interrogation might "endanger national security or unjustly injure his reputation, or the reputation of other individuals"; but petitioner was convicted and sentenced to a fine and imprisonment. *Held:* On the record in this case, it appears that the Committee violated its own Rule IV by failing to give consideration to the question whether interrogation in public would injure petitioner's reputation and by failing to act on his request that he be interrogated in executive session; and petitioner's conviction for refusal to testify in public cannot stand. Pp. 110–124.

(a) The Committee's Rule IV is quite explicit in requiring that injury to a witness' reputation be considered, along with danger to national security and injury to the reputation of a third party, in deciding whether to hold an executive session. Pp. 114–115.

(b) Rule IV conferred upon witnesses the right to request an executive session and the right to have the Committee act upon such a request, according to the standards set forth in the Rule. Pp. 115–117.

(c) That a witness may be questioned in public, even after an executive session has been held, does not mean that the Committee is freed from considering possible injury to his reputation. Pp. 117–118.

(d) It appears from the record that the Committee violated its own Rule in this case by deciding to interrogate petitioner publicly without giving any consideration to the question whether to do so would injure petitioner's reputation. Pp. 118–119.

(e) The Committee also violated its own Rule by failing to act upon petitioner's express request for an executive session, even though that request was directed to the Committee's General Counsel, instead of the Chairman. Pp. 119–121.

(f) The only remedy petitioner had for this denial of his rights under the Rule was his refusal to testify. Pp. 121–122.

(g) Petitioner's rights under Rule IV were not forfeited by his failure to make clear at the time he was questioned that his refusal to testify was based upon the Committee's departure from Rule IV. Pp. 122–124.

287 F. 2d 292, reversed.

Victor Rabinowitz reargued the cause for petitioner. With him on the briefs was *Leonard B. Boudin.*

Solicitor General Cox reargued the cause for the United States. With him on the briefs were *Assistant Attorney General Yeagley, Bruce J. Terris, Kevin T. Maroney* and *Lee B. Anderson.*

Osmond K. Fraenkel filed a brief for the American Civil Liberties Union, as *amicus curiae,* urging reversal.

Mr. Chief Justice Warren delivered the opinion of the Court.

This contempt of Congress case, stemming from investigations conducted by the House Committee on Un-American Activities, involves, among others, questions of whether the House Committee on Un-American Activities failed to comply with its rules and whether such a failure excused petitioner's refusal to answer the Committee's questions.

Petitioner Edward Yellin was indicted in the Northern District of Indiana on five counts of willfully refusing to answer questions put to him by a Subcommittee of the House Committee on Un-American Activities (hereafter Committee) at a public hearing. He was convicted, under 2 U. S. C. § 192, of contempt of Congress on four counts. He was sentenced to four concurrent terms of imprisonment, each for one year, and fined $250. The Court of Appeals for the Seventh Circuit affirmed. 287 F. 2d 292. Since the case presented constitutional questions of continuing importance, we granted certiorari. 368 U. S. 816. However, because of the view we take of the Committee's action, which was at variance with its rules, we do not reach the constitutional questions raised.[1]

The factual setting is for the most part not in dispute. The Committee was engaged, in 1958, in an investigation of so-called colonization by the Communist Party in basic industry. One of its inquiries focused upon the steel industry in Gary, Indiana, where petitioner was employed. Having information that petitioner was a Communist, the Committee decided to call Yellin and question him in a public rather than an executive session. The Committee then subpoenaed petitioner on January 23, 1958. His attorney, Mr. Rabinowitz, sent a telegram to the Committee's general counsel, Mr. Tavenner, on Thursday, February 6, 1958. The telegram asked for an executive session because "testimony needed for legislative . . . purposes can be secured in executive session without exposing witnesses to publicity." Since the Committee and

[1] The constitutional questions upon which we need not pass are whether the Committee's investigation infringed upon petitioner's rights under the First Amendment and whether petitioner was convicted under an unconstitutionally vague statute. In addition, we do not discuss petitioner's contention that the trial judge erred in excluding expert testimony about the factors which should be considered in determining petitioner's rights under the First Amendment.

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Mr. Tavenner had left Washington, D. C., for Gary, the telegram was answered by the Committee's Staff Director. His reply read:

> "Reurtel [Re your telegram?] requesting executive session in lieu of open session for Edward Yellin and Nicholas Busic. Your request denied.
>
> "Richard Arens Staff Director"

According to Congressman Walter, the Chairman of the Committee, Mr. Arens did not have authority to take such action.

Petitioner's counsel also sought to bring the matter to the Committee's attention when it commenced its public hearing the following Monday, February 10, 1958. His efforts to have the telegrams read into the record were cut short by Congressman Walter.[2] Mr. Rabinowitz would not have been justified in continuing, since Committee rules permit counsel only to advise a witness, not to engage in oral argument with the Committee. Rule

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[2] The Committee's General Counsel had asked Mr. Yellin a few preliminary questions when Mr. Rabinowitz interrupted.

"Mr. RABINOWITZ. Mr. Counsel [Mr. Tavenner], I wonder whether it would be possible to read into the record the exchange of telegrams between myself and the committee in connection with the witness's testimony. I would like to have it appear in the record.

"The CHAIRMAN. We will decide whether it will be made a part of the record when the executive session is held. Go ahead.

"Mr. RABINOWITZ. Mr. Chairman, I sent the telegrams because I wanted them to appear. I do not care whether they appear publicly or not. I do want it to appear that that exchange of telegrams occurred. I did not do it just to increase the revenue of the telegram company.

"The CHAIRMAN. Well, whatever the reason was, whether it has been stated or otherwise, it will be considered in executive session.

"Mr. RABINOWITZ. May I state—

"The CHAIRMAN. Do not bother. You know the privileges given you by this committee. You have appeared before it often enough. You know as well as anybody. Go ahead, Mr. Tavenner."

VII (B). In any event, Congressman Walter was not interested in discussing the content of the telegrams. From his sometimes conflicting testimony at trial, it appears he did not even know what the telegrams said.[3] And though Congressman Walter said the Committee would consider in executive session whether to make the telegrams a part of the record, it appears that whatever

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[3] Consider, for example, the following testimony of Congressman Walter:

"Q. [By Mr. RABINOWITZ] So that at the time I raised at this hearing the question of the telegrams, you didn't know anything about any telegrams, and you weren't sufficiently interested to find out what I was talking about; is that right?

"A. [By Congressman WALTER] Well, not exactly that, Mr. Rabinowitz. I was interested in knowing. I knew that you made an application for an executive session.

"Q. How did you know that?

"A. Well, the telegram; at least, that's what you started to talk about.

"Q. You knew it at the time of the hearing?

"A. No. Isn't that what you started to talk about?

"Q. When did you first learn that I had made an application for an executive session?

"A. *I believe today.* I never had seen these telegrams, actually. I heard you mention them, at least now my recollection is that I heard you mention them, *but I haven't seen them until this minute.*" (Emphasis added.)

See also the following testimony:

"Q. [By Mr. RABINOWITZ] Well, weren't you interested in finding out what I was talking about?

"A. [By Congressman WALTER] I knew what you were talking about. You were talking about a telegram that you say you sent, and it was too late then to raise any question that might have been raised by the telegram."

Later Congressman Walter said:

"I think the impression I got was that these were telegrams that were more or less in the nature of a request to postpone, without grounds, or whatever it was that Mr. Tavenner told me and the other members of the Committee; and I think that we were just not impressed by it."

action was taken was without knowledge of the telegrams' contents.[4]

It is against this background that the Committee's failure to comply with its own rules must be judged. It has been long settled, of course, that rules of Congress and its committees are judicially cognizable. *Christoffel* v. *United States,* 338 U. S. 84; *United States* v. *Smith,* 286 U. S. 6; *United States* v. *Ballin,* 144 U. S. 1. And a legislative committee has been held to observance of its rules, *Christoffel* v. *United States, supra,* just as, more frequently, executive agencies have been. See, *e. g., Vitarelli* v. *Seaton,* 359 U. S. 535; *Service* v. *Dulles,* 354 U. S. 363.

The particular Committee Rule involved, Rule IV, provides in part:

> "IV—Executive and Public Hearings:
>
> "A—*Executive:*
>
> "(1) If a majority of the Committee or Subcommittee, duly appointed as provided by the rules of the House of Representatives, believes that the interrogation of a witness in a public hearing might

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[4] The following occurred during Mr. Rabinowitz' direct examination of Congressman Walter:

"Q. Well, did you, or did you not, take it up in executive session as you said you would?

"A. I am not clear; I think that we probably did talk about making it a part of the record, and I think the conclusion was reached that it was not properly a part of the record already made.

"Q. Didn't you testify, Congressman, just a few minutes ago, while you were on the stand, that the first you knew about the contents of the telegram was just now, when you got on the witness stand?

"A. That's right.

"Q. So you discussed this whole matter in executive session after the Gary hearings, without even knowing what the telegrams said?

"A. That's about it.

"Q. And you reached the conclusion not to make them a part of the record without even knowing what was in them?

"A. That's right. . . ."

endanger national security or *unjustly injure his reputation,* or the reputation of other individuals, the Committee *shall* interrogate such witness in an Executive Session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing.

. . . . .

"B—*Public Hearings:*

"(1) All other hearings shall be public." (Emphasis added.)

The rule is quite explicit in requiring that injury to a witness' reputation be considered, along with danger to the national security and injury to the reputation of third parties, in deciding whether to hold an executive session.

At the threshold we are met with the argument that Rule IV was written to provide guidance for the Committee alone and that it was not designed to confer upon witnesses the right to request an executive session and the right to have the Committee act, either upon that request or on its own, according to the standards set forth in the rule. It seems clear, from the structure of the Committee's rules and from the Committee's practice, that such is not the case.

The rules are few in number and brief—all 17 take little more than six pages in the record. Yet throughout the rules the dominant theme is definition of the witness' rights and privileges. Rule II requires that the subject of any investigation be announced and that information sought be "relevant and germane to the subject." Rule III requires that witnesses be subpoenaed "a reasonably sufficient time in advance" to allow them a chance to prepare and employ counsel. Rule VI makes available to any witness a transcript of his testimony—though at his expense. Rule VII gives every witness the privilege of having counsel advise him during the hearing. Rule VIII gives a witness a reasonable time to get other coun-

sel, if his original counsel is removed for failure to comply with the rules. Rule X makes detailed provision for those persons who have been named as subversive, Fascist, Communist, etc., by another witness. Such persons are given an opportunity to present rebuttal testimony and are to be "accorded the same privileges as any other witness appearing before the Committee." Rule XIII permits any witness to keep out of the range of television cameras. Finally, Rule XVII requires that each witness "shall be furnished" a copy of the rules. All these work for the witness' benefit. They show that the Committee has in a number of instances intended to assure a witness fair treatment, *viz.*, the right to advice of counsel, or protection from undue publicity, *viz.*, the right not to be photographed by television cameras. Rule IV, in providing for an executive session when a public hearing might unjustly injure a witness' reputation, has the same protective import. And if it is the witness who is being protected, the most logical person to have the right to enforce those protections is the witness himself.

The Committee's practice reinforces this conclusion. Congressman Walter testified that the Committee "always" gave due consideration to requests for executive sessions.[5] Weight should be given such a practice of

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[5] Mr. Rabinowitz asked Congressman Walter:

"But it wasn't worth the chance of calling him in executive session, to see what his position would have been?

"A. I am sure that had you communicated this whole matter to the Committee before we left Washington so that we could have given it due consideration—*we would have, and always do*—we might have a different situation today." (Emphasis added.)

Congressman Walter also said he was "sure this could not have happened, had you [Mr. Rabinowitz] addressed your telegram to me."

Note also the following question by Mr. Rabinowitz and answer by Mr. Tavenner:

"Q. And does that rule [Rule IV] operate ever for the protection of a witness who is called?

"A. Certainly."

the Committee in construing its rules, *United States* v. *Smith,* 286 U. S. 6, 33. That the Committee has entertained, and always does entertain, requests for executive sessions reinforces the conclusion that the Committee intended in Rule IV to give the individual witness a right to some consideration of his efforts to protect his reputation.

It must be acknowledged, of course, that Rule IV does not provide complete protection. The Committee may not be required by its rules to avoid even unjust injury to a witness' reputation. Assuming that the Committee decides to hold an executive session, the Committee need do so only "for the purpose of determining the *necessity or advisability* of conducting such interrogation thereafter in a public hearing." (Emphasis added.) By inclusion of the word "necessity" the rule may contemplate cases in which the Committee will proceed in a public hearing despite the risk or even probability of injury to the witness' reputation.[6]

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[6] Although, for reasons to be developed later, it does not appear that the Committee was following Rule IV in Yellin's case, it seems clear that the Committee realized its public interrogation of Yellin would injure his reputation. Congressman Walter testified, for example, that:

"A. . . . [T]he Committee already passed on the question of whether or not we would hear Mr. Yellin at a session when the purpose of calling him was discussed, and it was decided then that the rule with respect to an executive session was not applicable because the investigator—and I might say it was Mr. Collins, a former F. B. I. agent, who developed this entire matter, and we were willing to accept his story with respect to the proposed testimony.

"Q. And what was his story?

"A. Well, his story was that the man was a known Communist; that he had been active in the international conspiracy, and that he had deceived his employer; and, furthermore, he came within the category of those people that we were experiencing a great deal of difficulty in finding out about with respect to the colonization."

Mr. Tavenner also said he would not have recommended to the Committee that Yellin be heard in executive session "[b]ecause we

That petitioner may be questioned in public, even after an executive session has been held, does not mean, however, that the Committee is freed from considering possible injury to his reputation. The Committee has at least undertaken to consider a witness' reputation and the efforts a witness makes to protect it, even though the Committee may in its discretion nevertheless decide thereafter to hold a public hearing. The Committee failed in two respects to carry out that undertaking in Yellin's case.

First, it does not appear from Congressman Walter's testimony that the Committee considered injury to the witness' reputation when it decided against calling Yellin in executive session:

> "Q. [By Mr. RABINOWITZ] The Committee does sometimes hold executive sessions, doesn't it?
>
> "A. [By Congressman WALTER] Yes.
>
> "Q. And what are the considerations which the Committee uses in determining whether to hold executive sessions?
>
> "A. This is usually done when the Committee is fearful lest a witness will mention the name of somebody against whom there is no sworn testimony, and in order to prevent the name of somebody being mentioned in public that we are not sure has been active in the conspiracy, at least that there isn't sworn testimony to that effect, we have an executive hearing.

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knew that he was a member of the Communist Party and he was in a position to give the Committee information, if he wanted to."

From the Committee's knowledge, whether it be reliable or not, the Committee could only have concluded that Yellin's reputation would suffer. Yet Congressman Walter said this was the kind of case in which a public hearing was appropriate.

"Q. Are those the only circumstances under which executive hearings are held?

"A. *I don't know of any other,* except that where we are fearful that testimony might be adduced that could be harmful to the national defense. We are not so sure about the testimony of any of the witnesses." (Emphasis added.)

By Congressman Walter's own admission, the Committee holds executive sessions in only two of the three instances specified in Rule IV, *i. e.,* when there may be injury to the reputation of a third party or injury to the national security. Injury to the witness himself is not a factor. Consequently the initial Committee decision to question Yellin publicly, made before serving him with a subpoena, was made without following Rule IV.

Secondly, the Committee failed to act upon petitioner's express request for an executive session.[7] The Staff Director, who lacked the authority to do so, acted in the Committee's stead. That petitioner addressed his request to the Committee's counsel does not alter the case. The Committee did not specify in Rule IV to whom such re-

[7] Any suggestion that petitioner's request was untimely cannot be accepted. For one thing, only 14 days intervened between service of the subpoena upon petitioner and delivery of his request to the Committee's offices in Washington. Also it is of some significance that the Committee did not hold another witness at the Gary hearings, one Joseph Gyurko, to the strict standard of timeliness now urged. Gyurko had sent a telegram to the Committee's offices in Washington about noon on Saturday, February 8, 1958. When Gyurko was called on Tuesday, February 11, he was given an executive hearing, even though Congressman Walter expressed the opinion that Gyurko had deliberately waited until after business hours on Saturday to send his request. Since the Committee did not even-handedly deny executive sessions to all who made such eleventh hour requests, it is not in a fair position to plead the untimeliness of Yellin's request.

quests should be addressed. But from other rules it may be inferred that the general counsel is an appropriate addressee. In Rule IX, the Committee permits witnesses to file prepared or written statements for the record. The statements are to be sent to the "counsel of the Committee." Rule X makes provision for third parties who have been named as subversive, Fascist, Communist, etc., in a public hearing. A person, notified of having been named, who feels that his reputation has been adversely affected is directed to "[c]ommunicate with the counsel of the Committee." As a footnote to that rule, the Committee has said: "All witnesses are invited at any time to confer with Committee counsel or investigators for the Committee prior to hearings." Also it should be noted that the Staff Director's telegraphed response had the misleading appearance of authority and finality. The Chairman of the Committee should not now be allowed to say that had petitioner disregarded the response he received from the Chairman's staff and instead renewed his request to the Chairman, "this could not have happened"—especially when petitioner's counsel tried to bring the matter to the attention of the Committee and was brusquely cut off.

Thus in two instances the Committee failed to exercise its discretion according to the standards which Yellin had a right to have considered. His position is similar to that of the petitioner in *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260. Accardi had been ordered deported. Concededly the order was valid. However, Accardi applied to the Board of Immigration Appeals for suspension of the order. This, in the discretion of the Attorney General, was permitted by § 19 (c) of the Immigration Act of 1917, 39 Stat. 889, as amended, 8 U. S. C. (1946 ed., Supp. V) § 155 (c). (The successor to that section in the 1952 Act is § 244, 66 Stat. 214, 8 U. S. C.

§ 1254.) The Attorney General had by regulation permitted the Board of Immigration Appeals to make final decisions upon applications for this discretionary relief, subject to certain exceptions not involved in Accardi's case. Shortly before petitioner appealed to the Board, the Attorney General published a list of "unsavory characters," including petitioner, who were to be deported. Accardi claimed that since the Board knew he was on the list, it did not exercise the full discretion the Attorney General had delegated to it. Its decision was predetermined.

This Court held that the Board had failed to exercise its discretion though required to do so by the Attorney General's regulations. Although the Court recognized that Accardi might well lose, even if the Board ignored the Attorney General's list of unsavory characters, it nonetheless held that Accardi should at least have the chance given him by the regulations.

The same result should obtain in the case at bar. Yellin might not prevail, even if the Committee takes note of the risk of injury to his reputation or his request for an executive session. But he is at least entitled to have the Committee follow its rules and give him consideration according to the standards it has adopted in Rule IV.

At that point, however, the similarity to Accardi's case ends. Petitioner has no traditional remedy, such as the writ of habeas corpus upon which Accardi relied, by which to redress the loss of his rights. If the Committee ignores his request for an executive session, it is highly improbable that petitioner could obtain an injunction against the Committee that would protect him from public exposure. See *Pauling* v. *Eastland,* 109 U. S. App. D. C. 342, 288 F. 2d 126, cert. denied, 364 U. S. 900. Nor is there an administrative remedy for petitioner to pursue, should

the Committee fail to consider the risk of injury to his reputation. To answer the questions put to him publicly and then seek redress is no answer. For one thing, his testimony will cause the injury he seeks to avoid; under pain of perjury, he cannot by artful dissimulation evade revealing the information he wishes to remain confidential. For another, he has no opportunity to recover in damages, U. S. Const., Art. I, § 6; *Kilbourn* v. *Thompson,* 103 U. S. 168, 201–205. Cf. *Tenney* v. *Brandhove,* 341 U. S. 367, 377. Even the Fifth Amendment is not sufficient protection, since petitioner could say many things which would discredit him without subjecting himself to the risk of criminal prosecution. The only avenue open is that which petitioner actually took. He refused to testify.

As a last obstacle, however, the Government argues that Yellin's rights were forfeited by his failure to make clear at the time he was questioned that his refusal to testify was based upon the Committee's departure from Rule IV. Whatever the merits of the argument might be when immediately apparent deviations from Committee rules are involved,[8] it has no application here. Yellin was unable, at the time of his hearing, to tell from the actions of the Committee that his rights had been violated. So far as Yellin knew, the Staff Director acted as Congress-

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[8] Although, as a matter of due process, a witness is entitled to an explanation of the pertinency of a question, if he asks for it, it appears he may lose that right if he fails to make a timely objection. See *Deutch* v. *United States,* 367 U. S. 456, 468–469; *Barenblatt* v. *United States,* 360 U. S. 109, 123–124; *Watkins* v. *United States,* 354 U. S. 178, 214–215.

For other instances in which a witness' defense has been rejected because he failed to make timely objection, see *McPhaul* v. *United States,* 364 U. S. 372, 379; *United States* v. *Bryan,* 339 U. S. 323, 332–333; *Hartman* v. *United States,* 290 F. 2d 460, 467.

man Walter's agent, announcing the results of the Committee's deliberations. And so far as he knew, the Committee, when it initially decided to hold a public hearing, did so in accordance with Rule IV. It was not until petitioner's trial, when his attorney for the first time had an opportunity for searching examination, that it became apparent the Committee was violating its rules.

It may be assumed that if petitioner had expressly rested his refusal to answer upon a violation of Rule IV and the Committee nevertheless proceeded, he would be entitled to acquittal, were he able to prove his defense. Otherwise, if Yellin could be convicted of contempt of Congress notwithstanding the violation of Rule IV, he would be deprived of the only remedy he has for protecting his reputation. Certainly the rights created by the Committee's rules cannot be that illusory.

Of course, should Yellin have refused to answer in the mistaken but good-faith belief that his rights had been violated, his mistake of law would be no defense. *Watkins* v. *United States,* 354 U. S. 178, 208; *Sinclair* v. *United States,* 279 U. S. 263, 299. But he would at least be entitled to submit the correctness of his belief to a court of law.

Yellin should be permitted the same opportunity for judicial review when he discovers at trial that his rights have been violated. This is especially so when the Committee's practice leads witnesses to misplaced reliance upon its rules. When reading a copy of the Committee's rules, which must be distributed to every witness under Rule XVII, the witness' reasonable expectation is that the Committee actually does what it purports to do, adhere to its own rules. To foreclose a defense based upon those rules, simply because the witness was deceived by the Committee's appearance of regularity, is not fair.

The Committee prepared the groundwork for prosecution in Yellin's case meticulously. It is not too exacting to require that the Committee be equally meticulous in obeying its own rules.

Reversed.

MR. JUSTICE WHITE, with whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

Petitioner stands convicted of having refused, in violation of 2 U. S. C. § 192,[1] to answer four questions asked him by the Committee on Un-American Activities of the House of Representatives. He was sentenced to one year on each count, the sentences to run concurrently, and a fine of $250. The Court of Appeals affirmed unanimously, 287 F. 2d 292.

Pursuant to House of Representatives Rules XI [2] and

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[1] "Every person who having been summoned as a witness by the authority of either House of Congress to give testimony or to produce papers upon any matter under inquiry before either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months."

[2] "Rule XI

"Powers and Duties of Committees

. . . . . .

"(q) (1) Committee on Un-American Activities.

"(A) Un-American activities.

"(2) The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is

XII,[3] the Committee resolved that hearings would be held in Gary, Indiana, to inquire into Communist Party activities in basic industry.[4] Petitioner was subpoenaed to appear before the Committee in Gary on February 10, 1958. Four days prior to the hearing, petitioner's counsel

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instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"The Committee on Un-American Activities shall report to the House (or to the Clerk of the House if the House is not in session) the results of any such investigation, together with such recommendations as it deems advisable.

"For the purpose of any such investigation, the Committee on Un-American Activities, or any subcommittee thereof, is authorized to sit and act at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, and to take such testimony, as it deems necessary. Subpenas may be issued under the signature of the chairman of the committee or any subcommittee, or by any member designated by any such chairman, and may be served by any person designated by any such chairman or member."

[3] "Rule XII

"Legislative Oversight by Standing Committees

"SEC. 136. To assist the Congress in appraising the administration of the laws and in developing such amendments or related legislation as it may deem necessary, each standing committee of the Senate and the House of Representatives shall exercise continuous watchfulness of the execution by the administrative agencies concerned of any laws, the subject matter of which is within the jurisdiction of such committee; and, for that purpose, shall study all pertinent reports and data submitted to the Congress by the agencies in the executive branch of the Government."

[4] The Committee's resolution enumerated these areas of inquiry:

"1. The extent, character, and objects of Communist infiltration and Communist Party propaganda activities in basic industry in the Gary, Indiana, area, the legislative purpose being to obtain additional information for use by the Committee in its consideration of

sent a telegram to the Committee's counsel requesting that petitioner be questioned in executive session in lieu of an open session. The Staff Director of the Committee responded the same day and denied the request.

Petitioner appeared on the appointed date with counsel. The Committee Chairman began the proceedings by reading the above-quoted resolution and by stating further the purposes of the inquiry.[5] The first witness, an or-

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Section 16 of H. R. 9352, relating to the proposed amendment of Section 4 of the Communist Control Act of 1954, prescribing a penalty for knowingly and willfully becoming or remaining a member of the Communist Party with knowledge of the purpose or objective thereof, and for the additional legislative purpose of adding to the Committee's overall knowledge on the subject, so that Congress may be kept informed and thus prepared to enact remedial legislation in the national defense and for internal security when and if the exigencies of the situation require it.

"2. Execution by administrative agencies concerned of Public Law 637, of the 83d Congress known as the 'Communist Control Act of 1954,' relating to the eligibility to exercise the rights and privileges provided under the National Labor Relations Act of labor organizations determined by the Subversive Activities Control Board to be Communist-infiltrated organizations. The legislative purpose is to assist Congress in appraising the administration of the Communist Control Act of 1954 and to enact such amendments thereto as the exigencies of the situation require.

"3. Any other matter within the jurisdiction of the Committee which it or any subcommittee thereof, appointed to conduct this hearing, may designate."

[5] "Under the provisions of Public Law 601, 79th Congress, the Congress has placed upon this committee certain legislative and investigative duties and, in addition, the duty of exercising continuous watchfulness over the execution of any laws, the subject matter of which is within the jurisdiction of this committee. Accordingly, within the framework of this broad jurisdiction and objectives, this subcommittee of the Committee on Un-American Activities is here in Gary for the purpose of receiving testimony concerning Communist techniques and tactics of infiltration and the extent, character, and objects of Communist Party propaganda activities in basic industries. The importance of this area of inquiry from the standpoint of national

ganizer and high official in the Communist Party from 1930 to 1950, testified that the Party had begun a policy of infiltrating into basic industry, that Party "colonizers" were sent to coordinate Party work in these industries, including the steel industry, and that these colonizers were mainly young men from colleges and universities. These colonizers, he continued, would misrepresent their backgrounds in applying for jobs and would conceal their educational qualifications so as to gain jobs alongside other less-educated workers without casting suspicion on their motives.

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security, cannot be overemphasized. Without this information, it would be impossible for the committee to carry out its legislative duties as required of it by the Congress.

"In response to the mandate from the Congress to keep constant surveillance over existing security legislation, the committee is constantly surveying the operation of the Internal Security Act of 1950, the Foreign Agents Registration Act, the various espionage statutes, the Communist Control Act of 1954, and similar laws for the purpose of keeping Congress informed of the manner in which laws are being administered and for the purpose of recommending any needed legislative amendments. This mandate will be carried out at this hearing.

"The committee recently formulated an Omnibus Security Bill, H. R. 9352, which represents the most comprehensive effort ever made to deal with all problems in the field of internal security. This bill combines numerous proposals for empowering the Government to combat the various aspects of the Communist conspiracy which are not dealt with adequately in our present laws. It is the hope of the committee that factual information obtained at this hearing will be of assistance in the consideration of the numerous provisions of this bill.

"The committee is especially desirous of obtaining additional information for use in its consideration of Section 16 of H. R. 9352, relating to the proposed amendment of Section 4 of the Communist Control Act of 1954, prescribing a penalty for knowingly and willingly becoming or remaining a member of the Communist Party with knowledge of the purpose or objective thereof."

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Petitioner, who had been present for all of the foregoing, was called as the second witness immediately thereafter. After answering preliminary questions as to his name and address and after his counsel requested that the exchange of telegrams concerning the executive session be made part of the record, petitioner was asked the following question:

> "Mr. Yellin, where did you reside prior to September 1957?" (Count 1.)

After conferring with counsel, petitioner refused to answer the question. He cited decisions of this Court in *Watkins* v. *United States,* 354 U. S. 178; *Sweezy* v. *New Hampshire,* 354 U. S. 234, and asserted that a congressional committee cannot investigate into areas protected by the First Amendment and into areas of personal belief and conscience, that the authorizing rule of the House of Representatives was unduly vague resulting in a denial of due process of law and that the questions he would answer would only be those pertinent to some legislation. He specifically disclaimed reliance on the privilege against self-incrimination. To indicate the pertinency of the question, the Committee's counsel stated that in order to learn anything from petitioner regarding Communist Party activities in the Gary area, it was necessary to know whether he was there over a period of time. When directed to answer the question after this statement, the petitioner again refused on the grounds above stated.

Petitioner was then asked to state his formal education and whether he was a student at the College of the City of New York, which he refused to do and, when directed to answer, added: "Mr. Tavenner, I will refuse to answer that question under the grounds already stated; but it just occurs to me that if the committee knows all these things, I can't see the purpose or the

pertinency of asking me what they consider a known fact. Furthermore, it kind of appears to me as if this line of questioning is merely trying to create an impression and expose me for the sake of merely exposing me and not leading to any valid legislative purpose." The Committee Chairman, in response, stated: "I will assure you that that is farthest from the intention of anybody on this committee, and this committee has never, for the mere sake of exposing, asked a question."

The Committee thereupon received in evidence copies of petitioner's college records showing that he transferred from the College of the City of New York to the University of Michigan in 1948 and that he had applied for employment in a Gary steel mill on June 23, 1949. After continued unproductive questioning, petitioner was asked:

> "Will you tell the committee, please, whether or not incidents came to your attention of the colonization of the steel unions in Gary by the Communist Party at any time prior to September 1957?" (Count 2.)

Following another refusal to answer, the Committee's counsel undertook to explain the purpose of the question.[6]

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[6] "It has been testified here that colonization of young men in the middle of their educational courses in industry was a deep-seated plan of the Communist Party to strengthen itself within basic industry. The chairman's opening statement indicated that the activities of the Communist Party within basic industries was the subject of inquiry here.

. . . . . .

"The statement was made here of the practice of the Communist Party in colonizing industry at Flint, Michigan; at the University of Colorado, which is at Fort Collins, Colorado [*sic*], where you now reside; and other places.

"In order to understand the full tactics of the Communist Party in its operations here in Gary, it is necessary the committee under-

Again petitioner declined to reply for the reasons he had given. In a similar vein, he refused to answer a good many other questions including the following two:

> "Were you a member of the Communist Party on the 23d day of June 1949, which is the date of application filed in your name for employment in Gary?" (Count 3.)
>
> "Will you tell the committee whether or not in 1957 there were present in any of the steel unions at Gary, Indiana, persons who were known to you to have been colonizers of the Communist Party?" (Count 4.)

Petitioner was excused and various other witnesses were called, among them Joseph E. LaFleur who joined and had been active in the Communist Party from 1942 to 1952 at the request of the Federal Bureau of Investigation and who worked in the steel mills in Gary at times pertinent to this inquiry. He identified petitioner as a member of the Communist Party who with other young men participated in organizing Communist Party activities in Gary.

Upon report and recommendation by the Committee, petitioner was cited for contempt by the House of Representatives and was indicted and tried for refusing to answer the four questions designated above by count numbers. The sole government witness at the trial was the Committee's counsel who testified that the purpose of the hearings was to find out how serious the Communist propaganda infiltration was in basic industry, particularly in the steel industry. The Committee wanted information on this subject, he stated, to decide whether to

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stand fully the extent of such practices, the full purposes of it, and the methods by which it is put into effect. That is the connective reasoning of the committee in asking the question."

amend various Acts of Congress and, in fact, members of the Committee did introduce several bills around the time of these hearings.[7] Prior to calling petitioner, he continued, the Committee had information that petitioner was a member of the Communist Party while at the University of Michigan, that he had applied for employment in Gary without disclosing his college education and that he had been employed in the steel industry in Gary.

The Committee Counsel emphasized that petitioner was summoned with the hope that he would cooperate and that the Committee believed petitioner had information about the colonization activities which had not been presented by any of the other witnesses. "We know nothing about the actual activities of the Communist Party in the steel plants in Indiana as of the time of this hearing, or shortly before. Mr. LaFleur, who did testify [at the Gary hearings], according to my recollection got out of the Communist Party in 1950. This witness, Mr. Yellin, as to whom we had testimony by several people, had been a member of the Communist Party at Michigan University, and had left there and come down and taken employment in Gary." [8]

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[7] H. R. 2369, 86th Cong., 1st Sess., sponsored by Congressman Walter, to redefine "organize" as used in the Smith Act; H. R. 3693, 86th Cong., 1st Sess., introduced by Congressman Scherer, to permit the Federal Government to guard strategic defense facilities against espionage, sabotage and other subversion; H. R. 9352, 85th Cong., 1st Sess., an omnibus bill to amend the Internal Security Act of 1950; H. R. 8121, 86th Cong., 2d Sess., a bill to provide a security program for defense contractors and their employees.

[8] "Q. [By Mr. Rabinowitz.] . . . [W]ill you state what information you had, and what additional information you hoped to get?

. . . . . .

"A. [By Committee Counsel.] As I was stating, the Committee had sworn testimony by two persons that Yellin was a member of the Communist Party at Michigan University. We had evidence

With respect to the denial of the request for an executive hearing, Committee Counsel testified as follows:

"Q. [By Mr. Rabinowitz.] Then why did you not comply with the request for an executive session?

"A. [By Committee Counsel.] . . . With the information that the Committee had regarding his membership, I would not have recommended—I will say this—I would not have recommended to the Committee, if they had asked, that he be heard in executive session.

"Q. Why not?

"A. Because we knew that he was a member of the Communist Party and he was in a position to give the Committee information, if he wanted to.

"Q. You knew he had been a member of the Communist Party?

"A. Yes.

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that he had been transferred there from New York City; that he came from Michigan University down here, down to Gary, Indiana, and there became employed in the steel plants.

. . . . . .

"We knew, from the statement made, by the information obtained from Mr. LaFleur, that Mr. Yellin had been active in Communist Party activities while employed by steel, the steel companies in Gary, and he so testified later, and it is in the record here.

"Now, with that information relating to Mr. Yellin, we felt certain that Mr. Yellin was in a position, if he would do so, to tell this Committee a great many things regarding the plan of the Communist Party to infiltrate the steel industry here, and to building up the Communist Party from its grass roots level, and just what the Communist Party plans were to make these bright young men leaders who did this thing of colonizing. He could have told us those things, from the position that he was in, if we were correct about his position, had he been willing to do so.

"But not a single witness who has been identified—who has been identified—as a colonizer in any of the places that you have mentioned, that I can recall, has ever admitted it, or ever testified that he had been a colonizer."

"Q. Many years before?

"A. Yes.

"Q. You didn't know whether he still was?

"A. If you had come and told me, now, this man has considerable information that he wants to give, that involves other people, and it ought to be thoroughly investigated before being made public, I would certainly have recommended that he be heard in executive session, but you never indicated that he was willing to do anything.

"Q. I did indicate that he wanted an executive session, though, didn't I?

"A. I say in the way of giving testimony.

"Q. And you did not feel that it was advisable to call an executive session for the purpose of determining whether he was prepared to give testimony, or not?

"A. My recollection is that he was sworn in as a witness, and you were sitting by his side, and at the beginning of the testimony you asked that we make a part of the record the telegrams which you had sent to the Committee. You didn't offer any suggestion then that he would give any information that would be of such a character that it ought to be taken in executive session to protect anybody while we were investigating to see whether the witness was telling the truth, or not."

Representative Walter of Pennsylvania, the Chairman of the House Un-American Activities Committee and of the Subcommittee which conducted the hearings in Gary, was called by petitioner. As far as he could recall, he did not know of petitioner's telegram asking for an executive session until the opening of the hearing in Gary. He pointed out that the telegram was not addressed to him and he had already departed for Gary when the telegram arrived. He stated that neither the Committee Counsel

nor the Staff Director had authority to pass on a request for an executive session and that when the matter of the telegram was raised at the hearings "it was too late then to raise any question that might have been raised by the telegram." When asked to explain, he said: "Well, the Committee already passed on the question of whether or not we would hear Mr. Yellin at a session when the purpose of calling him was discussed, and it was decided then that the rule with respect to an executive session was not applicable because the investigator—and I might say it was Mr. Collins, a former F.B.I. agent, who developed this entire matter, and we were willing to accept his story with respect to the proposed testimony." Mr. Collins' story, according to Chairman Walter, was "that the man was a known Communist; that he had been active in the international conspiracy, and that he had deceived his employer; and, furthermore, he came within the category of those people that we were experiencing a great deal of difficulty in finding out about with respect to the colonization." Congressman Walter further testified that petitioner's counsel at the hearing in Gary "didn't even there inform me as to the contents of the telegrams," which had not been sent to him, and also acknowledged that he had interrupted petitioner's counsel since "it is not the practice of the Committee to hear counsel, and that the function of counsel at Committee hearings is solely to confer with witnesses."

When asked to state the considerations which the Committee uses in determining whether to hold executive sessions, Chairman Walter explained: "This is usually done when the Committee is fearful lest a witness will mention the name of somebody against whom there is no sworn testimony, and in order to prevent the name of somebody being mentioned in public that we are not sure has been active in the conspiracy, at least that there isn't sworn testimony to that effect, we have an executive

hearing." He was aware that many witnesses refused to testify but "it is always worth a chance that somebody will testify . . . occasionally we are very pleasantly surprised at having somebody give us information that is of great value in the drafting of legislation."

Petitioner's challenge to his conviction is predicated upon, among other matters,[9] the claim that by the rules of the Committee he was improperly denied an executive session or at the very least a good-faith consideration of his request for one.

I.

Since petitioner did not refuse to testify at the hearing on the ground that it was a public rather than a private session, it is my view that he is not entitled, at this late stage, to rely upon the Committee's alleged failure to apply its executive session rule to him.

As the courts have repeatedly held, to be available as a defense in a contempt of Congress trial, an objection must have been relied upon and asserted before the congressional committee. *United States* v. *Bryan,* 339 U. S. 323, 332–333; *United States* v. *Fleischman,* 339 U. S. 349,

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[9] Petitioner also raises the following questions:

(1) Did the public interest in securing answers to the questions which were the subject of the indictment outweigh the petitioner's rights under the First Amendment and the public interest in the protection of the free exchange of ideas?

(2) Was the investigation carried on by the Committee in violation of the Constitution and particularly of the First Amendment thereof?

(3) Did the trial court err in excluding certain proffered evidence on the issue of the balancing of public rights and private interests?

(4) Was the statute under which petitioner was convicted unconstitutionally vague?

(5) Were the questions which formed the basis of Counts 2 and 4 too vague to support a valid indictment?

(6) In the circumstances here shown, was there any proper legislative purpose in issuing a subpoena to petitioner?

352; *Barenblatt* v. *United States,* 360 U. S. 109, 123–125; *McPhaul* v. *United States,* 364 U. S. 372; *Eisler* v. *United States,* 83 U. S. App. D. C. 315, 170 F. 2d 273; *Hartman* v. *United States,* 290 F. 2d 460 (C. A. 9th Cir.); *United States* v. *Kamin,* 136 F. Supp. 791. This is no technical quibble, for there are compelling reasons to require an objection to be pursued before the Committee. It serves the administration of justice to have objections seasonably made in order that asserted errors may be corrected at the earliest possible time. As is the case in proceedings before a trial court, 1 Wigmore (3d ed. 1940) § 18, at 322, the objecting party is required to state his position and afford an opportunity to act upon his claim. "The practice of withholding all objection until time of trial is not helpful in protecting a witness' right to a valid [hearing]. It prevents correction of any error in that respect and profits only the witness who seeks a concealed defect to exploit." *United States* v. *Bryan, supra,* at 344 (concurring opinion). Accordingly, if possible damage to petitioner's reputation was a ground for his demanding an executive session under the Committee's rules and for his refusal to answer questions put to him by the Committee, "a decent respect for the House of Representatives . . . would have required that [he] state [his] reasons . . . . To deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes." *Id.,* at 332–333.

There is certainly nothing in petitioner's telegram [10] which makes out a substantial demand for an executive session. It contains simply the request itself and the un-

[10] The telegram read: "Undersigned represents Edward Yellin and Nicholas Busic. On their behalf I request executive session in lieu of open session. Testimony needed for legislative purposes can be secured in executive session without exposing witnesses to publicity. Victor Rabinowitz."

supported conclusion of petitioner's counsel, who, without knowing the extent or direction of the investigation, insists that petitioner's questioning could as well be conducted in executive session. There is no mention of the Committee rule or the particular grounds upon which the request was founded, nor are there any factual assertions to bring to light considerations which under the rule would call for the executive session, such as facts showing potential damage to his reputation. Indeed, it is difficult to understand how petitioner, at the time of the request, could have anticipated any ground for an executive session under the rule since he had no way of knowing what questions would be asked of him. It was not at all unlikely that petitioner would be called, like any other employee working in the steel mills at that time irrespective of Communist Party affiliation, to relate what instances of infiltration he observed while at work. See Question, *ante,* p. 129. Moreover, the wire was directed to one without authority to grant or deny an executive session and was sent only four days prior to the hearings and after the Subcommittee had departed for Gary.

At the opening of the hearing, Chairman Walter was entirely unfamiliar with the contents of the wire. And the exchange which occurred at that time, set out in the margin,[11] can hardly be construed as a denial of a pointed

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[11] "Mr. TAVENNER. Will you state your name please, sir.

"Mr. YELLIN. Edward Yellin.

"Mr. TAVENNER. Will counsel accompanying the witness please identify himself for the record?

"Mr. RABINOWITZ. Victor Rabinowitz, New York.

"Mr. TAVENNER. Where and when were you born, Mr. Yellin?

"Mr. YELLIN. July 2, 1927, Bronx, New York.

"Mr. TAVENNER. Where do you now reside?

"Mr. YELLIN. Fort Collins, Colorado.

"Mr. SCHERER. I cannot hear the witness.

"The CHAIRMAN. Where? [*Footnote 11 continued on p. 138*]

request for an executive session based upon possible injury to Yellin's reputation. To be sure, Chairman Walter cut off petitioner's counsel immediately, but in terminating the discussion with counsel, the Chairman was simply making it clear that counsel's function before the Committee was to confer with the witness and not to argue with the Committee, which is in accordance with the Committee's rules. It was for the witness, with the help of his attorney, to answer the questions or to state his grounds for refusing to do so. The Chairman in no way indicated that the witness could not take up where counsel had left off.

"Mr. YELLIN. Fort Collins, Colorado.

"Mr. TAVENNER. How long have you lived at Fort Collins, Colorado?

"Mr. YELLIN. Since just about September of '57.

"Mr. TAVENNER. '50?

"Mr. YELLIN. September '57.

"Mr. TAVENNER. Where did you reside prior to—

"Mr. RABINOWITZ. Mr. Counsel, I wonder whether it would be possible to read into the record the exchange of telegrams between myself and the committee in connection with the witness's testimony. I would like to have it appear in the record.

"The CHAIRMAN. We will decide whether it will be made a part of the record when the executive session is held. Go ahead.

"Mr. RABINOWITZ. Mr. Chairman, I sent the telegrams because I wanted them to appear. I do not care whether they appear publicly or not. I do want it to appear that that exchange of telegrams occurred. I did not do it just to increase the revenue of the telegram company.

"The CHAIRMAN. Well, whatever the reason was, whether it has been stated or otherwise, it will be considered in executive session

"Mr. RABINOWITZ. May I state—

"The CHAIRMAN. Do not bother. You know the privileges given you by this committee. You have appeared before it often enough. You know as well as anybody.

"Go ahead, Mr. Tavenner."

As the immediately ensuing questioning reveals,[12] petitioner had every opportunity to state his reasons for refusing to answer and every opportunity to confer with counsel. But the grounds which petitioner then gave for not answering the Committee's questions were based principally upon the First Amendment and were not grounded upon Rule IV–A, upon an alleged right to testify

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[12] "Mr. TAVENNER. Mr. Yellin, where did you reside prior to September 1957?

"(The witness conferred with his counsel.)

"Mr. YELLIN. Mr. Tavenner, is that right?

"Mr. TAVENNER. Yes.

"Mr. YELLIN. Mr. Tavenner, if I may I would like to say just a few words before I answer that question to state my grounds as to what my position will be on answering questions.

"The CHAIRMAN. Just answer this question, not your grounds for answering questions that have not been asked.

"Mr. YELLIN. Then let me say that I feel that this question and this line of questioning will probably lead into certain areas of my freedom of beliefs, and I feel that I would like to say just a few words as to why I would not care to answer this question.

"The CHAIRMAN. It is not the case of whether you care to answer or not. It is a question of do you or do you not answer the question.

"(The witness conferred with his counsel.)

"Mr. YELLIN. Mr. Congressman, let me put it this way then: I will refuse to answer that question, and I would like the privilege—

"The CHAIRMAN. What is the question, Mr. Tavenner?

"Mr. TAVENNER. The question was where the witness lived prior to September 1957.

"The CHAIRMAN. And you feel honestly that if you answer the question of where you lived before September of last year, you might be confronted with a criminal prosecution, is that it?

"Mr. YELLIN. No. I didn't say that.

"The CHAIRMAN. You did not say that, but is that not what you mean?

"Mr. YELLIN. May I say what my objections are? If I can say what they are—

"The CHAIRMAN. Go ahead."

in private rather than in public or upon injury to his reputation.

More than once during the hearing the Committee took particular pains to ascertain the precise grounds upon which petitioner was refusing to testify. And on more than one occasion petitioner expanded and enlarged upon his reasons for not answering the Committee's questions. At no time, however, did he mention Rule IV–A or the matter of an executive session or specify how his reputation might be injured in a public hearing. Quite the contrary, when petitioner at one point asserted that he could not "see the purpose or the pertinency of asking me what they consider a known fact . . . it kind of appears to me as if this line of questioning is merely trying to create an impression and expose me for the sake of merely exposing me and not leading to any valid legislative purpose," Chairman Walter assured him that the Committee had never asked questions for the mere sake of exposing and then inquired: "And now I would like to ask you: What do you mean by exposing you? Exposing you to what?" Petitioner's answer was entirely unresponsive. He did not explain how he would be exposed or injured and instead launched upon a discussion of academic freedom. At another point, when petitioner said: "I don't like to have my loyalty questioned or my character questioned," Chairman Walter said: "Isn't this the best place to clarify the atmosphere? If you feel as you say you do, and I am sure that you do, is this not a great opportunity to eliminate whatever question might be in anybody's mind, particularly mine, about your activities?" Petitioner's answer was to decline to discuss himself. He did not accept the invitation to say how or in what manner his reputation would be unjustly injured by testifying in public.

Even if there could be sifted from this record a bona fide assertion of a right to an executive session and a re-

fusal to answer based upon that ground, petitioner consistently relied upon other grounds as well and it would sweep away much established law in this Court to give his claim to an executive session any practical significance. Petitioner's central thesis and repeated reasons for not responding to questions put to him by the Committee were based upon the First Amendment. These grounds were firmly and clearly put and petitioner in no way indicated that an executive session would have made any difference in his willingness to answer questions.

The Court considered a similar situation in *United States* v. *Bryan,* 339 U. S. 323, in connection with the same congressional committee. There, the witness at her trial for contempt asserted that her failure to produce records at the hearing was excusable because there was not a quorum present, but that ground was held unavailable because she had relied upon other grounds at the hearing. "Testimonial compulsion is an intensely practical matter. . . . [T]he fact that the alleged defect upon which respondent now insists is, in her own estimation, an immaterial one, is clearly shown by her reliance before the Committee upon other grounds for failing to produce the records. She does not deny, and the transcript of the hearing makes it perfectly clear, that she would not have complied with the subpoenas no matter how the Committee had been constituted at the time." Explaining an analogous case, *Hale* v. *Henkel,* 201 U. S. 43, the *Bryan* Court noted that the witness in *Hale,* "having refused compliance for other reasons which the lower court could not remedy . . . could not later complain of its refusal to do a meaningless act—to grant him additional time to gather papers which he had indicated he would not produce in any event. Here respondent [Bryan] would have the Committee go through the empty formality of summoning a quorum of its members to gather in solemn conclave to hear her refuse to

honor its demands." *United States* v. *Bryan, supra,* at 334.[13]

Petitioner was represented at the hearing before the Committee by experienced counsel, the same counsel who represented the witness in the *Bryan* case. It is difficult to believe that if petitioner was in fact refusing to answer because he was called at a public hearing instead of an executive session, express reliance upon the Committee rule would not appear in the record along with the supporting reasons. Rather, it is far more likely that petitioner preferred to include among his several reasons for refusing to answer the ground that the Committee was seeking only to expose him for exposure's sake. See *Watkins* v. *United States,* 354 U. S. 178, 187, 200; *Sweezy* v. *New Hampshire,* 354 U. S. 234; *NAACP* v. *Alabama,* 357 U. S. 449. It would have weakened if not destroyed that ground if petitioner based his refusal to testify on the executive session ground and had been granted a private hearing. Quite plainly petitioner was seeking to keep his constitutional grounds intact.

It is no answer to say that this rule of diligence can be relaxed here because petitioner was not aware until the trial that the Committee might have ignored its own rules in deliberating upon whether or not to question him in private. The point is that if petitioner has any standing to complain about the manner in which the Committee acted, it must be because he asserted at the Committee hearing, when matters were still open to direct explanation and correction, that he would suffer unjust damage to

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[13] See also *Loubriel* v. *United States,* 9 F. 2d 807, 808:

"The question is no less than whether courts must put up with shifts and subterfuges in the place of truth and are powerless to put an end to trifling. They would prove themselves incapable of dealing with actualities if it were so, for there is no surer sign of a feeble and fumbling law than timidity in penetrating the form to the substance."

his reputation by a public session and that he had a right under the rules of the Committee to have his reputational interest considered. Compare *Watkins* v. *United States,* 354 U. S. 178, and *Sweezy* v. *New Hampshire,* 354 U. S. 234, where the specific grounds sustained by the Court were vigorously asserted at the hearing. The Committee is obliged to make clear the demands which it makes upon the witness. *Quinn* v. *United States,* 349 U. S. 155. There surely must be a reciprocal obligation on the part of the witness to advise the Committee of the precise grounds for his silence.

II.

In any event, however, the Committee did not, as petitioner contends, fail to apply its executive session rule to him.

Article I, § 5, cl. 2, of the Constitution provides that "Each House may determine the Rules of its Proceedings." The role that the courts play in adjudicating questions involving the rules of either house must of necessity be a limited one, for the manner in which a house or committee of Congress chooses to run its business ordinarily raises no justiciable controversy. *Field* v. *Clark,* 143 U. S. 649; *United States* v. *Ballin,* 144 U. S. 1; *Leser* v. *Garnett,* 258 U. S. 130, 137; cf. *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 143. However, when the application or construction of a rule directly affects persons other than members of the house, "the question presented is of necessity a judicial one." *United States* v. *Smith,* 286 U. S. 6, 33; *Christoffel* v. *United States,* 338 U. S. 84. Even when a judicial controversy is presented, the function of the courts is a narrow one. "With the courts the question is only one of power. The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights, and there should be a reasonable

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relation between the mode or method of proceeding established by the rule and the result which is sought to be attained. But within these limitations all matters of method are open to the determination of the house, and it is no impeachment of the rule to say that some other way would be better, more accurate or even more just." *United States* v. *Ballin, supra,* at 5; *United States* v. *Smith, supra.*

The Committee, pursuant to enabling resolutions of the House of Representatives in exercise of that rule-making power, promulgated its rules of procedure, number IV–A of which is in issue here:

> "IV—Executive and Public Hearings:
>
> "A—*Executive:*
>
> "(1) If a majority of the Committee or Subcommittee, duly appointed as provided by the rules of the House of Representatives, believes that the interrogation of a witness in a public hearing might endanger national security or unjustly injure his reputation, or the reputation of other individuals, the Committee shall interrogate such witness in an Executive Session for the purpose of determining the necessity or advisability of conducting such interrogation thereafter in a public hearing.
>
> "(2) Attendance at Executive Sessions shall be limited to Members of the Committee, its staff, and other persons whose presence is requested, or consented to by the Committee.
>
> "(3) All testimony taken in Executive Sessions shall be kept secret and shall not be released or used in public sessions without the approval of a majority of the Committee."

Petitioner's claim is that in deciding to hold a public hearing in his case rather than to take his testimony in executive session, the Committee failed to give him the

full benefit of the rule because it did not consider whether "interrogation of a witness in a public hearing might . . . unjustly injure his reputation" and instead considered only injury to the reputation of other individuals. I find this contention wholly without substance.

My understanding of the testimony in the trial court is that when a witness before the Committee may implicate third persons about whom the Committee does not have reliable information, an executive session is held. In terms of Rule IV–A an executive session is afforded in these circumstances because an open hearing "might . . . unjustly injure . . . the reputation of other individuals." It is otherwise and a closed session is not required when the Committee has adequate and reliable information about the other individuals the witness may mention, for their reputation would not then be "unjustly injured" by revealing verified information in a public session.

The same considerations apply to the witness himself. "Certainly," as Mr. Tavenner testified, the rule operates for the benefit of the party testifying. See Opinion of the Court, *ante*, p. 116, n. 5. According to both Mr. Tavenner and Mr. Walter, Yellin was denied an executive session under the rule because he was a known Communist and the Committee had sworn testimony to this effect. The Committee believed the information furnished by its investigators about Yellin to be reliable. Measured against the plain terms of Rule IV–A, these facts did not call for a closed session. There was sworn testimony or other proof to back up the questions to be asked. There would be no "unjust injury" to the reputation of the witness Yellin. Publicly interrogating a witness if the Committee's foundation for its questions rests only upon suspicion or rumor falls within the area of unjust injury to reputation. But public revelation of the truth does not.

The foregoing appears to me to be the construction which the Committee placed upon its own rules and as so

construed it was applied here. It is true that in stating generally the considerations entering into the holding of an executive session, Mr. Walter said that private hearings are "usually" granted when third persons may be mentioned against whom there is no sworn testimony and that he did not know of any other considerations. But this general remark is, at best, ambiguous and is supplemented by his previous statements concerning the Committee's decision to hold a public hearing in petitioner's own case. That decision, according to his testimony, plainly was based upon the Committee's appraisal of its information about petitioner. Yellin was not denied an executive session because there was no indication of injury to third persons. The considerations underlying the denial were peculiar to Yellin himself. In the Committee's view, its information about him was reliable and adequate, his reputation would not be unjustly injured and he was therefore not entitled to a closed session. The Committee did not, as petitioner urges, fail to consider any element of its rule when it determined to interrogate him in a public hearing.

While the testimony is reasonably clear as to the Committee's construction and application of its own rule, if there were any doubt about the matter it is not our place to resolve every doubt against the Committee. "The presumption in favor of regularity, which applies to the proceedings of courts, cannot be denied to the proceedings of the Houses of Congress, when acting upon matters within their constitutional authority." *Barry* v. *United States ex rel. Cunningham,* 279 U. S. 597, 619. See also *McGrain* v. *Daugherty,* 273 U. S. 135, 179–180; *In re Chapman,* 166 U. S. 661, 670. Cf. *Tenney* v. *Brandhove,* 341 U. S. 367, 378. Due regard for the legislative branch of the Government requires a considerably clearer showing than what is offered here that the long-time Chairman of the Committee did not know his own rules when he

testified that the Committee had considered the request for an executive session and determined that the rule did not require it.

The Committee's construction of its own rules is entitled to great weight. *United States* v. *Smith,* 286 U. S. 6; *Christoffel* v. *United States,* 338 U. S. 84. "To place upon the standing rules of the [Congress] a construction different from that adopted by the [Congress] . . . is a serious and delicate exercise of judicial power." *United States* v. *Smith, supra,* at 48. Here, the Committee under its rule does not deem it to be unjust injury where the truth about the witness or a third person is brought out in a public hearing in pursuance of a valid legislative purpose. This reading of Rule IV–A is not bizarre, irrational or so out of keeping with history as to permit a court to ignore it because it would prefer a different construction or an entirely different rule. The House of Representatives has its own rule concerning executive sessions, Rule XI (m), which, according to the testimony at petitioner's trial and as contrasted with the rule of the Committee, has been construed by the House to afford no protection at all to the witness himself. Moreover, § 103 of the Revised Statutes, as amended, 2 U. S. C. § 193 provides that "[n]o witness is privileged to refuse to testify to any fact . . . upon the ground that his testimony to such fact . . . may tend to disgrace him or otherwise render him infamous." Whatever other problems may inhere in the rule of the Committee, of the House or in the statute, the Committee's construction of its own rule heralds no break with the tradition of the House or of Congress in affording privacy to a witness when the hearing may be a fishing expedition or an inquiry into mere rumor but permitting a public session when the matter to be brought out is both pertinent to a legislative purpose and nothing but the unvarnished truth. "The Constitution commits to the [House] the

power to make its own rules; and it is not the function of the Court to say that another rule would be better." *United States* v. *Smith, supra,* at 48.

Nor is there substance in petitioner's claim that the Committee erroneously failed to act upon the telegraphic request. Under the rule, all that is required is that the Committee consider whether to hold the session in an executive hearing. Cf. *United States ex rel. Accardi* v. *Shaughnessy,* 347 U. S. 260. Here, the Committee on its own motion, even before the telegram was transmitted, had given full consideration to whether petitioner should be questioned in private. Whatever would have been the prejudice resulting from disregarding the telegram and totally failing to consider whether the questioning should be conducted in secret, there is no room for complaint on this record since the Committee had already deliberated on the matter. Once it made its assessment, as it did here, it discharged any obligation which its own rules imposed.

III.

If "testimonial compulsion is an intensely practical matter" and "every exemption from testifying or producing records thus presupposes a very real interest to be protected," *United States* v. *Bryan,* 339 U. S., at 332, much of this discussion is really beside the point. Petitioner was convicted for refusing to answer four questions, each refusal constituting a separate count in the indictment. He was found guilty on all four counts, his sentences to run concurrently. His conviction must stand if his refusal to answer any one of the questions was unjustified. *Claassen* v. *United States,* 142 U. S. 140, 147; *Hirabayashi* v. *United States,* 320 U. S. 81, 85; *Barenblatt* v. *United States,* 360 U. S. 109, 115. The first question which petitioner refused to answer was: "Mr. Yellin, where did you reside prior to September 1957?" Petitioner refused to respond because to him it was ob-

vious where "this line of questioning will probably lead" and, expressly disclaiming Fifth Amendment protection, declined to answer on First Amendment grounds.

Petitioner's conviction on Count 1 should stand quite independently as against the claim to an executive session for it is difficult indeed to ascribe any reality to the view that petitioner may not be compelled, in a public hearing held by a legislative committee in pursuit of information pertinent to a legislative purpose, to answer, or to refuse to answer, a question about his residence prior to 1957 because of danger to his reputation. Oversight of congressional committee procedures should not be based upon such frivolous grounds.

In my view, petitioner's executive session argument is totally without support, and therefore I dissent.

UNITED STATES *v.* MUNIZ ET AL.

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

No. 464. Argued April 22–23, 1963.—Decided June 17, 1963.

A federal prisoner can sue under the Federal Tort Claims Act to recover damages from the United States for personal injuries sustained during confinement in a federal prison and resulting from the negligence of a government employee. *Feres* v. *United States*, 340 U. S. 135, distinguished. Pp. 150–166.

305 F. 2d 253, 285, affirmed.

J. William Doolittle argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Acting Assistant Attorney General Douglas, Morton Hollander* and *Howard E. Shapiro.*

John J. Abt and *Richard D. Friedman* argued the cause for respondents. With them on the briefs was *Charles Andrews Ellis.*

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

The question in this case is whether a person can sue under the Federal Tort Claims Act [1] to recover damages from the United States Government for personal injuries sustained during confinement in a federal prison, by reason of the negligence of a government employee. For reasons to be developed below, we hold that such suits are within the purview of the Act.

This litigation, brought here by the Government as a single case, arises from two separate suits for personal injuries brought by respondents Henry Winston and Carlos Muniz in the United States District Court for the

[1] 28 U. S. C. §§ 1346 (b), 2671–2680.

Southern District of New York. Both sought damages for personal injuries suffered while they were confined in federal prisons. The district judge granted the Government's motions to dismiss in both cases on the ground that such suits were not permitted by the Federal Tort Claims Act. The Court of Appeals for the Second Circuit, sitting *en banc,* reversed, four judges dissenting. 305 F. 2d 264, 287.[2] Because the decision below involves an important question in the construction of the Federal Tort Claims Act and because two Courts of Appeals had previously reached a contrary result,[3] we granted certiorari. 371 U. S. 919.

Winston alleged that in April 1959, while he was confined in the United States Penitentiary at Terre Haute, Indiana, he began suffering dizziness, loss of balance, and difficulty with his vision. Upon Winston's initial complaint, the prison medical officer's diagnosis was borderline hypertension; the treatment, a reduction in weight. Winston's symptoms nevertheless recurred with increasing severity over the next nine months; he was unable to keep his balance and fell frequently. He also began to suffer periodic loss of vision. Despite repeated complaints to the prison officers, Winston was given no further treatment, except some dramamine for his dizziness. In January 1960, Winston's attorney became alarmed by his condition and had him examined by a consulting physician. In February 1960, an operation successfully removed the benign brain tumor which had caused Winston's difficulties, but his sight could not be saved.

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[2] The orders of the District Court were initially reversed by a panel of three judges, one judge dissenting. 305 F. 2d 253, 285. On rehearing *en banc,* the panel decisions were upheld. 305 F. 2d 264, 287.

[3] *James* v. *United States,* 280 F. 2d 428 (C. A. 8th Cir.), cert. denied, 364 U. S. 845; *Lack* v. *United States,* 262 F. 2d 167 (C. A. 8th Cir.); *Jones* v. *United States,* 249 F. 2d 864 (C. A. 7th Cir.).

Winston alleged that the negligence of the prison employees was responsible for the delay in diagnosis and removal of the tumor and caused his blindness.

Respondent Muniz alleged that he was, in August 1959, a prisoner in a federal correctional institution in Danbury, Connecticut. On the afternoon of August 24, Muniz was outside one of the institution's dormitories when he was struck by an inmate, and then pursued by 12 inmates into another dormitory. A prison guard, apparently choosing to confine the altercation instead of interceding, locked the dormitory. The 12 inmates who had chased Muniz into the dormitory set upon him, beating him with chairs and sticks until he was unconscious. Muniz sustained a fractured skull and ultimately lost the vision of his right eye. He alleged that the prison officials were negligent in failing to provide enough guards to prevent the assaults leading to his injuries and in letting prisoners, some of whom were mentally abnormal, intermingle without adequate supervision.

Whether respondents are entitled to maintain these suits requires us to determine what Congress intended when it passed the Federal Tort Claims Act in 1946. This question would not appear at first glance to pose serious difficulty. Congress used neither intricate nor restrictive language in waiving the Government's sovereign immunity. It gave the District Courts jurisdiction

> "of civil actions on claims against the United States, for money damages, . . . for . . . personal injury . . . 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." 28 U. S. C. § 1346 (b).

The Act also provides that the "United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances." 28 U. S. C. § 2674. Congress qualified this general waiver of immunity in 28 U. S. C. § 2680 by excepting from the Act claims arising from certain government activity, such as transmission of postal matter, assessment of taxes, imposition of a quarantine, or operation of the Panama Canal. None of the exceptions precludes suit against the Government by federal prisoners for injuries sustained in prison. So far as it appears from the face of the Act, Congress has clearly consented to suits such as those involved in the case at bar. Whether a claim could be made out would depend upon whether a private individual under like circumstances would be liable under state law, but prisoners are at least not prohibited from suing. Since a number of lower courts have nevertheless reached a contrary conclusion,[4] largely in reliance upon our decision in *Feres* v. *United States,* 340 U. S. 135, we deem it appropriate to make a more detailed investigation into the intent of Congress.

An examination of the legislative history of the Act reinforces our conclusion that Congress intended to permit such suits. For a number of reasons, it appears that Congress was well aware of claims by federal prisoners

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[4] *James* v. *United States,* 280 F. 2d 428 (C. A. 8th Cir.), cert. denied, 364 U. S. 845; *Lack* v. *United States,* 262 F. 2d 167 (C. A. 8th Cir.); *Jones* v. *United States,* 249 F. 2d 864 (C. A. 7th Cir.); *Berman* v. *United States,* 170 F. Supp. 107; *Golub* v. *United States,* Civil No. 148–117, D. C. S. D. N. Y., Oct. 5, 1959; *Collins* v. *United States,* No. T–1509, D. C. D. Kansas, Jan. 29, 1958; *Trostle* v. *United States,* No. 1493, D. C. W. D. Mo., Feb. 20, 1958; *Van Zuch* v. *United States,* 118 F. Supp. 468; *Shew* v. *United States,* 116 F. Supp. 1; *Sigmon* v. *United States,* 110 F. Supp. 906; *Ellison* v. *United States,* No. 1003, D. C. W. D. N. C., July 26, 1951.

and that its failure to exclude them from the provisions of the Act in 28 U. S. C. § 2680 was deliberate. First, the Federal Tort Claims Act, as part of the Legislative Reorganization Act of 1946,[5] was designed not only to avoid injustice to those having meritorious claims hitherto barred by sovereign immunity, but to eliminate the burden on Congress of investigating and passing upon private bills seeking individual relief. See *Dalehite* v. *United States,* 346 U. S. 15, 24–25; *Feres* v. *United States,* 340 U. S. 135, 139–140.[6] The task of screening these bills was substantial. See, *e. g.*, 74 Cong. Rec. 6868. Private claim bills introduced in the Sixty-eighth through the Seventy-eighth Congresses averaged 2,000 or more per Congress, roughly 20% of which were enacted. H. R. Rep. No. 1287, 79th Cong., 1st Sess. Among the private claim bills were a number submitted on behalf of federal prisoners, of which, between 1935 and 1946, Congress passed 21.[7] The much larger number of private bills that must have been introduced were therefore among those adding to Congress' burdens. In these circumstances it cannot be assumed that Congress was unaware of their presence.

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[5] August 2, 1946, c. 753, 60 Stat. 812.

[6] To ensure transfer of private claims to the courts, Congress prohibited introduction of private bills for claims cognizable under the Federal Tort Claims Act. Legislative Reorganization Act of 1946, § 131, 60 Stat. 831, 2 U. S. C. § 190g.

[7] Act of August 13, 1935, 49 Stat. 2132; Act of August 26, 1935, 49 Stat. 2182; Act of March 7, 1936, 49 Stat. 2233; Act of March 7, 1936, 49 Stat. 2234; Act of June 11, 1937, 50 Stat. 986; Act of June 15, 1937, 50 Stat. 993; Act of June 29, 1937, 50 Stat. 1011; Act of July 19, 1937, 50 Stat. 1036; Act of April 13, 1938, 52 Stat. 1293; Act of July 15, 1939, 53 Stat. 1473; Act of August 5, 1939, 53 Stat. 1501; Act of August 21, 1941, 55 Stat. 955; Act of November 21, 1941, 55 Stat. 971; Act of February 10, 1942, 56 Stat. 1101; Act of February 18, 1942, 56 Stat. 1112; Act of June 6, 1942, 56 Stat. 1180; Act of December 17, 1942, 56 Stat. 1244; Act of February 22, 1944, 58 Stat. 948; Act of May 29, 1944, 58 Stat. 982; Act of December 20, 1944, 58 Stat. 1070; Act of July 25, 1946, 60 Stat. 1264.

A second indication that Congress was conscious of claims by federal prisoners is found in the prior versions of the Act. Efforts to permit tort suits against the Government began in 1925 with the introduction of H. R. 12178, 68th Cong., 2d Sess.[8] Thereafter, at least one bill was introduced in every Congress, with the exception of the Seventy-fifth, until the present Act was passed by the Seventy-ninth Congress in 1946. Though the provisions of these bills underwent change during the intervening 21 years, the similarities are noteworthy. With the amendment of S. 1912 in the Sixty-ninth Congress, First Session, for example, came the first specific exceptions to the general waiver of sovereign immunity. Two of those exceptions, relating to postal matters and taxation, were cast in language virtually identical to that used in the Act ultimately passed 20 years later. And as exceptions were added over the years, most relieved the Government from liability in the same circumstances as the present Act. Only a few exceptions were at one time proposed and later dropped, without counterpart in the present Act.[9] One such exception related to claims by federal

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[8] The Government already had consented to suits upon admiralty and maritime torts involving government vessels in the Suits in Admiralty Act, 41 Stat. 525, 46 U. S. C. §§ 741–752, and the Public Vessels Act, 43 Stat. 1112, 46 U. S. C. §§ 781–790.

[9] In a few bills, an exception was made for claims arising out of negligent treatment in government hospitals. No such exception was made in the Act and sovereign immunity was clearly waived as to such claims. See, *e. g.*, *United States* v. *Brown*, 348 U. S. 110.

Three exceptions would have barred recovery under the Act where comprehensive compensation schemes were in effect: (1) claims covered by the Federal Employees' Compensation Act; (2) claims for personal injuries incurred by military personnel on active duty; and (3) claims for destruction of personal property belonging to military personnel on active duty covered by predecessors of the Military Personnel Claims Act of 1945. The three applicable compensation statutes have been held to be exclusive: (1) *Johansen* v. *United States*,

prisoners. Six of the 31 bills introduced in Congress between 1925 and 1946 either barred prisoners from suing while in federal prison or precluded suit upon any claim for injury to or death of a prisoner.[10] That such an exception was absent from the Act itself is significant in view of the consistent course of development of the bills proposed over the years and the marked reliance by each succeeding Congress upon the language of the earlier bills. We therefore feel that the want of an exception for prisoners' claims reflects a deliberate choice, rather than an inadvertent omission.

Finally, the Report of the House Committee on the Judiciary made explicit reference to the laws of four States, which had relaxed, to differing degrees, the rule

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343 U. S. 427; *Sasse* v. *United States,* 201 F. 2d 871 (C. A. 7th Cir.); but cf. *Parr* v. *United States,* 172 F. 2d 462 (C. A. 10th Cir.); (2) *Feres* v. *United States,* 340 U. S. 135 (at least to the extent of service-connected injuries of active duty personnel); and (3) *Preferred Ins. Co.* v. *United States,* 222 F. 2d 942 (C. A. 9th Cir.), cert. denied, 350 U. S. 837.

Exceptions relating to the administration of laws by the SEC and FTC or to the effect of an Act of Congress or an Executive Order no longer appear, but are subsumed under 28 U. S. C. § 2680 (a), which excludes claims based "upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid . . . ."

Other than the exception for prisoners' claims, discussed in the text, the only remaining exceptions having no counterpart in the present Act barred liability for governmental activity relating to flood control, harbor and river work, and irrigation projects. To the extent that these activities constitute "discretionary function[s]," the exception of 28 U. S. C. § 2680 (a) still preserves government immunity. *United States* v. *Ure,* 225 F. 2d 709 (C. A. 9th Cir.); *Coates* v. *United States,* 181 F. 2d 816 (C. A. 8th Cir.); *McGillic* v. *United States,* 153 F. Supp. 565.

[10] H. R. 17168, 71st Cong., 3d Sess.; S. 211, 72d Cong., 1st Sess.; S. 4567, 72d Cong., 1st Sess.; H. R. 5065, 72d Cong., 1st Sess.; S. 1833, 73d Cong., 1st Sess.; S. 1043, 74th Cong., 1st Sess.

of sovereign immunity.[11] H. R. Rep. No. 1287, 79th Cong., 1st Sess. The report noted that such "legislation does not appear to have had any detrimental or undesirable effect." *Id.*, at 3.[12] In one of those four States, New York, it was well settled by 1946 that persons could recover for injuries sustained in prison.[13] Congressional

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[11] The House Report accompanied H. R. 181, 79th Cong., 1st Sess., which related only to tort claims. The Federal Tort Claims Act passed at the Second Session of the Seventy-ninth Congress as Title IV of the Legislative Reorganization Act of 1946 was virtually identical to H. R. 181, except that there was no limitation of liability.

[12] N. Y. Laws 1929, c. 467, provided, in part:

"The state hereby waives its immunity from liability for the torts of its officers and employees and consents to have its liability for such torts determined in accordance with the same rules of law as apply to an action in the supreme court against an individual or a corporation, and the state hereby assumes liability for such acts, and jurisdiction is hereby conferred upon the court of claims to hear and determine all claims against the state to recover damages for injuries to property or for personal injury caused by the misfeasance or negligence of the officers or employees of the state while acting as such officer or employee. . . ."

The laws of the other three States to which Congress referred, California, Arizona, and Illinois, conferred jurisdiction upon the state courts to hear suits against the state governments for negligence. Cal. Stat. 1893, c. 45; Ariz. Laws 1912, c. 59; Ill. Laws 1917, p. 325. However, the state courts did not construe the grant of jurisdiction as a waiver of sovereign immunity and continued to find the Government immune, at least when it was acting in a governmental rather than a proprietary capacity. *E. g., Denning* v. *State,* 123 Cal. 316, 55 P. 1000; *State* v. *Sharp,* 21 Ariz. 424, 189 P. 631; *Monahan* v. *State,* 10 C. C. R. 10 (Ill. Ct. of Claims).

The House Report does not make this distinction apparent, nor for that matter does the report refer with any particularity to the laws of any State.

[13] *E. g., Paige* v. *State,* 269 N. Y. 352, 199 N. E. 617 (1936); *White* v. *State,* 260 App. Div. 413, 23 N. Y. S. 2d 526, aff'd, 285 N. Y. 728, 34 N. E. 2d 896 (1941). The remedy was limited to some extent,

equanimity in the face of such liability further strengthens the conclusion that Congress intended to permit suits by federal prisoners.

Considering the plain import of the statutory language, the number of prisoners' claims among the individual applications for private bills leading to the passage of the Federal Tort Claims Act, the frequent mention of a prisoner-claims exception in proposed bills, and the reference, among others, to New York law, which permitted recovery by prisoners, we believe it is clear that Congress intended to waive sovereign immunity in cases arising from prisoners' claims.[14]

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however, since a "civil death" statute, N. Y. Penal Law § 510, precluded suit while the person was still in prison.

At the time Congress passed the Federal Tort Claims Act, Illinois had just amended its laws and waived its sovereign immunity in tort suits. Ill. Laws 1945, p. 660 (now Ill. Rev. Stat., 1961, c. 37, § 439.8). Under this amendment, Illinois prisoners were permitted to recover against the State for negligently caused injuries incurred in prison. *E. g., Moore* v. *State,* 21 C. C. R. 282 (Ill. Ct. of Claims). This change in Illinois law occurred after H. R. Rep. No. 1287, 79th Cong., 1st Sess., was prepared and was not brought to Congress' attention.

[14] It is true, as the Government points out, that Congress has, since 1946, passed private bills for the relief of federal prisoners. *E. g.,* Act of June 21, 1955, 69 Stat. A30; Act of June 29, 1956, 70 Stat. A97. Since § 131 of the Legislative Reorganization Act of 1946, 2 U. S. C. § 190g, does not permit such bills if recovery is available under the Federal Tort Claims Act, Congress' passage of private bills must, the Government argues, be taken as congressional approval of the decisions barring suit by federal prisoners. However, the construction given an Act of the Seventy-ninth Congress by the Eighty-fourth Congress is not determinative, *Rainwater* v. *United States,* 356 U. S. 590, 593, and the acquiescence of subsequent Congresses does not of necessity constitute approval. "We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation." *Jones* v. *Liberty Glass Co.,* 332 U. S. 524, 534.

The Government argues nevertheless that we should imply an exception to the Federal Tort Claims Act. For one thing, the Government urges that our decision in *Feres* v. *United States,* 340 U. S. 135, controls. For another, it maintains that the impact of liability upon prison discipline would so seriously impair the administration of our prisons that Congress could not have intended such an "extreme" result.

The Court held, in *Feres* v. *United States,* that a soldier could not sue under the Federal Tort Claims Act for injuries which "arise out of or are in the course of activity incident to service." 340 U. S., at 146. Among the principal reasons articulated for doing so were: (1) the absence of an analogous or parallel liability, on the part of either an individual or a State; no individual has power to mobilize a militia, no State had been held liable to its militiamen; (2) the presence of a comprehensive compensation system for service personnel; (3) the dearth of private bills from the military; (4) the distinctly federal relationship of the soldier to his superiors and the Government, which should not be disturbed by state laws; and (5) the variations in state law to which soldiers would be subjected, involuntarily, since they have no choice in where they go. Although we find no occasion to question *Feres,* so far as military claims are concerned, the reasons for that decision are not compelling here.

First, the Government's liability is no longer restricted to circumstances in which government bodies have traditionally been responsible for misconduct of their employees. The Act extends to novel and unprecedented forms of liability as well. *Indian Towing Co.* v. *United States,* 350 U. S. 61; *Rayonier, Inc.,* v. *United States,* 352 U. S. 315. And in any event, an analogous form of liability exists. A number of States have allowed prisoners to recover from their jailers for negligently caused

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injuries [15] and several States have allowed such recovery against themselves.[16]

Second, the presence of a compensation system, persuasive in *Feres,* does not of necessity preclude a suit for negligence. In *United States* v. *Brown,* 348 U. S. 110, a veteran sought damages for negligent treatment in a Veterans Administration Hospital aggravating a service-incurred injury. The veteran received additional compensation for the aggravation of the injury, even though he was no longer on active duty. The Court nonetheless held that he could bring suit under the Federal Tort Claims Act. Also, the compensation system in effect for prisoners in 1946 was not comprehensive. It provided compensation only for injuries incurred while engaged in prison industries. Neither Winston nor Muniz would have been covered.[17]

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[15] See cases collected at 14 A. L. R. 2d 353; see also Woody, Recovery by Federal Prisoners under the Federal Tort Claims Act, 36 Wash. L. Rev. 338, 353, n. 83.

[16] New York, see note 12, *supra;* Illinois, see note 13, *supra;* North Carolina, N. C. Gen. Stat., 1958, § 143–291; *Ivey* v. *North Carolina Prison Dept.,* 252 N. C. 615, 114 S. E. 2d 812; Washington, Wash. Laws 1961, c. 136.

[17] The predecessor of 18 U. S. C. § 4126 provided compensation in 1946 only for prisoners working for Federal Prison Industries, Inc. Only 20% of all federal prisoners were so engaged. 1957 Rep. Atty. Gen. 409. And even those prisoners would not have been covered for injuries sustained outside working hours. In 1961, Congress extended compensation "to inmates or their dependents for injuries suffered in any industry or in any work activity in connection with the maintenance or operation of the institution where confined." 18 U. S. C. § 4126, as amended, Sept. 26, 1961, 75 Stat. 681. Even this broadened coverage fails to reach roughly 10% of the prisoners who are physically unable to work. 1957 Rep. Atty. Gen. 409. And, in any event, the compensation system still fails to provide for non-work injuries, contrary to that applicable to military personnel. Finally, the alteration of a compensation scheme 15 years after Congress passed the Federal Tort Claims Act does not provide reliable insight into the then existing congressional intent.

Third, private bills were never a problem in the military, *Feres* v. *United States,* 340 U. S. 135, 140, as Congress might have thought them to be in the case of prisoners.[18]

Admittedly, the remaining reasons for the decision in *Feres,* flowing from the impact of state law upon a federal establishment, could have relevance to the prisons as well as the armed forces. The variations in state law may to some extent hamper uniform administration of federal prisons, as it was feared they would hamper the military. And the prisoners' opportunities to recover may be affected by differences in state law over which they have no control, a position shared by service personnel whose location is determined by government order rather than personal volition. So far as uniformity of operation is concerned, however, we have been given few concrete examples of how variations in personal injury law would impair the prison system.[19] We are told not that the Government will be judged under too high a standard but under too many. This seems more a matter of conjecture than of reality. The published decisions in which prisoners have sought damages have related more to the precautions necessary to protect a kitchen worker from getting steel wool in his fingers,[20] to protect a prisoner from an exploding emery wheel,[21] or to protect a prisoner

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[18] See note 7, *supra.*

[19] One suggestion was that Kansas might find a 10 to 1 guard to prisoner ratio necessary, while Alabama would be satisfied with 30 to 1; thus the wardens of penitentiaries at Leavenworth and Atlanta would have to shape their conduct to different state standards. It would seem more probable, however, that no State has so carefully delineated the boundary between negligence and reasonable care and that, in any event, wardens would assign the number of guards they could afford or thought necessary, rather than the number that might satisfy state concepts of due care.

[20] See *Van Zuch* v. *United States,* 118 F. Supp. 468.

[21] See *Sigmon* v. *United States,* 110 F. Supp. 906.

from falling off a ladder,[22] than to some delicate matter of prison administration. Even a matter such as improper medical treatment can be judged under the varying state laws of malpractice without violent dislocation of prison routine. Cf. *Panella* v. *United States,* 216 F. 2d 622 (C. A. 2d Cir.). Without more definite indication of the risks of harm from diversity, we conclude that the prison system will not be disrupted by the application of Connecticut law in one case and Indiana law in another to decide whether the Government should be liable to a prisoner for the negligence of its employees. Finally, though the Government expresses some concern that the nonuniform right to recover will prejudice prisoners, it nonetheless seems clear that no recovery would prejudice them even more.

In the last analysis, *Feres* seems best explained by the

> "peculiar and special relationship of the soldier to his superiors, the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty . . . ." *United States* v. *Brown,* 348 U. S. 110, 112.

We also are reluctant to believe that the possible abuses stemming from prisoners' suits are so serious that all chance of recovery should be denied. It is possible, as the Government suggests, that frivolous suits will be brought, designed only to harass or, more sinister, discover details of prison security useful in planning an escape. And it is possible that the Government will be subjected to the burden of pretrial preparation, discovery, and trial, even though it prevails on the merits. This seems an inescapable concomitant of any form of liability.

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[22] See *Lack* v. *United States,* 262 F. 2d 167 (C. A. 8th Cir.).

It is also possible that litigation will damage prison discipline, as the Government most vigorously argues. However, we have been shown no evidence that these possibilities have become actualities in the many States allowing suits against jailers, or the smaller number allowing recovery directly against the States themselves. See notes 15 and 16, *supra.*

In addition, Congress has taken steps to protect the Government from liability that would seriously handicap efficient government operations. We do not intimate any opinion upon their applicability to these complaints, since no such issue is presented for our review. We simply note that the Government is not without defenses. Most important, the Government is relieved from liability on

> "Any claim based upon an act or omission of an employee of the Government, exercising due care, *in the execution of a statute or regulation,* whether or not such statute or regulation be valid, or based upon *the exercise or performance* or the failure to exercise or perform *a discretionary function or duty* on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U. S. C. § 2680 (a). (Emphasis added.) [23]

Also, the Government is not liable for the intentional torts of its employees, 28 U. S. C. § 2680 (h), for which prisoners might be especially tempted to initiate retributive litigation.[24] We are confident that district judges, sitting without a jury as required by 28 U. S. C. § 2402, will be able to dispose of complaints intelligently without undue

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[23] See, *e. g., Morton* v. *United States,* 97 U. S. App. D. C. 84, 228 F. 2d 431.

[24] *Ibid.*

harm coming to our federal prisons.[25] Federal rules of procedure are not so inflexible that clearly frivolous suits need embarrass prison officials or burden United States Attorneys' offices.

One last point remains. Jailers in some States are not liable to their prisoners. For example, several States have decided that a warden in charge of a penitentiary, *Carder* v. *Steiner,* 225 Md. 271, 170 A. 2d 220, or a sheriff in charge of a county jail, *Bush* v. *Babb,* 23 Ill. App. 2d 285, 162 N. E. 2d 594, is immune from suit because he exercises a quasi-judicial function requiring the use of discretion. Another has decided that the master of a house of correction has no duty of care toward his prisoners which would make him liable for his negligence. *O'Hare* v. *Jones,* 161 Mass. 391, 37 N. E. 371. And there are overtones in these decisions suggesting that liability is also denied because of the fear that prison discipline would otherwise be undermined. Such cases should not be persuasive. Just as we refused to import the "casuistries of municipal liability for torts" in *Indian Towing,* so we think it improper to limit suits by federal prisoners because of restrictive state rules of immunity. Whether a discretionary function is involved is a matter to be decided under 28 U. S. C. § 2680 (a), rather than under state rules relating to political, judicial, quasi-judicial, and ministerial functions. And the duty of care owed by the Bureau of Prisons to federal pris-

[25] Though there are a number of instances in which federal courts have declined to review matters of internal prison discipline and administration, frequently upon application for habeas corpus, they have reviewed serious charges of deprivation of constitutional rights, *e. g., Pierce* v. *La Vallee,* 293 F. 2d 233 (C. A. 2d Cir.); *Sewell* v. *Pegelow,* 291 F. 2d 196 (C. A. 4th Cir.). See also *Panella* v. *United States,* 216 F. 2d 622 (C. A. 2d Cir.) (U. S. Public Health Service Hospital, Lexington, Ky.); *Coffin* v. *Reichard,* 143 F. 2d 443 (C. A. 6th Cir.) (U. S. Public Health Service Hospital, Lexington, Ky.).

oners is fixed by 18 U. S. C. § 4042, independent of an inconsistent state rule.[26] Finally, having decided that discipline in the federal prisons will not be so seriously impaired that all recovery should be denied for negligently inflicted injuries, we should not at the same time make recovery depend upon a State's decision to the contrary.[27]

The Federal Tort Claims Act provides much-needed relief to those suffering injury from the negligence of government employees. We should not, at the same time that state courts are striving to mitigate the hardships caused by sovereign immunity,[28] narrow the remedies pro-

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[26] 18 U. S. C. § 4042 provides:

"The Bureau of Prisons, under the direction of the Attorney General, shall—

"(1) have charge of the management and regulation of all Federal penal and correctional institutions;

"(2) provide suitable quarters and provide for the safekeeping, care, and subsistence of all persons charged with or convicted of offenses against the United States, or held as witnesses or otherwise;

"(3) provide for the protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States."

[27] Respondent Muniz suggests that a federal law should be developed, since some federal prisons are within federal enclaves. The suggestion is impractical, since some prisons are not within enclaves, and is forestalled by 45 Stat. 54, 16 U. S. C. § 457, which provides: "In the case of the death of any person by the neglect or wrongful act of another within a national park or other place subject to the exclusive jurisdiction of the United States, within the exterior boundaries of any State, such right of action shall exist as though the place were under the jurisdiction of the State within whose exterior boundaries such place may be; and in any action brought to recover on account of injuries sustained in any such place the rights of the parties shall be governed by the laws of the State within the exterior boundaries of which it may be." See, *e. g.*, *Stokes* v. *Adair*, 265 F. 2d 662 (C. A. 4th Cir.), cert. denied, 361 U. S. 816.

[28] See, *e. g.*, *Holytz* v. *Milwaukee*, 17 Wis. 2d 26, 115 N. W. 2d 618; *Muskopf* v. *Corning Hospital Dist.*, 55 Cal. 2d 211, 359 P. 2d 457;

vided by Congress.[29] As we said in *Rayonier, Inc.*, v. *United States, supra,* at 320, "There is no justification for this Court to read exemptions into the Act beyond those provided by Congress. If the Act is to be altered that is a function for the same body that adopted it."

Affirmed.

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

Williams v. *Detroit,* 364 Mich. 231, 111 N. W. 2d 1; *Molitor* v. *Kaneland Community Unit Dist. No. 302,* 18 Ill. 2d 11, 163 N. E. 2d 89; *Hargrove* v. *Cocoa Beach,* 96 So. 2d 130 (Fla.).

[29] See Pound, The Tort Claims Act: Reason or History? 30 NACCA L. J. — (1963).

MOSELEY, DOING BUSINESS AS MOSELEY PLUMBING & HEATING CO., *v.* ELECTRONIC & MISSILE FACILITIES, INC., ET AL.

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

No. 401. Argued April 16–17, 1963.—Decided June 17, 1963.

A plumbing and heating subcontractor brought suit under the Miller Act in a Federal District Court in Georgia against a prime contractor under contracts with the United States for construction work at two Air Force bases in Georgia seeking (1) recovery of amounts alleged to be due under the subcontracts, or (2) rescission of the subcontracts on grounds of fraud and recovery on a *quantum meruit* basis, or (3) recovery of the reasonable value of the labor and materials furnished, and (4) to enjoin the prime contractor from pursuing litigation which it had instituted in a New York State Court seeking arbitration proceedings in New York under provisions of the subcontracts, which the subcontractor claimed to be fraudulent. The District Court held that (1) the Miller Act gave the subcontractor the right to sue in the District where the subcontracts were performed and (2) the arbitration clause, if induced by fraud, would be vitiated; and it enjoined the arbitration proceedings in New York. The Court of Appeals reversed, holding that the subcontractor must arbitrate in New York under New York law. *Held:* The issue of fraud must first be determined by the District Court, since a determination that the subcontracts or their arbitration provisions were fraudulent would eliminate any conflict between them, the United States Arbitration Act and the Miller Act. Pp. 168–172.

306 F. 2d 554, reversed.

George C. Grant argued the cause for petitioner. With him on the brief was *T. Baldwin Martin.*

Newell Edenfield argued the cause for respondents. With him on the brief were *William H. Major* and *Lamar W. Sizemore.*

MR. JUSTICE CLARK delivered the opinion of the Court.

The primary issue in this case is whether a claim under the Miller Act, 40 U. S. C. §§ 270a–270d, as amended, based upon arbitration clauses in two subcontracts providing for arbitration of any dispute arising thereunder, is enforceable under the provisions of the United States Arbitration Act. 9 U. S. C. §§ 1, 2 and 3. The institution of this suit was directed toward the recovery of compensation alleged to be due under two subcontracts between the petitioner, a plumbing and heating contractor, and the respondent Electronic & Missile Facilities, Inc., who was the prime contractor under a contract with the United States Corps of Engineers, Savannah District, covering certain Nike Hercules missile installations at Robins Air Force Base Defense Area and Turner Air Force Base Defense Area, both of which are located in the State of Georgia. The subcontracts provided for arbitration in New York, and, disputes having arisen thereunder, the respondent filed suit in the Supreme Court of New York seeking an order directing arbitration in accordance with the arbitration provisions. Petitioner then filed this suit in the Middle District of Georgia, where the work under the subcontracts was performed, seeking (1) recovery of the amounts alleged to be due under the subcontracts; (2) rescission of the subcontracts—on grounds of fraud—and recovery on a *quantum meruit* basis; (3) in the alternative, failing in both of these claims, recovery of the reasonable value of the labor and materials furnished; and (4) an injunction enjoining the respondent from proceeding with its arbitration efforts in New York. Neither party sought to compel specific performance of the arbitration agreement. The District Court, holding (1) that the Miller Act gave petitioner the right to sue in the District Court where

the subcontracts were performed and (2) that the arbitration clause, if induced by fraud on the part of respondent, would be vitiated, made permanent its prior restraining order directed at the arbitration proceedings in New York. The Court of Appeals reversed, holding that petitioner must arbitrate in New York under New York law. 306 F. 2d 554. We granted certiorari. 371 U. S. 919. Petitioner attacks the subcontracts, as well as the arbitration agreement, as being fraudulent, and this issue, we conclude, must be first determined by the District Court. We therefore reverse the judgment and remand the case to the Court of Appeals with directions to remand to the District Court for further proceedings not inconsistent with this opinion.

I.

We need not elaborate at length on the involved factual situation since it is detailed in the opinions of the Court of Appeals and the District Court. As we have said, petitioner filed suit in the United States District Court for the Middle District of Georgia, the district in which the subcontracts were performed, alleging breach of contract for refusal to pay and seeking recovery for work which had been performed and, alternatively, rescission of the subcontracts on grounds of fraud. The suit was brought under the provisions of the Miller Act, which provides in pertinent part:

> "Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy . . . ." 40 U. S. C. § 270b (b).

It further provides that parties included within the Act "shall have the right to sue . . . and to prosecute said action to final execution and judgment . . . ." *Id.*, at § 270b (a). Respondent moved to dismiss the suit or stay the same so that the New York arbitration suit might proceed under the terms of both subcontracts, each of which provided that "[a]ny controversy or claim arising out of or relating to" the subcontracts or their breach would be submitted to arbitration in New York City under New York law. In denying these motions the District Court held that the Arbitration Act did not apply here since any other holding would nullify the provisions of the Miller Act. It also concluded that the allegations of fraud, if sustained, would, under Georgia law, rescind the subcontracts, including the agreement for arbitration.

The Court of Appeals, with one judge dissenting, reversed on the theory that the Miller Act was not enacted for the benefit of plaintiffs in the selection of a forum, but rather for the convenience of the defendant, and that this is the type of dispute that is and should be subject to arbitration. As to the issue of fraud, it held that federal law controls in determining whether an allegation of fraud precludes arbitration of a dispute arising under the subcontracts and concluded that, in order to bar arbitration under federal law, the allegation of fraud must be specifically directed to the arbitration clause rather than to the entire contract. Thus, it reversed the District Court on both points.

II.

At the outset we note, as we have indicated, that no request has been made here for the enforcement of the arbitration agreement included within the subcontracts. Indeed, the petitioner has attacked not only the subcontracts, but also the arbitration clauses contained therein,

as having been procured through fraud. With the pleadings in this posture, we are obliged to pass upon the priority in determination of that issue in the trial of the case. In essence, petitioner alleges that the subcontracts with him, as well as other subcontractors, were a fraudulent scheme to obtain a great amount of work and material from petitioner and the other subcontractors without making payment therefor and to "browbeat" petitioner and his fellow subcontractors into accepting much less than the value of their claims. One of the means used to effect such scheme was alleged to be the insertion in the subcontracts of an arbitration clause requiring arbitration of disputes in New York. Under either the Miller Act or the Arbitration Act, it seems clear that the issue of fraud should first be adjudicated before the rights of the parties under the subcontracts can be determined. It appears necessary, therefore, that the District Court proceed first to trial of this issue. In considering the question of the sufficiency of the pleadings with reference to the allegation of fraud, we believe that, as alleged here, the issue goes to the arbitration clause itself, since it is contended that it was to be used to effect the fraudulent scheme. If this issue is determined favorably to the petitioner, there can be no arbitration under the subcontracts.

In view of our holding here, it is not necessary to reach the issues relating to arbitrability of disputes arising under these subcontracts. In fact, disposition of the fraud issue may dispose of the entire suit. In the event the fraud issue is decided favorably to the respondent, and the United States District Court for the Middle District of Georgia should be called upon to decide the question of arbitrability of such disputes and related problems in Miller Act cases, its decision on that point would then, of course, be subject to review.

We therefore reverse the judgment of the Court of Appeals and remand the case to it with instructions that it remand the same to the District Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE STEWART would affirm the judgment substantially for the reasons stated in Chief Judge Tuttle's opinion for the Court of Appeals. 306 F. 2d 554.

THE CHIEF JUSTICE and MR. JUSTICE BLACK, concurring.

We agree with the Court that fraud in the procurement of an arbitration contract, like fraud in the procurement of any contract, makes it void and unenforceable and that this question of fraud is a judicial one, which must be determined by a court. To allow this question to be decided by arbitrators would be to that extent to enforce the arbitration agreement even though steeped in the grossest kind of fraud. Compare *Robert Lawrence Co.* v. *Devonshire Fabrics,* 271 F. 2d 402 (C. A. 2d Cir. 1959). For this reason we acquiesce in the Court's present disposition of the case on this single issue. But we point out that this disposition leaves open questions of great importance to laborers and materialmen who under the Miller Act are entitled to have their controversies settled in independent courts of law:

(1) Can a member of the special class of laborers and materialmen which Congress, in the public interest, has protected by fixing the venue for their claims under the Miller Act in a particular federal court deprive himself of that kind of remedy as a condition of his obtaining the employment or the purchase of his materials?

(2) Can any person, before any dispute has arisen, agree to arbitrate all future disputes he may have and

thereby lose his right to go into court to try his claim according to due process of law?

(3) Can the Arbitration Act, in light of its language and legislative history, be applied to laborers and materialmen or to construction projects subject to the Miller Act?

(4) Is a construction project, like the one in this case, one "involving commerce" so as to come within the restricted scope of the Arbitration Act?

UNITED STATES *v.* SINGER MANUFACTURING CO.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 438. Argued April 25, 29, 1963.—Decided June 17, 1963.

The United States sued to restrain appellee, the sole American manufacturer of household zigzag sewing machines, from conspiring with two of its competitors, an Italian manufacturer and a Swiss manufacturer, to restrain interstate and foreign trade in the importation, sale and distribution of such machines in this country. The evidence showed a course of dealings between these three manufacturers, including the cross-licensing of their patents on a nonexclusive, world-wide and royalty free basis and ultimately the sale and assignment to appellee of an American patent owned by the Swiss manufacturer, in order that it could be enforced more effectively in the United States against Japanese manufacturers of such machines, who were underpricing appellee and the Italian and Swiss manufacturers. The District Court dismissed the complaint. *Held:* On this record, there was a conspiracy to exclude Japanese competitors, in violation of § 1 of the Sherman Act, and the judgment is reversed. Pp. 175–197.

(a) In concluding that no conspiracy was established on this record, the District Court applied the wrong standard as a matter of law. Pp. 192–193.

(b) The course of dealings disclosed by this record shows that appellee and the Italian and Swiss manufacturers had a common purpose to suppress the competition of Japanese machines in the United States through the use of the patent which appellee obtained from the Swiss manufacturer and under which the Swiss and Italian manufacturers were the sole licensees. Implicit in such a course of dealings was a conspiracy which violated § 1 of the Sherman Act. Pp. 192–196.

205 F. Supp. 394, reversed.

Daniel M. Friedman argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel* and *Les J. Weinstein.*

Arthur E. Pettit argued the cause for appellee. With him on the brief were *Edwin J. Wesely, Terence H. Benbow* and *Edward A. Miller.*

MR. JUSTICE CLARK delivered the opinion of the Court.

This is a direct appeal from the judgment of the United States District Court for the Southern District of New York, 205 F. Supp. 394, dismissing a civil antitrust action brought by the United States against the Singer Manufacturing Company to prevent and restrain alleged violations of §§ 1 and 2 of the Sherman Act, 15 U. S. C. §§ 1 and 2. The complaint alleged that Singer combined and conspired with two competitors, Gegauf of Switzerland and Vigorelli of Italy, to restrain and monopolize and that Singer unilaterally attempted to monopolize interstate and foreign trade in the importation, sale and distribution of household zigzag sewing machines. The District Court dismissed after an extended trial, concluding that the charges were without merit. The United States appealed under § 2 of the Expediting Act, 15 U. S. C. § 29, but has abandoned its claim as to attempted monopolization. We noted probable jurisdiction in light of the fact that unless we did so the parties would be deprived of any appellate review in the case. 371 U. S. 918. We have examined the record (1,723 pages) in detail, as is necessary in these direct appeals,[1] and upon consideration of it, as well as the briefs and argument of counsel, have concluded that there was a conspiracy to exclude Japanese competitors in household zigzag sewing machines and that the judgment must be reversed.

[1] Whatever may have been the wisdom of the Expediting Act in providing direct appeals in antitrust cases at the time of its enactment in 1903, time has proven it unsatisfactory. See, *e. g.*, Gesell, A Much Needed Reform—Repeal the Expediting Act for Antitrust Cases, in 1961 N. Y. State Bar Assn. Antitrust L. Sym. 98 (CCH). Direct appeals not only place a great burden on the Court but also deprive us of the valuable assistance of the Courts of Appeals.

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I.

The details of the facts are long and complicated. The amended and corrected opinion of the District Court includes not only a description of the sewing machines involved and their operation but also an analysis of the patents covering them. We shall, therefore, not relate the facts in detail but satisfy ourselves with the overriding ones.

A. As the District Court stated, this action "concerns only the United States trade and commerce arising from the importation into the United States of a particular type of household sewing machine known as the 'machine-carried multicam zigzag machine.' " 205 F. Supp., at 396. The zigzag stitch machine produces various ornamental and functional zigzag stitches as well as straight ones. The automatic multicam zigzag machine, unlike the manually operated zigzag and the replaceable cam machine, each of which requires hand manipulation or insertion, operates in response to the turning of a knob or dial on the exterior of the machine. While the multicam machines involved here function in slightly different ways, all are a variant of the same basic principle.

B. Singer is the sole United States manufacturer of household zigzag sewing machines. In addition to the multicam variety at issue here, it produces replaceable cam machines but not the manually operated zigzag. Singer sells these machines in this country through a wholly owned subsidiary and in various foreign countries through independent distributors. Singer's sales comprised approximately 61.4% of all domestic sales in multicam zigzag machines in the United States in 1959. During the same year some 22.6% were imported from Japan and about 16% from Europe. In 1958 Singer's percentage was 69.6%, Japanese imports 20.7% and European imports 9.7%. Further, Singer's 1959 and

1960 domestic sales of multicam machines amounted to approximately $46 million per year, in each of which years such sales accounted for about 45% of all its domestic sewing machine sales.

C. It appears that Singer by April 29, 1953, through its experimental department, had completed a design of a multiple cam zigzag mechanism in what it calls the Singer "401" machine. It is disclosed in Singer's Johnson Patent. In 1953 Singer was also developing its Perla Patent as used in its "306" replaceable cam machine and in 1954 its "319" machine-carried multiple cam machine. In September of 1953 Vigorelli, an Italian corporation, introduced in the United States a sewing machine incorporating a stack of cams with a single follower. Singer concluded that Vigorelli had on file applications covering its machine in the various patent offices in the world and that the Singer design would infringe. On June 10, 1955, Singer bought for $8,000 a patent disclosing a plurality of cams with a single cam follower from Carl Harris, a Canadian. It was believed that this patent, filed June 9, 1952, might be reissued with claims covering the Singer 401 as well as its 319 machine, and that the reissued patent would dominate the Vigorelli machine as well as a Japanese one introduced into the United States in September 1954 by Brother International Corporation. Thereafter Singer concluded that litigation would result between it and Vigorelli unless a cross-licensing agreement could be made, and this was effected on November 17, 1955. The license was nonexclusive, world-wide and royalty free. The trial court found that Singer's only purpose was to effect a cross-licensing, but certain correspondence does cast some shadow upon these negotiations.[2] The agree-

[2] "Unless we are able to come to some agreement with Vigorelli, we will of course institute proceedings in Italy in due time, seeking to invalidate such patent as Vigorelli has received and we will do the same thing in France and other countries in accordance with the

ment also contained provisions by which each of the parties agreed not to bring any infringement action against the other "in any country" or institute against the other any opposition, nullity or invalidation proceedings in any country. In accordance with this agreement Singer withdrew its opposition to Vigorelli's patent application in Brazil and Vigorelli later (1958) abandoned a United States interference to the Johnson application which cleared the way for the Johnson Patent to issue on December 2 of that year.

D. While Singer was negotiating the cross-license agreement with Vigorelli it learned that Gegauf, a Swiss corporation, had a patent covering a multiple cam mechanism. This placed an additional cloud over Singer's Harris reissue plan because the Gegauf patent enjoyed an effective priority date in Italy of May 31, 1952. This was nine days earlier than Singer's Harris patent filing date in the United States. In December 1955 Singer learned that Gegauf and Vigorelli had entered a cross-licensing agreement covering their multiple cam patents similar to the Vigorelli-Singer agreement. In January 1956 Singer found that Gegauf had pending an application in the United States Patent Office and assumed that it was based on the same priority date, *i. e.*,

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proper procedure in each country. This litigation will undoubtedly result either in the cancelling of their patent and patent applications, or at any rate, severely limit the claims. On the other hand, if we were to refrain from instituting such proceedings and if we were to withdraw the Brazilian opposition, their applications might develop into rather broad patents which would have a dominating position in the industry. We ourselves hold some patents and have patent applications pending which would make trouble for Vigorelli if we were engaged in litigation with them, or which would greatly strengthen and broaden the patent situation if our position and theirs could be pooled by some mutual agreement." Letter from M. C. Lightner, Singer President, to W. P. Evans of Singer's Italian Corporation, September 12, 1955.

May 31, 1952. If this was true Singer could use its Harris reissue patent only to oppose through interference the allowance of broad claims to Gegauf. It therefore made preparation to negotiate with Gegauf, first approaching Vigorelli in order to ascertain how the latter had induced Gegauf to grant him a royalty-free license and drop any claim of infringement. Singer made direct arrangements for a conference with Gegauf for April 12, 1956, and the license agreement was made April 14, 1956.

The setting for this meeting was that Gegauf had a dominant Swiss patent with applications in Germany, Italy, and the United States all prior to Singer. In addition, Singer's counsel had examined Gegauf's Swiss patent and advised that it was valid. Singer opened conversation with indications of coming litigation on the Harris patent, concealing the Johnson and Perla applications. Gegauf felt secure in his patent claims but insecure with reference to the inroads the Japanese machines were making on the United States market. It was this "lever" which Singer used to secure the license, pointing out that without an agreement Gegauf and Singer might litigate for a protracted period; that they should not be fighting each other as that would only delay the issue of their respective patents; and, finally, that they should license each other and get their respective patents "so they could be enforced by whoever would own the particular patent." Singer in the discussions worked upon these Gegauf fears of Japanese competition "because one of the strong points" of its argument was that an agreement should be made "in order to fight against this Japanese competition in their building a machine that in any way reads on the patents of ourselves and of Bernina [Gegauf] which are in conflict." [3] The trial judge found that the only pur-

[3] Memorandum from M. L. Waterman, Singer Vice President, to M. C. Lightner, April 13, 1956.

pose "disclosed to Gegauf, and in fact the very one used to convince Gegauf of the advisability of entering into an agreement" was to "obtain protection against the Japanese machines which might be made under the Gegauf patent; this sprang from a fear which Singer had good reason to believe to be well founded." 205 F. Supp., at 413. While he found Singer's "underlying, dominant and sole purpose . . . was to settle the conflict in priority between the Gegauf and Harris patents and to secure for Singer a license right under the earlier patent," *ibid.*, it is significant that no such overriding purpose was found to have been disclosed to Gegauf.

The license agreement covered (1) the Singer-Harris patent and its reissue application in the United States and nine corresponding foreign ones, and (2) the Gegauf Swiss, Italian and German patents, as well as the United States and German applications covering the same. The parties agreed in the first paragraph of the agreement "not to do anything, either directly or indirectly and in any country, the result of which might restrict the scope of the claims of the other party relating to the subject matter of the above mentioned patents and patent applications." In addition "each undertakes, in accordance with the laws and regulations of the Patent Office concerned, to facilitate the allowance in any country of claims as broad as possible, as regards the subject matter of the patents and patent applications referred to above." The parties also agreed not to sue one another on the basis of any of the patents or applications. Singer agreed not to make a "slavish" copy of Gegauf's machine and to give Gegauf "the amical assistance of its patent attorneys for the defense of any of the above mentioned Gegauf patents or patent applications against an action in cancellation." The agreement made no mention of Singer's Perla or Johnson applications, the existence of which Singer did not wish Gegauf to know.

E. Approximately one week after the Gegauf cross-license agreement Singer met with Vigorelli at Milan, Italy, at the latter's request. Vigorelli at this meeting suggested that Singer, Gegauf and Vigorelli, having arrived at their respective agreements, should act in concert in prosecuting their patents against all others in the field. This was out of the question, Singer immediately replied, advising that "what appeared to us to be proper action was for each one to prosecute his own patents and take care of any cases of infringement that might appear." [4] The subsequent conversations at the meeting are reported from the same source as follows:

> "Upon learning that there could be no joint action by the three companies who have been mentioned in prosecuting patents against all others in the field, that subject was dropped . . . .
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> "At this point, it should perhaps be mentioned that Mr. Stanford and I have discussed between ourselves whether we should say anything to Mr. Gegauf about our feeling that we could prosecute his patents that will be issued sometime within the next few months in the United States better than perhaps he could if we owned them, but we had decided not to say anything to Mr. Gegauf about this at this time.
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> "In talking with Mr. Vigorelli's lawyer, Mr. Stanford dropped this view to him. The point was immediately understood, and the question was raised if we would have any objection if they were to pass the word on to Mr. Gegauf that they were raising this point. We said that, of course, we would have no objection but that we ourselves did not wish to do this, and we would not want the suggestion coming to Mr. Gegauf at this time as from us. If they wanted to suggest it, it was all right. We would, of

[4] M. L. Waterman, notes dictated at Milan, April 20, 1956.

> course, under such an arrangement have to give a license to Gegauf under the patent that he would turn over to us. Mr. Stanford believes that he would be able before the patent is issued to rewrite the claims and make it stronger than it now is and that it is a fact that, being in the United States, we would be better able to prosecute any claims against this patent than would Mr. Gegauf."

While the testimony of Mr. Stanford, Singer's patent attorney, varies somewhat from this memorandum of Mr. Waterman, it is substantially the same.[5] That the approach to Gegauf was not casually laid is shown by a May 7, 1956, letter from Mr. Stanford to Patent Department employees of Singer in which he said, "When in Italy we laid careful plans for Gegauf to be advised by a third

[5] Mr. Stanford testified that a Mr. Majnoni, patent attorney present for Vigorelli, came over to him as the discussions (which were in Italian and English as some participants spoke only their native tongue) were more or less over and said that he would like to speak in English. He asked "about the situation here in the United States between Gegauf and the Harris patent . . . ." Stanford replied "that they would probably be locked in interference very shortly; that Gegauf was ahead of us and that I was very much afraid that Gegauf was going to win the interference, that I was sorry because I felt that if we had the claims and were able to keep them in the Harris patent, we would be able to enforce them better than could [Gegauf] if he had a patent . . . ." Stanford told Majnoni that Singer had made no approaches to Gegauf because the price would "go sky high"; Majnoni said that he knew Mr. Gegauf's attorney, had "frequent contacts with him" and offered to approach him. Stanford said he "didn't think that would do any good; that I thought that would be just as bad." Majnoni replied that he would let him think it came directly from him. "I think," he added, "it would be advantageous . . . if Singer owned the claims . . . ." Stanford interpreted this to mean that Majnoni thought it would be better for Vigorelli "if Singer, who was a corporation in the United States, owned the Gegauf patent and they would rather have Singer own it than have Gegauf because they thought that we could enforce it better or were in a better position to enforce it."

party that Singer could best handle the patent situation if we owned the Gegauf U. S. Patent. Think it will bear fruit. This suggestion, with the U. S. attorney situation is pressure in the right direction."

Mr. Majnoni reported in June 1956 that he had the "opportunity of talking to the Patent Attorneys of Mr. F. Gegauf on a number of occasions" concerning "the question of the advantage of the American Singer Company being in possession of the different patents which might be useful in defence of sewing machines with multiple cams . . . ." He stated that "the particular character of the question," *i. e.*, "the possibility and advantage that the Gegauf patent application in the States be assigned to Singer," required that the approach be in "such a way as to prompt an initiative to this end by Gegauf." He was hopeful that this had been accomplished. Thereafter on September 19 Dr. S. Lando, Singer representative in Milan, reported that Majnoni advised that Gegauf "is today effectively willing to transfer his patent application in the U. S. to the Singer, without regard or with little regard to the financial side of the matter." This was brought about, he said, by discussions between Vigorelli and Gegauf concerning a United States Van Tuyl patent and its effect upon the validity of the Gegauf German patent; that Gegauf had "made informally known to Mr. Vigorelli that the withdrawing of the Vigorelli application in the U. S. would be greatly appreciated, to prevent the issuance of a printed patent wherein the fact that the Van Tuyl patent exists will be made known to third parties"; that Vigorelli had agreed to withdraw his application and that as a consequence Vigorelli would "drop any direct means adapted to protect his machines in the U. S., but he is quite sure that Singer will take care of the protection of the machines of the general type of interest, by making use of the owned Harris and Gegauf patents."

In the summer of 1956 Mr. F. Gegauf, Jr., and his sister attended a sewing machine convention at Kansas City. On returning home they met with Singer (Messrs. Waterman & Stanford) in Singer's office in New York City. Gegauf expressed concern over the number of Japanese machines that he had seen at the convention. Singer again found opportunity to employ the Japanese problem and stressed to Gegauf, Jr., the difficulties of enforcing a patent in the United States—namely, large number of importers, size of the country, number of judicial circuits, etc. Singer emphasized that these all presented problems to the owner of a United States patent. Singer being in the United States could, they said, enforce the patent better than Gegauf could. They asked Gegauf, Jr., whether he thought his father would be interested in selling the patent to Singer. Thereafter, on September 3, Gegauf, Jr. wrote Mr. Waterman that Singer's suggestion had been taken up with Gegauf, Sr., and "we might be interested in such an agreement." The closing paragraph says: "We agree that something should be done against Japanese competition in your country and maybe South America and are therefore looking forward to your early reply." Waterman replied on September 7 that he and Mr. Stanford would be in Germany on September 18 through 25; he asked that Gegauf's United States patent attorney be directed to meet with Stanford in New York City with authorization to disclose the content of the Gegauf patent application so that time might be saved in Europe. Mr. Waterman closed with the belief "that it may be possible that we can both strengthen our positions with respect to the Japanese competition which you mention . . . ." The conference was set for September 23 at which time Gegauf demanded $250,000 for the patent and negotiations broke off. Singer wrote Dr. Lando, its Milan agent, on October 9, informing him. The letter closed with this paragraph:

"I thought you would like to have this information if the subject should come up in talking with Mr. Vigorelli or his attorney." And on October 24 Singer wrote Mr. Gegauf advising that the United States Patent Office had declared an interference between their patent applications; that their cross-license agreement provided that this interference be settled in accordance with the patent laws of the United States; that "since . . . interference proceedings are usually time consuming and costly to the parties involved, it would appear that it would be advantageous for us to settle the interference between ourselves rather than to continue the proceeding and rely on the United States Patent Office finally to award a priority"; and finally Singer suggested that the attorneys for the parties in the United States get together with a view to settling the interference. Singer abandoned its interference on March 15, 1957, and the Gegauf claim was taken verbatim from the Singer Harris reissue claim.

Nothing more was done by Singer toward securing the Gegauf application until September 12, 1957, when Singer wrote Gegauf that its Harris application was about to be issued as a patent. It also anticipated that several other patents relating to ornamental stitch machines would soon be issued to it and presumed Gegauf's application would soon be granted. Then followed this paragraph:

> "When I had the pleasure of meeting you last fall we had some discussion relative to the procedures that might be followed to enforce the patents . . . , when issued, against infringing manufacturers who primarily are manufacturers in other countries seeking markets in the United States, and more and more throughout the entire world. These manufacturers are bringing out a large variety of ornamental stitch machines which would appear to come within the

> terms of claims which may be awarded in the United States with respect of the aforementioned Singer and Gegauf patents. A proper enforcement of these patents may make it necessary to instigate patent suits against each of the importers in the United States, of whom there will perhaps be many. I think you will agree with me that neither one of us alone can protect himself most effectively." [6]

This letter brought on a meeting of the parties in Zurich on October 16, 1957. Gegauf's position was that, as the trial court found, "while it had no objection 'to making an agreement with Singer, in order to stop as far as possible Japanese competitors in the United States market,' it was willing to do so only under certain conditions." 205 F. Supp., at 416. Finally, as the trial court found, Gegauf demanded $125,000 plus certain conditions declaring that it "was cheap and that it could not go lower since it could get more money if it licensed the invention. Kirker [of Singer] replied that there was no comparison since a sale to Singer was insurance against common competitors

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[6] This letter is substantially the same as the proposed letter which Mr. Stanford sent Mr. Waterman for transmittal to Gegauf, except that the quoted paragraph was phrased more directly in the proposed letter:

"You are no doubt aware that recently the many Japanese sewing machine manufacturers have brought out a large variety of ornamental stitch machines which would appear to come within the terms of claims which may be awarded in the United States with respect of the above Gegauf and Singer patents. We have reason to believe that all of the very many United States sewing machine importers will wish to deal in such Japanese ornamental stitch machines, and that patent suits against each of these importers may be necessary if our respective patents are to be enforced.

"Your [*sic*] may agree with us that under the terms of our present agreement neither party is in a position effectively to protect itself through patents in the United States with respect to this threatened competition, particularly when the competing machines are copies after both Bernina and Singer models."

and that was why Singer was willing to pay." *Ibid.* In another exchange Gegauf

> "advanced the argument that, if stopped by Singer in the United States, the Japanese manufacturers would run to Europe; to this Singer answered that a greater risk was run in Europe if Singer were not permitted to first stop infringements in the United States. . . . Singer continued 'to drive home the point' that Gegauf stood to benefit more by enforcement of the patents in the United States because the 'Brother Pacesetter' machine, a big selling and patent infringing Japanese-made machine, was in direct competition with the Gegauf machine, for both machines were of the free arm type." 205 F. Supp., at 417.

Finally Gegauf assigned to Singer its application and all rights in the invention claimed and to all United States patents which might be granted under it for $90,000. The accompanying agreement provided that (1) Singer would grant Gegauf a nonexclusive royalty-free license to sell in the United States sewing machines made in Gegauf's factory in Switzerland; (2) Singer would not institute, without the consent of Gegauf, legal proceedings asserting the patents when issued against Pfaff in Germany or Vigorelli in Italy with respect to machines manufactured in their home factories; and (3) Singer would not make a "slavish" copy of Gegauf's Bernina machine.

F. The Gegauf patent issued on April 29, 1958, and Singer filed two infringement suits against Brother, the largest domestic importer of Japanese machines. It also sued two other distributors of multicam machines, those actions terminating in consent decrees. Finally, in January 1959, eight months after the patent was issued, Singer brought a proceeding before the United States Tariff Commission under § 337 of the Tariff Act of 1930, 19 U. S. C.

§ 1337. It sought an order of the President of the United States excluding all imported machines coming within the claims of the Gegauf patent for the term of the patent, naming European as well as Japanese infringers. Singer alleged that the tremendous volume of imports from Japan of household sewing machines, other than automatic zigzag, had eliminated all domestic manufacturers save itself and one small straight stitch part-time concern. It further alleged that the increasing volume of infringing imports similarly threatened to result in the curtailment and ultimate cessation of manufacturing operations in the United States in automatic zigzags, with heavy loss of highly paid and skilled labor and large capital investment. At the time of the filing, Singer alleged, foreign-made machines, "primarily from Japan," were being imported to the extent of 50% of the entire Singer sales of automatic zigzag machines in this country; it represented that the automatic zigzag machine is its most important product and that it sells for a minimum price of $300; that infringers from Japan sell at no firm price, the average being $100 less than Singer's price but often far below that figure; and that the minimum price in Japan for export is $40 to $54.

During the hearing on its complaint Singer was asked whether Pfaff was licensed under the Gegauf patent. Singer replied in the negative but became skeptical and, believing that it might "have a better chance of prevailing before the Tariff Commission," decided to ask Gegauf to revise the agreement, which originally excepted Pfaff and Vigorelli from enforcement proceedings, except on consent of Gegauf. The latter agreed on condition that Phoenix, a German manufacturer which was a party-defendant in the proceedings, be substituted.

Upon commencement of this action by the United States, the Commission stayed the proceedings, and they are now in abeyance pending our disposition of this case.

II.

First it may be helpful to set out what is not involved in this case. There is no claim by the Government that it is illegal for one merely to acquire a patent in order to exclude his competitors; or that the owner of a lawfully acquired patent cannot use the patent laws to exclude all infringers of the patent; or that a licensee cannot lawfully acquire the covering patent in order better to enforce it on his own account, even when the patent dominates an industry in which the licensee is the dominant firm. Therefore, we put all these matters aside without discussion.

What is claimed here is that Singer engaged in a series of transactions with Gegauf and Vigorelli for an illegal purpose, *i. e.*, to rid itself and Gegauf, together, perhaps, with Vigorelli, of infringements by their common competitors, the Japanese manufacturers. The Government claims that in this respect there were an identity of purpose among the parties and actions pursuant thereto that in law amount to a combination or conspiracy violative of the Sherman Act. It claims that this can be established under the findings of the District Court.

We note from the findings that the importation of Japanese household multicam zigzag sewing machines first came to notice in the United States in 1954 with the introduction of such a machine by the Brother International Corporation. It incorporated the mechanism of the Vigorelli zigzag and the Singer 401 machines. By 1959 importations of all Japanese household sewing machines reached 1,100,000, while importations of European machines reached only 100,000. Moreover, it appears that all but two domestic manufacturers were put out of business in three to four years after the Japanese machines first appeared. The two remaining domestic manufacturers were Singer and a company not specializing in sew-

ing machines, which manufactured only straight stitch machines on order for a single domestic customer.

The trial court found that no mention was made of the Japanese machines during the negotiations covering the Vigorelli cross-licensing agreement with Singer. It first appeared during the Gegauf licensing negotiations where at those meetings Singer used "protection against the Japanese" as "one of the strong points" on the cross-licensing of the Gegauf and Harris patents and applications. Here, though the trial court stated that the "dominant and sole purpose of the license agreement was to settle the conflict in priority," it specifically, in the next paragraph of its opinion, found a "secondary" purpose, *i. e.,* protection against the Japanese machines which were infringing the Gegauf patent. In this connection it is most important to note another finding of the trial court, namely, that this purpose to exclude the Japanese "was the only one disclosed to Gegauf, and in fact the very one used to convince Gegauf of the advisability of entering into an agreement." 205 F. Supp., at 413. Under these findings it cannot be said that settlement of the conflict in priority was the "dominant and sole purpose" of Singer. Indeed, the two findings are in direct conflict. Furthermore the fact that the cross-license agreement provided that Singer and Gegauf would facilitate the allowance to each other of claims "as broad as possible" indicates a desire to secure as broad coverage for the patent as possible, the more effectively to stifle competition, the overwhelming percentage of which was Japanese. This effect was accomplished, for when the Patent Office placed the Harris (Singer) and Gegauf patents in interference, Singer abandoned the proceeding, thus facilitating the issuance of broad claims to Gegauf.[7]

[7] Since we have concluded that the entire course of dealings between the parties, including the cross-license agreement, establishes a conspiracy or combination in violation of the Sherman Act, we need not

We now come to the assignment of the Gegauf patent to Singer. The trial court found: (1) that six days after the license agreement was made with Gegauf, Singer proceeded to Italy where a conference was held with Vigorelli. At this meeting two events took place that led to the later acquisition of the patent by Singer. The first was Vigorelli's proposal that Singer, Gegauf and himself act "in concert against others" in enforcing the patent. This was rejected by Singer's representatives, who said it was best for each "to prosecute his own patents." At the same meeting, however, Singer proposed to Vigorelli that it could prosecute the Gegauf patent in the United States better than Gegauf and, after Vigorelli agreed, solicited his help in getting Gegauf to agree to assign the patent. (2) Vigorelli went to Gegauf "acting as Singer's agent," 205 F. Supp., at 414, and convinced the latter sufficiently for him to write Singer that he favored the idea of doing something "against Japanese competition." (3) Singer replied to Gegauf by letter that an arrangement could be reached "equally advantageous to both." (4) Singer went to Europe but was not able to agree on Gegauf's terms and thereafter, in September 1957, wrote the latter that "their mutual interests required that something be done to protect themselves from the Japanese infringing machines." (5) Gegauf replied that he would be happy to meet Singer to discuss "mutual enforcement" of its United States application and the Harris reissue. Then, (6) in the final conferences in Europe Gegauf told Singer that he had no objection "to making an agreement with Singer, in order to stop as far as possible Japanese competitors in the United States market." Further, the trial court found that Singer assured Gegauf that "Singer was in-

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and do not pass on the Government's contention that the cross-license agreement and the interference settlement are illegal apart from the other circumstances present here. As to this question, see Note, 31 Geo. Wash. L. Rev. 643 (1963).

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surance against common competitors" and Gegauf's fears that if Singer stopped the Japanese infringements in the United States they (the Japanese) would go to Europe, where Gegauf was not in as good a position to stop them, were unfounded because a greater risk was run in Europe if Singer were not permitted to first stop infringements in the United States. Finally, the court found that (7) Singer was determined "to drive home the point" that Gegauf stood to benefit more by enforcement of the patents in the United States because the "Brother Pacesetter" machine, a big selling and patent infringing Japanese-made machine, was in direct competition with the Gegauf machine in the United States. As the trial court put it, "[t]he point apparently reached home"—Gegauf ultimately assigned the patent for only $90,000, much less than its original asking price and much less than Gegauf believed it would realize *annually* from a license grant. Gegauf's beliefs as to the inadequacy of the *monetary* consideration were well founded, since Singer received more than twice that amount in a two-year period from the one license it granted under the Gegauf patent. That license, incidentally, was to Sears, Roebuck & Company, which imported machines from Europe.

III.

As we have noted with reference to the cross-license agreement, the trial court decided that "[t]he undisputed facts support no conclusion other than that the underlying, dominant and sole purpose of the license agreement was to settle the conflict in priority between the Gegauf and Harris patents . . . ." We have rejected this conclusion on the trial court's own finding in the next paragraph of the opinion that Singer's "secondary" purpose, the only one disclosed to Gegauf, was its "desire to obtain protection against the Japanese machines which might be made under the Gegauf patent." Likewise we reject,

as a question of law, the court's inference that the attitude of suspicion, wariness and self-preservation of the parties negated a conspiracy. See *United States* v. *Line Material Co.*, 333 U. S. 287, 297 (1948); *United States* v. *Masonite Corp.*, 316 U. S. 265, 280–281 (1942); *United States* v. *General Electric Co.*, 80 F. Supp. 989, 997–998 (S. D. N. Y. 1948).

The trial court held that the fact that Singer had a purpose, which "Gegauf well knew," of enforcing the patent upon its acquisition, that the enforcement "would most certainly include Japanese manufacturers who were the principal infringers," and "that Gegauf shared with Singer a common concern over Japanese competition" did not establish a conspiracy. 205 F. Supp., at 419. Given the court's own findings and the clear import of the record, it is apparent that its conclusions were predicated upon "an erroneous interpretation of the standard to be applied. . . ." Thus, "[b]ecause of the nature of the District Court's error we are reviewing a question of law, namely, whether the District Court applied the proper standard to essentially undisputed facts." *United States* v. *Parke, Davis & Co.*, 362 U. S. 29, 44 (1960). There in a discussion of a like problem we held that "the inference of an agreement in violation of the Sherman Act" is not "merely limited to particular fact complexes," *ibid.*, citing *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707 (1944), and *Federal Trade Comm'n* v. *Beech-Nut Packing Co.*, 257 U. S. 441 (1922). "Both cases," the Court continued, "teach that judicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. . . ." *Ibid.* Whether the conspiracy was achieved by agreement, by tacit understanding, or by "acquiescence . . . coupled with assistance in effectuating its purpose is immaterial." *United States* v. *Bausch & Lomb, supra,* at 723. Here the patent was put in Singer's hands to

achieve the common purpose of enforcement "equally advantageous to both" Singer and Gegauf and to Vigorelli as well.[8] What Singer had refused Vigorelli, *i. e.*, acting "in concert against others," was thus achieved by the simple expedient of transferring the patent to Singer.

Thus by entwining itself with Gegauf and Vigorelli in such a program Singer went far beyond its claimed purpose of merely protecting its own 401 machine—it was protecting Gegauf and Vigorelli, the sole licensees under the patent at the time, under the same umbrella. This the Sherman Act will not permit. As the Court held in *Frey & Son, Inc.*, v. *Cudahy Packing Co.*, 256 U. S. 208, 210 (1921), the conspiracy arises implicitly from the course of dealing of the parties, here resulting in Singer's obligation to enforce the patent to the benefit of all three parties. While there was no contract so stipulating, the facts as found by the trial court indicate a common purpose[9] to suppress the Japanese machine competition

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[8] In addition, though the parties do not discuss the effect of the final arrangement, it would permit both Gegauf and Vigorelli to sell machines under the patent in the United States. The fact that this might be consequential is indicated by the statistic that in 1959 Europe furnished 16% of the machines sold in the United States.

[9] The trial court's findings, as we have noted, are inconsistent in some respects. The court repeatedly described the role of the parties' "mutual interests" in the achievement of an agreement to assign the Gegauf patent to Singer. It also found that "Gegauf shared with Singer a common concern over Japanese competition," 205 F. Supp., at 419, and that both parties knew that Singer wanted the patent in order to enforce it against their common competitors, the Japanese. Still, at one point, the court states that "their dealings were characterized by an absence of unity or identity of any common purpose or motive." 205 F. Supp., at 418. Insofar as that conclusion derived from the court's application of an improper standard to the facts, it may be corrected as a matter of law. Insofar as the conclusion is based on "inferences drawn from documents or undisputed facts, . . . Rule 52 (a) of the Rules of Civil Procedure is applicable." *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 394

in the United States through the use of the patent, which was secured by Singer on the assurances to Gegauf and its colicensee, Vigorelli, that such would certainly be the result. See *Federal Trade Comm'n* v. *Beech-Nut Packing Co., supra.* Singer cannot, of course, contend that it sought the assignment of the patent merely to assure that it could produce and sell its machines, since the preceding cross-license agreement had assured that right. The fact that the enforcement plan likewise served Singer is of no consequence, the controlling factor being the overall common design, *i. e.,* to destroy the Japanese sale of infringing machines in the United States by placing the patent in Singer's hands the better to achieve this result. It is this concerted action to restrain trade, clearly established by the course of dealings, that condemns the transactions under the Sherman Act. As we said in *United States* v. *Parke, Davis & Co., supra,* at 44, "whether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used."

Moreover this overriding common design to exclude the Japanese machines in the United States is clearly illustrated by Singer's action before the United States Tariff Commission. Less than eight months after the patent was issued it started this effort to bar infringers in one sweep. As an American corporation, it was the sole company of the three that was able to bring such an action.

(1948). The rule was there stated that "[a] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id.,* at 395. The evidence here, including many findings of the trial court, clearly compels the conclusion that the parties' concerted activities were motivated by a common purpose, and the court's conclusion to the contrary must be regarded as clearly erroneous. *United States* v. *United States Gypsum Co., supra;* see *Pacific Portland Cement Co.* v. *Food Mach. & Chem. Corp.,* 178 F. 2d 541 (C. A. 9th Cir. 1949).

When it appeared that the references to Pfaff in the assignment agreement threatened the success of the Tariff Commission proceeding, Gegauf consented to the deletion of Pfaff from the agreement. This maneuver was for the purpose, as the trial court found, of giving Singer " 'a better chance of prevailing before the Tariff Commission' in its efforts to exclude" infringing machines. 205 F. Supp., at 427. While the tariff application was leveled against nine European as well as the Japanese competitors, the allegations were clearly beamed at the infringing Japanese machines to which Singer attributed the destruction of all American domestic household sewing machine companies save itself. As the parties to the agreements and assignment well knew, and as the trial court itself stated, "[b]y far the largest number of infringers of the Gegauf patent and invention were the Japanese." 205 F. Supp., at 418.

It is strongly urged upon us that application of the antitrust laws in this case will have a significantly deleterious effect on Singer's position as the sole remaining domestic producer of zigzag sewing machines for household use, the market for which has been increasingly preempted by foreign manufacturers. Whether economic consequences of this character warrant relaxation of the scope of enforcement of the antitrust laws, however, is a policy matter committed to congressional or executive resolution. It is not within the province of the courts, whose function is to apply the existing law. It is well settled that "[b]eyond the limited monopoly which is granted, the arrangements by which the patent is utilized are subject to the general law," *United States* v. *Masonite Corp., supra,* at 277, and it "is equally well settled that the possession of a valid patent or patents does not give the patentee any exemption from the provisions of the Sherman Act beyond the limits of the patent

monopoly. By aggregating patents in one control, the holder of the patents cannot escape the prohibitions of the Sherman Act." *United States* v. *Line Material Co., supra,* at 308. That Act imposes strict limitations on the concerted activities in which patent owners may lawfully engage, see *United States* v. *United States Gypsum Co.,* 333 U. S. 364 (1948); *United States* v. *Line Material Co., supra; United States* v. *National Lead Co.,* 63 F. Supp. 513, aff'd, 332 U. S. 319 (1947), and those limitations have been exceeded in this case.

The judgment of the District Court is reversed and the case is remanded for the entry of an appropriate decree in accordance with this opinion.

It is so ordered.

MR. JUSTICE WHITE, concurring.

There are two phases to the Government's case here: one, the conspiracy to exclude the Japanese from the market, and the other, the collusive termination of a Patent Office interference proceeding pursuant to an agreement between Singer and Gegauf to help one another to secure as broad a patent monopoly as possible, invalidity considerations notwithstanding. The Court finds a violation of § 1 of the Sherman Act in the totality of Singer's conduct, and intimates no views as to either phase of the Government's case standing alone. Since, in my view, either branch of the case is sufficient to warrant relief, I join the Court's opinion, except for footnote 1, with which I disagree.

As to the conspiracy to exclude the Japanese, there is involved, as the Court points out, more than the transfer of the patent from one competitor to another; implicit in the arrangement is Singer's undertaking to enforce the patent on behalf of both itself and Gegauf. Moreover, Singer was the dominant manufacturer in the American sewing machine industry and was acquiring a patent

which dominated the multicam field, an aspect of this case which in itself raises serious questions, in my view, and which is saved by the Court for future consideration. See p. 189, *supra*.

More must be said about the interference settlement. In 1956, Singer's "Harris" multicam zigzag reissue-patent application was pending in the United States Patent Office; Gegauf had an application pending at the same time covering substantially the same subject matter, but enjoying a nine-day earlier priority date. See 35 U. S. C. § 119. In the circumstances, it appeared to Singer that, between Singer and Gegauf, Gegauf would have a better claim to a patent on the multicam zigzag, at least on the broad and thus more valuable claims. But it was by no means certain that either of them would get the patent. In cases where several applicants claim the same subject matter, the Patent Office declares an "interference." This is an adversary proceeding between the rival applicants, primarily for the purpose of determining relative priority. But a party to an interference also can, by drawing additional prior art to the attention of the Patent Office which will require the Office to issue no patent at all to anyone, see 37 CFR §§ 1.232, 1.237 (a); cf. 35 U. S. C. §§ 101–102, prevent his rival from securing a patent which if granted might exclude him from the manufacture of the subject matter. 35 U. S. C. § 154. Gegauf, after Singer approached it to negotiate an agreement before the Office declared an interference, feared that Singer might in self-defense draw to the attention of the Patent Office certain earlier patents the Office was unaware of, and which might cause the Gegauf claims to be limited or invalidated; Singer "let them know that we thought we could knock out their claims but that in so doing we were probably going to hurt both of us."

The result was that in April 1956 Singer and Gegauf entered a general cross-licensing agreement providing that

the parties were not to attack one another's patent applications "directly or indirectly," not to do anything to restrict one another's claims in patents or applications, and to facilitate the allowance to one another of "claims as broad as possible." In August 1956 the Patent Office declared the anticipated interference. Singer and Gegauf settled the interference pursuant to their prior agreement: Singer withdrew its interfering claims and in April 1957 the Patent Office dissolved the interference proceeding before it had ever reached the litigation stage. 37 CFR § 1.262. Eventually the Gegauf patent issued and was sold to Singer as part of the concerted action to exclude the Japanese which is involved in the first branch of the case, *supra,* p. 197.

In itself the desire to secure broad claims in a patent may well be unexceptionable—when purely unilateral action is involved. And the settlement of an interference in which the only interests at stake are those of the adversaries, as in the case of a dispute over relative priority only and where possible invalidity, because of known prior art, is not involved, may well be consistent with the general policy favoring settlement of litigation. But the present case involves a less innocuous setting. Singer and Gegauf agreed to settle an interference, at least in part, to prevent an open fight over validity. There is a public interest here, see *Mercoid Corp.* v. *Mid-Continent Co.,* 320 U. S. 661, 665; *United States* v. *Masonite Corp.,* 316 U. S. 265, 278, which the parties have subordinated to their private ends—the public interest in granting patent monopolies only when the progress of the useful arts and of science will be furthered because as the consideration for its grant the public is given a novel and useful invention. U. S. Const., Art. I, § 8; 35 U. S. C. § 101; Statute of Monopolies, 21 Jac. I, c. 3. When there is no novelty and the public parts with the monopoly grant for no return, the public has been imposed upon

and the patent clause subverted. *United States* v. *Bell Telephone Co.*, 128 U. S. 315, 357, 370; see *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394, 400–401; *Cuno Corp.* v. *Automatic Devices Corp.*, 314 U. S. 84, 92; *A. & P. Tea Co.* v. *Supermarket Corp.*, 340 U. S. 147, 154–155 (concurring opinion). Whatever may be the duty of a single party to draw the prior art to the Office's attention, see 35 U. S. C. § 115; 37 CFR § 1.65 (a); *Bell Telephone, supra*, at 356, clearly collusion among applicants to prevent prior art from coming to or being drawn to the Office's attention is an inequitable imposition on the Office and on the public. *Precision Instrument Co.* v. *Automotive Co.*, 324 U. S. 806; see H. R. Rep. No. 1983, 87th Cong., 2d Sess. 1, 4 (Rep. on Act of October 15, 1962, Pub. L. 87–831, 76 Stat. 958). In my view, such collusion to secure a monopoly grant runs afoul of the Sherman Act's prohibitions against conspiracies in restraint of trade*—if not bad *per se*, then such agreements are at least presumptively bad. Compare *Mitchel* v. *Reynolds*, 1 P. Wms. 181, 191–192, 24 Eng. Rep. 347, 350–351. The patent laws do not authorize, and the Sherman Act does not permit, such agreements between business rivals to encroach upon the public domain and usurp it to themselves.

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*The Court has already held similar agreements contrary to public policy and unenforceable. In the "patent estoppel" cases, the Court found that public policy favors the exposure of invalid patent monopolies before the courts in order to free the public from their effects. Thus a licensee may not be prevented from attacking the validity of his licensor's patent. *Sola Elec. Co.* v. *Jefferson Elec. Co.*, 317 U. S. 173; *Scott Paper Co.* v. *Marcalus Mfg. Co.*, 326 U. S. 249; *Katzinger Co.* v. *Chicago Mfg. Co.*, 329 U. S. 394; *MacGregor* v. *Westinghouse Co.*, 329 U. S. 402; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 387–388.

It should be noted that the present agreement involved a specific promise not to attack one another's patents directly or indirectly in addition to a promise to cooperate in interference proceedings.

MR. JUSTICE HARLAN, dissenting.

Although the Court reverses this case on the ground that the District Court proceeded on erroneous legal premises, I do not believe its opinion can serve to obscure the fact that what the majority has really done is overturn the lower court's findings of fact.

A mere reading of the exhaustive opinion below will show that the District Court in dismissing the Government's case did not, as this Court now holds, fail to recognize that a concerted use by Singer and Gegauf of their patents in pursuit of a common purpose to thwart Japanese competition would violate the Sherman Act. Rather the District Court found that such a violation had not been made out.

The basic predicate for this Court's attributing to the District Court the following of an erroneous legal standard is the "direct conflict" which the majority sees between the lower court's finding that Singer's underlying, "dominant and sole purpose" in entering into the Gegauf license agreement "was to settle the conflict" between the Harris and the Gegauf patents and the finding that Singer's "secondary" purpose was its desire to obtain "protection against the Japanese machines" which might be made under the Gegauf patent (*ante,* p. 190). This is indeed a slender reed for the Court's position. For one is left at a loss to understand how the two findings can be deemed inconsistent. Obviously Singer wanted to settle the "priority" issue with Gegauf in order to have solid patent protection against all comers—particularly of course the Japanese, whose ability to manufacture these popular machines in a cheap labor market put them in the forefront of possible infringers. Thus it seems to me that the findings as to Singer's "dominant" and "secondary" purposes are entirely con-

sistent, and that their supposed inconsistency can be made to rest on nothing more substantial than a play on the word "sole" in the basic finding. The further circumstance that it was only Singer's "secondary" purpose that was disclosed to Gegauf goes not to the question of "consistency" but rather to the sufficiency of the lower court's ultimate finding that no illegal concert of action had been shown between Singer and Gegauf.

Nor does anything to which the Court points in the Gegauf patent assignment and Tariff Commission episodes (*ante*, pp. 191–196) lend support to this transparent effort to ground reversal on a question of law so as to escape the necessity of coming to grips with the only true issue in this case: are the District Court's findings of fact—which if accepted would put an end to the Government's case—"clearly erroneous"? Again the various bits and pieces which the Court has culled from this lengthy record go not to the consistency but to the sufficiency of the findings.

In my opinion the District Court's findings are invulnerable to attack under Rule 52 (a) of the Federal Rules of Civil Procedure. The mere fact that one or more of the members of this Court might have made opposite findings if sitting at *nisi prius* does not of course serve to justify reversal of a District Court's findings under the "clearly erroneous" rule. *United States* v. *Yellow Cab Co.*, 338 U. S. 338, 341–342.

In conclusion, it is gratifying to observe the Court's recognition of the fact that the requirement of direct review in cases like this has become an anachronism in light of the modern work load of this Court. *Ante*, note 1; see also the separate opinion of this writer in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 357, 364–365. The final outcome of this case might indeed have been different had this Court had "the valuable assistance of the Courts of Appeals" (*ante*, note 1).

I would affirm the judgment of the District Court.

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA, ET AL. *v.* SCHEMPP ET AL.

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

No. 142. Argued February 27–28, 1963.—Decided June 17, 1963.*

Because of the prohibition of the First Amendment against the enactment by Congress of any law "respecting an establishment of religion," which is made applicable to the States by the Fourteenth Amendment, no state law or school board may require that passages from the Bible be read or that the Lord's Prayer be recited in the public schools of a State at the beginning of each school day—even if individual students may be excused from attending or participating in such exercises upon written request of their parents. Pp. 205–227.

201 F. Supp. 815, affirmed.

228 Md. 239, 179 A. 2d 698, reversed.

John D. Killian III, Deputy Attorney General of Pennsylvania, and *Philip H. Ward III* argued the cause for appellants in No. 142. With them on the brief were *David Stahl,* Attorney General of Pennsylvania, *Percival R. Rieder* and *C. Brewster Rhoads.*

Henry W. Sawyer III argued the cause for appellees in No. 142. With him on the brief was *Wayland H. Elsbree.*

Leonard J. Kerpelman argued the cause and filed a brief for petitioners in No. 119.

Francis B. Burch and *George W. Baker, Jr.* argued the cause for respondents in No. 119. With them on the brief were *Nelson B. Seidman* and *Philip Z. Altfeld.*

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*Together with No. 119, *Murray et al.* v. *Curlett et al., Constituting the Board of School Commissioners of Baltimore City,* on certiorari to the Court of Appeals of Maryland, argued February 27, 1963.

Thomas B. Finan, Attorney General of Maryland, argued the cause for the State of Maryland, as *amicus curiae,* urging affirmance in No. 119. With him on the brief were *James P. Garland* and *Robert F. Sweeney,* Assistant Attorneys General of Maryland. *Richmond M. Flowers,* Attorney General of Alabama, *Robert Pickrell,* Attorney General of Arizona, *Bruce Bennett,* Attorney General of Arkansas, *Richard W. Ervin,* Attorney General of Florida, *Eugene Cook,* Attorney General of Georgia, *Allan G. Shepard,* Attorney General of Idaho, *William M. Ferguson,* Attorney General of Kansas, *Jack P. F. Gremillion,* Attorney General of Louisiana, *Frank E. Hancock,* Attorney General of Maine, *Joe T. Patterson,* Attorney General of Mississippi, *William Maynard,* Attorney General of New Hampshire, *Arthur J. Sills,* Attorney General of New Jersey, *Earl E. Hartley,* Attorney General of New Mexico, *Thomas Wade Bruton,* Attorney General of North Carolina, *J. Joseph Nugent,* Attorney General of Rhode Island, *Daniel R. McLeod,* Attorney General of South Carolina, *Frank R. Farrar,* Attorney General of South Dakota, and *George F. McCanless,* Attorney General of Tennessee, joined in the brief on behalf of their respective States, as *amici curiae.*

Briefs of *amici curiae,* urging affirmance in No. 142 and reversal in No. 119, were filed by *Morris B. Abram, Edwin J. Lukas, Burnett Roth, Arnold Forster, Paul Hartman, Theodore Leskes* and *Sol Rabkin* for the American Jewish Committee et al.; by *Leo Pfeffer, Lewis H. Weinstein, Albert Wald, Shad Polier, Samuel Lawrence Brennglass* and *Theodore R. Mann* for the Synagogue Council of America et al.; and by *Herbert A. Wolff, Leo Rosen, Morris L. Ernst* and *Nancy F. Wechsler* for the American Ethical Union.

MR. JUSTICE CLARK delivered the opinion of the Court.

Once again we are called upon to consider the scope of the provision of the First Amendment to the United States Constitution which declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. While raising the basic questions under slightly different factual situations, the cases permit of joint treatment. In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment.

I.

The Facts in Each Case: No. 142. The Commonwealth of Pennsylvania by law, 24 Pa. Stat. § 15–1516, as amended, Pub. Law 1928 (Supp. 1960) Dec. 17, 1959, requires that "At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian." The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of the statute, contending that their rights under the Fourteenth Amendment to the Constitution of the United States are, have been, and will continue to be violated unless this statute be declared unconstitutional as violative of these provisions of the First Amendment. They sought to enjoin the appellant school district, wherein the Schempp children attend school, and its officers and the

Superintendent of Public Instruction of the Commonwealth from continuing to conduct such readings and recitation of the Lord's Prayer in the public schools of the district pursuant to the statute. A three-judge statutory District Court for the Eastern District of Pennsylvania held that the statute is violative of the Establishment Clause of the First Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment and directed that appropriate injunctive relief issue. 201 F. Supp. 815.[1] On appeal by the District, its officials and the Superintendent, under 28 U. S. C. § 1253, we noted probable jurisdiction. 371 U. S. 807.

The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian Church in Germantown, Philadelphia, Pennsylvania, where they, as well as another son, Ellory, regularly attend religious services. The latter was originally a party but having graduated from the school system *pendente lite* was voluntarily dismissed from the action. The other children attend the Abington Senior High School, which is a public school operated by appellant district.

On each school day at the Abington Senior High School between 8:15 and 8:30 a. m., while the pupils are attending their home rooms or advisory sections, opening exer-

[1] The action was brought in 1958, prior to the 1959 amendment of § 15–1516 authorizing a child's nonattendance at the exercises upon parental request. The three-judge court held the statute and the practices complained of unconstitutional under both the Establishment Clause and the Free Exercise Clause. 177 F. Supp. 398. Pending appeal to this Court by the school district, the statute was so amended, and we vacated the judgment and remanded for further proceedings. 364 U. S. 298. The same three-judge court granted appellees' motion to amend the pleadings, 195 F. Supp. 518, held a hearing on the amended pleadings and rendered the judgment, 201 F. Supp. 815, from which appeal is now taken.

cises are conducted pursuant to the statute. The exercises are broadcast into each room in the school building through an intercommunications system and are conducted under the supervision of a teacher by students attending the school's radio and television workshop. Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students. Participation in the opening exercises, as directed by the statute, is voluntary. The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures. There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.

It appears from the record that in schools not having an intercommunications system the Bible reading and the recitation of the Lord's Prayer were conducted by the

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home-room teacher,[2] who chose the text of the verses and read them herself or had students read them in rotation or by volunteers. This was followed by a standing recitation of the Lord's Prayer, together with the Pledge of Allegiance to the Flag by the class in unison and a closing announcement of routine school items of interest.

At the first trial Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible "which were contrary to the religious beliefs which they held and to their familial teaching." 177 F. Supp. 398, 400. The children testified that all of the doctrines to which they referred were read to them at various times as part of the exercises. Edward Schempp testified at the second trial that he had considered having Roger and Donna excused from attendance at the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected.[3]

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[2] The statute as amended imposes no penalty upon a teacher refusing to obey its mandate. However, it remains to be seen whether one refusing could have his contract of employment terminated for "wilful violation of the school laws." 24 Pa. Stat. (Supp. 1960) § 11–1122.

[3] The trial court summarized his testimony as follows:

"Edward Schempp, the children's father, testified that after careful consideration he had decided that he should not have Roger or Donna excused from attendance at these morning ceremonies. Among his reasons were the following. He said that he thought his children would be 'labeled as "odd balls"' before their teachers and classmates every school day; that children, like Roger's and Donna's classmates, were liable 'to lump all particular religious difference[s] or religious objections [together] as "atheism"' and that today the word 'atheism' is often connected with 'atheistic communism,' and has 'very bad' connotations, such as 'un-American' or 'anti-Red,' with overtones of possible immorality. Mr. Schempp pointed out that due to the events of the morning exercises following in rapid succession, the Bible reading, the Lord's Prayer, the Flag Salute, and

Expert testimony was introduced by both appellants and appellees at the first trial, which testimony was summarized by the trial court as follows:

> "Dr. Solomon Grayzel testified that there were marked differences between the Jewish Holy Scriptures and the Christian Holy Bible, the most obvious of which was the absence of the New Testament in the Jewish Holy Scriptures. Dr. Grayzel testified that portions of the New Testament were offensive to Jewish tradition and that, from the standpoint of Jewish faith, the concept of Jesus Christ as the Son of God was 'practically blasphemous.' He cited instances in the New Testament which, assertedly, were not only sectarian in nature but tended to bring the Jews into ridicule or scorn. Dr. Grayzel gave as his expert opinion that such material from the New Testament could be explained to Jewish children in such a way as to do no harm to them. But if portions of the New Testament were read without explanation, they could be, and in his specific experience with children Dr. Grayzel observed, had been, psychologically harmful to the child and had caused a divisive force within the social media of the school.
>
> "Dr. Grayzel also testified that there was significant difference in attitude with regard to the respective Books of the Jewish and Christian Religions in that Judaism attaches no special significance to the reading of the Bible *per se* and that the Jewish Holy Scriptures are source materials to be studied. But Dr. Grayzel did state that many portions of the New,

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the announcements, excusing his children from the Bible reading would mean that probably they would miss hearing the announcements so important to children. He testified also that if Roger and Donna were excused from Bible reading they would have to stand in the hall outside their 'homeroom' and that this carried with it the imputation of punishment for bad conduct." 201 F. Supp., at 818.

as well as of the Old, Testament contained passages of great literary and moral value.

"Dr. Luther A. Weigle, an expert witness for the defense, testified in some detail as to the reasons for and the methods employed in developing the King James and the Revised Standard Versions of the Bible. On direct examination, Dr. Weigle stated that the Bible was non-sectarian. He later stated that the phrase 'non-sectarian' meant to him non-sectarian within the Christian faiths. Dr. Weigle stated that his definition of the Holy Bible would include the Jewish Holy Scriptures, but also stated that the 'Holy Bible' would not be complete without the New Testament. He stated that the New Testament 'conveyed the message of Christians.' In his opinion, reading of the Holy Scriptures to the exclusion of the New Testament would be a sectarian practice. Dr. Weigle stated that the Bible was of great moral, historical and literary value. This is conceded by all the parties and is also the view of the court." 177 F. Supp. 398, 401–402.

The trial court, in striking down the practices and the statute requiring them, made specific findings of fact that the children's attendance at Abington Senior High School is compulsory and that the practice of reading 10 verses from the Bible is also compelled by law. It also found that:

"The reading of the verses, even without comment, possesses a devotional and religious character and constitutes in effect a religious observance. The devotional and religious nature of the morning exercises is made all the more apparent by the fact that the Bible reading is followed immediately by a recital in unison by the pupils of the Lord's Prayer. The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises

> does not mitigate the obligatory nature of the ceremony for . . . Section 1516 . . . unequivocally requires the exercises to be held every school day in every school in the Commonwealth. The exercises are held in the school buildings and perforce are conducted by and under the authority of the local school authorities and during school sessions. Since the statute requires the reading of the 'Holy Bible,' a Christian document, the practice . . . prefers the Christian religion. The record demonstrates that it was the intention of . . . the Commonwealth . . . to introduce a religious ceremony into the public schools of the Commonwealth." 201 F. Supp., at 819.

No. 119. In 1905 the Board of School Commissioners of Baltimore City adopted a rule pursuant to Art. 77, § 202 of the Annotated Code of Maryland. The rule provided for the holding of opening exercises in the schools of the city, consisting primarily of the "reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer." The petitioners, Mrs. Madalyn Murray and her son, William J. Murray III, are both professed atheists. Following unsuccessful attempts to have the respondent school board rescind the rule, this suit was filed for mandamus to compel its rescission and cancellation. It was alleged that William was a student in a public school of the city and Mrs. Murray, his mother, was a taxpayer therein; that it was the practice under the rule to have a reading on each school morning from the King James version of the Bible; that at petitioners' insistence the rule was amended [4] to permit children to

[4] The rule as amended provides as follows:

"Opening Exercises. Each school, either collectively or in classes, shall be opened by the reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer. The Douay version may be used by those pupils who prefer it. Appropriate

be excused from the exercise on request of the parent and that William had been excused pursuant thereto; that nevertheless the rule as amended was in violation of the petitioners' rights "to freedom of religion under the First and Fourteenth Amendments" and in violation of "the principle of separation between church and state, contained therein. . . ." The petition particularized the petitioners' atheistic beliefs and stated that the rule, as practiced, violated their rights

> "in that it threatens their religious liberty by placing a premium on belief as against non-belief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith."

The respondents demurred and the trial court, recognizing that the demurrer admitted all facts well pleaded, sustained it without leave to amend. The Maryland Court of Appeals affirmed, the majority of four justices holding the exercise not in violation of the First and Fourteenth Amendments, with three justices dissenting. 228 Md. 239, 179 A. 2d 698. We granted certiorari. 371 U. S. 809.

II.

It is true that religion has been closely identified with our history and government. As we said in *Engel* v. *Vitale,* 370 U. S. 421, 434 (1962), "The history of man is inseparable from the history of religion. And . . . since

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patriotic exercises should be held as a part of the general opening exercise of the school or class. Any child shall be excused from participating in the opening exercises or from attending the opening exercises upon the written request of his parent or guardian."

the beginning of that history many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.'" In *Zorach* v. *Clauson,* 343 U. S. 306, 313 (1952), we gave specific recognition to the proposition that "[w]e are a religious people whose institutions presuppose a Supreme Being." The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, "So help me God." Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship. Indeed, only last year an official survey of the country indicated that 64% of our people have church membership, Bureau of the Census, U. S. Department of Commerce, Statistical Abstract of the United States (83d ed. 1962), 48, while less than 3% profess no religion whatever. *Id.,* at p. 46. It can be truly said, therefore, that today, as in the beginning, our national life reflects a religious people who, in the words of Madison, are "earnestly praying, as . . . in duty bound, that the Supreme Lawgiver of the Universe . . . guide them into every measure which may be worthy of his [blessing . . . .]" Memorial and Remonstrance Against Religious Assessments, quoted in *Everson* v. *Board of Education,* 330 U. S. 1, 71–72 (1947) (Appendix to dissenting opinion of Rutledge, J.).

This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life. Nothing but the most telling of personal experiences in religious persecution suffered by our forebears, see *Everson* v. *Board of Education, supra,* at 8–11, could have planted our belief in liberty of religious opinion any more deeply in our heritage. It is true that this liberty frequently was not realized by the colonists, but this is readily accountable by their close ties to the Mother Country.[5] However, the views of Madison and Jefferson, preceded by Roger Williams,[6] came to be incorporated not only in the Federal Constitution but likewise in those of most of our States. This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion. Today authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups. Bureau of the Census, *op. cit., supra,* at 46–47.

III.

Almost a hundred years ago in *Minor* v. *Board of Education of Cincinnati,*[7] Judge Alphonso Taft, father

[5] There were established churches in at least eight of the original colonies, and various degrees of religious support in others as late as the Revolutionary War. See *Engel* v. *Vitale, supra,* at 428, n. 10.

[6] "There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or human combination, or society. It hath fallen out sometimes, that both Papists and Protestants, Jews and Turks, may be embarked in one ship; upon which supposal, I affirm that all the liberty of conscience I ever pleaded for, turns upon these two hinges, that none of the Papists, Protestants, Jews, or Turks be forced to come to the ship's prayers or worship, nor compelled from their own particular prayers or worship, if they practice any."

[7] Superior Court of Cincinnati, February 1870. The opinion is not reported but is published under the title, The Bible in the Com-

of the revered Chief Justice, in an unpublished opinion stated the ideal of our people as to religious freedom as one of

> "absolute equality before the law, of all religious opinions and sects . . . .
>
> . . . . . .
>
> "The government is neutral, and, while protecting all, it prefers none, and it *disparages* none."

Before examining this "neutral" position in which the Establishment and Free Exercise Clauses of the First Amendment place our Government it is well that we discuss the reach of the Amendment under the cases of this Court.

First, this Court has decisively settled that the First Amendment's mandate that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" has been made wholly applicable to the States by the Fourteenth Amendment. Twenty-three years ago in *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940), this Court, through Mr. Justice Roberts, said:

> "The fundamental concept of liberty embodied in that [Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amend-

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mon Schools (Cincinnati: Robert Clarke & Co. 1870). Judge Taft's views, expressed in dissent, prevailed on appeal. See *Board of Education of Cincinnati* v. *Minor*, 23 Ohio St. 211, 253 (1872), in which the Ohio Supreme Court held that:

"The great bulk of human affairs and human interests is left by any free government to individual enterprise and individual action. Religion is eminently one of these interests, lying outside the true and legitimate province of government."

> ment has rendered the legislatures of the states as incompetent as Congress to enact such laws. . . ." [8]

In a series of cases since *Cantwell* the Court has repeatedly reaffirmed that doctrine, and we do so now. *Murdock* v. *Pennsylvania,* 319 U. S. 105, 108 (1943); *Everson* v. *Board of Education, supra; Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, 210–211 (1948); *Zorach* v. *Clauson, supra; McGowan* v. *Maryland,* 366 U. S. 420 (1961); *Torcaso* v. *Watkins,* 367 U. S. 488 (1961); and *Engel* v. *Vitale, supra.*

Second, this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost 20 years ago in *Everson, supra,* at 15, the Court said that "[n]either 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." And Mr. Justice Jackson, dissenting, agreed:

> "There is no answer to the proposition . . . that the effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. . . . This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity." *Id.,* at 26.

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[8] Application to the States of other clauses of the First Amendment obtained even before *Cantwell.* Almost 40 years ago in the opinion of the Court in *Gitlow* v. *New York,* 268 U. S. 652, 666 (1925), Mr. Justice Sanford said: "For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."

Further, Mr. Justice Rutledge, joined by Justices Frankfurter, Jackson and Burton, declared:

> "The [First] Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion." *Id.*, at 31–32.

The same conclusion has been firmly maintained ever since that time, see *Illinois ex rel. McCollum, supra,* at pp. 210–211; *McGowan* v. *Maryland, supra,* at 442–443; *Torcaso* v. *Watkins, supra,* at 492–493, 495, and we reaffirm it now.

While none of the parties to either of these cases has questioned these basic conclusions of the Court, both of which have been long established, recognized and consistently reaffirmed, others continue to question their history, logic and efficacy. Such contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.

IV.

The interrelationship of the Establishment and the Free Exercise Clauses was first touched upon by Mr. Justice Roberts for the Court in *Cantwell* v. *Connecticut, supra,* at 303–304, where it was said that their "inhibition of legislation" had

> "a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of

> conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

A half dozen years later in *Everson* v. *Board of Education, supra,* at 14–15, this Court, through MR. JUSTICE BLACK, stated that the "scope of the First Amendment . . . was designed forever to suppress" the establishment of religion or the prohibition of the free exercise thereof. In short, the Court held that the Amendment

> "requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them." *Id.,* at 18.

And Mr. Justice Jackson, in dissent, declared that public schools are organized

> "on the premise that secular education can be isolated from all religious teaching so that the school can inculcate all needed temporal knowledge and also maintain a strict and lofty neutrality as to religion. The assumption is that after the individual has been instructed in worldly wisdom he will be better fitted to choose his religion." *Id.,* at 23–24.

Moreover, all of the four dissenters, speaking through Mr. Justice Rutledge, agreed that

> "Our constitutional policy . . . does not deny the value or the necessity for religious training, teaching or observance. Rather it secures their free exercise. But to that end it does deny that the state can undertake or sustain them in any form or degree. For this

> reason the sphere of religious activity, as distinguished from the secular intellectual liberties, has been given the twofold protection and, as the state cannot forbid, neither can it perform or aid in performing the religious function. The dual prohibition makes that function altogether private." *Id.*, at 52.

Only one year later the Court was asked to reconsider and repudiate the doctrine of these cases in *McCollum* v. *Board of Education.* It was argued that "historically the First Amendment was intended to forbid only government preference of one religion over another . . . . In addition they ask that we distinguish or overrule our holding in the *Everson* case that the Fourteenth Amendment made the 'establishment of religion' clause of the First Amendment applicable as a prohibition against the States." 333 U. S., at 211. The Court, with Mr. Justice Reed alone dissenting, was unable to "accept either of these contentions." *Ibid.* Mr. Justice Frankfurter, joined by Justices Jackson, Rutledge and Burton, wrote a very comprehensive and scholarly concurrence in which he said that "[s]eparation is a requirement to abstain from fusing functions of Government and of religious sects, not merely to treat them all equally." *Id.*, at 227. Continuing, he stated that:

> "the Constitution . . . prohibited the Government common to all from becoming embroiled, however innocently, in the destructive religious conflicts of which the history of even this country records some dark pages." *Id.*, at 228.

In 1952 in *Zorach* v. *Clauson, supra,* Mr. Justice Douglas for the Court reiterated:

> "There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an

> 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter." 343 U. S., at 312.

And then in 1961 in *McGowan* v. *Maryland* and in *Torcaso* v. *Watkins* each of these cases was discussed and approved. CHIEF JUSTICE WARREN in *McGowan,* for a unanimous Court on this point, said:

> "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. . . .'" 366 U. S., at 441–442.

And MR. JUSTICE BLACK for the Court in *Torcaso,* without dissent but with Justices Frankfurter and HARLAN concurring in the result, used this language:

> "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." 367 U. S., at 495.

Finally, in *Engel* v. *Vitale,* only last year, these principles were so universally recognized that the Court, with-

out the citation of a single case and over the sole dissent of MR. JUSTICE STEWART, reaffirmed them. The Court found the 22-word prayer used in "New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer . . . [to be] a religious activity." 370 U. S., at 424. It held that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.*, at 425. In discussing the reach of the Establishment and Free Exercise Clauses of the First Amendment the Court said:

> "Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Id.*, at 430–431.

And in further elaboration the Court found that the "first and most immediate purpose [of the Establishment Clause] rested on the belief that a union of government and religion tends to destroy government and to degrade religion." *Id.*, at 431. When government, the Court said, allies itself with one particular form of religion, the

inevitable result is that it incurs "the hatred, disrespect and even contempt of those who held contrary beliefs." *Ibid.*

V.

The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. *Everson* v. *Board of Education, supra; McGowan* v. *Maryland, supra,* at 442. The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exer-

cise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach* v. *Clauson*. The trial court in No. 142 has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.

There is no such specific finding as to the religious character of the exercises in No. 119, and the State contends (as does the State in No. 142) that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. The case came up

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on demurrer, of course, to a petition which alleged that the uniform practice under the rule had been to read from the King James version of the Bible and that the exercise was sectarian. The short answer, therefore, is that the religious character of the exercise was admitted by the State. But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners.[9] Nor are these required exercises mitigated by the fact that individual students may absent

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[9] It goes without saying that the laws and practices involved here can be challenged only by persons having standing to complain. But the requirements for standing to challenge state action under the Establishment Clause, unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed. *McGowan* v. *Maryland, supra,* at 429–430. The parties here are school children and their parents, who are directly affected by the laws and practices against which their complaints are directed. These interests surely suffice to give the parties standing to complain. See *Engel* v. *Vitale, supra.* Cf. *McCollum* v. *Board of Education, supra; Everson* v. *Board of Education, supra.* Compare *Doremus* v. *Board of Education,* 342 U. S. 429 (1952), which involved the same substantive issues presented here. The appeal was there dismissed upon the graduation of the school child involved and because of the appellants' failure to establish standing as taxpayers.

themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. See *Engel* v. *Vitale, supra,* at 430. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, "it is proper to take alarm at the first experiment on our liberties." Memorial and Remonstrance Against Religious Assessments, quoted in *Everson, supra,* at 65.

It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." *Zorach* v. *Clauson, supra,* at 314. We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.

Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those

affected, collides with the majority's right to free exercise of religion.[10] While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to *anyone,* it has never meant that a majority could use the machinery of the State to practice its beliefs. Such a contention was effectively answered by Mr. Justice Jackson for the Court in *West Virginia Board of Education* v. *Barnette,* 319 U. S. 624, 638 (1943):

> "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment. Applying that rule to the facts of these cases, we affirm the judgment in No. 142.

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[10] We are not of course presented with and therefore do not pass upon a situation such as military service, where the Government regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities, military personnel would be unable to engage in the practice of their faiths.

In No. 119, the judgment is reversed and the cause remanded to the Maryland Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

I join the opinion of the Court and add a few words in explanation.

While the Free Exercise Clause of the First Amendment is written in terms of what the State may not require of the individual, the Establishment Clause, serving the same goal of individual religious freedom, is written in different terms.

Establishment of a religion can be achieved in several ways. The church and state can be one; the church may control the state or the state may control the church; or the relationship may take one of several possible forms of a working arrangement between the two bodies.[1] Under all of these arrangements the church typically has a place in the state's budget, and church law usually governs such matters as baptism, marriage, divorce and separation, at least for its members and sometimes for the entire body politic.[2] Education, too, is usually high on the priority

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[1] See Bates, Religious Liberty: An Inquiry (1945), 9–14, 239–252; Cobb, Religious Liberty in America (1902), 1–2, cc. IV, V; Gledhill, Pakistan, The Development of its Laws and Constitution (8 British Commonwealth, 1957), 11–15; Keller, Church and State on the European Continent (1936), c. 2; Pfeffer, Church, State, and Freedom (1953), c. 2; I Stokes, Church and State in the United States (1950), 151–169.

[2] See III Stokes, *op. cit., supra,* n. 1, 42–67; Bates, *op. cit., supra,* n. 1, 9–11, 58–59, 98, 245; Gledhill, *op. cit., supra,* n. 1, 128, 192, 205, 208; Rackman, Israel's Emerging Constitution (1955), 120–134; Drinan, Religious Freedom in Israel, America (Apr. 6, 1963), 456–457.

list of church interests.[3] In the past schools were often made the exclusive responsibility of the church. Today in some state-church countries the state runs the public schools, but compulsory religious exercises are often required of some or all students. Thus, under the agreement Franco made with the Holy See when he came to power in Spain, "The Church regained its place in the national budget. It insists on baptizing all children and has made the catechism obligatory in state schools." [4]

The vice of all such arrangements under the Establishment Clause is that the state is lending its assistance to a church's efforts to gain and keep adherents. Under the First Amendment it is strictly a matter for the individual and his church as to what church he will belong to and how much support, in the way of belief, time, activity or money, he will give to it. "This pure Religious Liberty" "declared . . . [all forms of church-state relationships] and their fundamental idea to be oppressions of conscience and abridgments of that liberty which God and nature had conferred on every living soul." [5]

In these cases we have no coercive religious exercise aimed at making the students conform. The prayers announced are not compulsory, though some may think they have that indirect effect because the nonconformist student may be induced to participate for fear of being called an "oddball." But that coercion, if it be present,

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[3] See II Stokes, *op. cit., supra,* n. 1, 488–548; Boles, The Bible, Religion, and the Public Schools (2d ed. 1963), 4–10; Rackman, *op. cit., supra,* n. 2, at 136–141; O'Brien, The *Engel* Case From A Swiss Perspective, 61 Mich. L. Rev. 1069; Freund, Muslim Education in West Pakistan, 56 Religious Education 31.

[4] Bates, *op. cit., supra,* n. 1, at 18; Pfeffer, *op. cit., supra,* n. 1, at 28–31; Thomas, The Balance of Forces in Spain, 41 Foreign Affairs 208, 210.

[5] Cobb, *op. cit., supra,* n. 1, at 2.

has not been shown; so the vices of the present regimes are different.

These regimes violate the Establishment Clause in two different ways. In each case the State is conducting a religious exercise; and, as the Court holds, that cannot be done without violating the "neutrality" required of the State by the balance of power between individual, church and state that has been struck by the First Amendment. But the Establishment Clause is not limited to precluding the State itself from conducting religious exercises. It also forbids the State to employ its facilities or funds in a way that gives any church, or all churches, greater strength in our society than it would have by relying on its members alone. Thus, the present regimes must fall under that clause for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others.

The most effective way to establish any institution is to finance it; and this truth is reflected in the appeals by church groups for public funds to finance their religious schools.[6] Financing a church either in its strictly religious activities or in its other activities is equally unconstitutional, as I understand the Establishment Clause. Budgets for one activity may be technically separable from budgets for others.[7] But the institution is an inseparable whole, a living organism, which is strengthened in proselytizing when it is strengthened in any department by contributions from other than its own members.

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[6] See II Stokes, *op. cit., supra,* n. 1, at 681–695.

[7] See Accountants' Handbook (4th ed. 1956) 4.8–4.15.

Such contributions may not be made by the State even in a minor degree without violating the Establishment Clause. It is not the amount of public funds expended; as this case illustrates, it is the use to which public funds are put that is controlling. For the First Amendment does not say that some forms of establishment are allowed; it says that "no law respecting an establishment of religion" shall be made. What may not be done directly may not be done indirectly lest the Establishment Clause become a mockery.

MR. JUSTICE BRENNAN, concurring.

Almost a century and a half ago, John Marshall, in *M'Culloch* v. *Maryland,* enjoined: ". . . we must never forget, that it is *a constitution* we are expounding." 4 Wheat. 316, 407. The Court's historic duty to expound the meaning of the Constitution has encountered few issues more intricate or more demanding than that of the relationship between religion and the public schools. Since undoubtedly we are "a religious people whose institutions presuppose a Supreme Being," *Zorach* v. *Clauson,* 343 U. S. 306, 313, deep feelings are aroused when aspects of that relationship are claimed to violate the injunction of the First Amendment that government may make "no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government. It is therefore understandable that the constitutional prohibitions encounter their severest test when they are sought to be applied in the school classroom. Nevertheless it is this Court's inescapable duty to declare whether exercises in the public schools of the States, such as those of Pennsylvania and Maryland questioned here, are involvements of religion in public institutions of a kind which offends the First and Fourteenth Amendments.

When John Locke ventured in 1689, "I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other," [1] he anticipated the necessity which would be thought by the Framers to require adoption of a First Amendment, but not the difficulty that would be experienced in defining those "just bounds." The fact is that the line which separates the secular from the sectarian in American life is elusive. The difficulty of defining the boundary with precision inheres in a paradox central to our scheme of liberty. While our institutions reflect a firm conviction that we are a religious people, those institutions by solemn constitutional injunction may not officially involve religion in such a way as to prefer, discriminate against, or oppress, a particular sect or religion. Equally the Constitution enjoins those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends where secular means would suffice. The constitutional mandate expresses a deliberate and considered judgment that such matters are to be left to the conscience of the citizen, and declares as a basic postulate of the relation between the citizen and his government that "the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand . . . ." [2]

I join fully in the opinion and the judgment of the Court. I see no escape from the conclusion that the exer-

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[1] Locke, A Letter Concerning Toleration, in 35 Great Books of the Western World (Hutchins ed. 1952), 2.

[2] Representative Daniel Carroll of Maryland during debate upon the proposed Bill of Rights in the First Congress, August 15, 1789, I Annals of Cong. 730.

cises called in question in these two cases violate the constitutional mandate. The reasons we gave only last Term in *Engel* v. *Vitale,* 370 U. S. 421, for finding in the New York Regents' prayer an impermissible establishment of religion, compel the same judgment of the practices at bar. The involvement of the secular with the religious is no less intimate here; and it is constitutionally irrelevant that the State has not composed the material for the inspirational exercises presently involved. It should be unnecessary to observe that our holding does not declare that the First Amendment manifests hostility to the practice or teaching of religion, but only applies prohibitions incorporated in the Bill of Rights in recognition of historic needs shared by Church and State alike. While it is my view that not every involvement of religion in public life is unconstitutional, I consider the exercises at bar a form of involvement which clearly violates the Establishment Clause.

The importance of the issue and the deep conviction with which views on both sides are held seem to me to justify detailing at some length my reasons for joining the Court's judgment and opinion.

I.

The First Amendment forbids both the abridgment of the free exercise of religion and the enactment of laws "respecting an establishment of religion." The two clauses, although distinct in their objectives and their applicability, emerged together from a common panorama of history. The inclusion of both restraints upon the power of Congress to legislate concerning religious matters shows unmistakably that the Framers of the First Amendment were not content to rest the protection of religious liberty exclusively upon either clause. "In assuring the free exercise of religion," Mr. Justice Frankfurter has said,

"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. 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, was a vital and compelling memory in 1789." *McGowan* v. *Maryland,* 366 U. S. 420, 464–465.

It is true that the Framers' immediate concern was to prevent the setting up of an official federal church of the kind which England and some of the Colonies had long supported. But nothing in the text of the Establishment Clause supports the view that the prevention of the setting up of an official church was meant to be the full extent of the prohibitions against official involvements in religion. It has rightly been said:

> "If the framers of the Amendment meant to prohibit Congress merely from the establishment of a 'church,' one may properly wonder why they didn't so state. That the words *church* and *religion* were regarded as synonymous seems highly improbable, particularly in view of the fact that the contemporary state constitutional provisions dealing with the subject of establishment used definite phrases such as 'religious sect,' 'sect,' or 'denomination.' . . . With such specific wording in contemporary state constitutions, why was not a similar wording adopted for the First Amendment if its framers intended to prohibit nothing more than what the States were pro-

hibiting?" Lardner, How Far Does the Constitution Separate Church and State? 45 Am. Pol. Sci. Rev. 110, 112 (1951).

Plainly, the Establishment Clause, in the contemplation of the Framers, "did not limit the constitutional proscription to any particular, dated form of state-supported theological venture." "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. . . . The Establishment Clause withdrew from 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." *McGowan* v. *Maryland, supra,* at 465–466 (opinion of Frankfurter, J.).

In sum, the history which our prior decisions have summoned to aid interpretation of the Establishment Clause permits little doubt that its prohibition was designed comprehensively to prevent those official involvements of religion which would tend to foster or discourage religious worship or belief.

But an awareness of history and an appreciation of the aims of the Founding Fathers do not always resolve concrete problems. The specific question before us has, for example, aroused vigorous dispute whether the architects of the First Amendment—James Madison and Thomas Jefferson particularly—understood the prohibition against any "law respecting an establishment of

religion" to reach devotional exercises in the public schools.[3] It may be that Jefferson and Madison would have held such exercises to be permissible—although even in Jefferson's case serious doubt is suggested by his admonition against "putting the Bible and Testament into the hands of the children at an age when their judgments are not sufficiently matured for religious inquiries . . . ."[4] But

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[3] See Healey, Jefferson on Religion in Public Education (1962); Boles, The Bible, Religion, and the Public Schools (1961), 16–21; Butts, The American Tradition in Religion and Education (1950), 119–130; Cahn, On Government and Prayer, 37 N. Y. U. L. Rev. 981 (1962); Costanzo, Thomas Jefferson, Religious Education and Public Law, 8 J. Pub. Law 81 (1959); Comment, The Supreme Court, the First Amendment, and Religion in the Public Schools, 63 Col. L. Rev. 73, 79–83 (1963).

[4] Jefferson's caveat was in full:

"Instead, therefore, of putting the Bible and Testament into the hands of the children at an age when their judgments are not sufficiently matured for religious inquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history." 2 Writings of Thomas Jefferson (Memorial ed. 1903), 204.

Compare Jefferson's letter to his nephew, Peter Carr, when the latter was about to begin the study of law, in which Jefferson outlined a suggested course of private study of religion since "[y]our reason is now mature enough to examine this object." Letter to Peter Carr, August 10, 1787, in Padover, The Complete Jefferson (1943), 1058. Jefferson seems to have opposed sectarian instruction at any level of public education, see Healey, Jefferson on Religion in Public Education (1962), 206–210, 256, 264–265. The absence of any mention of religious instruction in the projected elementary and secondary schools contrasts significantly with Jefferson's quite explicit proposals concerning religious instruction at the University of Virginia. His draft for "A Bill for the More General Diffusion of Knowledge" in 1779, for example, outlined in some detail the secular curriculum for the public schools, while avoiding any references to religious studies. See Padover, *supra*, at 1048–1054. The later draft of an "Act for Establishing Elementary Schools" which Jefferson submitted to the Virginia General Assembly in 1817 provided that "no religious reading, instruction or exercise, shall be prescribed or practiced incon-

I doubt that their view, even if perfectly clear one way or the other, would supply a dispositive answer to the question presented by these cases. A more fruitful inquiry, it seems to me, is whether the practices here challenged threaten those consequences which the Framers deeply feared; whether, in short, they tend to promote that type of interdependence between religion and state which the First Amendment was designed to prevent.[5] Our task is to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials

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sistent with the tenets of any religious sect or denomination." Padover, *supra,* at 1076. Reliance upon Jefferson's apparent willingness to permit certain religious instruction at the University seems, therefore, to lend little support to such instruction in the elementary and secondary schools. Compare, *e. g.,* Corwin, A Constitution of Powers in a Secular State (1951), 104–106; Costanzo, Thomas Jefferson, Religious Education and Public Law, 8 J. Pub. Law 81, 100–106 (1959).

[5] Cf. Mr. Justice Rutledge's observations in *Everson* v. *Board of Education,* 330 U. S. 1, 53–54 (dissenting opinion). See also Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis. L. Rev. 427, 428–429; Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt. L. Rev. 561, 569 (1961); MacKinnon, Freedom?—or Toleration? The Problem of Church and State in the United States, [1959] Pub. Law 374. One author has suggested these reasons for cautious application of the history of the Constitution's religious guarantees to contemporary problems:

"First, the brevity of Congressional debate and the lack of writings on the question by the framers make any historical argument inconclusive and open to serious question. Second, the amendment was designed to outlaw practices which had existed before its writing, but there is no authoritative declaration of the specific practices at which it was aimed. And third, most of the modern religious-freedom cases turn on issues which were at most academic in 1789 and perhaps did not exist at all. Public education was almost nonexistent in 1789, and the question of religious education in public schools may not have been foreseen." Beth, The American Theory of Church and State (1958), 88.

dealing with the problems of the twentieth century . . . ." *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 639.

A too literal quest for the advice of the Founding Fathers upon the issues of these cases seems to me futile and misdirected for several reasons: First, on our precise problem the historical record is at best ambiguous, and statements can readily be found to support either side of the proposition. The ambiguity of history is understandable if we recall the nature of the problems uppermost in the thinking of the statesmen who fashioned the religious guarantees; they were concerned with far more flagrant intrusions of government into the realm of religion than any that our century has witnessed.[6] While it is clear to me that the Framers meant the Establishment Clause to prohibit more than the creation of an established federal church such as existed in England, I have no doubt that, in their preoccupation with the imminent question of established churches, they gave no dis-

[6] See generally, for discussion of the early efforts for disestablishment of the established colonial churches, and of the conditions against which the proponents of separation of church and state contended, Sweet, The Story of Religion in America (1950), c. XIII; Cobb, The Rise of Religious Liberty in America (1902), c. IX; Eckenrode, Separation of Church and State in Virginia (1910); Brant, James Madison—The Nationalist, 1780–1787 (1948), c. XXII; Bowers, The Young Jefferson (1945), 193–199; Butts, The American Tradition in Religion and Education (1950), c. II; Kruse, The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 Washburn L. J. 65, 79–83 (1962). Compare also Alexander Hamilton's conception of "the characteristic difference between a tolerated and established religion" and his grounds of opposition to the latter, in his remarks on the Quebec Bill in 1775, 2 Works of Alexander Hamilton (Hamilton ed. 1850), 133–138. Compare, for the view that contemporary evidence reveals a design of the Framers to forbid not only formal establishment of churches, but various forms of incidental aid to or support of religion, Lardner, How Far Does the Constitution Separate Church and State? 45 Am. Pol. Sci. Rev. 110, 112–115 (1951).

tinct consideration to the particular question whether the clause also forbade devotional exercises in public institutions.

Second, the structure of American education has greatly changed since the First Amendment was adopted. In the context of our modern emphasis upon public education available to all citizens, any views of the eighteenth century as to whether the exercises at bar are an "establishment" offer little aid to decision. Education, as the Framers knew it, was in the main confined to private schools more often than not under strictly sectarian supervision. Only gradually did control of education pass largely to public officials.[7] It would, therefore,

[7] The origins of the modern movement for free state-supported education cannot be fixed with precision. In England, the Levellers unavailingly urged in their platform of 1649 the establishment of free primary education for all, or at least for boys. See Brailsford, The Levellers and the English Revolution (1961), 534. In the North American Colonies, education was almost without exception under private sponsorship and supervision, frequently under control of the dominant Protestant sects. This condition prevailed after the Revolution and into the first quarter of the nineteenth century. See generally Mason, Moral Values and Secular Education (1950), c. II; Thayer, The Role of the School in American Society (1960), c. X; Greene, Religion and the State: The Making and Testing of an American Tradition (1941), 120–122. Thus, Virginia's colonial Governor Berkeley exclaimed in 1671: "I thank God there are no free schools nor printing, and I hope we shall not have them these hundred years; for learning has brought disobedience, and heresy, and sects into the world . . . ." (Emphasis deleted.) Bates, Religious Liberty: An Inquiry (1945), 327.

The exclusively private control of American education did not, however, quite survive Berkeley's expectations. Benjamin Franklin's proposals in 1749 for a Philadelphia Academy heralded the dawn of publicly supported secondary education, although the proposal did not bear immediate fruit. See Johnson and Yost, Separation of Church and State in the United States (1948), 26–27. Jefferson's elaborate plans for a public school system in Virginia came to naught after the defeat in 1796 of his proposed Elementary School Bill, which found little favor among the wealthier legislators. See Bowers, The

hardly be significant if the fact was that the nearly universal devotional exercises in the schools of the young Republic did not provoke criticism; even today religious ceremonies in church-supported private schools are constitutionally unobjectionable.

Young Jefferson (1945), 182–186. It was not until the 1820's and 1830's, under the impetus of Jacksonian democracy, that a system of public education really took root in the United States. See 1 Beard, The Rise of American Civilization (1937), 810–818. One force behind the development of secular public schools may have been a growing dissatisfaction with the tightly sectarian control over private education, see Harner, Religion's Place in General Education (1949), 29–30. Yet the burgeoning public school systems did not immediately supplant the old sectarian and private institutions; Alexis de Tocqueville, for example, remarked after his tour of the Eastern States in 1831 that "[a]lmost all education is entrusted to the clergy." 1 Democracy in America (Bradley ed. 1945) 309, n. 4. And compare Lord Bryce's observations, a half century later, on the still largely denominational character of American higher education, 2 The American Commonwealth (1933), 734–735.

Efforts to keep the public schools of the early nineteenth century free from sectarian influence were of two kinds. One took the form of constitutional provisions and statutes adopted by a number of States forbidding appropriations from the public treasury for the support of religious instruction in any manner. See Moehlman, The Wall of Separation Between Church and State (1951), 132–135; Lardner, How Far Does the Constitution Separate Church and State? 45 Am. Pol. Sci. Rev. 110, 122 (1951). The other took the form of measures directed against the use of sectarian reading and teaching materials in the schools. The texts used in the earliest public schools had been largely taken over from the private academies, and retained a strongly religious character and content. See Nichols, Religion and American Democracy (1959), 64–80; Kinney, Church and State, The Struggle for Separation in New Hampshire, 1630–1900 (1955), 150–153. In 1827, however, Massachusetts enacted a statute providing that school boards might not thereafter "direct any school books to be purchased or used, in any of the schools . . . which are calculated to favour any particular religious sect or tenet." 2 Stokes, Church and State in the United States (1950), 53. For further discussion of the background of the Massachusetts law and difficulties in its early application, see Dunn,

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Third, our religious composition makes us a vastly more diverse people than were our forefathers. They knew differences chiefly among Protestant sects. Today the Nation is far more heterogeneous religiously, including as it does substantial minorities not only of Catholics and Jews but as well of those who worship according to no version of the Bible and those who worship no God at all.[8]

What Happened to Religious Education? (1958), c. IV. As other States followed the example of Massachusetts, the use of sectarian texts was in time as widely prohibited as the appropriation of public funds for religious instruction.

Concerning the evolution of the American public school systems free of sectarian influence, compare Mr. Justice Frankfurter's account:

"It is pertinent to remind that the establishment of this principle of Separation in the field of education was not due to any decline in the religious beliefs of the people. Horace Mann was a devout Christian, and the deep religious feeling of James Madison is stamped upon the Remonstrance. The secular public school did not imply indifference to the basic role of religion in the life of the people, nor rejection of religious education as a means of fostering it. The claims of religion were not minimized by refusing to make the public schools agencies for their assertion. The non-sectarian or secular public school was the means of reconciling freedom in general with religious freedom. The sharp confinement of the public schools to secular education was a recognition of the need of a democratic society to educate its children, insofar as the State undertook to do so, in an atmosphere free from pressures in a realm in which pressures are most resisted and where conflicts are most easily and most bitterly engendered." *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203, 216.

[8] The comparative religious homogeneity of the United States at the time the Bill of Rights was adopted has been considered in Haller, The Puritan Background of the First Amendment, in Read ed., The Constitution Reconsidered (1938), 131, 133–134; Beth, The American Theory of Church and State (1958), 74; Kinney, Church and State, The Struggle for Separation in New Hampshire, 1630–1900 (1955), 155–161. However, Madison suggested in the Fifty-first Federalist that the religious diversity which existed at the time of the Constitutional Convention constituted a source of strength for religious freedom, much as the multiplicity of economic and political interests enhanced the security of other civil rights. The Federalist (Cooke ed. 1961), 351–352.

See *Torcaso* v. *Watkins*, 367 U. S. 488, 495. In the face of such profound changes, practices which may have been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike.

Whatever Jefferson or Madison would have thought of Bible reading or the recital of the Lord's Prayer in what few public schools existed in their day, our use of the history of their time must limit itself to broad purposes, not specific practices. By such a standard, I am persuaded, as is the Court, that the devotional exercises carried on in the Baltimore and Abington schools offend the First Amendment because they sufficiently threaten in our day those substantive evils the fear of which called forth the Establishment Clause of the First Amendment. It is "*a constitution* we are expounding," and our interpretation of the First Amendment must necessarily be responsive to the much more highly charged nature of religious questions in contemporary society.

Fourth, the American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall. The public schools are supported entirely, in most communities, by public funds—funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. It is implicit in the history and character of American public education that the public schools serve a uniquely

public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions. See *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203. This is a heritage neither theistic nor atheistic, but simply civic and patriotic. See *Meyer* v. *Nebraska,* 262 U. S. 390, 400–403.

Attendance at the public schools has never been compulsory; parents remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. The relationship of the Establishment Clause of the First Amendment to the public school system is preeminently that of reserving such a choice to the individual parent, rather than vesting it in the majority of voters of each State or school district. The choice which is thus preserved is between a public secular education with its uniquely democratic values, and some form of private or sectarian education, which offers values of its own. In my judgment the First Amendment forbids the State to inhibit that freedom of choice by diminishing the attractiveness of either alternative—either by restricting the liberty of the private schools to inculcate whatever values they wish, or by jeopardizing the freedom of the public schools from private or sectarian pressures. The choice between these very different forms of education is one—very much like the choice of whether or not to worship—which our Constitution leaves to the individual parent. It is no proper function of the state or local government to influence or restrict that election. The lesson of history—drawn more from the experiences of other countries than from our own—is that a system of free public education forfeits its unique contribution to the growth of democratic citizenship when that choice ceases to be freely available to each parent.

II.

The exposition by this Court of the religious guarantees of the First Amendment has consistently reflected and reaffirmed the concerns which impelled the Framers to write those guarantees into the Constitution. It would be neither possible nor appropriate to review here the entire course of our decisions on religious questions. There emerge from those decisions, however, three principles of particular relevance to the issue presented by the cases at bar, and some attention to those decisions is therefore appropriate.

First. One line of decisions derives from contests for control of a church property or other internal ecclesiastical disputes. This line has settled the proposition that in order to give effect to the First Amendment's purpose of requiring on the part of all organs of government a strict neutrality toward theological questions, courts should not undertake to decide such questions. These principles were first expounded in the case of *Watson* v. *Jones,* 13 Wall. 679, which declared that judicial intervention in such a controversy would open up "the whole subject of the doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination . . . ." 13 Wall., at 733. Courts above all must be neutral, for "[t]he law knows no heresy, and is committed to the support of no dogma, the establishment of no sect." [9] 13 Wall., at 728. This principle has re-

[9] See Comment, The Power of Courts Over the Internal Affairs of Religious Groups, 43 Calif. L. Rev. 322 (1955); Comment, Judicial Intervention in Disputes Within Independent Church Bodies, 54 Mich. L. Rev. 102 (1955); Note, Judicial Intervention in Disputes Over the Use of Church Property, 75 Harv. L. Rev. 1142 (1962). Compare *Vidal* v. *Girard's Executors,* 2 How. 127. The principle of judicial nonintervention in essentially religious disputes appears to have been reflected in the decisions of several state courts declining to enforce essentially private agreements concerning the religious edu-

cently been reaffirmed in *Kedroff* v. *St. Nicholas Cathedral,* 344 U. S. 94; and *Kreshik* v. *St. Nicholas Cathedral,* 363 U. S. 190.

The mandate of judicial neutrality in theological controversies met its severest test in *United States* v. *Ballard,* 322 U. S. 78. That decision put in sharp relief certain principles which bear directly upon the questions presented in these cases. Ballard was indicted for fraudulent use of the mails in the dissemination of religious literature. He requested that the trial court submit to the jury the question of the truthfulness of the religious views he championed. The requested charge was refused, and we upheld that refusal, reasoning that the First Amendment foreclosed any judicial inquiry into the truth or falsity of the defendant's religious beliefs. We said: "Man's relation to his God was made no concern of the state. He was granted the right to worship as he pleased and to answer to no man for the verity of his religious views." "Men may believe what they cannot

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cation and worship of children of separated or divorced parents. See, *e. g., Hackett* v. *Hackett,* 78 Ohio Abs. 485, 150 N. E. 2d 431; *Stanton* v. *Stanton,* 213 Ga. 545, 100 S. E. 2d 289; Friedman, The Parental Right to Control the Religious Education of a Child, 29 Harv. L. Rev. 485 (1916); 72 Harv. L. Rev. 372 (1958); Note, 10 West. Res. L. Rev. 171 (1959).

Governmental nonintervention in religious affairs and institutions seems assured by Article 26 of the Constitution of India, which provides:

"Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

"(a) to establish and maintain institutions for religious and charitable purposes;

"(b) to manage its own affairs in matters of religion;

"(c) to own and acquire movable and immovable property; and

"(d) to administer such property in accordance with law." See 1 Chaudhri, Constitutional Rights and Limitations (1955), 875. This Article does not, however, appear to have completely foreclosed judicial inquiry into the merits of intradenominational disputes. See Gledhill, Fundamental Rights in India (1955), 101–102.

prove. They may not be put to the proof of their religious doctrines or beliefs. . . . Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations." 322 U. S., at 86–87.

The dilemma presented by the case was severe. While the alleged truthfulness of *nonreligious* publications could ordinarily have been submitted to the jury, Ballard was deprived of that defense only because the First Amendment forbids governmental inquiry into the verity of *religious* beliefs. In dissent Mr. Justice Jackson expressed the concern that under this construction of the First Amendment "[p]rosecutions of this character easily could degenerate into religious persecution." 322 U. S., at 95. The case shows how elusive is the line which enforces the Amendment's injunction of strict neutrality, while manifesting no official hostility toward religion—a line which must be considered in the cases now before us.[10] Some might view the result of the *Ballard* case as a manifestation of hostility—in that the conviction stood because the defense could not be raised. To others it

[10] For a discussion of the difficulties inherent in the *Ballard* case, see Kurland, Religion and the Law (1962), 75–79. This Court eventually reversed the convictions on the quite unrelated ground that women had been systematically excluded from the jury, *Ballard* v. *United States*, 329 U. S. 187. For discussions of the difficulties in interpreting and applying the First Amendment so as to foster the objective of neutrality without hostility, see, *e. g.*, Katz, Freedom of Religion and State Neutrality, 20 U. of Chi. L. Rev. 426, 438 (1953); Kauper, Church, State, and Freedom: A Review, 52 Mich. L. Rev. 829, 842 (1954). Compare, for an interesting apparent attempt to avoid the *Ballard* problem at the international level, Article 3 of the Multilateral Treaty between the United States and certain American Republics, which provides that extradition will not be granted, *inter alia*, when "the offense is . . . directed against religion." Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed. 1949), 316.

might represent merely strict adherence to the principle of neutrality already expounded in the cases involving doctrinal disputes. Inevitably, insistence upon neutrality, vital as it surely is for untrammeled religious liberty, may appear to border upon religious hostility. But in the long view the independence of both church and state in their respective spheres will be better served by close adherence to the neutrality principle. If the choice is often difficult, the difficulty is endemic to issues implicating the religious guarantees of the First Amendment. Freedom of religion will be seriously jeopardized if we admit exceptions for no better reason than the difficulty of delineating hostility from neutrality in the closest cases.

Second. It is only recently that our decisions have dealt with the question whether issues arising under the Establishment Clause may be isolated from problems implicating the Free Exercise Clause. *Everson* v. *Board of Education,* 330 U. S. 1, is in my view the first of our decisions which treats a problem of asserted unconstitutional involvement as raising questions purely under the Establishment Clause. A scrutiny of several earlier decisions said by some to have etched the contours of the clause shows that such cases neither raised nor decided any constitutional issues under the First Amendment. *Bradfield* v. *Roberts,* 175 U. S. 291, for example, involved challenges to a federal grant to a hospital administered by a Roman Catholic order. The Court rejected the claim for lack of evidence that any sectarian influence changed its character as a secular institution chartered as such by the Congress.[11]

Quick Bear v. *Leupp,* 210 U. S. 50, is also illustrative. The immediate question there was one of statutory construction, although the issue had originally involved the

[11] See Kurland, Religion and the Law (1962), 32–34.

constitutionality of the use of federal funds to support sectarian education on Indian reservations. Congress had already prohibited federal grants for that purpose, thereby removing the broader issue, leaving only the question whether the statute authorized the appropriation for religious teaching of Treaty funds held by the Government in trust for the Indians. Since these were the Indians' own funds, the Court held only that the Indians might direct their use for such educational purposes as they chose, and that the administration by the Treasury of the disbursement of the funds did not inject into the case any issue of the propriety of the use of federal moneys.[12] Indeed, the Court expressly approved the reasoning of the Court of Appeals that to deny the Indians the right to spend their own moneys for religious purposes of their choice might well infringe the free exercise of their religion: "it seems inconceivable that Congress should have intended to prohibit them from receiving religious education at their own cost if they so desired it . . . ." 210 U. S., at 82. This case forecast, however, an increasingly troublesome First Amendment paradox: that the logical interrelationship between the Establishment and Free Exercise Clauses may produce situations where an injunction against an apparent establishment must be withheld in order to avoid infringement of rights of free exercise. That paradox was not squarely presented in *Quick Bear,* but the care taken by the Court

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[12] Compare the treatment of an apparently very similar problem in Article 28 of the Constitution of India:

"(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

"(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution." 1 Chaudhri, Constitutional Rights and Limitations (1955), 875–876, 939.

to avoid a constitutional confrontation discloses an awareness of possible conflicts between the two clauses. I shall come back to this problem later, *infra,* pp. 296–299.

A third case in this group is *Cochran* v. *Louisiana State Board,* 281 U. S. 370, which involved a challenge to a state statute providing public funds to support a loan of free textbooks to pupils of both public and private schools. The constitutional issues in this Court extended no further than the claim that this program amounted to a taking of private property for nonpublic use. The Court rejected the claim on the ground that no private use of property was involved; ". . . we can not doubt that the taxing power of the State is exerted for a public purpose." 281 U. S., at 375. The case therefore raised no issue under the First Amendment.[13]

In *Pierce* v. *Society of Sisters,* 268 U. S. 510, a Catholic parochial school and a private but nonsectarian military academy challenged a state law requiring all children between certain ages to attend the public schools. This Court held the law invalid as an arbitrary and unreasonable interference both with the rights of the schools and with the liberty of the parents of the children who attended them. The due process guarantee of the Fourteenth Amendment "excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only." 268 U. S., at 535. While one of the plaintiffs was indeed a parochial school, the case obviously decided no First Amendment question but recognized only the constitutional right to establish and patronize private schools—including parochial schools—which meet the state's reasonable minimum curricular requirements.

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[13] See Kurland, Religion and the Law (1962), 28–31; Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis. L. Rev. 427, 442.

Third. It is true, as the Court says, that the "two clauses [Establishment and Free Exercise] may overlap." Because of the overlap, however, our decisions under the Free Exercise Clause bear considerable relevance to the problem now before us, and should be briefly reviewed. The early free exercise cases generally involved the objections of religious minorities to the application to them of general nonreligious legislation governing conduct. *Reynolds* v. *United States,* 98 U. S. 145, involved the claim that a belief in the sanctity of plural marriage precluded the conviction of members of a particular sect under nondiscriminatory legislation against such marriage. The Court rejected the claim, saying:

> "Laws are made for the government of actions, and while they cannot interfere with mere religious beliefs and opinions, they may with practices. . . . Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances." [14] 98 U. S., at 166–167.

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[14] This distinction, implicit in the First Amendment, had been made explicit in the original Virginia Bill of Rights provision that "all men should enjoy the fullest toleration in the exercise of religion according to the dictates of conscience, unpunished and unrestrained by the magistrate, unless under color of religion any man disturb the peace, the happiness, or safety of society." See Cobb, The Rise of Religious Liberty in America (1902), 491. Concerning various legislative limitations and restraints upon religiously motivated behavior which endangers or offends society, see Manwaring, Render Unto Caesar: The Flag-Salute Controversy (1962), 41–52. Various courts have applied this principle to proscribe certain religious exercises or activities which were thought to threaten the safety or morals of the participants or the rest of the community, *e. g., State* v. *Massey,* 229 N. C.

Davis v. *Beason,* 133 U. S. 333, similarly involved the claim that the First Amendment insulated from civil punishment certain practices inspired or motivated by religious beliefs. The claim was easily rejected: "It was never intended or supposed that the amendment could be invoked as a protection against legislation for the punishment of acts inimical to the peace, good order and morals of society." 133 U. S., at 342. See also *Mormon Church* v. *United States,* 136 U. S. 1; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Prince* v. *Massachusetts,* 321 U. S. 158; *Cleveland* v. *United States,* 329 U. S. 14.

But we must not confuse the issue of governmental power to regulate or prohibit conduct *motivated by religious beliefs* with the quite different problem of governmental authority to compel behavior *offensive to religious principles.* In *Hamilton* v. *Regents of the University of California,* 293 U. S. 245, the question was that of the power of a State to compel students at the State University to participate in military training instruction against their religious convictions. The validity of the statute was sustained against claims based upon the First Amendment. But the decision rested on a very narrow principle: since there was neither a constitutional right nor a legal obligation to attend the State University, the obligation to participate in military training courses,

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734, 51 S. E. 2d 179; *Harden* v. *State,* 188 Tenn. 17, 216 S. W. 2d 708; *Lawson* v. *Commonwealth,* 291 Ky. 437, 164 S. W. 2d 972; cf. *Sweeney* v. *Webb,* 33 Tex. Civ. App. 324, 76 S. W. 766.

That the principle of these cases, and the distinction between belief and behavior, are susceptible of perverse application, may be suggested by Oliver Cromwell's mandate to the besieged Catholic community in Ireland:

"As to freedom of conscience, I meddle with no man's conscience; but if you mean by that, liberty to celebrate the Mass, I would have you understand that in no place where the power of the Parliament of England prevails shall that be permitted." Quoted in Hook, The Paradoxes of Freedom (1962), 23.

reflecting a legitimate state interest, might properly be imposed upon those who chose to attend. Although the rights protected by the First and Fourteenth Amendments were presumed to include "the right to entertain the beliefs, to adhere to the principles and to teach the doctrines on which these students base their objections to the order prescribing military training," those Amendments were construed not to free such students from the military training obligations if they chose to attend the University. Justices Brandeis, Cardozo and Stone, concurring separately, agreed that the requirement infringed no constitutionally protected liberties. They added, however, that the case presented no question under the Establishment Clause. The military instruction program was not an establishment since it in no way involved "instruction in the practice or tenets of a religion." 293 U. S., at 266. Since the only question was one of free exercise, they concluded, like the majority, that the strong state interest in training a citizen militia justified the restraints imposed, at least so long as attendance at the University was voluntary.[15]

Hamilton has not been overruled, although *United States* v. *Schwimmer,* 279 U. S. 644, and *United States* v. *Macintosh,* 283 U. S. 605, upon which the Court in *Hamilton* relied, have since been overruled by *Girouard* v. *United States,* 328 U. S. 61. But if *Hamilton* retains any vitality with respect to higher education, we recognized its inapplicability to cognate questions in the public primary and secondary schools when we held in *West Virginia Board of Education* v. *Barnette, supra,* that a State had no power to expel from public schools students who refused on religious grounds to comply with a daily flag

[15] With respect to the decision in *Hamilton* v. *Regents,* compare two recent comments: Kurland, Religion and the Law (1962), 40; and French, Comment, Unconstitutional Conditions: An Analysis, 50 Geo. L. J. 234, 246 (1961).

salute requirement. Of course, such a requirement was no more a law "respecting an establishment of religion" than the California law compelling the college students to take military training. The *Barnette* plaintiffs, moreover, did not ask that the whole exercise be enjoined, but only that an excuse or exemption be provided for those students whose religious beliefs forbade them to participate in the ceremony. The key to the holding that such a requirement abridged rights of free exercise lay in the fact that attendance at school was not voluntary but compulsory. The Court said:

> "This issue is not prejudiced by the Court's previous holding that where a State, without compelling attendance, extends college facilities to pupils who voluntarily enroll, it may prescribe military training as part of the course without offense to the Constitution. . . . *Hamilton* v. *Regents,* 293 U. S. 245. In the present case attendance is not optional." 319 U. S., at 631–632.

The *Barnette* decision made another significant point. The Court held that the State must make participation in the exercise voluntary for all students and not alone for those who found participation obnoxious on religious grounds. In short, there was simply no need to "inquire whether non-conformist beliefs will exempt from the duty to salute" because the Court found no state "power to make the salute a legal duty." 319 U. S., at 635.

The distinctions between *Hamilton* and *Barnette* are, I think, crucial to the resolution of the cases before us. The different results of those cases are attributable only in part to a difference in the strength of the particular state interests which the respective statutes were designed to serve. Far more significant is the fact that *Hamilton* dealt with the voluntary attendance at college of young adults, while *Barnette* involved the compelled attendance

of young children at elementary and secondary schools.[16] This distinction warrants a difference in constitutional results. And it is with the involuntary attendance of young school children that we are exclusively concerned in the cases now before the Court.

III.

No one questions that the Framers of the First Amendment intended to restrict exclusively the powers of the Federal Government.[17] Whatever limitations that Amendment now imposes upon the States derive from the Fourteenth Amendment. The process of absorption of the religious guarantees of the First Amendment as protections against the States under the Fourteenth Amendment began with the Free Exercise Clause. In 1923 the Court held that the protections of the Fourteenth included at least a person's freedom "to worship God according to the dictates of his own conscience . . . ." [18] *Meyer* v. *Nebraska,* 262 U. S. 390, 399. See also *Hamilton* v. *Regents, supra,* at 262. *Cantwell* v. *Connecticut,* 310 U. S. 296, completed in 1940 the process of absorption

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[16] See generally as to the background and history of the *Barnette* case, Manwaring, Render Unto Caesar: The Flag-Salute Controversy (1962), especially at 252–253. Compare, for the interesting treatment of a problem similar to that of *Barnette,* in a nonconstitutional context, *Chabot* v. *Les Commissaires D'Ecoles de Lamorandière,* [1957] Que. B. R. 707, noted in 4 McGill L. J. 268 (1958).

[17] See *Barron* v. *Baltimore,* 7 Pet. 243; *Permoli* v. *New Orleans,* 3 How. 589, 609; cf. *Fox* v. *Ohio,* 5 How. 410, 434–435; *Withers* v. *Buckley,* 20 How. 84, 89–91. As early as 1825, however, at least one commentator argued that the guarantees of the Bill of Rights, excepting only those of the First and Seventh Amendments, were meant to limit the powers of the States. Rawle, A View of the Constitution of the United States of America (1825), 120–130.

[18] In addition to the statement of this Court in *Meyer,* at least one state court assumed as early as 1921 that claims of abridgment of the free exercise of religion in the public schools must be tested under the guarantees of the First Amendment as well as those of the state

of the Free Exercise Clause and recognized its dual aspect: the Court affirmed freedom of belief as an absolute liberty, but recognized that conduct, while it may also be comprehended by the Free Exercise Clause, "remains subject to regulation for the protection of society." 310 U. S., at 303–304. This was a distinction already drawn by *Reynolds* v. *United States, supra.* From the beginning this Court has recognized that while government may regulate the behavioral manifestations of religious beliefs, it may not interfere at all with the beliefs themselves.

The absorption of the Establishment Clause has, however, come later and by a route less easily charted. It has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation "respecting an establishment of religion" is conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches.[19] Whether or not such was the understanding of the Framers and whether such a purpose would have inhibited the absorption of the Establishment Clause at the threshold of the Nineteenth Century are questions not dispositive of our present inquiry. For it is

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constitution. *Hardwick* v. *Board of School Trustees,* 54 Cal. App. 696, 704–705, 205 P. 49, 52. See Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal. L. Rev. 751, 772 (1962). Even before the Fourteenth Amendment, New York State enacted a general common school law in 1844 which provided that no religious instruction should be given which could be construed to violate the rights of conscience "as secured by the constitution of this state and the United States." N. Y. Laws, 1844, c. 320, § 12.

[19] See, *e. g.*, Snee, Religious Disestablishment and the Fourteenth Amendment, 1954 Wash. U. L. Q. 371, 373–394; Kruse, The Historical Meaning and Judicial Construction of the Establishment of Religion Clause of the First Amendment, 2 Washburn L. J. 65, 84–85, 127–130 (1962); Katz, Religion and American Constitutions, Address at Northwestern University Law School, March 20, 1963, pp. 6–7. But

clear on the record of history that the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments.[20] Any such objective of the First Amendment, having become historical anachronism by 1868, cannot be thought to have deterred the absorption of the Establishment Clause to any greater degree than it would, for example, have deterred the absorption of the Free Exercise Clause. That no organ of the Federal Government possessed in 1791 any power to restrain the interference of the States in religious matters is indisputable. See *Permoli* v. *New Orleans,* 3 How. 589. It is equally plain, on the other hand, that the Fourteenth Amendment created a panoply of new federal rights for the protection of citizens of the various States. And among those rights was freedom from such state governmental involvement in the affairs of religion as the Establishment Clause had originally foreclosed on the part of Congress.

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see the debate in the Constitutional Convention over the question whether it was necessary or advisable to include among the enumerated powers of the Congress a power "to establish an University, in which no preferences or distinctions should be allowed on account of religion." At least one delegate thought such an explicit delegation "is not necessary," for "[t]he exclusive power at the Seat of Government, will reach the object." The proposal was defeated by only two votes. 2 Farrand, Records of the Federal Convention of 1787 (1911), 616.

[20] The last formal establishment, that of Massachusetts, was dissolved in 1833. The process of disestablishment in that and other States is described in Cobb, The Rise of Religious Liberty in America (1902), c. X; Sweet, The Story of Religion in America (1950), c. XIII. The greater relevance of conditions existing at the time of adoption of the Fourteenth Amendment is suggested in Note, State Sunday Laws and the Religious Guarantees of the Federal Constitution, 73 Harv. L. Rev. 729, 739, n. 79 (1960).

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It has also been suggested that the "liberty" guaranteed by the Fourteenth Amendment logically cannot absorb the Establishment Clause because that clause is not one of the provisions of the Bill of Rights which in terms protects a "freedom" of the individual. See Corwin, A Constitution of Powers in a Secular State (1951), 113–116. The fallacy in this contention, I think, is that it underestimates the role of the Establishment Clause as a co-guarantor, with the Free Exercise Clause, of religious liberty. The Framers did not entrust the liberty of religious beliefs to either clause alone. The Free Exercise Clause "was not to be the full extent of the Amendment's guarantee of freedom from governmental intrusion in matters of faith." *McGowan* v. *Maryland, supra,* at 464 (opinion of Frankfurter, J.).

Finally, it has been contended that absorption of the Establishment Clause is precluded by the absence of any intention on the part of the Framers of the Fourteenth Amendment to circumscribe the residual powers of the States to aid religious activities and institutions in ways which fell short of formal establishments.[21] That argument relies in part upon the express terms of the

[21] See Corwin, A Constitution of Powers in a Secular State (1951), 111–114; Fairman and Morrison, Does the Fourteenth Amendment Incorporate the Bill of Rights? 2 Stan. L. Rev. 5 (1949); Meyer, Comment, The Blaine Amendment and the Bill of Rights, 64 Harv. L. Rev. 939 (1951); Howe, Religion and Race in Public Education, 8 Buffalo L. Rev. 242, 245–247 (1959). Cf. Cooley, Principles of Constitutional Law (2d ed. 1891), 213–214. Compare Professor Freund's comment:

"Looking back, it is hard to see how the Court could have done otherwise, how it could have persisted in accepting freedom of contract as a guaranteed liberty without giving equal status to freedom of press and speech, assembly, and religious observance. What does not seem so inevitable is the inclusion within the Fourteenth Amendment of the concept of nonestablishment of religion in the sense of forbidding nondiscriminatory aid to religion, where there is no interference with freedom of religious exercise." Freund, The Supreme Court of the United States (1961), 58–59.

abortive Blaine Amendment—proposed several years after the adoption of the Fourteenth Amendment—which would have added to the First Amendment a provision that "[n]o State shall make any law respecting an establishment of religion . . . ." Such a restriction would have been superfluous, it is said, if the Fourteenth Amendment had already made the Establishment Clause binding upon the States.

The argument proves too much, for the Fourteenth Amendment's protection of the free exercise of religion can hardly be questioned; yet the Blaine Amendment would also have added an explicit protection against state laws abridging that liberty.[22] Even if we assume that the draftsmen of the Fourteenth Amendment saw no immediate connection between its protections against state action infringing personal liberty and the guarantees of the First Amendment, it is certainly too late in the day to suggest that their assumed inattention to the question dilutes the force of these constitutional guarantees in their application to the States.[23] It is enough to conclude

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[22] The Blaine Amendment, 4 Cong. Rec. 5580, included also a more explicit provision that "no money raised by taxation in any State for the support of public schools or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect or denomination . . . ." The Amendment passed the House but failed to obtain the requisite two-thirds vote in the Senate. See 4 Cong. Rec. 5595. The prohibition which the Blaine Amendment would have engrafted onto the American Constitution has been incorporated in the constitutions of other nations; compare Article 28 (1) of the Constitution of India ("No religious instruction shall be provided in any educational institution wholly maintained out of State funds"); Article XX of the Constitution of Japan (". . . the State and its organs shall refrain from religious education or any other religious activity"). See 1 Chaudhri, Constitutional Rights and Limitations (1955), 875, 876.

[23] Three years after the adoption of the Fourteenth Amendment, Mr. Justice Bradley wrote a letter expressing his views on a proposed constitutional amendment designed to acknowledge the dependence

that the religious liberty embodied in the Fourteenth Amendment would not be viable if the Constitution were interpreted to forbid only establishments ordained by Congress.[24]

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of the Nation upon God, and to recognize the Bible as the foundation of its laws and the supreme ruler of its conduct:

"I have never been able to see the necessity or expediency of the movement for obtaining such an amendment. The Constitution was evidently framed and adopted by the people of the United States with the fixed determination to allow absolute religious freedom and equality, and to avoid all appearance even of a State religion, or a State endorsement of any particular creed or religious sect. . . . And after the Constitution in its original form was adopted, the people made haste to secure an amendment that Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. This shows the earnest desire of our Revolutionary fathers that religion should be left to the free and voluntary action of the people themselves. I do not regard it as manifesting any hostility to religion, but as showing a fixed determination to leave the people entirely free on the subject.

"And it seems to me that our fathers were wise; that the great voluntary system of this country is quite as favorable to the promotion of real religion as the systems of governmental protection and patronage have been in other countries. And whilst I do not understand that the association which you represent desire to invoke any governmental interference, still the amendment sought is a step in that direction which our fathers (quite as good Christians as ourselves) thought it wise not to take. In this country they thought they had settled one thing at least, that it is not the province of government to teach theology.

". . . Religion, as the basis and support of civil government, must reside, not in the written Constitution, but in the people themselves. And we cannot legislate religion into the people. It must be infused by gentler and wiser methods." Miscellaneous Writings of Joseph P. Bradley (1901), 357–359.

For a later phase of the controversy over such a constitutional amendment as that which Justice Bradley opposed, see Finlator, Christ in Congress, 4 J. Church and State 205 (1962).

[24] There is no doubt that, whatever "establishment" may have meant to the Framers of the First Amendment in 1791, the draftsmen of the Fourteenth Amendment three quarters of a century later understood the Establishment Clause to foreclose many incidental

The issue of what particular activities the Establishment Clause forbids the States to undertake is our more immediate concern. In *Everson* v. *Board of Education,* 330 U. S. 1, 15–16, a careful study of the relevant history led the Court to the view, consistently recognized in decisions since *Everson,* that the Establishment Clause embodied the Framers' conclusion that government and religion have discrete interests which are mutually best served when each avoids too close a proximity to the other. It is not only the nonbeliever who fears the injection of sectarian doctrines and controversies into the civil polity, but in as high degree it is the devout believer who fears the secularization of a creed which becomes too deeply involved with and dependent upon the government.[25] It

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forms of governmental aid to religion which fell far short of the creation or support of an official church. The Report of a Senate Committee as early as 1853, for example, contained this view of the Establishment Clause:

"If Congress has passed, or should pass, any law which, fairly construed, has in any degree introduced, or should attempt to introduce, in favor of any church, or ecclesiastical association, or system of religious faith, all or any one of these obnoxious particulars—endowment at the public expense, peculiar privileges to its members, or disadvantages or penalties upon those who should reject its doctrines or belong to other communions—such law would be a 'law respecting an establishment of religion,' and, therefore, in violation of the constitution." S. Rep. No. 376, 32d Cong., 2d Sess. 1–2.

Compare Thomas M. Cooley's exposition in the year in which the Fourteenth Amendment was ratified:

"Those things which are not lawful under any of the American constitutions may be stated thus:—

"1. Any law respecting an establishment of religion. . . .

"2. Compulsory support, by taxation or otherwise, of religious instruction. Not only is no one denomination to be favored at the expense of the rest, but all support of religious instruction must be entirely voluntary." Cooley, Constitutional Limitations (1st ed. 1868), 469.

[25] Compare, *e. g.,* Miller, Roger Williams: His Contribution to the American Tradition (1953), 83, with Madison, Memorial and Remonstrance Against Religious Assessments, reprinted as an Ap-

has rightly been said of the history of the Establishment Clause that "our tradition of civil liberty rests not only on the secularism of a Thomas Jefferson but also on the fervent sectarianism . . . of a Roger Williams." Freund, The Supreme Court of the United States (1961), 84.

Our decisions on questions of religious education or exercises in the public schools have consistently reflected this dual aspect of the Establishment Clause. *Engel* v. *Vitale* unmistakably has its roots in three earlier cases which, on cognate issues, shaped the contours of the Establishment Clause. First, in *Everson* the Court held that reimbursement by the town of parents for the cost of transporting their children by public carrier to parochial (as well as public and private nonsectarian) schools did not offend the Establishment Clause. Such reimbursement, by easing the financial burden upon Catholic parents, may indirectly have fostered the operation of the Catholic schools, and may thereby indirectly have facilitated the teaching of Catholic principles, thus serving ultimately a religious goal. But this form of governmental assistance was difficult to distinguish from myriad other incidental if not insignificant government benefits enjoyed by religious institutions—fire and police protection, tax exemptions, and the pavement of streets and sidewalks, for example. "The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from

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pendix to the dissenting opinion of Mr. Justice Rutledge, *Everson* v. *Board of Education, supra,* at 63–72. See also Cahn, On Government and Prayer, 37 N. Y. U. L. Rev. 981, 982–985 (1962); Jefferson's Bill for Establishing Religious Freedom, in Padover, The Complete Jefferson (1943), 946–947; Moulton and Myers, Report on Appointing Chaplains to the Legislature of New York, in Blau, Cornerstones of Religious Freedom in America (1949), 141–156; Bury, A History of Freedom of Thought (2d ed. 1952), 75–76.

accredited schools." 330 U. S., at 18. Yet even this form of assistance was thought by four Justices of the *Everson* Court to be barred by the Establishment Clause because too perilously close to that public support of religion forbidden by the First Amendment.

The other two cases, *Illinois ex rel. McCollum* v. *Board of Education,* 333 U. S. 203, and *Zorach* v. *Clauson,* 343 U. S. 306, can best be considered together. Both involved programs of released time for religious instruction of public school students. I reject the suggestion that *Zorach* overruled *McCollum* in silence.[26] The distinction which the Court drew in *Zorach* between the two cases is, in my view, faithful to the function of the Establishment Clause.

I should first note, however, that *McCollum* and *Zorach* do not seem to me distinguishable in terms of the free exercise claims advanced in both cases.[27] The nonparticipant in the *McCollum* program was given secular instruction in a separate room during the times his classmates had religious lessons; the nonparticipant in any *Zorach* program also received secular instruction, while his classmates repaired to a place outside the school for religious instruction.

The crucial difference, I think, was that the *McCollum* program offended the Establishment Clause while the *Zorach* program did not. This was not, in my view, because of the difference in public expenditures involved. True, the *McCollum* program involved the regular use of school facilities, classrooms, heat and light and time from the regular school day—even though the actual

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[26] See, *e. g.,* Spicer, The Supreme Court and Fundamental Freedoms (1959), 83–84; Kauper, Church, State, and Freedom: A Review, 52 Mich. L. Rev. 829, 839 (1954); Reed, Church-State and the Zorach Case, 27 Notre Dame Lawyer 529, 539–541 (1952).

[27] See 343 U. S., at 321–322 (Frankfurter, J., dissenting); Kurland, Religion and the Law (1962), 89. I recognize that there is a question whether in *Zorach* the free exercise claims asserted were in fact proved. 343 U. S., at 311.

incremental cost may have been negligible. All religious instruction under the *Zorach* program, by contrast, was carried on entirely off the school premises, and the teacher's part was simply to facilitate the children's release to the churches. The deeper difference was that the *McCollum* program placed the religious instructor in the public school classroom in precisely the position of authority held by the regular teachers of secular subjects, while the *Zorach* program did not.[28] The *McCollum* pro-

[28] Mr. Justice Frankfurter described the effects of the *McCollum* program thus:

"Religious education so conducted on school time and property is patently woven into the working scheme of the school. The Champaign arrangement thus presents powerful elements of inherent pressure by the school system in the interest of religious sects. . . . As a result, the public school system of Champaign actively furthers inculcation in the religious tenets of some faiths, and in the process sharpens the consciousness of religious differences at least among some of the children committed to its care." 333 U. S., at 227–228.

For similar reasons some state courts have enjoined the public schools from employing or accepting the services of members of religious orders even in the teaching of secular subjects, *e. g.*, *Zellers* v. *Huff*, 55 N. M. 501, 236 P. 2d 949; *Berghorn* v. *Reorganized School Dist. No. 8*, 364 Mo. 121, 260 S. W. 2d 573; compare ruling of Texas Commissioner of Education, Jan. 25, 1961, in 63 American Jewish Yearbook (1962), 188. Over a half century ago a New York court sustained a school board's exclusion from the public schools of teachers wearing religious garb on similar grounds:

"Then all through the school hours these teachers . . . were before the children as object lessons of the order and church of which they were members. It is within our common observation that young children . . . are very susceptible to the influence of their teachers and of the kind of object lessons continually before them in schools conducted under these circumstances and with these surroundings." *O'Connor* v. *Hendrick*, 109 App. Div. 361, 371–372, 96 N. Y. Supp. 161, 169. See also *Commonwealth* v. *Herr*, 229 Pa. 132, 78 A. 68; Comment, Religious Garb in the Public Schools—A Study in Conflicting Liberties, 22 U. of Chi. L. Rev. 888 (1955).

Also apposite are decisions of several courts which have enjoined the use of parochial schools as part of the public school system, *Harfst*

gram, in lending to the support of sectarian instruction all the authority of the governmentally operated public school system, brought government and religion into that proximity which the Establishment Clause forbids. To be sure, a religious teacher presumably commands substantial respect and merits attention in his own right. But the Constitution does not permit that prestige and capacity for influence to be augmented by investiture of all the symbols of authority at the command of the lay teacher for the enhancement of secular instruction.

More recent decisions have further etched the contours of Establishment. In the *Sunday Law Cases,* we found in state laws compelling a uniform day of rest from worldly labor no violation of the Establishment Clause (*McGowan* v. *Maryland,* 366 U. S. 420). The basic

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v. *Hoegen,* 349 Mo. 808, 163 S. W. 2d 609; or have invalidated programs for the distribution in public school classrooms of Gideon Bibles, *Brown* v. *Orange County Board of Public Instruction,* 128 So. 2d 181 (Fla. App.); *Tudor* v. *Board of Education,* 14 N. J. 31, 100 A. 2d 857. See Note, The First Amendment and Distribution of Religious Literature in the Public Schools, 41 Va. L. Rev. 789, 803–806 (1955). In *Tudor,* the court stressed the role of the public schools in the Bible program:

". . . the public school machinery is used to bring about the distribution of these Bibles to the children . . . . In the eyes of the pupils and their parents the board of education has placed its stamp of approval upon this distribution and, in fact, upon the Gideon Bible itself. . . . This is more than mere 'accommodation' of religion permitted in the *Zorach* case. The school's part in this distribution is an active one and cannot be sustained on the basis of a mere assistance to religion." 14 N. J., at 51–52, 100 A. 2d, at 868.

The significance of the teacher's authority was recognized by one early state court decision:

"The school being in session, the right to command was vested in the teacher, and the duty of obedience imposed upon the pupils. Under such circumstances a request and a command have the same meaning. A request from one in authority is understood to be a mere euphemism. It is in fact a command in an inoffensive form." *State ex rel. Freeman* v. *Scheve,* 65 Neb. 876, 880, 93 N. W. 169, 170.

ground of our decision was that, granted the Sunday Laws were first enacted for religious ends, they were continued in force for reasons wholly secular, namely, to provide a universal day of rest and ensure the health and tranquillity of the community. In other words, government may originally have decreed a Sunday day of rest for the impermissible purpose of supporting religion but abandoned that purpose and retained the laws for the permissible purpose of furthering overwhelmingly secular ends.

Such was the evolution of the contours of the Establishment Clause before *Engel* v. *Vitale*. There, a year ago, we held that the daily recital of the state-composed Regents' Prayer constituted an establishment of religion because, although the prayer itself revealed no *sectarian* content or purpose, its nature and meaning were quite clearly *religious*. New York, in authorizing its recitation, had not maintained that distance between the public and the religious sectors commanded by the Establishment Clause when it placed the "power, prestige and financial support of government" behind the prayer. In *Engel*, as in *McCollum*, it did not matter that the amount of time and expense allocated to the daily recitation was small so long as the exercise itself was manifestly religious. Nor did it matter that few children had complained of the practice, for the measure of the seriousness of a breach of the Establishment Clause has never been thought to be the number of people who complain of it.

We also held two Terms ago in *Torcaso* v. *Watkins*, *supra*, that a State may not constitutionally require an applicant for the office of Notary Public to swear or affirm that he believes in God. The problem of that case was strikingly similar to the issue presented 18 years before in the flag salute case, *West Virginia Board of Education* v. *Barnette*, *supra*. In neither case was there any claim of establishment of religion, but only of infringement of

the individual's religious liberty—in the one case, that of the nonbeliever who could not attest to a belief in God; in the other, that of the child whose creed forbade him to salute the flag. But *Torcaso* added a new element not present in *Barnette*. The Maryland test oath involved an attempt to employ essentially religious (albeit nonsectarian) means to achieve a secular goal to which the means bore no reasonable relationship. No one doubted the State's interest in the integrity of its Notaries Public, but that interest did not warrant the screening of applicants by means of a religious test. The *Sunday Law Cases* were different in that respect. Even if Sunday Laws retain certain religious vestiges, they are enforced today for essentially secular objectives which cannot be effectively achieved in modern society except by designating Sunday as the universal day of rest. The Court's opinions cited very substantial problems in selecting or enforcing an alternative day of rest. But the teaching of both *Torcaso* and the *Sunday Law Cases* is that government may not employ religious means to serve secular interests, however legitimate they may be, at least without the clearest demonstration that nonreligious means will not suffice.[29]

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[29] See for other illustrations of the principle that where First Amendment freedoms are or may be affected, government must employ those means which will least inhibit the exercise of constitutional liberties, *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, 308 U. S. 147, 161; *Martin* v. *Struthers*, 319 U. S. 141; *Saia* v. *New York*, 334 U. S. 558; *Shelton* v. *Tucker*, 364 U. S. 479, 488–489; *Bantam Books, Inc.*, v. *Sullivan*, 372 U. S. 58, 66, 69–71. See also Note, State Sunday Laws and the Religious Guarantees of the Federal Constitution, 73 Harv. L. Rev. 729, 743–745 (1960); Freund, The Supreme Court of the United States (1961), 86–87; 74 Harv. L. Rev. 613 (1961). And compare *Miller* v. *Cooper*, 56 N. M. 355, 244 P. 2d 520 (1952), in which a state court permitted the holding of public school commencement exercises in a church building only because no public buildings in the community were adequate to accommodate the ceremony.

IV.

I turn now to the cases before us.[30] The religious nature of the exercises here challenged seems plain. Unless *Engel* v. *Vitale* is to be overruled, or we are to engage in wholly disingenuous distinction, we cannot sus-

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[30] No question has been raised in these cases concerning the standing of these parents to challenge the religious practices conducted in the schools which their children presently attend. Whatever authority *Doremus* v. *Board of Education*, 342 U. S. 429, might have on the question of the standing of one not the parent of children affected by the challenged exercises is not before us in these cases. Neither in *McCollum* nor in *Zorach* was there any reason to question the standing of the parent-plaintiffs under settled principles of justiciability and jurisdiction, whether or not their complaints alleged pecuniary loss or monetary injury. The free-exercise claims of the parents alleged injury sufficient to give them standing. If, however, the gravamen of the lawsuit were exclusively one of establishment, it might seem illogical to confer standing upon a parent who—though he is concededly in the best position to assert a free-exercise claim—suffers no financial injury, by reason of being a parent, different from that of the ordinary taxpayer, whose standing may be open to question. See Sutherland, Establishment According to *Engel*, 76 Harv. L. Rev. 25, 41–43 (1962). I would suggest several answers to this conceptual difficulty. First, the parent is surely the person most directly and immediately concerned about and affected by the challenged establishment, and to deny him standing either in his own right or on behalf of his child might effectively foreclose judicial inquiry into serious breaches of the prohibitions of the First Amendment—even though no special monetary injury could be shown. See *Schempp* v. *School District of Abington Township*, 177 F. Supp. 398, 407; Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . . ," 1962 Supreme Court Review 1, 22. Second, the complaint in every case thus far challenging an establishment has set forth at least a colorable claim of infringement of free exercise. When the complaint includes both claims, and neither is frivolous, it would surely be overtechnical to say that a parent who does not detail the monetary cost of the exercises to him may ask the court to pass only upon the free-exercise claim, however logically the two may be related. Cf. *Pierce* v. *Society of Sisters*, *supra*; *Truax* v. *Raich*, 239

tain these practices. Daily recital of the Lord's Prayer and the reading of passages of Scripture are quite as clearly breaches of the command of the Establishment Clause as was the daily use of the rather bland Regents' Prayer in the New York public schools. Indeed, I would suppose that, if anything, the Lord's Prayer and the Holy Bible are more clearly sectarian, and the present violations of the First Amendment consequently more serious. But the religious exercises challenged in these cases have a long history. And almost from the beginning, Bible reading and daily prayer in the schools have been the subject of debate, criticism by educators and other public officials, and proscription by courts and legislative councils. At the outset, then, we must carefully canvass both aspects of this history.

The use of prayers and Bible readings at the opening of the school day long antedates the founding of our Republic. The Rules of the New Haven Hopkins Grammar School required in 1684 "[t]hat the Scholars being

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U. S. 33, 38–39; *NAACP* v. *Alabama ex rel. Patterson*, 357 U. S. 449, 458–460; *Bell* v. *Hood*, 327 U. S. 678; *Bantam Books, Inc.*, v. *Sullivan*, 372 U. S. 58, 64, n. 6. Finally, the concept of standing is a necessarily flexible one, designed principally to ensure that the plaintiffs have "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions . . . ." *Baker* v. *Carr*, 369 U. S. 186, 204. It seems to me that even a cursory examination of the complaints in these two cases and the opinions below discloses that these parents have very real grievances against the respective school authorities which cannot be resolved short of constitutional adjudication. See generally Arthur Garfield Hays Civil Liberties Conference: Public Aid to Parochial Schools and Standing to Bring Suit, 12 Buffalo L. Rev. 35 (1962); Jaffe, Standing to Secure Judicial Review: Public Actions, 74 Harv. L. Rev. 1265 (1961); Sutherland, Due Process and Disestablishment, 62 Harv. L. Rev. 1306, 1327–1332 (1949); Comment, The Supreme Court, the First Amendment, and Religion in the Public Schools, 63 Col. L. Rev. 73, 94, n. 153 (1963).

called together, the Mr. shall every morning begin his work with a short prayer for a blessing on his Laboures and their learning . . . ." [31] More rigorous was the provision in a 1682 contract with a Dutch schoolmaster in Flatbush, New York:

> "When the school begins, one of the children shall read the morning prayer, as it stands in the catechism, and close with the prayer before dinner; in the afternoon it shall begin with the prayer after dinner, and end with the evening prayer. The evening school shall begin with the Lord's prayer, and close by singing a psalm." [32]

After the Revolution, the new States uniformly continued these long-established practices in the private and the few public grammar schools. The school committee of Boston in 1789, for example, required the city's several schoolmasters "daily to commence the duties of their office by prayer and reading a portion of the Sacred Scriptures . . . ." [33] That requirement was mirrored throughout the original States, and exemplified the universal practice well into the nineteenth century. As the free public schools gradually supplanted the private academies and sectarian schools between 1800 and 1850, morning devotional exercises were retained with few alterations. Indeed, public pressures upon school administrators in many parts of the country would hardly have condoned abandonment of practices to which a century or more of private religious education had accustomed the American people.[34] The controversy centered, in

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[31] Quoted in Dunn, What Happened to Religious Education? (1958), 21.

[32] Quoted, *id.*, at 22.

[33] Quoted in Hartford, Moral Values in Public Education: Lessons From the Kentucky Experience (1958), 31.

[34] See Culver, Horace Mann and Religion in the Massachusetts Public Schools (1929), for an account of one prominent educator's

fact, principally about the elimination of plainly sectarian practices and textbooks, and led to the eventual substitution of nonsectarian, though still religious, exercises and materials.[35]

Statutory provision for daily religious exercises is, however, of quite recent origin. At the turn of this century, there was but one State—Massachusetts—which had a law making morning prayer or Bible reading obligatory. Statutes elsewhere either permitted such practices or simply left the question to local option. It was not until after 1910 that 11 more States, within a few years, joined Massachusetts in making one or both exercises compulsory.[36] The Pennsylvania law with which we are

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efforts to satisfy both the protests of those who opposed continuation of sectarian lessons and exercises in public schools, and the demands of those who insisted upon the retention of some essentially religious practices. Mann's continued use of the Bible for what he regarded as nonsectarian exercises represented his response to these cross-pressures. See Mann, Religious Education, in Blau, Cornerstones of Religious Freedom in America (1949), 163–201 (from the Twelfth Annual Report for 1848 of the Secretary of the Board of Education of Massachusetts). See also Boles, The Bible, Religion, and the Public Schools (1961), 22–27.

[35] See 2 Stokes, Church and State in the United States (1950), 572–579; Greene, Religion and the State: The Making and Testing of an American Tradition (1941), 122–126.

[36] *E. g.*, Ala. Code, Tit. 52, § 542; Del. Code Ann., Tit. 14, §§ 4101–4102; Fla. Stat. Ann. § 231.09 (2); Mass. Ann. Laws, c. 71, § 31; Tenn. Code Ann. § 49–1307 (4). Some statutes, like the recently amended Pennsylvania statute involved in *Schempp,* provide for the excusal or exemption of children whose parents do not wish them to participate. See generally Johnson and Yost, Separation of Church and State in the United States (1948), 33–36; Thayer, The Role of the School in American Society (1960), 374–375; Beth, The American Theory of Church and State (1958), 106–107. Compare with the American statutory approach Article 28 (3) of the Constitution of India:

"(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to

concerned in the *Schempp* case, for example, took effect in 1913; and even the Rule of the Baltimore School Board involved in the *Murray* case dates only from 1905. In no State has there ever been a constitutional or statutory prohibition against the recital of prayers or the reading of Scripture, although a number of States have outlawed these practices by judicial decision or administrative order. What is noteworthy about the panoply of state and local regulations from which these cases emerge is the relative recency of the statutory codification of practices which have ancient roots, and the rather small number of States which have ever prescribed compulsory religious exercises in the public schools.

The purposes underlying the adoption and perpetuation of these practices are somewhat complex. It is beyond question that the religious benefits and values realized from daily prayer and Bible reading have usually been considered paramount, and sufficient to justify the continuation of such practices. To Horace Mann, embroiled in an intense controversy over the role of *sectarian* instruction and textbooks in the Boston public schools, there was little question that the regular use of the Bible—which he thought essentially nonsectarian—would bear fruit in the spiritual enlightenment of his pupils.[37] A contemporary of Mann's, the Commissioner of Education of a neighboring State, expressed a view which many enlightened educators of that day shared:

> "As a textbook of morals the Bible is pre-eminent, and should have a prominent place in our schools,

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take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto." See 1 Chaudhri, Constitutional Rights and Limitations (1955), 876, 939.

[37] See note 34, *supra*.

> either as a reading book or as a source of appeal and instruction. Sectarianism, indeed, should not be countenanced in the schools; but the Bible is not sectarian . . . . The Scriptures should at least be read at the opening of the school, if no more. Prayer may also be offered with the happiest effects." [38]

Wisconsin's Superintendent of Public Instruction, writing a few years later in 1858, reflected the attitude of his eastern colleagues, in that he regarded "with special favor the use of the Bible in public schools, as pre-eminently first in importance among text-books for teaching the noblest principles of virtue, morality, patriotism, and good order—love and reverence for God—charity and good will to man." [39]

Such statements reveal the understanding of educators that the daily religious exercises in the schools served broader goals than compelling formal worship of God or fostering church attendance. The religious aims of the educators who adopted and retained such exercises were comprehensive, and in many cases quite devoid of sectarian bias—but the crucial fact is that they were nonetheless religious. While it has been suggested, see pp. 278–281, *infra*, that daily prayer and reading of Scripture now serve secular goals as well, there can be no doubt that the origins of these practices were unambiguously religious, even where the educator's aim was not to win adherents to a particular creed or faith.

Almost from the beginning religious exercises in the public schools have been the subject of intense criticism, vigorous debate, and judicial or administrative prohibition. Significantly, educators and school boards

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[38] Quoted from New Hampshire School Reports, 1850, 31–32, in Kinney, Church and State: The Struggle for Separation in New Hampshire, 1630–1900 (1955), 157–158.

[39] Quoted in Boyer, Religious Education of Public School Pupils in Wisconsin, 1953 Wis. L. Rev. 181, 186.

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early entertained doubts about both the legality and the soundness of opening the school day with compulsory prayer or Bible reading. Particularly in the large Eastern cities, where immigration had exposed the public schools to religious diversities and conflicts unknown to the homogeneous academies of the eighteenth century, local authorities found it necessary even before the Civil War to seek an accommodation. In 1843, the Philadelphia School Board adopted the following resolutions:

> "RESOLVED, that no children be required to attend or unite in the reading of the Bible in the Public Schools, whose parents are conscientiously opposed thereto:
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> "RESOLVED, that those children whose parents conscientiously prefer and desire any particular version of the Bible, without note or comment, be furnished with same." [40]

A decade later, the Superintendent of Schools of New York State issued an even bolder decree that prayers could no longer be required as part of public school activities, and that where the King James Bible was read, Catholic students could not be compelled to attend.[41] This type of accommodation was not restricted to the East Coast; the Cincinnati Board of Education resolved in 1869 that "religious instruction and the reading of religious books, including the Holy Bible, are prohibited in the common schools of Cincinnati, it being the true object and intent of this rule to allow the children of the parents of all sects and opinions, in matters of faith and worship,

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[40] Quoted in Dunn, What Happened to Religious Education? (1958), 271.

[41] Quoted in Butts, The American Tradition in Religion and Education (1950), 135–136.

to enjoy alike the benefit of the common-school fund." [42] The Board repealed at the same time an earlier regulation which had required the singing of hymns and psalms to accompany the Bible reading at the start of the school day. And in 1889, one commentator ventured the view that "[t]here is not enough to be gained from Bible reading to justify the quarrel that has been raised over it." [43]

Thus a great deal of controversy over religion in the public schools had preceded the debate over the Blaine Amendment, precipitated by President Grant's insistence that matters of religion should be left "to the family altar, the church, and the private school, supported entirely by private contributions." [44] There was ample precedent, too, for Theodore Roosevelt's declaration that in the interest of "absolutely nonsectarian public schools" it was "not our business to have the Protestant Bible or the Catholic Vulgate or the Talmud read in those schools." [45] The same principle appeared in the message of an Ohio Governor who vetoed a compulsory Bible-reading bill in 1925:

> "It is my belief that religious teaching in our homes, Sunday schools, churches, by the good

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[42] See *Board of Education* v. *Minor*, 23 Ohio St. 211; Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed. 1949), 864.

[43] Report of the United States Commissioner of Education for the Year 1888–1889, part I, H. R. Exec. Doc. No. 1, part 5, 51st Cong., 1st Sess. 627.

[44] Quoted in *Illinois ex rel. McCollum* v. *Board of Education*, *supra*, at 218 (opinion of Frankfurter, J.). See also President Grant's Annual Message to Congress, Dec. 7, 1875, 4 Cong. Rec. 175 *et seq.*, which apparently inspired the drafting and submission of the Blaine Amendment. See Meyer, Comment, The Blaine Amendment and the Bill of Rights, 64 Harv. L. Rev. 939 (1951).

[45] Theodore Roosevelt to Michael A. Schaap, Feb. 22, 1915, 8 Letters of Theodore Roosevelt (Morison ed. 1954), 893.

> mothers, fathers, and ministers of Ohio is far preferable to compulsory teaching of religion by the state. The spirit of our federal and state constitutions from the beginning . . . [has] been to leave religious instruction to the discretion of parents." [46]

The same theme has recurred in the opinions of the Attorneys General of several States holding religious exercises or instruction to be in violation of the state or federal constitutional command of separation of church and state.[47] Thus the basic principle upon which our decision last year in *Engel* v. *Vitale* necessarily rested, and which we reaffirm today, can hardly be thought to be radical or novel.

Particularly relevant for our purposes are the decisions of the state courts on questions of religion in the public schools. Those decisions, while not, of course, authoritative in this Court, serve nevertheless to define the problem before us and to guide our inquiry. With the growth of religious diversity and the rise of vigorous dissent it was inevitable that the courts would be called upon to enjoin religious practices in the public schools which offended certain sects and groups. The earliest of such decisions declined to review the propriety of actions taken by school authorities, so long as those actions were within

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[46] Quoted in Boles, The Bible, Religion, and the Public Schools (1961), 238.

[47] *E. g.*, 1955 Op. Ariz. Atty. Gen. 67; 26 Ore. Op. Atty. Gen. 46 (1952); 25 Cal. Op. Atty. Gen. 316 (1955); 1948–1950 Nev. Atty. Gen. Rep. 69 (1948). For a 1961 opinion of the Attorney General of Michigan to the same effect, see 63 American Jewish Yearbook (1962) 189. In addition to the Governor of Ohio, see note 46, *supra*, a Governor of Arizona vetoed a proposed law which would have permitted "reading the Bible, without comment, except to teach Historical or Literary facts." See 2 Stokes, Church and State in the United States (1950), 568.

the purview of the administrators' powers.[48] Thus, where the local school board *required* religious exercises, the courts would not enjoin them;[49] and where, as in at least one case, the school officials *forbade* devotional practices, the court refused on similar grounds to overrule that decision.[50] Thus, whichever way the early cases came up, the governing principle of nearly complete deference to administrative discretion effectively foreclosed any consideration of constitutional questions.

The last quarter of the nineteenth century found the courts beginning to question the constitutionality of public school religious exercises. The legal context was still, of course, that of the state constitutions, since the First Amendment had not yet been held applicable to state action. And the state constitutional prohibitions against church-state cooperation or governmental aid to religion were generally less rigorous than the Establishment Clause of the First Amendment. It is therefore remarkable that the courts of a half dozen States found compulsory religious exercises in the public schools in violation of their respective state constitutions.[51] These

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[48] See Johnson and Yost, Separation of Church and State in the United States (1948), 71; Note, Bible Reading in Public Schools, 9 Vand. L. Rev. 849, 851 (1956).

[49] *E. g., Spiller* v. *Inhabitants of Woburn,* 12 Allen (Mass.) 127 (1866); *Donahoe* v. *Richards,* 38 Maine 376, 413 (1854); cf. *Ferriter* v. *Tyler,* 48 Vt. 444, 471–472 (1876).

[50] *Board of Education* v. *Minor,* 23 Ohio St. 211 (1873).

[51] *People ex rel. Ring* v. *Board of Education,* 245 Ill. 334, 92 N. E. 251 (1910); *Herold* v. *Parish Board of School Directors,* 136 La. 1034, 68 So. 116 (1915); *State ex rel. Weiss* v. *District Board,* 76 Wis. 177, 44 N. W. 967 (1890); *State ex rel. Finger* v. *Weedman,* 55 S. D. 343, 226 N. W. 348 (1929); *State ex rel. Dearle* v. *Frazier,* 102 Wash. 369, 173 P. 35 (1918); cf. *State ex rel. Clithero* v. *Showalter,* 159 Wash. 519, 293 P. 1000 (1930); *State ex rel. Freeman* v. *Scheve,* 65 Neb. 853, 91 N. W. 846 (1902), modified, 65 Neb. 876, 93

courts attributed much significance to the clearly religious origins and content of the challenged practices, and to the impossibility of avoiding sectarian controversy in their conduct. The Illinois Supreme Court expressed in 1910 the principles which characterized these decisions:

> "The public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of the public school. . . . No one denies that they should be taught to the youth of the State. The constitution and the law do not interfere with such teaching, but they do banish theological polemics from the schools and the school districts. This is done, not from any hostility to religion, but because it is no part of the duty of the State to teach religion,—to take the money of all and apply it to teaching the children of all the religion of a part, only. Instruction in religion must be voluntary." *People ex rel. Ring* v. *Board of Education,* 245 Ill. 334, 349, 92 N. E. 251, 256 (1910).

The Supreme Court of South Dakota, in banning devotional exercises from the public schools of that State, also cautioned that "[t]he state as an educator must keep out of this field, and especially is this true in the common schools, where the child is immature, without fixed religious convictions . . . ." *State ex rel. Finger* v. *Weedman,* 55 S. D. 343, 357, 226 N. W. 348, 354 (1929).

N. W. 169 (1903). The cases are discussed in Boles, The Bible, Religion, and the Public Schools (1961), c. IV; Harrison, The Bible, the Constitution and Public Education, 29 Tenn. L. Rev. 363, 386–389 (1962).

Even those state courts which have sustained devotional exercises under state law [52] have usually recognized the primarily religious character of prayers and Bible readings. If such practices were not for that reason unconstitutional, it was necessarily because the state constitution forbade only public expenditures for *sectarian* instruction, or for activities which made the schoolhouse a "place of worship," but said nothing about the subtler question of laws "respecting an establishment of religion." [53] Thus the panorama of history permits no

[52] *Moore* v. *Monroe,* 64 Iowa 367, 20 N. W. 475 (1884); *Hackett* v. *Brooksville Graded School District,* 120 Ky. 608, 87 S. W. 792 (1905); *Billard* v. *Board of Education,* 69 Kan. 53, 76 P. 422 (1904); *Pfeiffer* v. *Board of Education,* 118 Mich. 560, 77 N. W. 250 (1898); *Kaplan* v. *School District,* 171 Minn. 142, 214 N. W. 18 (1927); *Lewis* v. *Board of Education,* 157 Misc. 520, 285 N. Y. Supp. 164 (Sup. Ct. 1935), modified on other grounds, 247 App. Div. 106, 286 N. Y. Supp. 174 (1936), appeal dismissed, 276 N. Y. 490, 12 N. E. 2d 172 (1937); *Doremus* v. *Board of Education,* 5 N. J. 435, 75 A. 2d 880 (1950), appeal dismissed, 342 U. S. 429; *Church* v. *Bullock,* 104 Tex. 1, 109 S. W. 115 (1908); *People ex rel. Vollmar* v. *Stanley,* 81 Colo. 276, 255 P. 610 (1927); *Wilkerson* v. *City of Rome,* 152 Ga. 762, 110 S. E. 895 (1922); *Carden* v. *Bland,* 199 Tenn. 665, 288 S. W. 2d 718 (1956); *Chamberlin* v. *Dade County Board of Public Instruction,* 143 So. 2d 21 (Fla. 1962).

[53] For discussion of the constitutional and statutory provisions involved in the state cases which sustained devotional exercises in the public schools, see Boles, The Bible, Religion, and the Public Schools (1961), c. III; Harrison, The Bible, the Constitution and Public Education, 29 Tenn. L. Rev. 363, 381–385 (1962); Fellman, Separation of Church and State in the United States: A Summary View, 1950 Wis.. L. Rev. 427, 450–452; Note, Bible Reading in Public Schools, 9 Vand. L. Rev. 849, 854–859 (1956); Note, Nineteenth Century Judicial Thought Concerning Church-State Relations, 40 Minn. L. Rev. 672, 675–678 (1956). State courts appear to have been increasingly influenced in sustaining devotional practices by the availability of an excuse or exemption for dissenting students. See Cushman, The Holy Bible and the Public Schools, 40 Cornell L. Q. 475, 477 (1955); 13 Vand. L. Rev. 552 (1960).

other conclusion than that daily prayers and Bible readings in the public schools have always been designed to be, and have been regarded as, essentially religious exercises. Unlike the Sunday closing laws, these exercises appear neither to have been divorced from their religious origins nor deprived of their centrally religious character by the passage of time,[54] cf. *McGowan* v. *Maryland*, *supra*, at 442–445. On this distinction alone we might well rest a constitutional decision. But three further contentions have been pressed in the argument of these cases. These contentions deserve careful consideration, for if the position of the school authorities were correct in respect to any of them, we would be misapplying the principles of *Engel* v. *Vitale*.

A.

First, it is argued that however clearly religious may have been the origins and early nature of daily prayer and Bible reading, these practices today serve so clearly secular educational purposes that their religious attributes may be overlooked. I do not doubt, for example, that morning devotional exercises may foster better discipline in the classroom, and elevate the spiritual level on which the school day opens. The Pennsylvania Superintendent of Public Instruction, testifying by deposition in the *Schempp* case, offered his view that daily Bible reading "places upon the children or those hearing the reading of this, and the atmosphere which goes on in the reading . . . one of the last vestiges of moral value

[54] See Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt. L. Rev. 561, 571–572 (1961); Harrison, The Bible, the Constitution and Public Education, 29 Tenn. L. Rev. 363, 399–400 (1962); 30 Ford. L. Rev. 801, 803 (1962); 45 Va. L. Rev. 1381 (1959). The essentially religious character of the materials used in these exercises is, in fact, strongly suggested by the presence of excusal or exemption provisions, and by the practice of rotating or alternating the use of different prayers and versions of the Holy Bible.

that we have left in our school system." The exercise thus affords, the Superintendent concluded, "a strong contradiction to the materialistic trends of our time." Baltimore's Superintendent of Schools expressed a similar view of the practices challenged in the *Murray* case, to the effect that "[t]he acknowledgement of the existence of God as symbolized in the opening exercises establishes a discipline tone which tends to cause each individual pupil to constrain his overt acts and to consequently conform to accepted standards of behavior during his attendance at school." These views are by no means novel, see, *e. g., Billard* v. *Board of Education,* 69 Kan. 53, 57–58, 76 P. 422, 423 (1904).[55]

It is not the business of this Court to gainsay the judgments of experts on matters of pedagogy. Such decisions must be left to the discretion of those administrators charged with the supervision of the Nation's public schools. The limited province of the courts is to determine whether the means which the educators have chosen to achieve legitimate pedagogical ends infringe the constitutional freedoms of the First Amendment. The secular purposes which devotional exercises are said to serve fall into two categories—those which depend upon an immediately religious experience shared by the participating children; and those which appear sufficiently divorced from the religious content of the devotional material that they can be served equally by nonreligious

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[55] In the *Billard* case, the teacher whose use of the Lord's Prayer and the Twenty-third Psalm was before the court testified that the exercise served disciplinary rather than spiritual purposes:

"It is necessary to have some general exercise after the children come in from the playground to prepare them for their work. You need some general exercise to quiet them down."

When asked again if the purpose were not at least partially religious, the teacher replied, "[i]t was religious to the children that are religious, and to the others it was not." 69 Kan., at 57–58, 76 P., at 423.

materials. With respect to the first objective, much has been written about the moral and spiritual values of infusing some religious influence or instruction into the public school classroom.[56] To the extent that only *religious* materials will serve this purpose, it seems to me that the purpose as well as the means is so plainly religious that the exercise is necessarily forbidden by the Establishment Clause. The fact that purely secular benefits may eventually result does not seem to me to justify the exercises, for similar indirect nonreligious benefits could no doubt have been claimed for the released time program invalidated in *McCollum*.

The second justification assumes that religious exercises at the start of the school day may directly serve solely secular ends—for example, by fostering harmony and tolerance among the pupils, enhancing the authority of the teacher, and inspiring better discipline. To the extent that such benefits result not from the content of the readings and recitation, but simply from the holding of such a solemn exercise at the opening assembly or the first class of the day, it would seem that less sensitive materials might equally well serve the same purpose. I have previously suggested that *Torcaso* and the *Sunday Law Cases* forbid the use of religious means to achieve sec-

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[56] See, *e. g.*, Henry, The Place of Religion in Public Schools (1950); Martin, Our Public Schools—Christian or Secular (1952); Educational Policies Comm'n of the National Educational Assn., Moral and Spiritual Values in the Public Schools (1951), c. IV; Harner, Religion's Place in General Education (1949). Educators are by no means unanimous, however, on this question. See Boles, The Bible, Religion, and the Public Schools (1961), 223–224. Compare George Washington's advice in his Farewell Address:

"And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect that National morality can prevail in exclusion of religious principle." 35 Writings of George Washington (Fitzpatrick ed. 1940), 229.

ular ends where nonreligious means will suffice. That principle is readily applied to these cases. It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation of the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between the spheres of religion and government.[57] Such substitutes would, I think, be unsatisfactory or inadequate only to the extent that the present activities do in fact serve religious goals. While I do not question the judgment of experienced educators that the challenged practices may well achieve valuable secular ends, it seems to me that the State acts unconstitutionally if it either sets about to attain even indirectly religious ends by religious means, or if it uses religious means to serve secular ends where secular means would suffice.

B.

Second, it is argued that the particular practices involved in the two cases before us are unobjectionable

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[57] Thomas Jefferson's insistence that where the judgments of young children "are not sufficiently matured for religious inquiries, their memories may here be stored with the most useful facts from Grecian, Roman, European and American history," 2 Writings of Thomas Jefferson (Memorial ed. 1903), 204, is relevant here. Recent proposals have explored the possibility of commencing the school day "with a quiet moment that would still the tumult of the playground and start a day of study," Editorial, Washington Post, June 28, 1962, § A, p. 22, col. 2. See also New York Times, Aug. 30, 1962, § 1, p. 18, col. 2. For a consideration of these and other alternative proposals see Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 370–371 (1963). See also 2 Stokes, Church and State in the United States (1950), 571.

because they prefer no particular sect or sects at the expense of others. Both the Baltimore and Abington procedures permit, for example, the reading of any of several versions of the Bible, and this flexibility is said to ensure neutrality sufficiently to avoid the constitutional prohibition. One answer, which might be dispositive, is that any version of the Bible is inherently sectarian, else there would be no need to offer a system of rotation or alternation of versions in the first place, that is, to allow different sectarian versions to be used on different days. The sectarian character of the Holy Bible has been at the core of the whole controversy over religious practices in the public schools throughout its long and often bitter history.[58] To

[58] The history, as it bears particularly upon the role of sectarian differences concerning Biblical texts and interpretation, has been summarized in *Tudor* v. *Board of Education,* 14 N. J. 31, 36–44, 100 A. 2d 857, 859–864. See also *State ex rel. Weiss* v. *District Board,* 76 Wis. 177, 190–193, 44 N. W. 967, 972–975. One state court adverted to these differences a half century ago:

"The Bible, in its entirety, is a sectarian book as to the Jew and every believer in any religion other than the Christian religion, and as to those who are heretical or who hold beliefs that are not regarded as orthodox . . . its use in the schools necessarily results in sectarian instruction. There are many sects of Christians, and their differences grow out of their differing constructions of various parts of the Scriptures—the different conclusions drawn as to the effect of the same words. The portions of Scripture which form the basis of these sectarian differences cannot be thoughtfully and intelligently read without impressing the reader, favorably or otherwise, with reference to the doctrines supposed to be derived from them." *People ex rel. Ring* v. *Board of Education,* 245 Ill. 334, 347–348, 92 N. E. 251, 255. But see, for a sharply critical comment, Schofield, Religious Liberty and Bible Reading in Illinois Public Schools, 6 Ill. L. Rev. 17 (1911).

See also Dunn, What Happened to Religious Education? (1958), 268–273; Dawson, America's Way in Church, State, and Society (1953), 53–54; Johnson and Yost, Separation of Church and State in the United States (1948), c. IV; Harpster, Religion, Education and

vary the version as the Abington and Baltimore schools have done may well be less offensive than to read from the King James version every day, as once was the practice. But the result even of this relatively benign procedure is that majority sects are preferred in approximate proportion to their representation in the community and in the student body, while the smaller sects suffer commensurate discrimination. So long as the subject matter of the exercise is sectarian in character, these consequences cannot be avoided.

The argument contains, however, a more basic flaw. There are persons in every community—often deeply devout—to whom any version of the Judaeo-Christian Bible is offensive.[59] There are others whose reverence for the Holy Scriptures demands private study or reflection and to whom public reading or recitation is sacrilegious, as one of the expert witnesses at the trial of the *Schempp* case explained. To such persons it is not the fact of using the Bible in the public schools, nor the content of any particular version, that is offensive, but only the *manner* in

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the Law, 36 Marquette L. Rev. 24, 44–45 (1952); 20 Ohio State L. J. 701, 702–703 (1959).

[59] See *Torcaso* v. *Watkins, supra,* at 495, n. 11; Cushman, The Holy Bible and the Public Schools, 40 Cornell L. Q. 475, 480–483 (1955); Note, Separation of Church and State: Religious Exercises in the Schools, 31 U. of Cinc. L. Rev. 408, 411–412 (1962). Few religious persons today would share the universality of the Biblical canons of John Quincy Adams:

"You ask me *what* Bible I take as the standard of my faith—the Hebrew, the Samaritan, the old English translation, or what? I answer, the Bible containing the sermon upon the mount—any Bible that I can read and understand. . . . I take any one of them for my standard of faith. If Socinus or Priestley had made a fair *translation* of the Bible, I would have taken that, but without their comments." John Quincy Adams to John Adams, Jan. 3, 1817, in Koch and Peden, Selected Writings of John and John Quincy Adams (1946), 292.

which it is used.[60] For such persons, the anathema of public communion is even more pronounced when prayer is involved. Many deeply devout persons have always regarded prayer as a necessarily private experience.[61] One Protestant group recently commented, for example: "When one thinks of prayer as sincere outreach of a

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[60] Rabbi Solomon Grayzel testified before the District Court, "In Judaism the Bible is not read, it is studied. There is no special virtue attached to a mere reading of the Bible; there is a great deal of virtue attached to a study of the Bible." See Boles, The Bible, Religion, and the Public Schools (1961), 208–218; Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 372–375 (1963). One religious periodical has suggested the danger that "an observance of this sort is likely to deteriorate quickly into an empty formality with little, if any, spiritual significance. Prescribed forms of this sort, as many colleges have concluded after years of compulsory chapel attendance, can actually work against the inculcation of vital religion." Prayers in Public Schools Opposed, 69 Christian Century, Jan. 9, 1952, p. 35.

[61] See Cahn, On Government and Prayer, 37 N. Y. U. L. Rev. 981, 993–994 (1962). A leading Protestant journal recently noted:

"Agitation for removal of religious practices in public schools is not prompted or supported entirely by Jews, humanists, and atheists. At both local and national levels, many Christian leaders, concerned both for civil rights of minorities and for adequate religious education, are opposed to religious exercises in public schools. . . . Many persons, both Jews and Christians, believe that prayer and Bible reading are too sacred to be permitted in public schools in spite of their possible moral value." Smith, The Religious Crisis In Our Schools, 128 The Episcopalian, May 1963, pp. 12–13. See, *e. g.*, for other recent statements on this question, Editorial, Amending the Amendment, 108 America, May 25, 1963, p. 736; Sissel, A Christian View: Behind the Fight Against School Prayer, 27 Look, June 18, 1963, p. 25.

It should be unnecessary to demonstrate that the Lord's Prayer, more clearly than the Regents' Prayer involved in *Engel* v. *Vitale*, is an essentially Christian supplication. See, *e. g.*, Scott, The Lord's Prayer: Its Character, Purpose, and Interpretation (1951), 55; Buttrick, So We Believe, So We Pray (1951), 142; Levy, Lord's Prayer, in 7 Universal Jewish Encyclopedia (1948), 192–193.

human soul to the Creator, 'required prayer' becomes an absurdity." [62] There is a similar problem with respect to comment upon the passages of Scripture which are to be read. Most present statutes forbid comment, and this practice accords with the views of many religious groups as to the manner in which the Bible should be read. However, as a recent survey discloses, scriptural passages read without comment frequently convey no message to the younger children in the school. Thus there has developed a practice in some schools of bridging the gap between faith and understanding by means of "definitions," even where "comment" is forbidden by statute.[63] The present practice therefore poses a difficult dilemma: While Bible reading is almost universally required to be without comment, since only by such a prohibition can sectarian interpretation be excluded from the classroom,

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[62] Statement of the Baptist Joint Committee on Public Affairs, in 4 J. Church and State 144 (1962).

[63] See Harrison, The Bible, the Constitution and Public Education, 29 Tenn. L. Rev. 363, 397 (1962). The application of statutes and regulations which forbid comment on scriptural passages is further complicated by the view of certain religious groups that reading without comment is either meaningless or actually offensive. Compare Rabbi Grayzel's testimony before the District Court that "the Bible is misunderstood when it is taken without explanation." A recent survey of the attitudes of certain teachers disclosed concern that "refusal to answer pupil questions regarding any curricular activity is not educationally sound," and that reading without comment might create in the minds of the pupils the impression that something was "hidden or wrong." Boles, The Bible, Religion, and the Public Schools (1961), 235–236. Compare the comment of a foreign observer: "In no other field of learning would we expect a child to draw the full meaning from what he reads without accompanying explanatory comment. But comment by the teacher will inevitably reveal his own personal preferences; and the exhibition of preferences is what we are seeking to eliminate." MacKinnon, Freedom?—or Toleration? The Problem of Church and State in the United States, [1959] Pub. Law 374, 383.

the rule breaks down at the point at which rudimentary definitions of Biblical terms are necessary for comprehension if the exercise is to be meaningful at all.

It has been suggested that a tentative solution to these problems may lie in the fashioning of a "common core" of theology tolerable to all creeds but preferential to none.[64] But as one commentator has recently observed, "[h]istory is not encouraging to" those who hope to fashion a "common denominator of religion detached from its manifestation in any organized church." Sutherland, Establishment According to *Engel,* 76 Harv. L. Rev. 25, 51 (1962). Thus, the notion of a "common core" litany or supplication offends many deeply devout worshippers who do not find clearly sectarian practices objectionable.[65] Father Gustave Weigel has recently expressed

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[64] See Abbott, A Common Bible Reader for Public Schools, 56 Religious Education 20 (1961); Note, 22 Albany L. Rev. 156–157 (1958); 2 Stokes, Church and State in the United States (1950), 501–506 (describing the "common denominator" or "three faiths" plan and certain programs of instruction designed to implement the "common core" approach). The attempts to evolve a universal, nondenominational prayer are by no means novel. See, *e. g.*, Madison's letter to Edward Everett, March 19, 1823, commenting upon a "project of a prayer . . . intended to comprehend & conciliate College Students of every [Christian] denomination, by a Form composed wholly of texts & phrases of scripture." 9 Writings of James Madison (Hunt ed. 1910), 126. For a fuller description of this and other attempts to fashion a "common core" or nonsectarian exercise, see *Engel* v. *Vitale,* 18 Misc. 2d 659, 660–662, 191 N. Y. S. 2d 453, 459–460.

[65] See the policy statement recently drafted by the National Council of the Churches of Christ: ". . . neither true religion nor good education is dependent upon the devotional use of the Bible in the public school program. . . . Apart from the constitutional questions involved, attempts to establish a 'common core' of religious beliefs to be taught in public schools for the purpose of indoctrination are unrealistic and unwise. Major faith groups have not agreed on a formulation of religious beliefs common to all. Even if they had

a widely shared view: "The moral code held by each separate religious community can reductively be unified, but the consistent particular believer wants no such reduction." [66] And, as the American Council on Education warned several years ago, "The notion of a common core suggests a watering down of the several faiths to the point where common essentials appear. This might easily lead to a new sect—a public school sect—which would take its place alongside the existing faiths and compete with them." [67] *Engel* is surely authority that nonsectarian religious practices, equally with sectarian exercises, violate the Establishment Clause. Moreover, even if the Establishment Clause were oblivious to nonsectarian religious practices, I think it quite likely that the "common core" approach would be sufficiently objectionable to many groups to be foreclosed by the prohibitions of the Free Exercise Clause.

C.

A third element which is said to absolve the practices involved in these cases from the ban of the religious guarantees of the Constitution is the provision to excuse or exempt students who wish not to participate. Insofar as these practices are claimed to violate the Establishment

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done so, such a body of religious doctrine would tend to become a substitute for the more demanding commitments of historic faiths." Washington Post, May 25, 1963, § A, p. 1, col. 4. See also Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 341, 368–369 (1963). See also Hartford, Moral Values in Public Education: Lessons from the Kentucky Experience (1958), 261–262; Moehlman, The Wall of Separation Between Church and State (1951), 158–159. Cf. Mosk, "Establishment Clause" Clarified, 22 Law in Transition 231, 235–236 (1963).

[66] Quoted in Kurland, The Regents' Prayer Case: "Full of Sound and Fury, Signifying . . . ," 1962 Supreme Court Review (1962), 1, 31.

[67] Quoted in Harrison, The Bible, the Constitution and Public Education, 29 Tenn. L. Rev. 363, 417 (1962). See also Dawson, America's Way in Church, State, and Society (1953), 54.

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Clause, I find the answer which the District Court gave after our remand of *Schempp* to be altogether dispositive:

> "The fact that some pupils, or theoretically all pupils, might be excused from attendance at the exercises does not mitigate the obligatory nature of the ceremony . . . . The exercises are held in the school buildings and perforce are conducted by and under the authority of the local school authorities and during school sessions. Since the statute requires the reading of the 'Holy Bible,' a Christian document, the practice, as we said in our first opinion, prefers the Christian religion. The record demonstrates that it was the intention of the General Assembly of the Commonwealth of Pennsylvania to introduce a religious ceremony into the public schools of the Commonwealth." 201 F. Supp., at 819.

Thus the short, and to me sufficient, answer is that the availability of excusal or exemption simply has no relevance to the establishment question, if it is once found that these practices are essentially religious exercises designed at least in part to achieve religious aims through the use of public school facilities during the school day.

The more difficult question, however, is whether the availability of excusal for the dissenting child serves to refute challenges to these practices under the Free Exercise Clause. While it is enough to decide these cases to dispose of the establishment questions, questions of free exercise are so inextricably interwoven into the history and present status of these practices as to justify disposition of this second aspect of the excusal issue. The answer is that the excusal procedure itself necessarily operates in such a way as to infringe the rights of free exercise of those children who wish to be excused. We have held in *Barnette* and *Torcaso,* respectively, that a State may require neither public school students nor candidates

for an office of public trust to profess beliefs offensive to religious principles. By the same token the State could not constitutionally require a student to profess publicly his disbelief as the prerequisite to the exercise of his constitutional right of abstention. And apart from *Torcaso* and *Barnette,* I think *Speiser* v. *Randall,* 357 U. S. 513, suggests a further answer. We held there that a State may not condition the grant of a tax exemption upon the willingness of those entitled to the exemption to affirm their loyalty to the Government, even though the exemption was itself a matter of grace rather than of constitutional right. We concluded that to impose upon the eligible taxpayers the affirmative burden of proving their loyalty impermissibly jeopardized the freedom to engage in constitutionally protected activities close to the area to which the loyalty oath related. *Speiser* v. *Randall* seems to me to dispose of two aspects of the excusal or exemption procedure now before us. First, by requiring what is tantamount in the eyes of teachers and schoolmates to a profession of disbelief, or at least of nonconformity, the procedure may well deter those children who do not wish to participate for any reason based upon the dictates of conscience from exercising an indisputably constitutional right to be excused.[68] Thus the excusal

[68] See the testimony of Edward L. Schempp, the father of the children in the Abington schools and plaintiff-appellee in No. 142, concerning his reasons for not asking that his children be excused from the morning exercises after excusal was made available through amendment of the statute:

"We originally objected to our children being exposed to the reading of the King James version of the Bible . . . and under those conditions we would have theoretically liked to have had the children excused. But we felt that the penalty of having our children labelled as 'odd balls' before their teachers and classmates every day in the year was even less satisfactory than the other problem. . . .

"The children, the classmates of Roger and Donna are very liable to label and lump all particular religious difference or religious objec-

provision in its operation subjects them to a cruel dilemma. In consequence, even devout children may well avoid claiming their right and simply continue to participate in exercises distasteful to them because of an understandable reluctance to be stigmatized as atheists or nonconformists simply on the basis of their request.

Such reluctance to seek exemption seems all the more likely in view of the fact that children are disinclined at this age to step out of line or to flout "peer-group norms." Such is the widely held view of experts who have studied the behaviors and attitudes of children.[69] This is also

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tions as atheism, particularly, today the word 'atheism' is so often tied to atheistic communism, and atheism has very bad connotations in the minds of children and many adults today."

A recent opinion of the Attorney General of California gave as one reason for finding devotional exercises unconstitutional the likelihood that "[c]hildren forced by conscience to leave the room during such exercises would be placed in a position inferior to that of students adhering to the State-endorsed religion." 25 Cal. Op. Atty. Gen. 316, 319 (1955). Other views on this question, and possible effects of the excusal procedure, are summarized in Rosenfield, Separation of Church and State in the Public Schools, 22 U. of Pitt. L. Rev. 561, 581–585 (1961); Note, Separation of Church and State: Religious Exercises in the Schools, 31 U. of Cinc. L. Rev. 408, 416 (1962); Note, 62 W. Va. L. Rev. 353, 358 (1960).

[69] Extensive testimony by behavioral scientists concerning the effect of similar practices upon children's attitudes and behaviors is discussed in *Tudor* v. *Board of Education*, 14 N. J. 31, 50–52, 100 A. 2d 857, 867–868. See also Choper, Religion in the Public Schools: A Proposed Constitutional Standard, 47 Minn. L. Rev. 329, 344 (1963). There appear to be no reported experiments which bear directly upon the question under consideration. There have, however, been numerous experiments which indicate the susceptibility of school children to peer-group pressures, especially where important group norms and values are involved. See, *e. g.*, Berenda, The Influence of the Group on the Judgments of Children (1950), 26–33; Argyle, Social Pressure in Public and Private Situations, 54 J. Abnormal & Social Psych. 172 (1957); cf. Rhine, The Effect of Peer

the basis of Mr. Justice Frankfurter's answer to a similar contention made in the *McCollum* case:

> "That a child is offered an alternative may reduce the constraint; it does not eliminate the operation of influence by the school in matters sacred to conscience and outside the school's domain. The law of imitation operates, and non-conformity is not an

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Group Influence Upon Concept-Attitude Development and Change, 51 J. Social Psych. 173 (1960); French, Morrison and Levinger, Coercive Power and Forces Affecting Conformity, 61 J. Abnormal and Social Psych. 93 (1960). For a recent and important experimental study of the susceptibility of students to various factors in the school environment, see Zander, Curtis and Rosenfeld, The Influence of Teachers and Peers on Aspirations of Youth (U. S. Office of Education Cooperative Research Project No. 451, 1961), 24–25, 78–79. It is also apparent that the susceptibility of school children to prestige suggestion and social influence within the school environment varies inversely with the age, grade level, and consequent degree of sophistication of the child, see Patel and Gordon, Some Personal and Situational Determinants of Yielding to Influence, 61 J. Abnormal and Social Psych. 411, 417 (1960).

Experimental findings also shed some light upon the probable effectiveness of a provision for excusal when, as is usually the case, the percentage of the class wishing not to participate in the exercises is very small. It has been demonstrated, for example, that the inclination even of adults to depart or dissent overtly from strong group norms varies proportionately with the size of the dissenting group—that is, inversely with the apparent or perceived strength of the norm itself—and is markedly slighter in the case of the sole or isolated dissenter. See, *e. g.*, Asch, Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority (Psych. Monographs No. 416, 1956), 69–70; Asch, Effects of Group Pressure upon the Modification and Distortion of Judgments, in Cartwright and Zander, Group Dynamics (2d ed. 1960), 189–199; Luchins and Luchins, On Conformity With True and False Communications, 42 J. Social Psych. 283 (1955). Recent important findings on these questions are summarized in Hare, Handbook of Small Group Research (1962), c. II.

> outstanding characteristic of children. The result is an obvious pressure upon children to attend." 333 U. S., at 227.

Also apposite is the answer given more than 70 years ago by the Supreme Court of Wisconsin to the argument that an excusal provision saved a public school devotional exercise from constitutional invalidation:

> ". . . the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion, and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others." *State ex rel. Weiss* v. *District Board of School District No. 8,* 76 Wis. 177, 200, 44 N. W. 967, 975.

And 50 years ago a like answer was offered by the Louisiana Supreme Court:

> "Under such circumstances, the children would be excused from the opening exercises . . . because of their religious beliefs. And excusing such children on religious grounds, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious matters." *Herold* v. *Parish Board of School Directors,* 136 La. 1034, 1049–1050, 68 So. 116, 121. See also *Tudor* v. *Board of Education,* 14 N. J. 31, 48–52,

100 A. 2d 857, 867–868; *Brown* v. *Orange County Board of Public Instruction,* 128 So. 2d 181, 185 (Fla. App.).

Speiser v. *Randall* also suggests the answer to a further argument based on the excusal procedure. It has been suggested by the School Board, in *Schempp,* that we ought not pass upon the appellees' constitutional challenge at least until the children have availed themselves of the excusal procedure and found it inadequate to redress their grievances. Were the right to be excused not itself of constitutional stature, I might have some doubt about this issue. But we held in *Speiser* that the constitutional vice of the loyalty oath procedure discharged any obligation to seek the exemption before challenging the constitutionality of the conditions upon which it might have been denied. 357 U. S., at 529. Similarly, we have held that one need not apply for a permit to distribute constitutionally protected literature, *Lovell* v. *Griffin,* 303 U. S. 444, or to deliver a speech, *Thomas* v. *Collins,* 323 U. S. 516, before he may attack the constitutionality of a licensing system of which the defect is patent. Insofar as these cases implicate only questions of establishment, it seems to me that the availability of an excuse is constitutionally irrelevant. Moreover, the excusal procedure seems to me to operate in such a way as to discourage the free exercise of religion on the part of those who might wish to utilize it, thereby rendering it unconstitutional in an additional and quite distinct respect.

To summarize my views concerning the merits of these two cases: The history, the purpose and the operation of the daily prayer recital and Bible reading leave no doubt that these practices standing by themselves constitute an impermissible breach of the Establishment Clause. Such devotional exercises may well serve legitimate nonreligious purposes. To the extent, however, that such pur-

poses are really without religious significance, it has never been demonstrated that secular means would not suffice. Indeed, I would suggest that patriotic or other nonreligious materials might provide adequate substitutes—inadequate only to the extent that the purposes now served are indeed directly or indirectly religious. Under such circumstances, the States may not employ religious means to reach a secular goal unless secular means are wholly unavailing. I therefore agree with the Court that the judgment in *Schempp,* No. 142, must be affirmed, and that in *Murray,* No. 119, must be reversed.

V.

These considerations bring me to a final contention of the school officials in these cases: that the invalidation of the exercises at bar permits this Court no alternative but to declare unconstitutional every vestige, however slight, of cooperation or accommodation between religion and government. I cannot accept that contention. While it is not, of course, appropriate for this Court to decide questions not presently before it, I venture to suggest that religious exercises in the public schools present a unique problem. For not every involvement of religion in public life violates the Establishment Clause. Our decision in these cases does not clearly forecast anything about the constitutionality of other types of interdependence between religious and other public institutions.

Specifically, I believe that the line we must draw between the permissible and the impermissible is one which accords with history and faithfully reflects the understanding of the Founding Fathers. It is a line which the Court has consistently sought to mark in its decisions expounding the religious guarantees of the First Amendment. What the Framers meant to foreclose, and what our decisions under the Establishment Clause have for-

bidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice. When the secular and religious institutions become involved in such a manner, there inhere in the relationship precisely those dangers—as much to church as to state—which the Framers feared would subvert religious liberty and the strength of a system of secular government. On the other hand, there may be myriad forms of involvements of government with religion which do not import such dangers and therefore should not, in my judgment, be deemed to violate the Establishment Clause. Nothing in the Constitution compels the organs of government to be blind to what everyone else perceives—that religious differences among Americans have important and pervasive implications for our society. Likewise nothing in the Establishment Clause forbids the application of legislation having purely secular ends in such a way as to alleviate burdens upon the free exercise of an individual's religious beliefs. Surely the Framers would never have understood that such a construction sanctions that involvement which violates the Establishment Clause. Such a conclusion can be reached, I would suggest, only by using the words of the First Amendment to defeat its very purpose.

The line between permissible and impermissible forms of involvement between government and religion has already been considered by the lower federal and state courts. I think a brief survey of certain of these forms of accommodation will reveal that the First Amendment commands not official hostility toward religion, but only a strict neutrality in matters of religion. Moreover, it may serve to suggest that the scope of our holding today

is to be measured by the special circumstances under which these cases have arisen, and by the particular dangers to church and state which religious exercises in the public schools present. It may be helpful for purposes of analysis to group these other practices and forms of accommodation into several rough categories.

A. *The Conflict Between Establishment and Free Exercise.*—There are certain practices, conceivably violative of the Establishment Clause, the striking down of which might seriously interfere with certain religious liberties also protected by the First Amendment.[70] Provisions for churches and chaplains at military establishments for those in the armed services may afford one such example.[71]

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[70] See, on the general problem of conflict and accommodation between the two clauses, Katz, Freedom of Religion and State Neutrality, 20 U. of Chi. L. Rev. 426, 429 (1953); Griswold, Absolute Is In the Dark, 8 Utah L. Rev. 167, 176–179 (1963); Kauper, Church, State, and Freedom: A Review, 52 Mich. L. Rev. 829, 833 (1954). One author has suggested that the Establishment and Free Exercise Clauses must be "read as stating a single precept: that government cannot utilize religion as a standard for action or inaction because these clauses, read together as they should be, prohibit classification in terms of religion either to confer a benefit or to impose a burden." Kurland, Religion and the Law (1962), 112. Compare the formula of accommodation embodied in the Australian Constitution, § 116:

"The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth." Essays on the Australian Constitution (Else-Mitchell ed. 1961), 15.

[71] There has been much difference of opinion throughout American history concerning the advisability of furnishing chaplains at government expense. Compare, *e. g.*, Washington's order regarding chaplains for the Continental Army, July 9, 1776, in 5 Writings of George Washington (Fitzpatrick ed. 1932), 244, with Madison's views on a very similar question, letter to Edward Livingston, July 10, 1822, 9 Writings of James Madison (Hunt ed. 1910), 100–

The like provision by state and federal governments for chaplains in penal institutions may afford another example.[72] It is argued that such provisions may be assumed to contravene the Establishment Clause, yet be sustained on constitutional grounds as necessary to secure to the members of the Armed Forces and prisoners those rights of worship guaranteed under the Free Exercise Clause. Since government has deprived such persons of the oppor-

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103. Compare also this statement by the Armed Forces Chaplains Board concerning the chaplain's obligation:

"To us has been entrusted the spiritual and moral guidance of the young men and women in the Armed Services of this country. A chaplain has many duties—yet, first and foremost is that of presenting God to men and women wearing the military uniform. What happens to them while they are in military service has a profound effect on what happens in the community as they resume civilian life. We, as chaplains, must take full cognizance of that fact and dedicate our work to making them finer, spiritually strengthened citizens." Builders of Faith (U. S. Department of Defense 1955), ii. It is interesting to compare in this regard an express provision, Article 140, of the Weimar Constitution: "Necessary free time shall be accorded to the members of the armed forces for the fulfilment of their religious duties." McBain and Rogers, The New Constitutions of Europe (1922), 203.

[72] For a discussion of some recent and difficult problems in connection with chaplains and religious exercises in prisons, see, *e. g.*, *Pierce* v. *La Vallee*, 293 F. 2d 233; *In re Ferguson*, 55 Cal. 2d 663, 361 P. 2d 417; *McBride* v. *McCorkle*, 44 N. J. Super. 468, 130 A. 2d 881; *Brown* v. *McGinnis*, 10 N. Y. 2d 531, 180 N. E. 2d 791; discussed in Comment, 62 Col. L. Rev. 1488 (1962); 75 Harv. L. Rev. 837 (1962). Compare Article XVIII of the Hague Convention Regulations of 1899:

"Prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities." Quoted in Blakely, American State Papers and Related Documents on Freedom in Religion (4th rev. ed. 1949), 313.

tunity to practice their faith at places of their choice, the argument runs, government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be. Such a principle might support, for example, the constitutionality of draft exemptions for ministers and divinity students,[73] cf. *Selective Draft Law Cases*, 245 U. S. 366, 389–390; of the excusal of children from school on their respective religious holidays; and of the allowance by government of temporary use of public buildings by religious organizations when their own churches have become unavailable because of a disaster or emergency.[74]

Such activities and practices seem distinguishable from the sponsorship of daily Bible reading and prayer recital. For one thing, there is no element of coercion present in the appointment of military or prison chaplains; the soldier or convict who declines the opportunities for worship would not ordinarily subject himself to the suspicion or obloquy of his peers. Of special significance to this distinction is the fact that we are here usually deal-

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[73] Compare generally Sibley and Jacob, Conscription of Conscience: The American State and the Conscientious Objector, 1940–1947 (1952), with Conklin, Conscientious Objector Provisions: A View in the Light of *Torcaso v. Watkins*, 51 Geo. L. J. 252 (1963).

[74] See, *e. g.*, *Southside Estates Baptist Church* v. *Board of Trustees*, 115 So. 2d 697 (Fla.); *Lewis* v. *Mandeville*, 201 Misc. 120, 107 N. Y. S. 2d 865; cf. *School District No. 97* v. *Schmidt*, 128 Colo. 495, 263 P. 2d 581 (temporary loan of school district's custodian to church). A different problem may be presented with respect to the regular use of public school property for religious activities, *State ex rel. Gilbert* v. *Dilley*, 95 Neb. 527, 145 N. W. 999; the erection on public property of a statue of or memorial to an essentially religious figure, *State ex rel. Singelmann* v. *Morrison*, 57 So. 2d 238 (La. App.); seasonal displays of a religious character, *Baer* v. *Kolmorgen*, 14 Misc. 2d 1015, 181 N. Y. S. 2d 230; or the performance on public property of a drama or opera based on religious material or carrying a religious message, cf. *County of Los Angeles* v. *Hollinger*, 200 Cal. App. 2d 877, 19 Cal. Rptr. 648.

ing with adults, not with impressionable children as in the public schools. Moreover, the school exercises are not designed to provide the pupils with general opportunities for worship denied them by the legal obligation to attend school. The student's compelled presence in school for five days a week in no way renders the regular religious facilities of the community less accessible to him than they are to others. The situation of the school child is therefore plainly unlike that of the isolated soldier or the prisoner.

The State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion. In my view, government cannot sponsor religious exercises in the public schools without jeopardizing that neutrality. On the other hand, hostility, not neutrality, would characterize the refusal to provide chaplains and places of worship for prisoners and soldiers cut off by the State from all civilian opportunities for public communion, the withholding of draft exemptions for ministers and conscientious objectors, or the denial of the temporary use of an empty public building to a congregation whose place of worship has been destroyed by fire or flood. I do not say that government *must* provide chaplains or draft exemptions, or that the courts should intercede if it fails to do so.

B. *Establishment and Exercises in Legislative Bodies.*—The saying of invocational prayers in legislative chambers, state or federal, and the appointment of legislative chaplains, might well represent no involvements of the kind prohibited by the Establishment Clause.[75] Legislators, federal and state, are mature adults who may presumably absent themselves from such public and cere-

[75] Compare Moulton and Myers, Report on Appointing Chaplains to the Legislature of New York, in Blau, Cornerstones of Religious Freedom in America (1949), 141–156; Comment, 63 Col. L. Rev. 73, 97 (1963).

monial exercises without incurring any penalty, direct or indirect. It may also be significant that, at least in the case of the Congress, Art. I, § 5, of the Constitution makes each House the monitor of the "Rules of its Proceedings" so that it is at least arguable whether such matters present "political questions" the resolution of which is exclusively confided to Congress. See *Baker* v. *Carr,* 369 U. S. 186, 232. Finally, there is the difficult question of who may be heard to challenge such practices. See *Elliott* v. *White,* 23 F. 2d 997.

C. *Non-Devotional Use of the Bible in the Public Schools.*—The holding of the Court today plainly does not foreclose teaching *about* the Holy Scriptures or about the differences between religious sects in classes in literature or history. Indeed, whether or not the Bible is involved, it would be impossible to teach meaningfully many subjects in the social sciences or the humanities without some mention of religion.[76] To what extent, and at what points in the curriculum, religious materials should be cited are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation's public schools. They are experts in such matters, and we are not. We should heed Mr. Justice Jackson's caveat that any attempt by this Court to announce curricular standards would be "to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards represent-

[76] A comprehensive survey of the problems raised concerning the role of religion in the secular curriculum is contained in Brown, ed., The Study of Religion in the Public Schools: An Appraisal (1958). See also Katz, Religion and American Constitutions, Lecture at Northwestern University Law School, March 21, 1963, pp. 37–41; Educational Policies Comm'n of the National Education Assn., Moral and Spiritual Values in the Public Schools (1951), 49–80. Compare, for a consideration of similar problems in state-supported colleges and universities, Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal. L. Rev. 751 (1962).

ing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes." *Illinois ex rel. McCollum* v. *Board of Education, supra,* at 237.

We do not, however, in my view usurp the jurisdiction of school administrators by holding as we do today that morning devotional exercises in any form are constitutionally invalid. But there is no occasion now to go further and anticipate problems we cannot judge with the material now before us. Any attempt to impose rigid limits upon the mention of God or references to the Bible in the classroom would be fraught with dangers. If it should sometime hereafter be shown that in fact religion can play no part in the teaching of a given subject without resurrecting the ghost of the practices we strike down today, it will then be time enough to consider questions we must now defer.

D. *Uniform Tax Exemptions Incidentally Available to Religious Institutions.*—Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions, along with many secular charities and nonprofit organizations. If religious institutions benefit, it is in spite of rather than because of their religious character. For religious institutions simply share benefits which government makes generally available to educational, charitable, and eleemosynary groups.[77] There is no indication that taxing authorities have used such benefits in any way to subsidize worship or foster belief in God. And as

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[77] See generally Torpey, Judicial Doctrines of Religious Rights in America (1948), c. VI; Van Alstyne, Tax Exemption of Church Property, 20 Ohio State L. J. 461 (1959); Sutherland, Due Process and Disestablishment, 62 Harv. L. Rev. 1306, 1336–1338 (1949); Louisell and Jackson, Religion, Theology, and Public Higher Education, 50 Cal. L. Rev. 751, 773–780 (1962); 7 De Paul L. Rev. 206 (1958); 58 Col. L. Rev. 417 (1958); 9 Stan. L. Rev. 366 (1957).

among religious beneficiaries, the tax exemption or deduction can be truly nondiscriminatory, available on equal terms to small as well as large religious bodies, to popular and unpopular sects, and to those organizations which reject as well as those which accept a belief in God.[78]

E. *Religious Considerations in Public Welfare Programs.*—Since government may not support or directly aid religious *activities* without violating the Establishment Clause, there might be some doubt whether nondiscriminatory programs of governmental aid may constitutionally include *individuals* who become eligible wholly or partially for religious reasons. For example, it might be suggested that where a State provides unemployment compensation generally to those who are unable to find suitable work, it may not extend such benefits to persons who are unemployed by reason of religious beliefs or practices without thereby establishing the religion to which those persons belong. Therefore, the argument runs, the State may avoid an establishment only by singling out and excluding such persons on the ground that religious beliefs or practices have made them potential beneficiaries. Such a construction would, it seems to me, require government to impose religious discriminations and disabilities, thereby jeopardizing the free exercise of religion, in order to avoid what is thought to constitute an establishment.

The inescapable flaw in the argument, I suggest, is its quite unrealistic view of the aims of the Establishment Clause. The Framers were not concerned with the effects of certain incidental aids to individual worshippers which come about as by-products of general and nondiscriminatory welfare programs. If such benefits serve to make

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[78] See, *e. g., Washington Ethical Society* v. *District of Columbia,* 101 U. S. App. D. C. 371, 249 F. 2d 127; *Fellowship of Humanity* v. *County of Alameda,* 153 Cal. App. 2d 673, 315 P. 2d 394.

easier or less expensive the practice of a particular creed, or of all religions, it can hardly be said that the purpose of the program is in any way religious, or that the consequence of its nondiscriminatory application is to create the forbidden degree of interdependence between secular and sectarian institutions. I cannot therefore accept the suggestion, which seems to me implicit in the argument outlined here, that every judicial or administrative construction which is designed to prevent a public welfare program from abridging the free exercise of religious beliefs, is for that reason *ipso facto* an establishment of religion.

F. *Activities Which, Though Religious in Origin, Have Ceased to Have Religious Meaning.*—As we noted in our *Sunday Law* decisions, nearly every criminal law on the books can be traced to some religious principle or inspiration. But that does not make the present enforcement of the criminal law in any sense an establishment of religion, simply because it accords with widely held religious principles. As we said in *McGowan* v. *Maryland,* 366 U. S. 420, 442, "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." This rationale suggests that the use of the motto "In God We Trust" on currency, on documents and public buildings and the like may not offend the clause. It is not that the use of those four words can be dismissed as "de minimis"—for I suspect there would be intense opposition to the abandonment of that motto. The truth is that we have simply interwoven the motto so deeply into the fabric of our civil polity that its present use may well not present that type of involvement which the First Amendment prohibits.

This general principle might also serve to insulate the various patriotic exercises and activities used in the public schools and elsewhere which, whatever may have been

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their origins, no longer have a religious purpose or meaning. The reference to divinity in the revised pledge of allegiance, for example, may merely recognize the historical fact that our Nation was believed to have been founded "under God." Thus reciting the pledge may be no more of a religious exercise than the reading aloud of Lincoln's Gettysburg Address, which contains an allusion to the same historical fact.

The principles which we reaffirm and apply today can hardly be thought novel or radical. They are, in truth, as old as the Republic itself, and have always been as integral a part of the First Amendment as the very words of that charter of religious liberty. No less applicable today than they were when first pronounced a century ago, one year after the very first court decision involving religious exercises in the public schools, are the words of a distinguished Chief Justice of the Commonwealth of Pennsylvania, Jeremiah S. Black:

> "The manifest object of the men who framed the institutions of this country, was to have a *State without religion,* and a *Church without politics*—that is to say, they meant that one should never be used as an engine for any purpose of the other, and that no man's rights in one should be tested by his opinions about the other. As the Church takes no note of men's political differences, so the State looks with equal eye on all the modes of religious faith. . . . Our fathers seem to have been perfectly sincere in their belief that the members of the Church would be more patriotic, and the citizens of the State more religious, by keeping their respective functions entirely separate." Essay on Religious Liberty, in Black, ed., Essays and Speeches of Jeremiah S. Black (1886), 53.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE HARLAN joins, concurring.

As is apparent from the opinions filed today, delineation of the constitutionally permissible relationship between religion and government is a most difficult and sensitive task, calling for the careful exercise of both judicial and public judgment and restraint. The considerations which lead the Court today to interdict the clearly religious practices presented in these cases are to me wholly compelling; I have no doubt as to the propriety of the decision and therefore join the opinion and judgment of the Court. The singular sensitivity and concern which surround both the legal and practical judgments involved impel me, however, to add a few words in further explication, while at the same time avoiding repetition of the carefully and ably framed examination of history and authority by my Brethren.

The First Amendment's guarantees, as applied to the States through the Fourteenth Amendment, foreclose not only laws "respecting an establishment of religion" but also those "prohibiting the free exercise thereof." These two proscriptions are to be read together, and in light of the single end which they are designed to serve. The basic purpose of the religion clause of the First Amendment is to promote and assure the fullest possible scope of religious liberty and tolerance for all and to nurture the conditions which secure the best hope of attainment of that end.

The fullest realization of true religious liberty requires that government neither engage in nor compel religious practices, that it effect no favoritism among sects or between religion and nonreligion, and that it work deterrence of no religious belief. But devotion even to these simply stated objectives presents no easy course, for the unavoidable accommodations necessary to achieve the

maximum enjoyment of each and all of them are often difficult of discernment. There is for me no simple and clear measure which by precise application can readily and invariably demark the permissible from the impermissible.

It is said, and I agree, that the attitude of government toward religion must be one of neutrality. But untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution commands, but of a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so. And it seems clear to me from the opinions in the present and past cases that the Court would recognize the propriety of providing military chaplains and of the teaching *about* religion, as distinguished from the teaching *of* religion, in the public schools. The examples could readily be multiplied, for both the required and the permissible accommodations between state and church frame the relation as one free of hostility or favor and productive of religious and political harmony, but without undue involvement of one in the concerns or practices of the other. To be sure, the judgment in each case is a delicate one, but it must be made if we are to do loyal service as judges to the ultimate First Amendment objective of religious liberty.

The practices here involved do not fall within any sensible or acceptable concept of compelled or permitted accommodation and involve the state so significantly and directly in the realm of the sectarian as to give rise to those very divisive influences and inhibitions of freedom which both religion clauses of the First Amendment preclude. The state has ordained and has utilized its facilities to engage in unmistakably religious exercises—the devotional reading and recitation of the Holy Bible—in a manner having substantial and significant import and impact. That it has selected, rather than written, a particular devotional liturgy seems to me without constitutional import. The pervasive religiosity and direct governmental involvement inhering in the prescription of prayer and Bible reading in the public schools, during and as part of the curricular day, involving young impressionable children whose school attendance is statutorily compelled, and utilizing the prestige, power, and influence of school administration, staff, and authority, cannot realistically be termed simply accommodation, and must fall within the interdiction of the First Amendment. I find nothing in the opinion of the Court which says more than this. And, of course, today's decision does not mean that all incidents of government which import of the religious are therefore and without more banned by the strictures of the Establishment Clause. As the Court declared only last Term in *Engel* v. *Vitale,* 370 U. S. 421, 435, n. 21:

> "There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our country by reciting historical documents such as the Declaration of Independence which contain references to the Deity or by singing officially espoused anthems which include the composer's professions of faith in a Supreme Being, or

> with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercise that the State . . . has sponsored in this instance."

The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

MR. JUSTICE STEWART, dissenting.

I think the records in the two cases before us are so fundamentally deficient as to make impossible an informed or responsible determination of the constitutional issues presented. Specifically, I cannot agree that on these records we can say that the Establishment Clause has necessarily been violated.[1] But I think there exist serious questions under both that provision and the Free Exercise Clause—insofar as each is imbedded in the Fourteenth Amendment—which require the remand of these cases for the taking of additional evidence.

I.

The First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." It is, I

[1] It is instructive, in this connection, to examine the complaints in the two cases before us. Neither complaint attacks the challenged practices as "establishments." What both allege as the basis for their causes of actions are, rather, violations of religious liberty.

think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of "separation of church and state," which can be mechanically applied in every case to delineate the required boundaries between government and religion. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways. Secondly, the fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.

A single obvious example should suffice to make the point. Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion. And such examples could readily be multiplied. The short of the matter is simply that the two relevant clauses of the First Amendment cannot accurately be reflected in a sterile metaphor which by its very nature may distort rather than illumine the problems involved in a particular case. Cf. *Sherbert* v. *Verner, post,* p. 398.

II.

As a matter of history, the First Amendment was adopted solely as a limitation upon the newly created National Government. The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but

would also be unable to interfere with existing state establishments. See *McGowan* v. *Maryland*, 366 U. S. 420, 440–441. Each State was left free to go its own way and pursue its own policy with respect to religion. Thus Virginia from the beginning pursued a policy of disestablishmentarianism. Massachusetts, by contrast, had an established church until well into the nineteenth century.

So matters stood until the adoption of the Fourteenth Amendment, or more accurately, until this Court's decision in *Cantwell* v. *Connecticut*, in 1940. 310 U. S. 296. In that case the Court said: "The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws." [2]

I accept without question that the liberty guaranteed by the Fourteenth Amendment against impairment by the States embraces in full the right of free exercise of religion protected by the First Amendment, and I yield to no one in my conception of the breadth of that freedom. See *Braunfeld* v. *Brown*, 366 U. S. 599, 616 (dissenting opinion). I accept too the proposition that the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy. But I cannot agree with what seems to me the insensitive definition of the Establishment Clause contained in the Court's opinion, nor with the different but, I think, equally mechanistic definitions contained in the separate opinions which have been filed.

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[2] 310 U. S., at 303. The Court's statement as to the Establishment Clause in *Cantwell* was dictum. The case was decided on free exercise grounds.

III.

Since the *Cantwell* pronouncement in 1940, this Court has only twice held invalid state laws on the ground that they were laws "respecting an establishment of religion" in violation of the Fourteenth Amendment. *McCollum* v. *Board of Education,* 333 U. S. 203; *Engel* v. *Vitale,* 370 U. S. 421. On the other hand, the Court has upheld against such a challenge laws establishing Sunday as a compulsory day of rest, *McGowan* v. *Maryland,* 366 U. S. 420, and a law authorizing reimbursement from public funds for the transportation of parochial school pupils. *Everson* v. *Board of Education,* 330 U. S. 1.

Unlike other First Amendment guarantees, there is an inherent limitation upon the applicability of the Establishment Clause's ban on state support to religion. That limitation was succinctly put in *Everson* v. *Board of Education,* 330 U. S. 1, 18: "State power is no more to be used so as to handicap religions than it is to favor them." [3] And in a later case, this Court recognized that the limitation was one which was itself compelled by the free exercise guarantee. "To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not . . . manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free

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[3] See also, in this connection, *Zorach* v. *Clauson,* 343 U. S. 306, 314: "Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence."

exercise of religion." *McCollum* v. *Board of Education,* 333 U. S. 203, 211–212.

That the central value embodied in the First Amendment—and, more particularly, in the guarantee of "liberty" contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized. Thus, in the case of *Hamilton* v. *Regents,* 293 U. S. 245, 265, Mr. Justice Cardozo, concurring, assumed that it was ". . . *the religious liberty* protected by the First Amendment against invasion by the nation [which] is protected by the Fourteenth Amendment against invasion by the states." (Emphasis added.) And in *Cantwell* v. *Connecticut, supra,* the purpose of those guarantees was described in the following terms: "On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion." 310 U. S., at 303.

It is this concept of constitutional protection embodied in our decisions which makes the cases before us such difficult ones for me. For there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible.

It has become accepted that the decision in *Pierce* v. *Society of Sisters,* 268 U. S. 510, upholding the right of parents to send their children to nonpublic schools, was ultimately based upon the recognition of the validity of the free exercise claim involved in that situation. It might be argued here that parents who wanted their children to be exposed to religious influences in school could, under *Pierce,* send their children to private or parochial

schools. But the consideration which renders this contention too facile to be determinative has already been recognized by the Court: "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." *Murdock* v. *Pennsylvania,* 319 U. S. 105, 111.

It might also be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.

What seems to me to be of paramount importance, then, is recognition of the fact that the claim advanced here in favor of Bible reading is sufficiently substantial to make simple reference to the constitutional phrase "establishment of religion" as inadequate an analysis of the cases before us as the ritualistic invocation of the nonconstitutional phrase "separation of church and state." What these cases compel, rather, is an analysis of just what the "neutrality" is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment, as imbedded in the Fourteenth.

IV.

Our decisions make clear that there is no constitutional bar to the use of government property for religious purposes. On the contrary, this Court has consistently held that the discriminatory barring of religious groups from public property is itself a violation of First and Fourteenth Amendment guarantees. *Fowler* v. *Rhode Island,* 345 U. S. 67; *Niemotko* v. *Maryland,* 340 U. S. 268. A different standard has been applied to public school property, because of the coercive effect which the use by religious sects of a compulsory school system would necessarily have upon the children involved. *McCollum* v. *Board of Education,* 333 U. S. 203. But insofar as the *McCollum* decision rests on the Establishment rather than the Free Exercise Clause, it is clear that its effect is limited to religious instruction—to government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets.[4]

The dangers both to government and to religion inherent in official support of instruction in the tenets of various religious sects are absent in the present cases, which involve only a reading from the Bible unaccompanied by comments which might otherwise constitute instruction. Indeed, since, from all that appears in either record, any teacher who does not wish to do so is free not to participate,[5] it cannot even be contended that some

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[4] "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups *to spread their faith.*" *McCollum* v. *Board of Education,* 333 U. S. 203, 210. (Emphasis added.)

[5] The Pennsylvania statute was specifically amended to remove the compulsion upon teachers. Act of December 17, 1959, P. L. 1928, 24 Purdon's Pa. Stat. Ann. § 15–1516. Since the Maryland case is

infinitesimal part of the salaries paid by the State are made contingent upon the performance of a religious function.

In the absence of evidence that the legislature or school board intended to prohibit local schools from substituting a different set of readings where parents requested such a change, we should not assume that the provisions before us—as actually administered—may not be construed simply as authorizing religious exercises, nor that the designations may not be treated simply as indications of the promulgating body's view as to the community's preference. We are under a duty to interpret these provisions so as to render them constitutional if reasonably possible. Compare *Two Guys* v. *McGinley,* 366 U. S. 582, 592–595; *Everson* v. *Board of Education,* 330 U. S. 1, 4, and n. 2. In the *Schempp* case there is evidence which indicates that variations were in fact permitted by the very school there involved, and that further variations were not introduced only because of the absence of requests from parents. And in the *Murray* case the Baltimore rule itself contains a provision permitting another version of the Bible to be substituted for the King James version.

If the provisions are not so construed, I think that their validity under the Establishment Clause would be extremely doubtful, because of the designation of a particular religious book and a denominational prayer. But since, even if the provisions are construed as I believe they must be, I think that the cases before us must be remanded for further evidence on other issues—thus affording the plaintiffs an opportunity to prove that local variations are not in fact permitted—I shall for the bal-

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here on a demurrer, the issue of whether or not a teacher could be dismissed for refusal to participate seems, among many others, never to have been raised.

ance of this dissenting opinion treat the provisions before us as making the variety and content of the exercises, as well as a choice as to their implementation, matters which ultimately reflect the consensus of each local school community. In the absence of coercion upon those who do not wish to participate—because they hold less strong beliefs, other beliefs, or no beliefs at all—such provisions cannot, in my view, be held to represent the type of support of religion barred by the Establishment Clause. For the only support which such rules provide for religion is the withholding of state hostility—a simple acknowledgment on the part of secular authorities that the Constitution does not require extirpation of all expression of religious belief.

V.

I have said that these provisions authorizing religious exercises are properly to be regarded as measures making possible the free exercise of religion. But it is important to stress that, strictly speaking, what is at issue here is a privilege rather than a right. In other words, the question presented is not whether exercises such as those at issue here are constitutionally compelled, but rather whether they are constitutionally invalid. And that issue, in my view, turns on the question of coercion.

It is clear that the dangers of coercion involved in the holding of religious exercises in a schoolroom differ qualitatively from those presented by the use of similar exercises or affirmations in ceremonies attended by adults. Even as to children, however, the duty laid upon government in connection with religious exercises in the public schools is that of refraining from so structuring the school environment as to put any kind of pressure on a child to participate in those exercises; it is not that of providing an atmosphere in which children are kept scrupulously insulated from any awareness that some of their fellows

may want to open the school day with prayer, or of the fact that there exist in our pluralistic society differences of religious belief.

These are not, it must be stressed, cases like *Brown* v. *Board of Education,* 347 U. S. 483, in which this Court held that, in the sphere of public education, the Fourteenth Amendment's guarantee of equal protection of the laws required that race not be treated as a relevant factor. A segregated school system is not invalid because its operation is coercive; it is invalid simply because our Constitution presupposes that men are created equal, and that therefore racial differences cannot provide a valid basis for governmental action. Accommodation of religious differences on the part of the State, however, is not only permitted but required by that same Constitution.

The governmental neutrality which the First and Fourteenth Amendments require in the cases before us, in other words, is the extension of evenhanded treatment to all who believe, doubt, or disbelieve—a refusal on the part of the State to weight the scales of private choice. In these cases, therefore, what is involved is not state action based on impermissible categories, but rather an attempt by the State to accommodate those differences which the existence in our society of a variety of religious beliefs makes inevitable. The Constitution requires that such efforts be struck down only if they are proven to entail the use of the secular authority of government to coerce a preference among such beliefs.

It may well be, as has been argued to us, that even the supposed benefits to be derived from noncoercive religious exercises in public schools are incommensurate with the administrative problems which they would create. The choice involved, however, is one for each local community and its school board, and not for this Court. For, as I have said, religious exercises are not constitutionally invalid if they simply reflect differences which exist in the

society from which the school draws its pupils. They become constitutionally invalid only if their administration places the sanction of secular authority behind one or more particular religious or irreligious beliefs.

To be specific, it seems to me clear that certain types of exercises would present situations in which no possibility of coercion on the part of secular officials could be claimed to exist. Thus, if such exercises were held either before or after the official school day, or if the school schedule were such that participation were merely one among a number of desirable alternatives,[6] it could hardly be contended that the exercises did anything more than to provide an opportunity for the voluntary expression of religious belief. On the other hand, a law which provided for religious exercises during the school day and which contained no excusal provision would obviously be unconstitutionally coercive upon those who did not wish to participate. And even under a law containing an excusal provision, if the exercises were held during the school day, and no equally desirable alternative were provided by the school authorities, the likelihood that children might be under at least some psychological compulsion to participate would be great. In a case such as the latter, however, I think we would err if we *assumed* such coercion in the absence of any evidence.[7]

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[6] See, *e. g.*, the description of a plan permitting religious instruction off school property contained in *McCollum* v. *Board of Education*, 333 U. S. 203, 224 (separate opinion of Mr. Justice Frankfurter).

[7] Cf. "The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school boards of the nation, . . . is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own

VI.

Viewed in this light, it seems to me clear that the records in both of the cases before us are wholly inadequate to support an informed or responsible decision. Both cases involve provisions which explicitly permit any student who wishes, to be excused from participation in the exercises. There is no evidence in either case as to whether there would exist any coercion of any kind upon a student who did not want to participate. No evidence at all was adduced in the *Murray* case, because it was decided upon a demurrer. All that we have in that case, therefore, is the conclusory language of a pleading. While such conclusory allegations are acceptable for procedural purposes, I think that the nature of the constitutional problem involved here clearly demands that no decision be made except upon evidence. In the *Schempp* case the record shows no more than a subjective prophecy by a parent of what he thought would happen if a request were made to be excused from participation in the exercises under the amended statute. No such request was ever made, and there is no evidence whatever as to what might or would actually happen, nor of what administrative arrangements the school actually might or could make to free from pressure of any kind those who do not want to participate in the exercises. There were no District Court findings on this issue, since the case under the amended statute was decided exclusively on Establishment Clause grounds. 201 F. Supp. 815.

What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or

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ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation." *McCollum* v. *Board of Education*, 333 U. S. 203, 237 (concurring opinion of Mr. Justice Jackson).

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Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government. It is conceivable that these school boards, or even all school boards, might eventually find it impossible to administer a system of religious exercises during school hours in such a way as to meet this constitutional standard—in such a way as completely to free from any kind of official coercion those who do not affirmatively want to participate.[8] But I think we must not assume that school boards so lack the qualities of inventiveness and good will as to make impossible the achievement of that goal.

I would remand both cases for further hearings.

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[8] For example, if the record in the *Schempp* case contained proof (rather than mere prophecy) that the timing of morning announcements by the school was such as to handicap children who did not want to listen to the Bible reading, or that the excusal provision was so administered as to carry any overtones of social inferiority, then impermissible coercion would clearly exist.

Syllabus.

UNITED STATES *v.* PHILADELPHIA NATIONAL BANK ET AL.

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

No. 83. Argued February 20–21, 1963.—Decided June 17, 1963.

Appellees, a national bank and a state bank, are the second and third largest of the 42 commercial banks in the metropolitan area consisting of Philadelphia and its three contiguous counties, and they have branches throughout that area. Appellees' boards of directors approved an agreement for their consolidation, under which the national bank's stockholders would retain their stock certificates, which would represent shares in the consolidated bank, while the state bank's stockholders would surrender their shares in exchange for shares in the consolidated bank. After obtaining reports, as required by the Bank Merger Act of 1960, from the Board of Governors of the Federal Reserve System, the Federal Deposit Insurance Corporation and the Attorney General, all of whom advised that the proposed merger would substantially lessen competition in the area, the Comptroller of the Currency approved it. The United States sued to enjoin consummation of the proposed consolidation, on the ground, *inter alia*, that it would violate § 7 of the Clayton Act. *Held:* The proposed consolidation of appellee banks is forbidden by § 7 of the Clayton Act, and it must be enjoined. Pp. 323–372.

1. By the amendments to § 7 of the Clayton Act enacted in 1950, Congress intended to close a loophole in the original section by broadening its scope so as to cover the entire range of corporate amalgamations, from pure stock acquisitions to pure acquisitions of assets, and it did not intend to exclude bank mergers. Pp. 335–349.

2. The Bank Merger Act of 1960, by directing the banking agencies to consider competitive factors before approving mergers, did not immunize mergers approved by them from operation of the federal antitrust laws; and the doctrine of primary jurisdiction is not applicable here. *California* v. *Federal Power Commission*, 369 U. S. 482. Pp. 350–355.

3. The proposed consolidation of appellee banks would violate § 7 of the Clayton Act, and it must be enjoined. Pp. 355–372.

(a) The "line of commerce" here involved is commercial banking. Pp. 355–357.

(b) The "section of the country" which is relevant here is the metropolitan area consisting of Philadelphia and its three contiguous counties. Pp. 357–362.

(c) The consolidated bank would control such an undue percentage share of the relevant market (at least 30%) and the consolidation would result in such a significant increase in the concentration of commercial banking facilities in the area (33%) that the result would be inherently likely to lessen competition substantially, and there is no evidence in the record to show that it would not do so. Pp. 362–367.

(d) The facts that commercial banking is subject to a high degree of governmental regulation and that it deals with the intangibles of credit and services, rather than in the manufacture or sale of tangible commodities, do not immunize it from the anticompetitive effects of undue concentration. Pp. 368–370.

(e) This proposed consolidation cannot be justified on the theory that only through mergers can banks follow their customers to the suburbs and retain their business, since this can be accomplished by establishing new branches in the suburbs. P. 370.

(f) This proposed consolidation cannot be justified on the ground that the increased lending limit would enable the consolidated bank to compete with the large out-of-state banks, particularly the New York banks, for very large loans. Pp. 370–371.

(g) This proposed consolidation cannot be justified on the ground that Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development. P. 371.

(h) This Court rejects appellees' pervasive suggestion that application of the procompetitive policy of § 7 to the banking industry will have dire, although unspecified, consequences for the national economy. Pp. 371–372.

201 F. Supp. 348, reversed.

Assistant Attorney General Loevinger argued the cause for the United States. With him on the briefs were *Solicitor General Cox, Charles H. Weston, George D. Reycraft, Lionel Kestenbaum* and *Melvin Spaeth.*

Philip Price and *Arthur Littleton* argued the cause for appellees. With them on the brief were *Ernest R. von Starck, Donald A. Scott, Carroll R. Wetzel, John J. Brennan* and *Minturn T. Wright III.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

The United States, appellant here, brought this civil action in the United States District Court for the Eastern District of Pennsylvania under § 4 of the Sherman Act, 15 U. S. C. § 4, and § 15 of the Clayton Act, 15 U. S. C. § 25, to enjoin a proposed merger of The Philadelphia National Bank (PNB) and Girard Trust Corn Exchange Bank (Girard), appellees here. The complaint charged violations of § 1 of the Sherman Act, 15 U. S. C. § 1, and § 7 of the Clayton Act, 15 U. S. C. § 18.[1] From a judgment for appellees after trial, see 201 F. Supp. 348, the United States appealed to this Court under § 2 of the Expediting Act, 15 U. S. C. § 29. Probable jurisdiction was noted. 369 U. S. 883. We reverse the judgment of the District Court. We hold that the merger of appellees is forbidden by § 7 of the

[1] Section 1 of the Sherman Act provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Section 7 of the Clayton Act, as amended in 1950 by the Celler-Kefauver Antimerger Act, provides in pertinent part: "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

Clayton Act and so must be enjoined; we need not, and therefore do not, reach the further question of alleged violation of § 1 of the Sherman Act.

I. The Facts and Proceedings Below.

A. *The Background: Commercial Banking in the United States.*

Because this is the first case which has required this Court to consider the application of the antitrust laws to the commercial banking industry, and because aspects of the industry and of the degree of governmental regulation of it will recur throughout our discussion, we deem it appropriate to begin with a brief background description.[2]

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[2] The discussion in this portion of the opinion draws upon undisputed evidence of record in the case, supplemented by pertinent reference materials. See Board of Govs. of the Fed. Res. System, Financing Small Business (Comm. print 1958); The Federal Reserve System (3d ed. 1954); Concentration of Banking in the United States (Comm. print 1952); Bogen, The Competitive Position of Commercial Banks (1959); Commission on Money and Credit, Money and Credit (1961); Freeman, The Problems of Adequate Bank Capital (1952); Hart, Money, Debt, and Economic Activity (2d ed. 1953); Lent, The Changing Structure of Commercial Banking (1960); Sayers, Modern Banking (5th ed. 1960); Staff of House Select Comm. on Small Business, 86th Cong., 2d Sess., Banking Concentration and Small Business (1960); U. S. Attorney General's Comm. on Administrative Procedure, Federal Control of Banking (S. Doc. No. 186, 76th Cong., 3d Sess., 1940); Fox, Supervision of Banking by the Comptroller of the Currency, in Public Administration and Policy Formation (Redford ed. 1956), 117; Stokes, Public Convenience and Advantage in Applications for New Banks and Branches, 74 Banking L. J. 921 (1957). For materials which focus specifically on the question of competition in the banking industry, see also Alhadeff, Monopoly and Competition in Banking (1954); Chapman, Concentration of Banking (1934); Horvitz, Concentration and Competition in New England Banking

Commercial banking in this country is primarily unit banking. That is, control of commercial banking is diffused throughout a very large number of independent, local banks—13,460 of them in 1960—rather than concentrated in a handful of nationwide banks, as, for example, in England and Germany. There are, to be sure, in addition to the independent banks, some 10,000 branch banks; but branching, which is controlled largely by state law—and prohibited altogether by some States—enables a bank to extend itself only to state lines and often not that far.[3] It is also the case, of course, that many banks place loans and solicit deposits outside their home area. But with these qualifications, it remains true that ours is essentially a decentralized system of community banks. Recent years, however, have witnessed a definite trend toward concentration. Thus, during the decade ending in 1960 the number of commercial banks in the United

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(1958); Lawrence, Banking Concentration in the United States (1930); Berle, Banking Under the Anti-Trust Laws, 49 Col. L. Rev. 589 (1949); Chandler, Monopolistic Elements in Commercial Banking, 46 J. Pol. Econ. 1 (1938); Gruis, Antitrust Laws and Their Application to Banking, 24 Geo. Wash. L. Rev. 89 (1955); Funk, Antitrust Legislation Affecting Bank Mergers, 12 Bus. Law. 496 (1957); Klebaner, Federal Control of Commercial Bank Mergers, 37 Ind. L. J. 287 (1962); Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus. Law. 994 (1961); Comment, Bank Charter, Branching, Holding Company and Merger Laws: Competition Frustrated, 71 Yale L. J. 502 (1962); Note, Federal Regulation of Bank Mergers: The Opposing Views of the Federal Banking Agencies and the Department of Justice, 75 Harv. L. Rev. 756 (1962).

[3] In addition, there is a certain amount of bank holding company activity. The Bank Holding Company Act of 1956, 12 U. S. C. §§ 1841–1848, brought bank holding companies under stringent federal regulation. As of 1958, the 43 registered bank holding companies controlled 5.7% of all banking offices and 7.4% of all deposits. Lent, The Changing Structure of Commercial Banking (1960), 19. See also Comment, *supra*, note 2, 71 Yale L. J., at 516–522.

States declined by 714, despite the chartering of 887 new banks and a very substantial increase in the Nation's credit needs during the period. Of the 1,601 independent banks which thus disappeared, 1,503, with combined total resources of well over $25,000,000,000, disappeared as the result of mergers.

Commercial banks are unique among financial institutions in that they alone are permitted by law to accept demand deposits. This distinctive power gives commercial banking a key role in the national economy. For banks do not merely deal in, but are actually a source of, money and credit; when a bank makes a loan by crediting the borrower's demand deposit account, it augments the Nation's credit supply.[4] Furthermore, the power to accept demand deposits makes banks the intermediaries in most financial transactions (since transfers of substantial moneys are almost always by check rather than by cash) and, concomitantly, the repositories of very substantial individual and corporate funds. The banks' use of these funds is conditioned by the fact that their working capital consists very largely of demand deposits, which makes liquidity the guiding principle of bank lending and investing policies; thus it is that banks are the chief source of the country's short-term business credit.

Banking operations are varied and complex; "commercial banking" describes a congeries of services and credit devices.[5] But among them the creation of additional

[4] Such creation is not, to be sure, pure sleight of hand. A bank may not make a loan without adequate reserves. Nevertheless, the element of bank money creation is real. *E. g.*, Samuelson, Economics (5th ed. 1961), 331–343.

[5] The principal banking "products" are of course various types of credit, for example: unsecured personal and business loans, mortgage loans, loans secured by securities or accounts receivable, automobile installment and consumer goods installment loans, tuition financing, bank credit cards, revolving credit funds. Banking services include: acceptance of demand deposits from individuals, corporations, gov-

money and credit, the management of the checking-account system, and the furnishing of short-term business loans would appear to be the most important. For the proper discharge of these functions is indispensable to a healthy national economy, as the role of bank failures in depression periods attests. It is therefore not surprising that commercial banking in the United States is subject to a variety of governmental controls, state and federal. Federal regulation is the more extensive, and our focus will be upon it. It extends not only to the national banks, *i. e.*, banks chartered under federal law and supervised by the Comptroller of the Currency, see 12 U. S. C. § 21 *et seq.* For many state banks, see 12 U. S. C. § 321, as well as virtually all the national banks, 12 U. S. C. § 222, are members of the Federal Reserve System (FRS), and more than 95% of all banks, see 12 U. S. C. § 1815, are insured by the Federal Deposit Insurance Corporation (FDIC). State member and nonmember insured banks are subject to a federal regulatory scheme almost as elaborate as that which governs the national banks.

The governmental controls of American banking are manifold. First, the Federal Reserve System, through its open-market operations, see 12 U. S. C. §§ 263 (c), 353–359, control of the rediscount rate, see 12 U. S. C. § 357, and modifications of reserve requirements, see 12 U. S. C.

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ernmental agencies, and other banks; acceptance of time and savings deposits; estate and trust planning and trusteeship services; lock boxes and safety-deposit boxes; account reconciliation services; foreign department services (acceptances and letters of credit); correspondent services; investment advice. It should be noted that many other institutions are in the business of supplying credit, and so more or less in competition with commercial banks (see further, pp. 356–357, *infra*), for example: mutual savings banks, savings and loan associations, credit unions, personal-finance companies, sales-finance companies, private businessmen (through the furnishing of trade credit), factors, direct-lending government agencies, the Post Office, Small Business Investment Corporations, life insurance companies.

§§ 462, 462b, regulates the supply of money and credit in the economy and thereby indirectly regulates the interest rates of bank loans. This is not, however, rate regulation. The Reserve System's activities are only designed to influence the prime, *i. e.*, minimum, bank interest rate. There is no federal control of the maximum, although all banks, state and national, are subject to state usury laws where applicable. See 12 U. S. C. § 85. In the range between the maximum fixed by state usury laws and the practical minimum set by federal fiscal policies (there is no law against undercutting the prime rate but bankers seldom do), bankers are free to price their loans as they choose. Moreover, charges for other banking services, such as service charges for checking privileges, are free of governmental regulation, state or federal.

Entry, branching, and acquisitions are covered by a network of state and federal statutes. A charter for a new bank, state or national, will not be granted unless the invested capital and management of the applicant, and its prospects for doing sufficient business to operate at a reasonable profit, give adequate protection against undue competition and possible failure. See, *e. g.*, 12 U. S. C. §§ 26, 27, 51; 12 CFR § 4.1 (b); Pa. Stat. Ann., Tit. 7, § 819–306. Failure to meet these standards may cause the FDIC to refuse an application for insurance, 12 U. S. C. §§ 1815, 1816, and may cause the FDIC, Federal Reserve Board (FRB), and Comptroller to refuse permission to branch to insured, member, and national banks, respectively. 12 U. S. C. §§ 36, 321, 1828 (d). Permission to merge, consolidate, acquire assets, or assume liabilities may be refused by the agencies on the same grounds. 12 U. S. C. (1958 ed., Supp. IV) § 1828 (c), note 8, *infra*. Furthermore, national banks appear to be subject to state geographical limitations on branching. See 12 U. S. C. § 36 (c).

Banks are also subject to a number of specific provisions aimed at ensuring sound banking practices. For example, member banks of the Federal Reserve System may not pay interest on demand deposits, 12 U. S. C. § 371a, may not invest in common stocks or hold for their own account investment securities of any one obligor in excess of 10% of the bank's unimpaired capital and surplus, see 12 U. S. C. §§ 24 Seventh, 335, and may not pay interest on time or savings deposits above the rate fixed by the FRB, 12 U. S. C. § 371b. The payment of interest on deposits by nonmember insured banks is also federally regulated. 12 U. S. C. (1958 ed., Supp. IV) § 1828 (g); 12 CFR, 1962 Supp., Part 329. In the case of national banks, the 10% limit on the obligations of a single obligor includes loans as well as investment securities. See 12 U. S. C. § 84. Pennsylvania imposes the same limitation upon banks chartered under its laws, such as Girard. Pa. Stat. Ann. (1961 Supp.), Tit. 7, § 819–1006.

But perhaps the most effective weapon of federal regulation of banking is the broad visitatorial power of federal bank examiners. Whenever the agencies deem it necessary, they may order "a thorough examination of all the affairs of the bank," whether it be a member of the FRS or a nonmember insured bank. 12 U. S. C. §§ 325, 481, 483, 1820 (b); 12 CFR § 4.2. Such examinations are frequent and intensive. In addition, the banks are required to furnish detailed periodic reports of their operations to the supervisory agencies. 12 U. S. C. §§ 161, 324, 1820 (e). In this way the agencies maintain virtually a day-to-day surveillance of the American banking system. And should they discover unsound banking practices, they are equipped with a formidable array of sanctions. If in the judgment of the FRB a member bank is making "undue use of bank credit," the Board may suspend the bank from the use of the credit facilities of the FRS. 12 U. S. C. § 301. The FDIC has an even more formidable

power. If it finds "unsafe or unsound practices" in the conduct of the business of any insured bank, it may terminate the bank's insured status. 12 U. S. C. § 1818 (a). Such involuntary termination severs the bank's membership in the FRS, if it is a state bank, and throws it into receivership if it is a national bank. 12 U. S. C. § 1818 (b). Lesser, but nevertheless drastic, sanctions include publication of the results of bank examinations. 12 U. S. C. §§ 481, 1828 (f). As a result of the existence of this panoply of sanctions, recommendations by the agencies concerning banking practices tend to be followed by bankers without the necessity of formal compliance proceedings. 1 Davis, Administrative Law (1958), § 4.04.

Federal supervision of banking has been called "[p]robably the outstanding example in the federal government of regulation of an entire industry through methods of supervision . . . . The system may be one of the most successful [systems of economic regulation], if not the most successful." *Id.*, § 4.04, at 247. To the efficacy of this system we may owe, in part, the virtual disappearance of bank failures from the American economic scene.[6]

B. *The Proposed Merger of PNB and Girard.*

The Philadelphia National Bank and Girard Trust Corn Exchange Bank are, respectively, the second and third largest of the 42 commercial banks with head offices in the Philadelphia metropolitan area, which consists of the City of Philadelphia and its three contiguous counties in Pennsylvania. The home county of both banks is the

[6] In 1957, for example, there were three bank suspensions in the entire country by reason of financial difficulties; in 1960, two; and in 1961, nine. Of these nine, four involved state banks which were neither members of the FRS nor insured by the FDIC. 1961 Annual Report of the Comptroller of the Currency 286. In a typical year in the 1920's, roughly 600 banks failed throughout the country, about 100 of them national banks. See S. Rep. No. 196, Regulation of Bank Mergers, 86th Cong., 1st Sess. 17–18.

city itself; Pennsylvania law, however, permits branching into the counties contiguous to the home county, Pa. Stat. Ann. (1961 Supp.), Tit. 7, § 819–204.1, and both banks have offices throughout the four-county area. PNB, a national bank, has assets of over $1,000,000,000, making it (as of 1959) the twenty-first largest bank in the Nation. Girard, a state bank, is a member of the FRS and is insured by the FDIC; it has assets of about $750,000,000. Were the proposed merger to be consummated, the resulting bank would be the largest in the four-county area, with (approximately) 36% of the area banks' total assets, 36% of deposits, and 34% of net loans. It and the second largest (First Pennsylvania Bank and Trust Company, now the largest) would have between them 59% of the total assets, 58% of deposits, and 58% of the net loans, while after the merger the four largest banks in the area would have 78% of total assets, 77% of deposits, and 78% of net loans.

The present size of both PNB and Girard is in part the result of mergers. Indeed, the trend toward concentration is noticeable in the Philadelphia area generally, in which the number of commercial banks has declined from 108 in 1947 to the present 42. Since 1950, PNB has acquired nine formerly independent banks and Girard six; and these acquisitions have accounted for 59% and 85% of the respective banks' asset growth during the period, 63% and 91% of their deposit growth, and 12% and 37% of their loan growth. During this period, the seven largest banks in the area increased their combined share of the area's total commercial bank resources from about 61% to about 90%.

In November 1960 the boards of directors of the two banks approved a proposed agreement for their consolidation under the PNB charter. By the terms of the agreement, PNB's stockholders were to retain their share certificates, which would be deemed to represent an equal

number of shares in the consolidated bank, while Girard's stockholders would surrender their shares in exchange for shares in the consolidated bank, receiving 1.2875 such shares for each Girard share. Such a consolidation is authorized, subject to the approval of the Comptroller of the Currency, by 12 U. S. C. (1958 ed., Supp. IV) § 215.[7] But under the Bank Merger Act of 1960, 12 U. S. C. (1963 ed., Supp. IV) § 1828 (c), the Comptroller may not give his approval until he has received reports from the other two banking agencies and the Attorney General respecting the probable effects of the proposed transaction on competition.[8] All three reports advised that the pro-

[7] The proposed "merger" of appellees is technically a consolidation, since the resulting bank will be a different entity from either of the constituent banks, whereas if the transaction were a merger, Girard would disappear into PNB and PNB would survive. However, the proposed transaction resembles a merger very closely, in that PNB's shareholders are not to surrender their present share certificates and the resulting bank is to operate under PNB's charter. In any event, the statute treats mergers and consolidations essentially alike, compare 12 U. S. C. (1958 ed., Supp. IV) § 215 with § 215a, and it is not suggested that the legal question of the instant case would be affected by whether the transaction is technically a merger or a consolidation. Therefore, throughout this opinion we use the term "merger."

[8] Section 1828 (c) provides in pertinent part:

"No insured [by FDIC] bank shall merge or consolidate with any other insured bank or, either directly or indirectly, acquire the assets of, or assume liability to pay any deposits made in, any other insured bank without the prior written consent (i) of the Comptroller of the Currency if the acquiring, assuming, or resulting bank is to be a national bank or a District [of Columbia] bank, or (ii) of the Board of Governors of the Federal Reserve System if the acquiring, assuming, or resulting bank is to be a State member bank (except a District bank), or (iii) of the [Federal Deposit Insurance] Corporation if the acquiring, assuming, or resulting bank is to be a nonmember insured bank (except a District bank). . . . In granting or withholding consent under this subsection, the Comptroller, the Board, or the Corporation, as the case may be, shall consider the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the

posed merger would have substantial anticompetitive effects in the Philadelphia metropolitan area. However, on February 24, 1961, the Comptroller approved the merger. No opinion was rendered at that time. But as required by § 1828 (c), the Comptroller explained the basis for his decision to approve the merger in a statement to be included in his annual report to Congress. As to effect upon competition, he reasoned that "[s]ince there will remain an adequate number of alternative sources of banking service in Philadelphia, and in view of the beneficial effects of this consolidation upon international and national competition it was concluded that the over-all effect upon competition would not be unfavorable." He also stated that the consolidated bank "would be far better able to serve the convenience and needs of its community by being of material assistance to its city and state in their efforts to attract new industry and to retain existing industry." The day after the Comptroller approved the

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general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter. In the case of a merger, consolidation, acquisition of assets, or assumption of liabilities, the appropriate agency shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest. In the interests of uniform standards, before acting on a merger, consolidation, acquisition of assets, or assumption of liabilities under this subsection, the agency (unless it finds that it must act immediately in order to prevent the probable failure of one of the banks involved) shall request a report on the competitive factors involved from the Attorney General and the other two banking agencies referred to in this subsection . . . . The Comptroller, the Board, and the Corporation shall each include in its annual report to the Congress a description of each merger, consolidation, acquisition of assets, or assumption of liabilities approved by it during the period covered by the report, along with the following information: . . . a statement by the Comptroller, the Board, or the Corporation, as the case may be, of the basis for its approval."

merger, the United States commenced the present action. No steps have been taken to consummate the merger pending the outcome of this litigation.

C. *The Trial and the District Court's Decision.*

The Government's case in the District Court relied chiefly on statistical evidence bearing upon market structure and on testimony by economists and bankers to the effect that, notwithstanding the intensive governmental regulation of banking, there was a substantial area for the free play of competitive forces; that concentration of commercial banking, which the proposed merger would increase, was inimical to that free play; that the principal anticompetitive effect of the merger would be felt in the area in which the banks had their offices, thus making the four-county metropolitan area the relevant geographical market; and that commercial banking was the relevant product market. The defendants, in addition to offering contrary evidence on these points, attempted to show business justifications for the merger. They conceded that both banks were economically strong and had sound management, but offered the testimony of bankers to show that the resulting bank, with its greater prestige and increased lending limit,[9] would be better able to compete with large out-of-state (particularly New York) banks, would attract new business to Philadelphia, and in general would promote the economic development of the metropolitan area.[10]

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[9] See 12 U. S. C. § 84, p. 329, *supra*. The resulting bank would have a lending limit of $15,000,000, of which $1,000,000 would not be attributable to the merger but to unrelated accounting factors.

[10] There was evidence that Philadelphia, although it ranks fourth or fifth among the Nation's urban areas in terms of general commercial activity, ranks only ninth in terms of the size of its largest bank, and that some large business firms which have their head offices in Philadelphia must seek elsewhere to satisfy their banking needs because of the inadequate lending limits of Philadelphia's

Upon this record, the District Court held that: (1) the passage of the Bank Merger Act of 1960 did not repeal by implication the antitrust laws insofar as they may apply to bank mergers; (2) § 7 of the Clayton Act is inapplicable to bank mergers because banks are not corporations "subject to the jurisdiction of the Federal Trade Commission"; (3) but assuming that § 7 is applicable, the four-county Philadelphia metropolitan area is not the relevant geographical market because PNB and Girard actively compete with other banks for bank business throughout the greater part of the northeastern United States; (4) but even assuming that § 7 is applicable and that the four-county area is the relevant market, there is no reasonable probability that competition among commercial banks in the area will be substantially lessened as the result of the merger; (5) since the merger does not violate § 7 of the Clayton Act, *a fortiori* it does not violate § 1 of the Sherman Act; (6) the merger will benefit the Philadelphia metropolitan area economically. The District Court also ruled that for the purposes of § 7, commercial banking is a line of commerce; the appellees do not contest this ruling.

II. The Applicability of Section 7 of the Clayton Act to Bank Mergers.

A. *The Original Section and the 1950 Amendment.*

By its terms, the present § 7 reaches acquisitions of corporate stock or share capital by any corporation engaged

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banks; First Pennsylvania and PNB, currently the two largest banks in Philadelphia, each have a lending limit of $8,000,000. Girard's is $6,000,000.

Appellees offered testimony that the merger would enable certain economies of scale, specifically, that it would enable the formation of a more elaborate foreign department than either bank is presently able to maintain. But this attempted justification, which was not mentioned by the District Court in its opinion and has not been developed with any fullness before this Court, we consider abandoned.

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in commerce, but it reaches acquisitions of corporate assets only by corporations "subject to the jurisdiction of the Federal Trade Commission." The FTC, under § 5 of the Federal Trade Commission Act, has no jurisdiction over banks. 15 U. S. C. § 45 (a)(6).[11] Therefore, if the proposed merger be deemed an assets acquisition, it is not within § 7.[12] Appellant argues vigorously that a merger is crucially different from a pure assets acquisition,[13] and

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[11] We reject the argument that § 11 of the Clayton Act, as amended, 15 U. S. C. § 21, confers jurisdiction over banks upon the FTC. That section provides in pertinent part: "Authority to enforce compliance with sections 13, 14, 18, and 19 of this title [§§ 2, 3, 7, and 8 of the Clayton Act, as amended] by the persons respectively subject thereto is vested . . . in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce . . . ." The argument is that since the FRB has no authority to enforce the Clayton Act against bank mergers, see note 22, *infra*, bank mergers must fall into the residual category of "all other character of commerce" and so be subject to the FTC. However, there is no intimation in the legislative history of the 1950 amendment to §§ 7 and 11 that the FTC's traditional lack of jurisdiction over banks was to be disturbed. Moreover, it is clear from the language of § 11 that "banks, banking associations, and trust companies" are meant to comprise a distinct "character of commerce," and so cannot be part of the "other character of commerce" reserved to the FTC.

The exclusion of banks from the FTC's jurisdiction appears to have been motivated by the fact that banks were already subject to extensive federal administrative controls. See *T. C. Hurst & Son* v. *Federal Trade Comm'n*, 268 F. 874, 877 (D. C. E. D. Va. 1920).

[12] No argument is made in this case that banking is not commerce, and therefore that § 7 is inapplicable; plainly, such an argument would have no merit. See *Transamerica Corp.* v. *Board of Govs. of Fed. Res. Sys.*, 206 F. 2d 163, 166 (C. A. 3d Cir. 1953); cf. *United States* v. *South-Eastern Underwriters Assn.*, 322 U. S. 533.

[13] "A merger necessarily involves the complete disappearance of one of the merging corporations. A sale of assets, on the other hand, may involve no more than a substitution of cash for some part of the selling company's properties, with no change in corporate structure and no change in stockholder interests. Shareholders of merging

appellees argue with equal vigor that it is crucially different from a pure stock acquisition.[14] Both positions, we think, have merit; a merger fits neither category neatly. Since the literal terms of § 7 thus do not dispose of our question, we must determine whether a congressional design to embrace bank mergers is revealed in the history of the statute. The question appears to be one of first impression; we have been directed to no previous case in which a merger or consolidation was challenged under § 7 of the Clayton Act, as amended, where the acquiring corporation was not subject to the FTC's jurisdiction.

When it was first enacted in 1914, § 7 referred only to corporate acquisitions of stock and share capital; it was silent as to assets acquisitions and as to mergers and con-

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corporations surrender their interests in those corporations in exchange for their very different rights in the resulting corporation. In an asset acquisition, however, the shareholders of the selling corporation obtain no interest in the purchasing corporation and retain no interest in the assets transferred. In a merger, unlike an asset acquisition, the resulting firm automatically acquires all the rights, powers, franchises, liabilities, and fiduciary rights and obligations of the merging firms. In a merger, but not in an asset acquisition, there is the likelihood of a continuity of management and other personnel. Finally, a merger, like a stock acquisition, necessarily involves the acquisition by one corporation of an immediate voice in the management of the business of another corporation; no voice in the decisions of another corporation is acquired by purchase of some part of its assets." Brief for the United States, 75–76.

[14] "[A] merger such as appellees' may be effected upon the affirmative vote of the holders of only two-thirds of the outstanding stock of each bank . . . but if PNB were acquiring all of the Girard stock each Girard shareholder could decide for himself whether to transfer his shares. A merger requires public notice whereas stock can be acquired privately. A shareholder dissenting from a merger has the right to receive the appraised value of his shares . . . whereas no shareholder has a comparable right in an acquisition of stock. Furthermore the corporate existence of a merged company is terminated by a merger, but remains unaffected by an acquisition of stock." Brief for Appellees, 30–31.

solidations. Act of October 15, 1914, c. 323, § 7, 38 Stat. 731–732, note 18, *infra*. It is true that the omission may not have been an oversight. Congress' principal concern was with the activities of holding companies, and specifically with the practice whereby corporations secretly acquired control of their competitors by purchasing the stock of those companies. Although assets acquisitions and mergers were known forms of corporate amalgamation at the time, their no less dangerously anticompetitive effects may not have been fully apparent to the Congress.[15] Still, the statutory language, read in the light of the overriding congressional purpose to control corporate concentrations tending to monopoly, lent itself to a construction whereby § 7 would have reached at least mergers and consolidations. It would hardly have done violence to the language so to have interpreted the vague term "share capital," see 30 Geo. Wash. L. Rev. 1024, 1027–1028 (1962), or to have adopted the view that: "where the assets are exchanged for the stock of the purchasing company, assuming that the two companies were previously in competition, it is apparent that the seller has acquired stock in a competing company . . . [and] therefore, that in effecting the merger section 7 was violated and hence the distribution of the stock received by the selling company to its shareholders and its subsequent dissolution are no bar to proceedings by the government to set aside the purchase." Handler, Industrial Mergers and the Anti-Trust Laws, 32 Col. L. Rev. 179, 266 (1932).[16]

But the courts found mergers to be beyond the reach of § 7, even when the merger technique had supplanted

[15] The legislative history of the 1914 Act is reviewed in *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 313–314, and notes 22–24.

[16] In the case of an acquisition like the instant one, in which shares in the acquired corporation are to be exchanged for shares in the resulting corporation, *a fortiori* we discern no difficulty in conceptualizing the transaction as a "stock acquisition." Compare note 13, *supra*.

stock acquisitions as the prevalent mode of corporate amalgamation. *United States* v. *Celanese Corp. of America,* 91 F. Supp. 14 (D. C. S. D. N. Y. 1950); see *Thatcher Mfg. Co.* v. *Federal Trade Comm'n* and *Swift & Co.* v. *Federal Trade Comm'n,* decided together with *Federal Trade Comm'n* v. *Western Meat Co.,* 272 U. S. 554; *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Comm'n,* 291 U. S. 587.[17] As a result, § 7 became largely

[17] Statements to the same effect may be found in, *e. g., Brown Shoe Co., supra,* at 313–314, 316; *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 592; *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 507, n. 7; *United States* v. *Columbia Pictures Corp.,* 189 F. Supp. 153, 182 (D. C. S. D. N. Y. 1960). See also 33 Op. Atty. Gen. 225, 241 (1922); Hernacki, Mergerism and Section 7 of the Clayton Act, 20 Geo. Wash. L. Rev. 659, 676–677 (1952); Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus. Law. 994, 999–1000 (1961); Note, Section 7 of the Clayton Act: A Legislative History, 52 Col. L. Rev. 766, 768–769 (1952).

Actually, the holdings in the three cases that reached this Court, *Thatcher, Swift,* and *Arrow-Hart,* were quite narrow. See generally Note, 26 Col. L. Rev. 594–596 (1926). They were based not on a lack of substantive power under § 7, but on the enforcement section, § 11, which limited the FTC's remedial powers to "an order requiring such person to cease and desist from such violations [of §§ 2, 3, 7, and 8 of the Clayton Act], and divest itself of the stock held or rid itself of the directors chosen contrary to the provisions of sections seven and eight of this Act." 38 Stat. 735. Faced with Congress' evident refusal to confer upon the FTC the ordinary powers of a court of equity, this Court held that unless the assets were acquired after the FTC's order of stock divestiture had been issued (which was the case in *Federal Trade Comm'n* v. *Western Meat Co., supra,* where the Commission was sustained), the Commission could not order a divestiture of assets. Compare *Board of Govs. of Fed. Res. Sys.* v. *Transamerica Corp.,* 184 F. 2d 311 (C. A. 9th Cir. 1950), with *Federal Trade Comm'n* v. *International Paper Co.,* 241 F. 2d 372 (C. A. 2d Cir. 1956). Since under this Court's decisions the FTC was powerless even where the transfer of assets was an evasive maneuver aimed at defeating the FTC's remedial jurisdiction over stock acquisitions violative of § 7, *a fortiori* the Commission was powerless against the typical merger. See *Arrow-Hart & Hegeman Elec. Co.* v. *Fed-*

a dead letter. Comment, 68 Yale L. J. 1627, 1629–1630 (1959); see Federal Trade Commission, The Merger Movement: A Summary Report (1948), 1, 3–6; Henderson, The Federal Trade Commission (1924), 40. Meanwhile, this Court's decision in *United States* v. *Columbia Steel Co.*, 334 U. S. 495, stirred concern whether the Sherman Act alone was a check against corporate acquisitions. Note, 52 Col. L. Rev. 766, 768 (1952).

It was against this background that Congress in 1950 amended § 7 to include an assets-acquisition provision. Act of December 29, 1950 (Celler-Kefauver Antimerger Act), c. 1184, 64 Stat. 1125–1126, 15 U. S. C. § 18.[18]

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eral Trade Comm'n, supra, at 595, 598–599. As part of the 1950 amendments to the Clayton Act, § 11 was amended to read: "an order requiring such person to . . . divest itself of the stock, or other share capital, or assets, held . . . ." 15 U. S. C. § 21. Whether as an original matter *Thatcher, Swift* and *Arrow-Hart* were correctly decided is no longer an open question, since they were the explicit premise of the 1950 amendment to § 7. See *State Bd. of Ins.* v. *Todd Shipyards Corp.*, 370 U. S. 451, 458, p. 349, *infra.*

The question of the FTC's remedial powers under § 11 of the Clayton Act is to be distinguished from that of its remedial powers under § 5 of the Federal Trade Commission Act, 15 U. S. C. § 45 (b). In *Federal Trade Comm'n* v. *Eastman Kodak Co.*, 274 U. S. 619, the Court, relying on *Thatcher* and *Swift,* held that the Commission had no power to order divestiture in § 5 proceedings. But cf. *Gilbertville Trucking Co.* v. *United States,* 371 U. S. 115, 129–131; *Pan American World Airways* v. *United States,* 371 U. S. 296, 312, and n. 17.

[18] See note 1, *supra,* for text of amended § 7. The original § 7 read in pertinent part: "no 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."

The passage of the 1950 amendment followed many years of unsuccessful attempts to enact legislation plugging the assets-acquisition

The legislative history is silent on the specific questions why the amendment made no explicit reference to mergers, why assets acquisitions by corporations not subject to FTC jurisdiction were not included, and what these omissions signify. Nevertheless, the basic congressional design clearly emerges and from that design the answers to these questions may be inferred. Congress primarily sought to bring mergers within § 7 and thereby close what it regarded as a loophole in the section.[19] But, in addition, it sought to reach transactions such as that involved in *Columbia Steel,* which was a simple purchase

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loophole. See Note, 52 Col. L. Rev. 766–767, notes 3 and 4 (1952). To be sure, the 1950 amendment was intended not only to enlarge the number of transactions covered by § 7 but also to change the test of illegality. The legislative history pertinent to the latter point is reviewed in *Brown Shoe Co., supra,* at 315–323, and is not directly relevant to the present discussion.

[19] "The purpose of the proposed legislation [the 1950 amendments to § 7] is to prevent corporations from acquiring another corporation by means of the acquisition of its assets, whereunder [*sic*] the present law it is prohibited from acquiring the stock of said corporation. Since the acquisition of stock is significant chiefly because it is likely to result in control of the underlying assets, failure to prohibit direct purchase of the same assets has been inconsistent and paradoxical as to the over-all effect of existing law." S. Rep. No. 1775, 81st Cong., 2d Sess. 2. This theme pervaded congressional consideration of the proposed amendments. See, *e. g.*, H. R. Rep. No. 1191, 81st Cong., 1st Sess., *passim;* Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, pp. 11–13, 28–29, 39, 117; Hearings before a Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 4–5, 15, 20, 62–63, 126–129, 139, 321; 95 Cong. Rec. 11485 (Congressman Celler, sponsor of the bill to amend § 7 in the House: "this bill seeks to plug a loophole in the present antitrust laws. . . . It is time to stop, look, and listen and to call a halt to the merger movement that is going on in this country"), 11493–11494, 11497, 11502; 96 Cong. Rec. 16433, 16443.

of assets and not a merger.[20] In other words, Congress contemplated that the 1950 amendment would give § 7 a reach which would bring the entire range of corporate amalgamations, from pure stock acquisitions to pure assets acquisitions, within the scope of § 7. Thus, the stock-acquisition and assets-acquisition provisions, *read together,* reach mergers, which fit neither category perfectly but lie somewhere between the two ends of the spectrum. See pp. 336–337, and notes 13, 14, *supra.* So construed, the specific exception for acquiring corporations not subject to the FTC's jurisdiction excludes from the coverage of § 7 only assets acquisitions by such corporations when not accomplished by merger.

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[20] *Columbia Steel* involved the cash purchase by United States Steel Corporation of the physical assets of Consolidated Steel Corporation; there was no exchange of shares and no alteration of Consolidated's corporate identity. See Transcript of Record, *United States* v. *Columbia Steel Co.*, 334 U. S. 495 (No. 461, October Term, 1947), pp. 453–475. As a result of the purchase, in its horizontal aspect, U. S. Steel controlled about 24% of the structural steel fabricating market in an 11-state western area. This Court held that the acquisition could not be reached under § 7 of the Clayton Act, see 334 U. S., at 507, n. 7, and did not violate the Sherman Act. It should be noted, however, that the Court regarded the 24% market-share figure proposed by the Government as a "doubtful assumption" and also pointed to "unusual conditions" tending to mitigate the anticompetitive effect of the acquisition. 334 U. S., at 529. *Columbia Steel* was repeatedly cited by Congressmen considering the amendment of § 7 as an example of what they conceived to be the inability of the Sherman Act, as then construed, to deal with the problems of corporate concentration. See, *e. g.*, H. R. Rep. No. 1191, 81st Cong., 1st Sess. 10–11, and n. 16; Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, pp. 28, 73; Hearings before a Subcommittee of the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 24; 96 Cong. Rec. 16453 (Senator Kefauver, Senate sponsor of the bill to amend § 7: "the Columbia Steel Co. case is a vivid illustration of the necessity for the proposed amendment of the Clayton Act"), 16503; and cf. 96 Cong. Rec. 16498–16499.

This construction is supported by a number of specific considerations.

First. Any other construction would be illogical and disrespectful of the plain congressional purpose in amending § 7, because it would create a large loophole in a statute designed to close a loophole. It is unquestioned that the stock-acquisition provision of § 7 embraces every corporation engaged in commerce, including banks. And it is plain that Congress, in amending § 7, considered a distinction for antitrust purposes between acquisition of corporate control by purchase of stock and acquisition by merger unsupportable in reason, and sought to overrule the decisions of this Court which had recognized such a distinction.[21] If, therefore, mergers in industries outside

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[21] See note 19, *supra*. The congressional attitude toward this Court's *Thatcher*, *Swift*, and *Arrow-Hart* decisions is typified in this remark of Senator O'Conor's: "The Court, in effect, said that the [Federal Trade] Commission was quite free to use the power which Congress had conferred upon it, so long as it confined the use of that power to ordering the divestiture of pieces of paper which happened to be worthless." 96 Cong. Rec. 16433. Senator O'Mahoney remarked, for example, that there was "no doubt of the fundamental fact that an innocent defect in the drafting of section 7 of the Clayton Act back in 1914 had resulted in creating a great opportunity for escape by flagrant violators of the law." 96 Cong. Rec. 16443. After sharply criticizing this Court's decisions, the Senator continued: "I take it the record is perfectly clear that what this bill purports to do is to correct an omission in the original Clayton Act. When the authors of the Clayton Act and the Congress which passed it enacted the bill into law they thought they were giving the Federal Trade Commission administrative authority to prevent monopolistic mergers . . . ." *Ibid.* So also, Senator Kefauver observed: "it would have been much better for the economy of the country to have repealed sections 7 and 11 of the Clayton Act rather than let this wide-open loophole to remain. Most of the large and monopolistic mergers which have become detrimental to the free-enterprise system of our Nation have occurred by way of this plain evasion of the intent of the original Clayton Act." 96 Cong. Rec. 16451.

the FTC's jurisdiction were deemed beyond the reach of § 7, the result would be precisely that difference in treatment which Congress rejected. On the other hand, excluding from the section assets acquisitions not by merger in those industries does not appear to create a lacuna of practical importance.[22]

[22] A cash purchase of another bank's assets would not seem to be a fully effective method of corporate acquisition. In other industries, a cash purchase of plant, inventory, patents, trade secrets, and the like will often directly enhance the competitive position of the acquiring corporation, as in *Columbia Steel Co.* But a bank desiring to increase its share of banking business through corporate acquisition would ordinarily need to acquire the other bank's deposits and capital, not merely its assets. For more deposits mean more working capital, and additions to capital and surplus increase the lending limit. A cash purchase, in effect, only substitutes cash for cash, since bank assets consist principally of cash and very liquid securities and loans receivable, and adds nothing to the acquiring bank's capital and surplus or to its working capital. True, an exchange of its stock for assets would achieve the acquiring bank's objectives. We are clear, however, that in light of Congress' overriding purpose, in amending § 7, to close the loophole in the original section, if such an exchange (or other clearly evasive transaction) were tantamount in its effects to a merger, the exchange would not be an "assets" acquisition within the meaning of § 7 but would be treated as a transaction subject to that section.

We have not overlooked the fact that there are corporations in other industries not subject to the FTC's jurisdiction. Chief among these are air carriers subject to the Civil Aeronautics Board and other carriers subject to the Interstate Commerce Commission. Both agencies have been given, expressly, broad powers to exempt mergers and acquisitions in whatever form from the antitrust laws. See 49 U. S. C. §§ 1378, 1384; 49 U. S. C. § 5 (11) and (13). Therefore, the exclusion of assets acquisitions in such industries from § 7 would seem to have little significance.

Section 11 of the Clayton Act, 15 U. S. C. § 21, vests the FRB with authority to enforce § 7 "where applicable to banks." This provision has been in the Act since it was first passed in 1914 and was not changed by the 1950 amendments. The Bank Merger Act of 1960, assigning roles in merger applications to the FDIC and the Comptroller of the Currency as well as to the FRB, plainly supplanted, we

Second. The Congress which debated the bill to amend § 7 was fully aware of the important differences between a merger and a pure purchase of assets. For example, Senator Kilgore remarked:

> "When you talk about mergers, you are talking about a stock transaction. . . .
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> ". . . [A]ctually what you do is merge the stockholdings of both corporations, and instead of that—I am thinking in practical terms—you merge the corporate entities of the two corporations and you get one corporation out of it, and you issue stock in the one corporation in lieu of the stock in the other corporation, whereupon the stock of the corporation which had been merged is canceled by the new corporation, and you have one corporation handling the operation of two. So it really is a stock transaction in the final wind-up, regardless of what you call it. But what I call a purchase of assets is where you purchase physical assets, things upon which you could lay your hand, either in the records or on the ground . . . ." Hearings before a Subcommittee of

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think, whatever authority the FRB may have acquired under § 11, by virtue of the amendment of § 7, to enforce § 7 against bank mergers. Since the Bank Merger Act applies only to mergers, consolidations, acquisitions of assets, and assumptions of liabilities but not to outright stock acquisitions, the FRB's authority under § 11 as it existed before the 1950 amendment of § 7 remains unaffected. See, *e. g., Transamerica Corp.* v. *Board of Govs. of Fed. Res. Sys.*, 206 F. 2d 163 (C. A. 3d Cir. 1953).

Nothing in this opinion, of course, limits the power of the FTC, under §§ 7 and 11, as amended, to reach any transaction, including mergers and consolidations, in the broad range between and including pure stock and pure assets acquisitions, where the acquiring corporation is subject to the FTC's jurisdiction, see 15 U. S. C. § 45 (a)(6), and to order divestiture of the stock, share capital, or assets acquired in the transaction, see 15 U. S. C. § 21.

the Senate Committee on the Judiciary on Corporate Mergers and Acquisitions, 81st Cong., 1st and 2d Sess. 176; to the same effect, see, *e. g., id.,* at 100, 139, 320–325.

Plainly, acquisition of "assets" as used in amended § 7 was not meant to be a simple equivalent of acquisition by merger, but was intended rather to ensure against the blunting of the antimerger thrust of the section by evasive transactions such as had rendered the original section ineffectual. Thus, the stock-acquisition provision of § 7, though reenacted *in haec verba* by the 1950 amendment, must be deemed expanded in its new context to include, at the very least, acquisitions by merger or consolidation, transactions which entail a transfer of stock of the parties, while the assets-acquisition provision clearly reaches corporate acquisitions involving no such transfer. And see note 22, *supra.* This seems to be the point of Congressman Patman's remark, typical of many, that: "What this bill does is to put all corporate mergers on the same footing, whether the result of the acquisitions of stock or the acquisition of physical assets." Hearings, *supra,* at 126. To the same effect is the House Report on the bill to amend § 7: "The bill retains language of the present statute which is broad enough to prevent evasion of the central purpose. It covers not only purchase of assets or stock but also any other method of acquisition . . . . It forbids not only direct acquisitions but also indirect acquisitions . . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8–9.

Third. The legislative history shows that the objective of including the phrase "corporation subject to the jurisdiction of the Federal Trade Commission" in § 7 was not to limit the amalgamations to be covered by the amended statute but to make explicit the role of the FTC in administering the section. The predominant focus of the hear-

ings, debates, and committee reports was upon the powers of the FTC. The decisions of this Court which had uncovered the loophole in the original § 7—*Thatcher, Swift,* and *Arrow-Hart*—had not rested directly upon the substantive coverage of § 7, but rather upon the limited scope of the FTC's divestiture powers under § 11. See note 17, *supra.* There were intimations that the *courts'* power to enforce § 7 might be far greater. See *Thatcher Mfg. Co.* v. *Federal Trade Comm'n, supra,* at 561; *Swift & Co.* v. *Federal Trade Comm'n, supra,* at 563; *Federal Trade Comm'n* v. *Eastman Kodak Co.,* 274 U. S. 619, 624; *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Comm'n, supra,* at 598–599; Irvine, The Uncertainties of Section 7 of the Clayton Act, 14 Cornell L. Q. 28 (1928). Thus, the loophole was sometimes viewed as primarily a gap in the FTC's jurisdiction.[23] Furthermore, although the Clayton Act has always provided for dual enforcement by court and agency, see 15 U. S. C. § 25; *United States* v. *W. T. Grant Co.,* 345 U. S. 629; *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 208, prior to the 1950 amendment enforcement of § 7 was left largely to the FTC. Martin, Mergers and the Clayton Act (1959), 205, 219; Montague, The Celler Anti-Merger Act: An Administrative Problem in an Economic Crisis, 37 A. B. A. J. 253

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[23] See, *e. g.,* statement of Assistant Attorney General Bergson: "If it [§ 7] is to have any significant effect for the future, it is essential that it be amended so that the Federal Trade Commission will be in a position to deal with the merger problem as it exists today." Hearing before Subcommittee No. 3 of the House Committee on the Judiciary on Amending Sections 7 and 11 of the Clayton Act, 81st Cong., 1st Sess., ser. 10, p. 28. See also 96 Cong. Rec. 16437, 16452–16453; 95 Cong. Rec. 11490–11491, 11499, 11504 (Representative Byrne: "the suggested amendment to sections 7 and 11 of the Clayton Act would merely give the [Federal Trade] Commission the same power in regard to asset acquisitions that it already possesses over acquisitions of stock. This would close the loophole and restore meaning to the statute.").

(1951). And the impetus to amend § 7 came in large part from the FTC. See, *e. g.,* Martin, *supra,* 187–194; Federal Trade Commission, Annual Reports, 1928, pp. 18–19; 1940, pp. 12–13; 1948, pp. 11–22; The Merger Movement: A Summary Report (1948). Congress in 1950 clearly intended to remove all question concerning the FTC's remedial power over corporate acquisitions, and therefore explicitly enlarged the FTC's jurisdiction. Congress' choice of this means of underscoring the FTC's role in enforcing § 7 provides no basis for a construction which would undercut the dominant congressional purpose of eliminating the difference in treatment accorded stock acquisitions and mergers by the original § 7 as construed.

Fourth. It is settled law that "[i]mmunity from the antitrust laws is not lightly implied." *California* v. *Federal Power Comm'n,* 369 U. S. 482, 485. Cf. *United States* v. *Borden Co.,* 308 U. S. 188, 198–199; *United States* v. *Southern Pac. Co.,* 259 U. S. 214, 239–240. This canon of construction, which reflects the felt indispensable role of antitrust policy in the maintenance of a free economy, is controlling here. For there is no indication in the legislative history to the 1950 amendment of § 7 that Congress wished to confer a special dispensation upon the banking industry; if Congress had so wished, moreover, surely it would have exempted the industry from the stock-acquisition as well as the assets-acquisition provision.

Of course, our construction of the amended § 7 is not foreclosed because, after the passage of the amendment, some members of Congress, and for a time the Justice Department, voiced the view that bank mergers were still beyond the reach of the section.[24] "[T]he views of a sub-

[24] See, *e. g.,* Staff of Subcommittee No. 5 of House Committee on the Judiciary, 82d Cong., 2d Sess., Bank Mergers and Concentration of Banking Facilities (1952) vii; H. R. 5948, printed in 102

sequent Congress form a hazardous basis for inferring the intent of an earlier one." *United States* v. *Price,* 361 U. S. 304, 313; see *Rainwater* v. *United States,* 356 U. S. 590, 593; *United States* v. *United Mine Workers,* 330 U. S. 258, 282; cf. *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 590. This holds true even though misunderstanding of the scope of § 7 may have played some part in the passage of the Bank Merger Act of 1960.[25] There is a question, to which we shall shortly turn, whether there exists such inconsistency between the Bank Merger Act and § 7, as we now construe it, as to require a holding that § 7 must be deemed repealed *pro tanto;* but that is a different question from whether misunderstanding of the scope of § 7 is relevant to our task of defining what scope Congress gave the section in 1950. When Congress enacted the Bank Merger Act, the applicability of § 7 to bank mergers was still to be authoritatively determined; it was a subject of speculation. Thus, this is not a case in which our "earlier decisions are part of the arch on which the new structure rests, [and] we [must] refrain from disturbing them lest we change the design that Congress fashioned." *State Board of Ins.* v. *Todd Shipyards Corp.,* 370 U. S. 451, 458. Cf. note 17, *supra.* The design fashioned in the Bank Merger Act was predicated upon uncertainty as to the scope of § 7, and we do no violence to that design by dispelling the uncertainty.

Cong. Rec. 2108–2109 (1956); Hearings before a Subcommittee of the Senate Committee on Banking and Currency on the Financial Institutions Act of 1957, 85th Cong., 1st Sess., pt. 2, p. 1030 (testimony of Attorney General Brownell); H. R. Rep. No. 1416, Regulation of Bank Mergers, 86th Cong., 2d Sess. 9; S. Rep. No. 196, Regulation of Bank Mergers, 86th Cong., 1st Sess. 1–2, 5.

[25] See, *e. g.,* remarks of Representative Spence: "The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way." 106 Cong. Rec. 7257 (1960). See also note 24, *supra.*

B. *The Effect of the Bank Merger Act of 1960.*

Appellees contended below that the Bank Merger Act, by directing the banking agencies to consider competitive factors before approving mergers, 12 U. S. C. (1958 ed., Supp. IV) § 1828 (c), note 8, *supra,* immunizes approved mergers from challenge under the federal antitrust laws.[26] We think the District Court was correct in rejecting this contention. No express immunity is conferred by the Act.[27] Repeals of the antitrust laws by implication from a regulatory statute are strongly disfavored,[28] and

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[26] This contention was abandoned on appeal. We consider it, nevertheless, because it touches the proper relations of the judicial and administrative spheres. *United States* v. *Western Pac. R. Co.,* 352 U. S. 59, 63.

[27] Contrast this with the express exemption provisions of, *e. g.,* the Federal Aviation Act, 49 U. S. C. § 1384; Federal Communications Act, 47 U. S. C. §§ 221 (a), 222 (c)(1); Interstate Commerce Act, 49 U. S. C. §§ 5 (11), 5b (9), 22; Shipping Act, 46 U. S. C. (1958 ed. Supp. III) § 814; Webb-Pomerene Act, 15 U. S. C. § 62; and the Clayton Act itself, § 7, 15 U. S. C. § 18.

[28] See *United States* v. *Trans-Missouri Freight Assn.,* 166 U. S. 290, 314–315; *United States* v. *Joint Traffic Assn.,* 171 U. S. 505; *Northern Securities Co.* v. *United States,* 193 U. S. 197, 343 (plurality opinion), 374–376 (dissenting opinion); *United States* v. *Pacific & Arctic Ry. & Nav. Co.,* 228 U. S. 87, 105, 107; *Keogh* v. *Chicago & N. W. R. Co.,* 260 U. S. 156, 161–162; *Central Transfer Co.* v. *Terminal Railroad Assn.,* 288 U. S. 469, 474–475; *Terminal Warehouse Co.* v. *Pennsylvania R. Co.,* 297 U. S. 500, 513–515; *United States* v. *Borden Co.,* 308 U. S. 188, 197–206; *United States* v. *Socony-Vacuum Oil Co.,* 310 U. S. 150, 226–228; *Georgia* v. *Pennsylvania R. Co.,* 324 U. S. 439, 456–457; *United States Alkali Export Assn.* v. *United States,* 325 U. S. 196, 205–206; *Allen Bradley Co.* v. *Local Union No. 3,* 325 U. S. 797, 809–810; *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1; *United States* v. *Radio Corp. of America,* 358 U. S. 334; *Maryland & Va. Milk Producers Assn.* v. *United States,* 362 U. S. 458, 464–467; *California* v. *Federal Power Comm'n,* 369 U. S. 482; *Pan American World Airways* v. *United States,* 371 U. S. 296, 304, 305; *Silver* v. *New York Stock Exchange,* 373 U. S. 341.

have only been found in cases of plain repugnancy between the antitrust and regulatory provisions.[29] Two recent cases, *Pan American World Airways* v. *United States,* 371 U. S. 296, and *California* v. *Federal Power Comm'n,* 369 U. S. 482, illustrate this principle. In *Pan American,* the Court held that because the Civil Aeronautics Board had been given broad powers to enforce the competitive standard clearly delineated by the Civil Aeronautics Act, and to immunize a variety of transactions from the operation of the antitrust laws, the Sherman Act could not be applied to facts composing the precise ingredients of a case subject to the Board's broad regulatory and remedial powers; in contrast, the banking agencies have authority neither to enforce the antitrust laws against mergers, cf. note 22, *supra,* nor to grant immunity from those laws.

In the *California* case, on the other hand, the Court held that the FPC's approval of a merger did not confer immunity from § 7 of the Clayton Act, even though, as in the instant case, the agency had taken the competitive factor into account in passing upon the merger application. See 369 U. S., at 484–485, 487–488. We think *California* is controlling here. Although the Comptroller was required to consider effect upon competition in passing upon appellees' merger application, he was not required to give this factor any particular weight; he was not even required to (and did not) hold a hearing before approving the application; and there is no specific provision for judicial review of his decision.[30] Plainly, the

[29] See, *e. g., Keogh* v. *Chicago & N. W. R. Co., supra,* at 163; *Pan American World Airways* v. *United States, supra,* at 309–310. Cf. *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426.

[30] With respect to the question (upon which we intimate no view) whether judicial review of the Comptroller's decision is possible notwithstanding the absence of a specific provision, see Note, 75 Harv. L. Rev. 756, 762–763 (1962); Note, 37 N. Y. U. L. Rev. 735, 750, n. 95 (1962); cf. 1 Davis, Administrative Law (1958), § 4.04.

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range and scope of administrative powers under the Bank Merger Act bear little resemblance to those involved in *Pan American.*

Nor did Congress, in passing the Bank Merger Act, embrace the view that federal regulation of banking is so comprehensive that enforcement of the antitrust laws would be either unnecessary, in light of the completeness of the regulatory structure, or disruptive of that structure. On the contrary, the legislative history of the Act seems clearly to refute any suggestion that applicability of the antitrust laws was to be affected. Both the House and Senate Committee Reports stated that the Act would not affect in any way the applicability of the antitrust laws to bank acquisitions. H. R. Rep. No. 1416, 86th Cong., 2d Sess. 9; S. Rep. No. 196, 86th Cong., 1st Sess. 3. See also, *e. g.,* 105 Cong. Rec. 8131 (remarks of Senator Robertson, the Act's sponsor). Moreover, bank regulation is in most respects less complete than public utility regulation, to which interstate rail and air carriers, among others, are subject. Rate regulation in the banking industry is limited and largely indirect, see p. 328, *supra;* banks are under no duty not to discriminate in their services; and though the location of bank offices is regulated, banks may do business—place loans and solicit deposits—where they please. The fact that the banking agencies maintain a close surveillance of the industry with a view toward preventing unsound practices that might impair liquidity or lead to insolvency does not make federal banking regulation all-pervasive, although it does minimize the hazards of intense competition. Indeed, that there are so many direct public controls over unsound competitive practices in the industry refutes the argument that private controls of competition are necessary in the public interest and ought therefore to be immune from scrutiny under the antitrust laws. Cf. Kaysen and Turner, Antitrust Policy (1959), 206.

We note, finally, that the doctrine of "primary jurisdiction" is not applicable here. That doctrine requires judicial abstention in cases where protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme. See *Far East Conference* v. *United States,* 342 U. S. 570; *Great Northern R. Co.* v. *Merchants Elevator Co.,* 259 U. S. 285; Schwartz, Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility, 67 Harv. L. Rev. 436, 464 (1954).[31] Court jurisdiction is not thereby ousted, but only postponed. See *General Am. Tank Car Corp.* v. *El Dorado Terminal Co.,* 308 U. S. 422, 433; *Federal Maritime Bd.* v. *Isbrandtsen Co.,* 356 U. S. 481, 498–499; 3 Davis, Administrative Law (1958), 1–55. Thus, even if we were to assume the applicability of the doctrine to merger-application proceedings before the banking agencies,[32] the present action would not be barred, for the agency proceeding was completed before the antitrust action was commenced. Cf. *United States* v. *Western Pac. R. Co.,* 352 U. S. 59, 69; *Retail Clerks Int'l Assn.* v. *Schermerhorn,* 373 U. S. 746, 756. We recognize that the practical effect of applying the doctrine of pri-

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[31] See generally Jaffe, Primary Jurisdiction Reconsidered. The Anti-Trust Laws, 102 U. of Pa. L. Rev. 577 (1954); Latta, Primary Jurisdiction in the Regulated Industries and the Antitrust Laws, 30 U. of Cin. L. Rev. 261 (1961); Note, Regulated Industries and the Antitrust Laws: Substantive and Procedural Coordination, 58 Col. L. Rev. 673 (1958).

[32] In *California* v. *Federal Power Comm'n, supra,* the Court held that the FPC must stay its proceeding on a merger application until the completion of a pending antitrust suit by the Justice Department; *a fortiori,* the court entertaining the suit would not be required to abstain pending consideration of the merger application by the FPC. We need not and do not consider the question whether the *California* decision would control here had the Comptroller been denied an opportunity to approve the merger before the antitrust suit was commenced.

mary jurisdiction has sometimes been to channel judicial enforcement of antitrust policy into appellate review of the agency's decision, see *Federal Maritime Bd.* v. *Isbrandtsen Co., supra;* cf. *D. L. Piazza Co.* v. *West Coast Line, Inc.,* 210 F. 2d 947 (C. A. 2d Cir. 1954), or even to preclude such enforcement entirely if the agency has the power to approve the challenged activities, see *United States Nav. Co.* v. *Cunard S. S. Co.,* 284 U. S. 474; cf. *United States* v. *Railway Express Agency,* 101 F. Supp. 1008 (D. C. D. Del. 1951); but see *Federal Maritime Bd.* v. *Isbrandtsen Co., supra.* But here there may be no power of judicial review of the administrative decision approving the merger, and such approval does not in any event confer immunity from the antitrust laws, see pp. 350–352, *supra.* Furthermore, the considerations that militate against finding a repeal of the antitrust laws by implication from the existence of a regulatory scheme also argue persuasively against attenuating, by postponing, the courts' jurisdiction to enforce those laws.

It should be unnecessary to add that in holding as we do that the Bank Merger Act of 1960 does not preclude application of § 7 of the Clayton Act to bank mergers, we deprive the later statute of none of its intended force. Congress plainly did not intend the 1960 Act to extinguish other sources of federal restraint of bank acquisitions having anticompetitive effects. For example, Congress certainly knew that bank mergers would continue subject to the Sherman Act, see p. 352, *supra,* as well as that pure stock acquisitions by banks would continue subject to § 7 of the Clayton Act. If, in addition, bank mergers are subject to § 7, we do not see how the objectives of the 1960 Act are thereby thwarted. It is not as if the Clayton and Sherman Acts embodied approaches to antitrust policy inconsistent with or unrelated to each other. The Sherman Act, of course, forbids mergers effecting an unreasonable restraint of trade. See, *e. g., Northern*

Securities Co. v. *United States,* 193 U. S. 197; *United States* v. *Union Pac. R. Co.,* 226 U. S. 61; indeed, there is presently pending before this Court a challenge to a bank merger predicated solely on the Sherman Act. *United States* v. *First Nat. Bank & Trust Co. of Lexington,* prob. juris. noted, *post,* p. 824. And the tests of illegality under the Sherman and Clayton Acts are complementary. "[T]he public policy announced by § 7 of the Clayton Act is to be taken into consideration in determining whether acquisition of assets . . . violates the prohibitions of the Sherman Act against unreasonable restraints." *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 507, n. 7; see Note, 52 Col. L. Rev. 766, 768, n. 10 (1952). To be sure, not every violation of § 7, as amended, would necessarily be a violation of the Sherman Act; our point is simply that since Congress passed the 1960 Act with no intention of displacing the enforcement of the Sherman Act against bank mergers—or even of § 7 against pure stock acquisitions by banks—continued application of § 7 to bank mergers cannot be repugnant to the design of the 1960 Act. It would be anomalous to conclude that Congress, while intending the Sherman Act to remain fully applicable to bank mergers, and § 7 of the Clayton Act to remain fully applicable to pure stock acquisitions by banks, nevertheless intended § 7 to be completely inapplicable to bank mergers.

III. The Lawfulness of the Proposed Merger Under Section 7.

The statutory test is whether the effect of the merger "may be substantially to lessen competition" "in any line of commerce in any section of the country." We analyzed the test in detail in *Brown Shoe Co.* v. *United States,* 370 U. S. 294, and that analysis need not be repeated or extended here, for the instant case presents only a straightforward problem of application to particular facts.

We have no difficulty in determining the "line of commerce" (relevant product or services market) and "section of the country" (relevant geographical market) in which to appraise the probable competitive effects of appellees' proposed merger. We agree with the District Court that the cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term "commercial banking," see note 5, *supra,* composes a distinct line of commerce. Some commercial banking products or services are so distinctive that they are entirely free of effective competition from products or services of other financial institutions; the checking account is in this category. Others enjoy such cost advantages as to be insulated within a broad range from substitutes furnished by other institutions. For example, commercial banks compete with small-loan companies in the personal-loan market; but the small-loan companies' rates are invariably much higher than the banks', in part, it seems, because the companies' working capital consists in substantial part of bank loans.[33] Finally, there are banking facilities which,

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[33] Cf. *United States* v. *Aluminum Co. of America,* 148 F. 2d 416, 425 (C. A. 2d Cir. 1945). In the instant case, unlike *Aluminum Co.,* there is virtually no time lag between the banks' furnishing competing financial institutions (small-loan companies, for example) with the raw material, *i. e.,* money, and the institutions' selling the finished product, *i. e.,* loans; hence the instant case, compared with *Aluminum Co.* in this respect, is *a fortiori.* As one banker testified quite frankly in the instant case in response to the question: "Do you feel that you are in substantial competition with these institutions [personal-finance and sales-finance companies] that you lend . . . such money to for loans that you want to make?"—"Oh, no, we definitely do not. If we did, we would stop making the loans to them." (R. 298.) The reason for the competitive disadvantage of most lending institutions *vis-à-vis* banks is that only banks obtain the bulk of their working capital without having to pay interest or comparable charges thereon, by virtue of their unique power to accept demand deposits. The critical

although in terms of cost and price they are freely competitive with the facilities provided by other financial institutions, nevertheless enjoy a settled consumer preference, insulating them, to a marked degree, from competition; this seems to be the case with savings deposits.[34] In sum, it is clear that commercial banking is a market "sufficiently inclusive to be meaningful in terms of trade realities." *Crown Zellerbach Corp.* v. *Federal Trade Comm'n*, 296 F. 2d 800, 811 (C. A. 9th Cir. 1961).

We part company with the District Court on the determination of the appropriate "section of the country." The proper question to be asked in this case is not where the parties to the merger do business or even where they compete, but where, within the area of competitive overlap, the effect of the merger on competition will be direct and immediate. See Bock, Mergers and Markets (1960), 42. This depends upon "the geographic structure of supplier-customer relations." Kaysen and Turner, Anti-

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area of short-term commercial credit, see pp. 326–327, *supra*, appears to be one in which banks have little effective competition, save in the case of very large companies which can meet their financing needs from retained earnings or from issuing securities or paper.

[34] As one witness for the defendants testified:

"We have had in Philadelphia for 50 years or more the mutual savings banks offering ½ per cent and in some instances more than ½ per cent higher interest than the commercial banks. Nevertheless, the rate of increase in savings accounts in commercial banks has kept pace with and in many of the banks exceeded the rate of increase of the mutual banks paying 3½ per cent. . . .

"I have made some inquiries. There are four banks on the corner of Broad and Chestnut. Three of them are commercial banks all offering 3 per cent, and one is a mutual savings bank offering 3½. As far as I have been able to discover, there isn't anybody in Philadelphia who will take the trouble to walk across Broad Street to get ½ of 1 per cent more interest. If you ask me why, I will say I do not know. Habit, custom, personal relationships, convenience, doing all your banking under one roof appear to be factors superior to changes in the interest rate level." (R. 1388–1389.)

trust Policy (1959), 102. In banking, as in most service industries, convenience of location is essential to effective competition. Individuals and corporations typically confer the bulk of their patronage on banks in their local community; they find it impractical to conduct their banking business at a distance.[35] See *Transamerica Corp.* v. *Board of Govs. of Fed. Res. Sys.*, 206 F. 2d 163, 169 (C. A. 3d Cir. 1953). The factor of inconvenience localizes banking competition as effectively as high transportation costs in other industries. See, *e. g.*, *American*

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[35] Consider the following colloquy between governmental counsel and a witness for the defendants:

"Q. What do you consider to be the area of a branch office?

"A. Well, there is no set rule on that. We hope to have an area from 1½ to 2 miles.

"However, we have opened branches directly in the communities where other banks are established, in fact, across the street from them because it is not only a question of getting new business, it's a question of servicing and retaining the accounts that we now have.

. . . . . .

"Q. And your business is not necessarily dependent upon it [the customer] being within a mile or two of a branch, is it?

"A. To a large degree, it is, because we found that we were losing deposit accounts regularly from our in-town offices because other banks were opening or had offices in other sections of the city; and in order to retain those accounts and to get additional business we felt it was necessary to establish branches." (R. 1815.)

As far as the customer for a bank loan is concerned, "the size of his market is somewhat dependent upon his own size, how well he is known, and so on. For example, for small business concerns known primarily locally, they may consider that their market is a strictly local one, and they may be forced by circumstances to do business with banks in a nearby geographic relationship to them. On the other hand, as businesses increase in size, the scope of their business activities, their national reputation, the alternatives they have available to them will be spread again over a very large area, possibly as large as the entire United States." (R. 1372.) (Defendants' testimony on direct examination.)

Crystal Sugar Co. v. *Cuban-American Sugar Co.*, 152 F. Supp. 387, 398 (D. C. S. D. N. Y. 1957), aff'd, 259 F. 2d 524 (C. A. 2d Cir. 1958). Therefore, since, as we recently said in a related context, the "area of effective competition in the known line of commerce must be charted by careful selection of the market area in which the seller operates, *and to which the purchaser can practicably turn for supplies*," *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U. S. 320, 327 (emphasis supplied); see *Standard Oil Co.* v. *United States*, 337 U. S. 293, 299 and 300, n. 5, the four-county area in which appellees' offices are located would seem to be the relevant geographical market. Cf. *Brown Shoe Co., supra*, at 338–339. In fact, the vast bulk of appellees' business originates in the four-county area.[36] Theoretically, we should be concerned with the possibility that bank offices on the perimeter of the area may be in

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[36] The figures for PNB and Girard respectively are: 54% and 63% of the dollar volume of their commercial and industrial loans originate in the four-county area; 75% and 70%, personal loans; 74% and 84%, real estate loans; 41% and 62%, lines of credit; 94% and 72%, personal trusts; 81% and 94%, time and savings deposits; 56% and 77%, demand deposits; 93% and 87%, demand deposits of individuals. Actually, these figures may be too low. The evidence discloses that most of the business done outside the area is with large borrowers and large depositors; appellees do not, by and large, deal with small businessmen and average individuals not located in the four-county area. For example, of appellees' combined total business demand deposits under $10,000, 94% originate in the four-county area. This reinforces the thesis that the smaller the customer, the smaller is his banking market geographically. See note 35, *supra*.

The appellees concede that the four-county area has sufficient commercial importance to qualify, under *Brown Shoe Co., supra*, at 336–337, as a "section of the country" within the meaning of § 7. See *Maryland & Va. Milk Producers Assn.* v. *United States*, 362 U. S. 458, 469; cf. *United States* v. *Yellow Cab Co.*, 332 U. S. 218, 226; *Indiana Farmer's Guide Publishing Co.* v. *Prairie Farmer Publishing Co.*, 293 U. S. 268, 279.

effective competition with bank offices within; actually, this seems to be a factor of little significance.[37]

We recognize that the area in which appellees have their offices does not delineate with perfect accuracy an appropriate "section of the country" in which to appraise the effect of the merger upon competition. Large borrowers and large depositors, the record shows, may find it practical to do a large part of their banking business outside their home community; very small borrowers and depositors may, as a practical matter, be confined to bank offices in their immediate neighborhood; and customers

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[37] Appellees suggest not that bank offices skirting the four-county area provide meaningful alternatives to bank customers within the area, but that such alternatives are provided by large banks, from New York and elsewhere, which solicit business in the Philadelphia area. There is no evidence of the amount of business done in the area by banks with offices outside the area; it may be that such figures are unobtainable. In any event, it would seem from the local orientation of banking insofar as smaller customers are concerned, see notes 35 and 36, *supra*, that competition from outside the area would only be important to the larger borrowers and depositors. If so, the four-county area remains a valid geographical market in which to assess the anticompetitive effect of the proposed merger upon the banking facilities available to the smaller customer—a perfectly good "line of commerce," in light of Congress' evident concern, in enacting the 1950 amendments to § 7, with preserving small business. See *Brown Shoe Co., supra*, at 315–316. As a practical matter the small businessman can only satisfy his credit needs at local banks. To be sure, there is still some artificiality in deeming the four-county area the relevant "section of the country" so far as businessmen located near the perimeter are concerned. But such fuzziness would seem inherent in any attempt to delineate the relevant geographical market. Note, 52 Col. L. Rev. 766, 778–779, n. 77 (1952). And it is notable that outside the four-county area, appellees' business rapidly thins out. Thus, the other six counties of the Delaware Valley account for only 2% of appellees' combined individual demand deposits; 4%, demand deposits of partnerships and corporations; 7%, loans; 2%, savings deposits; 4%, business time deposits.

of intermediate size, it would appear, deal with banks within an area intermediate between these extremes. See notes 35–37, *supra*. So also, some banking services are evidently more local in nature than others. But that in banking the relevant geographical market is a function of each separate customer's economic scale means simply that a workable compromise must be found: some fair intermediate delineation which avoids the indefensible extremes of drawing the market either so expansively as to make the effect of the merger upon competition seem insignificant, because only the very largest bank customers are taken into account in defining the market, or so narrowly as to place appellees in different markets, because only the smallest customers are considered. We think that the four-county Philadelphia metropolitan area, which state law apparently recognizes as a meaningful banking community in allowing Philadelphia banks to branch within it, and which would seem roughly to delineate the area in which bank customers that are neither very large nor very small find it practical to do their banking business, is a more appropriate "section of the country" in which to appraise the instant merger than any larger or smaller or different area. Cf. Hale and Hale, Market Power: Size and Shape Under the Sherman Act (1958), 119. We are helped to this conclusion by the fact that the three federal banking agencies regard the area in which banks have their offices as an "area of effective competition." Not only did the FDIC and FRB, in the reports they submitted to the Comptroller of the Currency in connection with appellees' application for permission to merge, so hold, but the Comptroller, in his statement approving the merger, agreed: "With respect to the effect upon competition, there are three separate levels and effective areas of competition involved. These are the national level for na-

tional accounts, the regional or sectional area, and the local area of the City of Philadelphia and the immediately surrounding area."

Having determined the relevant market, we come to the ultimate question under § 7: whether the effect of the merger "may be substantially to lessen competition" in the relevant market. Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anticompetitive tendencies in their "incipiency." See *Brown Shoe Co., supra,* at 317, 322. Such a prediction is sound only if it is based upon a firm understanding of the structure of the relevant market; yet the relevant economic data are both complex and elusive. See generally Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L. Rev. 226 (1960). And unless businessmen can assess the legal consequences of a merger with some confidence, sound business planning is retarded. See *Crown Zellerbach Corp.* v. *Federal Trade Comm'n,* 296 F. 2d 800, 826–827 (C. A. 9th Cir. 1961). So also, we must be alert to the danger of subverting congressional intent by permitting a too-broad economic investigation. *Standard Oil Co.* v. *United States,* 337 U. S. 293, 313. And so in any case in which it is possible, without doing violence to the congressional objective embodied in § 7, to simplify the test of illegality, the courts ought to do so in the interest of sound and practical judicial administration. See *Union Carbide Corp.,* Trade Reg. Rep., FTC Complaints and Orders, 1961–1963, ¶ 15503, at 20375–20376 (concurring opinion). This is such a case.

We noted in *Brown Shoe Co., supra,* at 315, that "[t]he dominant theme pervading congressional consideration of

the 1950 amendments [to § 7] was a fear of what was considered to be a rising tide of economic concentration in the American economy." This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects. Specifically, we think that a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market, is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects. See *United States* v. *Koppers Co.*, 202 F. Supp. 437 (D. C. W. D. Pa. 1962).

Such a test lightens the burden of proving illegality only with respect to mergers whose size makes them inherently suspect in light of Congress' design in § 7 to prevent undue concentration. Furthermore, the test is fully consonant with economic theory.[38] That "[c]ompetition is likely to be greatest when there are many sellers, none of which has any significant market share," [39] is common ground among most economists, and was undoubtedly a premise of congressional reasoning about the antimerger statute.

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[38] See Kaysen and Turner, Antitrust Policy (1959), 133; Stigler, Mergers and Preventive Antitrust Policy, 104 U. of Pa. L. Rev. 176, 182 (1955); Bok, *supra*, at 308–316, 328. Cf. Markham, Merger Policy Under the New Section 7: A Six-Year Appraisal, 43 Va. L. Rev. 489, 521–522 (1957).

[39] Comment, "Substantially to Lessen Competition . . .": Current Problems of Horizontal Mergers, 68 Yale L. J. 1627, 1638–1639 (1959); see, *e. g.*, Machlup, The Economics of Sellers' Competition (1952), 84–93, 333–336; Bain, Barriers to New Competition (1956), 27. Cf. Mason, Market Power and Business Conduct: Some Comments, 46–2 Am. Econ. Rev. (1956), 471.

The merger of appellees will result in a single bank's controlling at least 30% of the commercial banking business in the four-county Philadelphia metropolitan area.[40] Without attempting to specify the smallest market share which would still be considered to threaten undue concentration, we are clear that 30% presents that threat.[41]

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[40] See p. 331, *supra*. We note three factors that cause us to shade the percentages given earlier in this opinion, in seeking to calculate market share. (1) The percentages took no account of banks which do business in the four-county area but have no offices there; however, this seems to be a factor of little importance, at least insofar as smaller customers are concerned, see note 37, *supra*. (2) The percentages took no account of banks which have offices in the four-county area but not their home offices there; however, there seem to be only two such offices and appellees in this Court make no reference to this omission. (3) There are no percentages for the amount of business of banks located in the area, other than appellees, which originates in the area. Appellees contend that since most of the 40 other banks are smaller, they do a more concentratedly local business than appellees, and hence account for a relatively larger proportion of such business. If so, we doubt much correction is needed. The five largest banks in the four-county area at present control some 78% of the area banks' assets. Thus, even if the small banks have a somewhat different pattern of business, it is difficult to see how that would substantially diminish the appellees' share of the local banking business.

No evidence was introduced as to the quantitative significance of these three factors, and appellees do not contend that as a practical matter such evidence could have been obtained. Under the circumstances, we think a downward correction of the percentages to 30% produces a conservative estimate of appellees' market share.

[41] Kaysen and Turner, *supra*, note 38, suggest that 20% should be the line of prima facie unlawfulness; Stigler suggests that any acquisition by a firm controlling 20% of the market after the merger is presumptively unlawful; Markham mentions 25%. Bok's principal test is increase in market concentration, and he suggests a figure of 7% or 8%. And consult note 20, *supra*. We intimate no view on the validity of such tests for we have no need to consider percentages smaller than those in the case at bar, but we note that such tests are more rigorous than is required to dispose of the instant case. Need-

Further, whereas presently the two largest banks in the area (First Pennsylvania and PNB) control between them approximately 44% of the area's commercial banking business, the two largest after the merger (PNB-Girard and First Pennsylvania) will control 59%. Plainly, we think, this increase of more than 33% in concentration must be regarded as significant.[42]

Our conclusion that these percentages raise an inference that the effect of the contemplated merger of appellees may be substantially to lessen competition is not an arbitrary one, although neither the terms of § 7 nor the legislative history suggests that any particular percentage share was deemed critical. The House Report states that the tests of illegality under amended § 7 "are intended to be similar to those which the courts have applied in interpreting the same language as used in other sections of the Clayton Act." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 8. Accordingly, we have relied upon decisions under these other sections in applying § 7. See *Brown Shoe Co., supra, passim;* cf. *United States* v. *E. I. du Pont de Nemours & Co.,* 353 U. S. 586, 595, and n. 15. In *Standard Oil Co.* v. *United States,* 337 U. S. 293, cited in S. Rep. No. 1775, 81st Cong., 2d Sess. 6, this Court held violative of § 3 of the Clayton Act exclusive contracts

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less to say, the fact that a merger results in a less-than-30% market share, or in a less substantial increase in concentration than in the instant case, does not raise an inference that the merger is *not* violative of § 7. See, *e. g., Brown Shoe Co., supra.*

[42] See note 41, *supra.* It is no answer that, among the three presently largest firms (First Pennsylvania, PNB, and Girard), there will be no increase in concentration. If this argument were valid, then once a market had become unduly concentrated, further concentration would be legally privileged. On the contrary, if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great. Comment, note 39, *supra,* at 1644.

whereby the defendant company, which accounted for 23% of the sales in the relevant market and, together with six other firms, accounted for 65% of such sales, maintained control over outlets through which approximately 7% of the sales were made. In *Federal Trade Comm'n* v. *Motion Picture Adv. Serv. Co.*, 344 U. S. 392, we held unlawful, under § 1 of the Sherman Act and § 5 of the Federal Trade Commission Act, rather than under § 3 of the Clayton Act, exclusive arrangements whereby the four major firms in the industry had foreclosed 75% of the relevant market; the respondent's market share, evidently, was 20%. Kessler and Stern, Competition, Contract, and Vertical Integration, 69 Yale L. J. 1, 53 n. 231 (1959). In the instant case, by way of comparison, the four largest banks after the merger will foreclose 78% of the relevant market. P. 331, *supra.* And in *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346, the Court held violative of § 3 a series of exclusive contracts whereby a single manufacturer controlled 40% of the industry's retail outlets. Doubtless these cases turned to some extent upon whether "by the nature of the market there is room for newcomers." *Federal Trade Comm'n* v. *Motion Picture Adv. Serv. Co., supra,* at 395. But they remain highly suggestive in the present context, for as we noted in *Brown Shoe Co., supra,* at 332, n. 55, integration by merger is more suspect than integration by contract, because of the greater permanence of the former. The market share and market concentration figures in the contract-integration cases, taken together with scholarly opinion, see notes 41 and 42, *supra,* support, we believe, the inference we draw in the instant case from the figures disclosed by the record.

There is nothing in the record of this case to rebut the inherently anticompetitive tendency manifested by these percentages. There was, to be sure, testimony by bank officers to the effect that competition among banks in

Philadelphia was vigorous and would continue to be vigorous after the merger. We think, however, that the District Court's reliance on such evidence was misplaced. This lay evidence on so complex an economic-legal problem as the substantiality of the effect of this merger upon competition was entitled to little weight, in view of the witnesses' failure to give concrete reasons for their conclusions.[43]

Of equally little value, we think, are the assurances offered by appellees' witnesses that customers dissatisfied with the services of the resulting bank may readily turn to the 40 other banks in the Philadelphia area. In every case short of outright monopoly, the disgruntled customer has alternatives; even in tightly oligopolistic markets, there may be small firms operating. A fundamental purpose of amending § 7 was to arrest the trend toward concentration, the *tendency* to monopoly, before the consumer's alternatives disappeared through merger, and that purpose would be ill-served if the law stayed its hand until 10, or 20, or 30 more Philadelphia banks were absorbed. This is not a fanciful eventuality, in view of the strong trend toward mergers evident in the area, see p. 331, *supra;* and we might note also that entry of new competitors into the banking field is far from easy.[44]

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[43] The fact that some of the bank officers who testified represented small banks in competition with appellees does not substantially enhance the probative value of their testimony. The test of a competitive market is not only whether small competitors flourish but also whether consumers are well served. See *United States* v. *Bethlehem Steel Corp.*, 168 F. Supp. 576, 588, 592 (D. C. S. D. N. Y. 1958). "[C]ongressional concern [was] with the protection of *competition*, not *competitors*." *Brown Shoe Co., supra,* at 320. In an oligopolistic market, small companies may be perfectly content to follow the high prices set by the dominant firms, yet the market may be profoundly anticompetitive.

[44] Entry is, of course, wholly a matter of governmental grace. See p. 328, *supra.* In the 10-year period ending in 1961, only one

So also, we reject the position that commercial banking, because it is subject to a high degree of governmental regulation, or because it deals in the intangibles of credit and services rather than in the manufacture or sale of tangible commodities, is somehow immune from the anti-competitive effects of undue concentration. Competition among banks exists at every level—price, variety of credit arrangements, convenience of location, attractiveness of physical surroundings, credit information, investment advice, service charges, personal accommodations, advertising, miscellaneous special and extra services—and it is keen; on this appellees' own witnesses were emphatic.[45]

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new bank opened in the Philadelphia four-county area. That was in 1951. At the end of 10 years, the new bank controlled only one-third of 1% of the area's deposits.

[45] The following colloquy is representative:

"Q. Mr. Jennings, what is the nature of competition among commercial banks?

"A. Keen, highly competitive. I think, from my own observation, that I have never known competition among banks to be keener than it is today. . . .

"Q. In what area does competition exist? . . .

"A. I think the stiffest, sternest competition of all is in the field to obtain demand deposits and loans. . . .

"Q. What form does the competition take?

"A. It takes many forms. If we are dealing with the deposits of large corporations, wealthy individuals, I would say that most, if not all, of the major banks of the country are competing for such deposits. The same would hold true as regards loans to those corporations or wealthy individuals.

"If we go into the field of smaller loans, smaller deposits, the competition is more regional—wide but nevertheless regional—and there the large banks as well as the small banks are after that business with everything they have.

. . . . . .

"Q. What form does the competition take? Is it competition in price?

"A. No, I wouldn't say that it is competition as to price. After all, interest rates are regulated at the top level by the laws of the

There is no reason to think that concentration is less inimical to the free play of competition in banking than in other service industries. On the contrary, it is in all probability more inimical. For example, banks compete to fill the credit needs of businessmen. Small businessmen especially are, as a practical matter, confined to their locality for the satisfaction of their credit needs. See note 35, *supra*. If the number of banks in the locality is reduced, the vigor of competition for filling the marginal small business borrower's needs is likely to diminish.

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50 states. Interest rates at the bottom level have no legal limitation, but for practical purposes the prime rate . . . furnishes a very effective floor. I would say that the area of competition for interest rates would range between, let us say, the prime rate of 4½ and 6 per cent for normal loans exclusive of consumer loans, where higher rates are permitted.

. . . . .

"In the area of service charges, I would say that banks are competitive in that field. They base their service charges primarily on their costs, but they have to maintain a weather eye to windward as to what the competitors are charging in the service charge field. The minute they get out of line in connection with service charges they find their customers will start to protest, and if something isn't done some of the customers will leave them for a differential in service charges of any significance.

"I do not believe that competition is really affected by the price area. I think it is affected largely by the quality and the caliber of service that banks give and whether or not they feel they are being received in the right way, whether they are welcome in the bank. Personalities enter into it very heavily, but I do not think price as such is a major factor in banking competition. It is there, it is a factor, but not major." (R. 1940–1942.)

It should be noted that besides competition in interest rates, there is a great deal of indirect price competition in the banking industry. For example, the amount of compensating balance a bank requires of a borrower (*i. e.*, the amount the borrower must always retain in his demand deposit account with the bank) affects the real cost of the loan, and varies considerably in the bank's discretion.

At the same time, his concomitantly greater difficulty in obtaining credit is likely to put him at a disadvantage *vis-à-vis* larger businesses with which he competes. In this fashion, concentration in banking accelerates concentration generally.

We turn now to three affirmative justifications which appellees offer for the proposed merger. The first is that only through mergers can banks follow their customers to the suburbs and retain their business. This justification does not seem particularly related to the instant merger, but in any event it has no merit. There is an alternative to the merger route: the opening of new branches in the areas to which the customers have moved—so-called *de novo* branching. Appellees do not contend that they are unable to expand thus, by opening new offices rather than acquiring existing ones, and surely one premise of an antimerger statute such as § 7 is that corporate growth by internal expansion is socially preferable to growth by acquisition.

Second, it is suggested that the increased lending limit of the resulting bank will enable it to compete with the large out-of-state banks, particularly the New York banks, for very large loans. We reject this application of the concept of "countervailing power." Cf. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons,* 340 U. S. 211. If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader. For if all the commercial banks in the Philadelphia area merged into one, it would be smaller than the largest bank in New York City. This is not a case, plainly, where two small firms in a market propose to merge in order to be able to compete more successfully with the leading firms in that

market. Nor is it a case in which lack of adequate banking facilities is causing hardships to individuals or businesses in the community. The present two largest banks in Philadelphia have lending limits of $8,000,000 each. The only businesses located in the Philadelphia area which find such limits inadequate are large enough readily to obtain bank credit in other cities.

This brings us to appellees' final contention, that Philadelphia needs a bank larger than it now has in order to bring business to the area and stimulate its economic development. See p. 334 and note 10, *supra*. We are clear, however, that a merger the effect of which "may be substantially to lessen competition" is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us already, by Congress when it enacted the amended § 7. Congress determined to preserve our traditionally competitive economy. It therefore proscribed anticompetitive mergers, the benign and the malignant alike, fully aware, we must assume, that some price might have to be paid.

In holding as we do that the merger of appellees would violate § 7 and must therefore be enjoined, we reject appellees' pervasive suggestion that application of the procompetitive policy of § 7 to the banking industry will have dire, although unspecified, consequences for the national economy. Concededly, PNB and Girard are healthy and strong; they are not undercapitalized or overloaned; they have no management problems; the Philadelphia area is not overbanked; ruinous competition is not in the offing. Section 7 does not mandate cutthroat competition in the banking industry, and does not exclude defenses based on dangers to liquidity or

solvency, if to avert them a merger is necessary.[46] It does require, however, that the forces of competition be allowed to operate within the broad framework of governmental regulation of the industry. The fact that banking is a highly regulated industry critical to the Nation's welfare makes the play of competition not less important but more so. At the price of some repetition, we note that if the businessman is denied credit because his banking alternatives have been eliminated by mergers, the whole edifice of an entrepreneurial system is threatened; if the costs of banking services and credit are allowed to become excessive by the absence of competitive pressures, virtually all costs, in our credit economy, will be affected; and unless competition is allowed to fulfill its role as an economic regulator in the banking industry, the result may well be even more governmental regulation. Subject to narrow qualifications, it is surely the case that competition is our fundamental national economic policy, offering as it does the only alternative to the cartelization or governmental regimentation of large portions of the economy. Cf. *Northern Pac. R. Co.* v. *United States,* 356 U. S. 1, 4. There is no warrant for declining to enforce it in the instant case.

The judgment of the District Court is reversed and the case remanded with direction to enter judgment enjoining the proposed merger. *It is so ordered.*

MR. JUSTICE WHITE took no part in the consideration or decision of this case.

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[46] Thus, arguably, the so-called failing-company defense, see *International Shoe Co.* v. *Federal Trade Comm'n,* 280 U. S. 291, 299–303, might have somewhat larger contours as applied to bank mergers because of the greater public impact of a bank failure compared with ordinary business failures. But the question what defenses in § 7 actions must be allowed in order to avert unsound banking conditions is not before us, and we intimate no view upon it.

MR. JUSTICE HARLAN, whom MR. JUSTICE STEWART joins, dissenting.

I suspect that no one will be more surprised than the Government to find that the Clayton Act has carried the day for its case in this Court.

In response to an apparently accelerating trend toward concentration in the commercial banking system in this country, a trend which existing laws were evidently ill-suited to control, numerous bills were introduced in Congress from 1955 to 1960.[1] During this period, the Department of Justice and the federal banking agencies [2] advocated divergent methods of dealing with the competitive aspects of bank mergers, the former urging the extension of § 7 of the Clayton Act to cover such mergers and the latter supporting a regulatory scheme under which the effect of a bank merger on competition would be only one of the factors to be considered in determining whether the merger would be in the public interest. The Justice Department's proposals were repeatedly rejected by Congress, and the regulatory approach of the banking agencies was adopted in the Bank Merger Act of 1960. See *infra,* pp. 379–383.

Sweeping aside the "design fashioned in the Bank Merger Act" as "predicated upon uncertainty as to the scope of § 7" of the Clayton Act (*ante,* p. 349), the Court today holds § 7 to be applicable to bank mergers and concludes that it has been violated in this case. I respectfully submit that this holding, which sanctions a remedy

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[1] See Wemple and Cutler, The Federal Bank Merger Law and the Antitrust Laws, 16 Bus. Law. 994, 995 (1961). Many of the bills are summarized in Funk, Antitrust Legislation Affecting Bank Mergers, 75 Banking L. J. 369 (1958).

[2] These agencies and the areas of their primary supervisory responsibility are: (1) the Comptroller of the Currency—national banks; (2) the Federal Reserve System—state Reserve-member banks; (3) the FDIC—insured nonmember banks.

regarded by Congress as inimical to the best interests of the banking industry and the public, and which will in large measure serve to frustrate the objectives of the Bank Merger Act, finds no justification in either the terms of the 1950 amendment of the Clayton Act or the history of the statute.

I.

The key to this case is found in the special position occupied by commercial banking in the economy of this country. With respect to both the nature of the operations performed and the degree of governmental supervision involved, it is fundamentally different from ordinary manufacturing and mercantile businesses.

The unique powers of commercial banks to accept demand deposits, provide checking account services, and lend against fractional reserves permit the banking system as a whole to create a supply of "money," a function which is indispensable to the maintenance of the structure of our national economy. And the amount of the funds held by commercial banks is very large indeed; demand deposits alone represent approximately three-fourths of the money supply in the United States.[3] Since a bank's assets must be sufficiently liquid to accommodate demand withdrawals, short-term commercial and industrial loans are the major element in bank portfolios, thus making commercial banks the principal source of short-term business credit. Many other services are also provided by banks, but in these more or less collateral areas they receive more active competition from other financial institutions.[4]

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[3] Samuelson, Economics (5th ed. 1961), p. 311.

[4] For example, savings and loan associations, credit unions, and other institutions compete with banks in installment lending to individuals, and banks are in competition with individuals in the personal trust field.

Deposit banking operations affect not only the volume of money and credit, but also the value of the dollar and the stability of the currency system. In this field, considerations other than simply the preservation of competition are relevant. Moreover, commercial banks are entrusted with the safekeeping of large amounts of funds belonging to individuals and corporations. Unlike the ordinary investor, these depositors do not regard their funds as subject to a risk of loss and, at least in the case of demand depositors, they do not receive a return for taking such a risk. A bank failure is a community disaster; its impact first strikes the bank's depositors most heavily, and then spreads throughout the economic life of the community.[5] Safety and soundness of banking practices are thus critical factors in any banking system.

The extensive blanket of state and federal regulation of commercial banking, much of which is aimed at limiting competition, reflects these factors. Since the Court's opinion describes, at some length, aspects of the supervision exercised by the federal banking agencies (*ante*, pp. 327–330), I do no more here than point out that, in my opinion, such regulation evidences a plain design grounded on solid economic considerations to deal with banking as a specialized field.

This view is confirmed by the Bank Merger Act of 1960 and its history.

Federal legislation dealing with bank mergers[6] dates from 1918, when Congress provided that, subject to the

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[5] Since bank insolvencies destroy sources of credit, not only borrowers but also others who rely on the borrowers' ability to secure loans may be adversely affected. See Berle, Banking Under the Anti-Trust Laws, 49 Col. L. Rev. 589, 592 (1949).

[6] The term "merger" is generally used throughout this opinion to designate any form of corporate amalgamation. See note 7 in the

approval of the Comptroller of the Currency, two or more national banks could consolidate to form a new national bank; [7] similar provision was made in 1927 for the consolidation of a state and a national bank resulting in a national bank.[8] In 1952 mergers of national and state banks into national banks were authorized, also conditioned on approval by the Comptroller of the Currency.[9] In 1950 Congress authorized the theretofore prohibited [10] merger or consolidation of a national bank with a state bank when the assuming or resulting bank would be a state bank.[11] In addition, the Federal Deposit Insurance Act was amended to require the approval of the FDIC for all mergers and consolidations between insured and noninsured banks, and of specified federal banking agencies for conversions of insured banks into insured state banks if the conversion would result in the capital stock or surplus of the newly formed bank being less than that of the converting bank.[12] The Act further required insured banks merging with insured state banks to secure the approval of the Comptroller of the Currency if the assuming bank would be a national bank, and the

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Court's opinion, *ante*, p. 332. Occasionally, however, as in the above paragraph, the terms "merger" and "consolidation" are used in their technical sense.

[7] 40 Stat. 1043, as amended, 12 U. S. C. (Supp. IV, 1963) § 215.

[8] 44 Stat. 1225, as amended, 12 U. S. C. (Supp. IV, 1963) § 215.

[9] 66 Stat. 599, as amended, 12 U. S. C. (Supp. IV, 1963) § 215a.

[10] See Paton, Conversion, Merger and Consolidation Legislation—"Two-Way Street" For National and State Banks, 71 Banking L. J. 15 (1954).

[11] 64 Stat. 455, as amended, 12 U. S. C. § 214a.

[12] 64 Stat. 457; see 64 Stat. 892 (now 74 Stat. 129, 12 U. S. C. (Supp. IV, 1963) § 1828 (c)).

approval of the Board of Governors of the Federal Reserve System and the FDIC, respectively, if the assuming or resulting bank would be a state member bank or nonmember insured bank.[13]

None of this legislation prescribed standards by which the appropriate federal banking agencies were to be guided in determining the significance to be attributed to the anticompetitive effects of a proposed merger. As previously noted (*supra*, p. 373), Congress became increasingly concerned with this problem in the 1950's. The antitrust laws apparently provided no solution; in only one case prior to 1960, *United States* v. *Firstamerica Corp.*, Civil No. 38139, N. D. Cal., March 30, 1959, settled by consent decree, had either the Sherman or Clayton Act been invoked to attack a commercial bank merger.

Indeed the inapplicability to bank mergers of § 7 of the Clayton Act, even after it was amended in 1950, was, for a time, an explicit premise on which the Department of Justice performed its antitrust duties. In passing upon an application for informal clearance of a bank merger in 1955, the Department stated:

> "After a complete consideration of this matter, we have concluded that this Department would not have jurisdiction to proceed under section 7 of the Clayton Act. For this reason this Department does not presently plan to take any action on this matter." Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, pt. 3, p. 2141 (1955).

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[13] *Ibid.* However, under the Act, insured banks merging with insured state banks did not have to obtain approval unless the capital stock or surplus of the resulting or assuming bank would be less than the aggregate capital stock or surplus of all the merging banks.

And in testifying before the Senate Committee on Banking and Currency in 1957 Attorney General Brownell, speaking of bank mergers, noted:

> "On the basis of these provisions the Department of Justice has concluded, and all apparently agree, that asset acquisitions by banks are not covered by section 7 [of the Clayton Act] as amended in 1950." Hearings on the Financial Institutions Act of 1957 before a Subcommittee of the Senate Committee on Banking and Currency, 85th Cong., 1st Sess., pt. 2, p. 1030 (1957).

Similar statements were repeatedly made to Congress by Justice Department representatives in the years prior to the enactment of the Bank Merger Act.[14]

The inapplicability of § 7 to bank mergers was also an explicit basis on which Congress acted in passing the Bank Merger Act of 1960. The Senate Report on S. 1062, the bill that was finally enacted, stated:

> "Since bank mergers are customarily, if not invariably, carried out by asset acquisitions, they are exempt from section 7 of the Clayton Act. (Stock acquisitions by bank holding companies, as distinguished from mergers and consolidations, are subject to both the Bank Holding Company Act of 1956 and sec. 7 of the Clayton Act.)" S. Rep. No. 196, 86th Cong., 1st Sess. 1–2 (1959).
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> "In 1950 (64 Stat. 1125) section 7 of the Clayton Act was amended to correct these deficiencies. Acquisitions of assets were included within the section,

[14] See Hearings before the Antitrust Subcommittee of the House Committee on the Judiciary, 84th Cong., 1st Sess., Ser. 3, pt. 1, pp. 243–244 (1955); Hearings on S. 3911 before a Subcommittee of the Senate Committee on Banking and Currency, 84th Cong., 2d Sess. 60–61, 84 (1956); Hearings on S. 1062 before the Senate Committee on Banking and Currency, 86th Cong., 1st Sess. 9 (1959).

> in addition to stock acquisitions, but only in the case of corporations subject to the jurisdiction of the Federal Trade Commission (banks, being subject to the jurisdiction of the Federal Reserve Board for purposes of the Clayton Act by virtue of section 11 of that act, were not affected)." *Id.*, at 5.[15]

During the floor debates Representative Spence, the Chairman of the House Committee on Banking and Currency, recognized the same difficulty: "The Clayton Act is ineffective as to bank mergers because in the case of banks it covers only stock acquisitions and bank mergers are not accomplished that way." 106 Cong. Rec. 7257 (1960).[16]

But instead of extending the scope of § 7 to cover bank mergers, as numerous proposed amendments to that section were designed to accomplish,[17] Congress made the

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[15] See also H. R. Rep. No. 1416, 86th Cong., 2d Sess. 5 (1960) ("The Federal antitrust laws are also inadequate to the task of regulating bank mergers; while the Attorney General may move against bank mergers to a limited extent under the Sherman Act, the Clayton Act offers little help."); *id.*, at 9 ("Because section 7 [of the Clayton Act] is limited, insofar as banks are concerned, to cases where a merger is accomplished through acquisition of stock, and because bank mergers are accomplished by asset acquisitions rather than stock acquisitions, the act offers 'little help,' in the words of Hon. Robert A. Bicks, acting head of the Antitrust Division, in controlling bank mergers.").

[16] In the Senate, a sponsor of S. 1062, Senator Fulbright, reported that the "1950 amendment to section 7 of the Clayton Act, which for the first time imposed controls over mergers by means other than stock acquisitions, did not apply to bank mergers which are practically invariably accomplished by means other than stock acquisition. Accordingly for all practical purposes bank mergers have been and still are exempt from section 7 of the Clayton Act." 106 Cong. Rec. 9711 (1960).

[17] *E. g.*, H. R. 5948, 84th Cong. 1st Sess. (1955); S. 198, 85th Cong., 1st Sess. (1957); S. 722, 85th Cong., 1st Sess. (1957); see note 1, *supra*.

deliberate policy judgment that "it is impossible to subject bank mergers to the simple rule of section 7 of the Clayton Act. Under that act, a merger would be barred if it might tend substantially to lessen competition, regardless of the effects on the public interest." 105 Cong. Rec. 8076 (1959) (remarks of Senator Robertson, a sponsor of S. 1062). Because of the peculiar nature of the commercial banking industry, its crucial role in the economy, and its intimate connection with the fiscal and monetary operations of the Government, Congress rejected the notion that the general economic and business premises of the Clayton Act should be the only considerations applicable to this field. Unrestricted bank competition was thought to have been a major cause of the panic of 1907 and of the bank failures of the 1930's,[18] and was regarded as a highly undesirable condition to impose on banks in the future:

> "Banking is too important to depositors, to borrowers, to the Government, and the public generally, to permit unregulated and unrestricted competition in that field.

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[18] S. Rep. No. 196, 86th Cong., 1st Sess. 17 (1959): "Time and again the Nation has suffered from the results of unregulated and uncontrolled competition in the field of banking, and from insufficiently regulated competition. . . . The rapid increase in the number of small weak banks, to such a large number that the Comptroller could not effectively supervise them or control any but the worst abuses, was one of the factors which led to the panic of 1907.

"The banking collapse in the early 1930's again was in large part the result of insufficient regulation and control of banks, in effect the result of too much competition." See also 105 Cong. Rec. 8076 (1959): "But unlimited and unrestricted competition in banking is just not possible. We have had too many panics and banking crises and bank failures, largely as the result of excessive competition in banking, to consider for a moment going back to the days of free banking or unregulated banking."

"The antitrust laws have reflected an awareness of the difference between banking and other regulated industries on the one hand, and ordinary unregulated industries and commercial enterprises on the other hand." 106 Cong. Rec. 9711 (1960) (remarks of Senator Fulbright, a sponsor of S. 1062).

"It is this distinction between banking and other businesses which justifies different treatment for bank mergers and other mergers. It was this distinction that led the Senate to reject the flat prohibition of the Clayton Act test which applies to other mergers." *Id.*, at 9712.[19]

Thus the Committee on Banking and Currency recommended "continuance of the existing exemption from section 7 of the Clayton Act." 105 Cong. Rec. 8076 (1959). Congress accepted this recommendation; it decided to handle the problem of concentration in commercial banking "through banking laws, specially framed to fit the particular needs of the field . . . ." S. Rep. No. 196, 86th Cong., 1st Sess. 18 (1959). As finally enacted in 1960, the Bank Merger Act embodies the regulatory approach advocated by the banking agencies, vesting in them responsibility for its administration and placing the scheme within the framework of existing banking laws as an amendment to § 18 (c) of the Federal Deposit Insurance Act, 12 U. S. C. (Supp. IV, 1963), § 1828 (c).[20] It maintains the latter Act's requirement of advance approval by the appropriate federal agency for mergers between insured banks and between insured and noninsured

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[19] See also S. Rep. No. 196, 86th Cong., 1st Sess. 16 (1959): "But it is impossible to require unrestricted competition in the field of banking, and it would be impossible to subject banks to the rules applicable to ordinary industrial and commercial concerns, not subject to regulation and not vested with a public interest."

[20] For the pertinent text of the statute, see note 8 in the Court's opinion, *ante*, pp. 332–333.

banks (*supra,* pp. 375–377), but establishes that such approval is necessary in every merger of this type. To aid the respective agencies in determining whether to approve a merger, and in "the interests of uniform standards" (12 U. S. C. (Supp. IV, 1963) § 1828 (c)), the Act requires the two agencies not making the particular decision and the Attorney General to submit to the immediately responsible agency reports on the competitive factors involved. It further provides that in addition to considering the banking factors examined by the FDIC in connection with applications to become an insured bank, which focus primarily on matters of safety and soundness,[21] the approving agency "shall also take into consideration the effect of the transaction on competition (including any tendency toward monopoly), and shall not approve the transaction unless, after considering all of such factors, it finds the transaction to be in the public interest." 12 U. S. C. (Supp. IV, 1963) § 1828 (c).

The congressional purpose clearly emerges from the terms of the statute and from the committee reports, hearings, and floor debates on the bills. Time and again it was repeated that effect on competition was *not to be the controlling factor* in determining whether to approve a bank merger, that a merger could be approved as being in the public interest even though it would cause a substantial lessening of competition. The following statement is typical:

> "The committee wants to make crystal clear its intention that the various banking factors in any par-

[21] These factors are: "the financial history and condition of each of the banks involved, the adequacy of its capital structure, its future earnings prospects, the general character of its management, the convenience and needs of the community to be served, and whether or not its corporate powers are consistent with the purposes of this chapter." 12 U. S. C. (Supp. IV, 1963) § 1828 (c). Compare § 6 of the Federal Deposit Insurance Act, 12 U. S. C. § 1816.

> ticular case may be held to outweigh the competitive factors, and that the competitive factors, however favorable or unfavorable, are not, in and of themselves, controlling on the decision. And, of course, the banking agencies are not bound in their consideration of the competitive factors by the report of the Attorney General." S. Rep. No. 196, 86th Cong., 1st Sess. 24 (1959); *id.*, at 19, 21.[22]

The foregoing statement also shows that it was the congressional intention to place the responsibility for approval squarely on the banking agencies; the report of the Attorney General on the competitive aspects of a merger was to be advisory only.[23] And there was deliberately omitted any attempt to specify or restrict the kinds of circumstances in which the agencies might properly determine that a proposed merger would be in the public interest notwithstanding its adverse effect on competition.[24]

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[22] See also 106 Cong. Rec. 7259 (1960): "The language of S. 1062 as amended by the House Banking and Currency Committee and as it appears in the bill we are now about to pass in the House makes it clear that the competitive and monopolistic factors are to be considered along with the banking factors and that after considering all of the factors involved, if the resulting institution will be in the public interest, then the application should be approved and otherwise disapproved."

[23] 106 Cong. Rec. 7257 (1960): "This puts the responsibility for acting on a proposed merger where it belongs—in the agency charged with supervising and examining the bank which will result from the merger. Out of their years of experience in supervising banks, our Federal banking agencies have developed specialized knowledge of banking and the people who engage in it. They are experts at judging the condition of the banks involved, their prospects, their management, and the needs of the community for banking services. They should have *primary responsibility* in deciding whether a proposed merger would be in the public interest." (Emphasis added.)

[24] H. R. Rep. No. 1416, 86th Cong., 2d Sess. 11–12 (1960): "We are convinced, also, that approval of a merger should depend on a posi-

What Congress has chosen to do about mergers and their effect on competition in the highly specialized field of commercial banking could not be more "crystal clear." (*Supra,* p. 382.) But in the face of overwhelming evidence to the contrary, the Court, with perfect equanimity, finds "uncertainty" in the foundations of the Bank Merger Act (*ante,* p. 349) and on this premise puts it aside as irrelevant to the task of construing the scope of § 7 of the Clayton Act.

I am unable to conceive of a more inappropriate case in which to overturn the considered opinion of all concerned as to the reach of prior legislation.[25] For 10 years everyone—the department responsible for antitrust law enforcement, the banking industry, the Congress, and the bar—proceeded on the assumption that the 1950 amendment of the Clayton Act did not affect bank mergers. This assumption provided a major impetus to the enactment of remedial legislation, and Congress, when it finally settled on what it thought was the solution to the problem at hand, emphatically rejected the remedy now brought to life by the Court.

The result is, of course, that the Bank Merger Act is almost completely nullified; its enactment turns out to have been an exorbitant waste of congressional time and energy. As the present case illustrates, the Attorney General's report to the designated banking agency is no longer truly advisory, for if the agency's decision is not

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tive showing of some benefit to be derived from it. As previously indicated, your committee is not prepared to say that the cases enumerated in the hearings are the only instances in which a merger is in the public interest, nor are we prepared to devise a specific and exclusive list of situations in which a merger should be approved."

[25] Compare *State Board of Ins.* v. *Todd Shipyards Corp.,* 370 U. S. 451, 457, in which this Court refused to reconsider certain prior decisions because Congress had "posited a regime of state regulation" of the insurance business on their continuing validity. Cf. *Toolson* v. *New York Yankees, Inc.,* 346 U. S. 356.

satisfactory a § 7 suit may be commenced immediately.[26] The bank merger's legality will then be judged solely from its competitive aspects, unencumbered by any considerations peculiar to banking.[27] And if such a suit were deemed to lie after a bank merger has been consummated, there would then be introduced into this field, for the first time to any significant extent, the threat of divestiture of assets and all the complexities and disruption attendant upon the use of that sanction.[28] The only vestige of the Bank Merger Act which remains is that the banking agencies will have an initial veto.[29]

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[26] If a bank merger such as this falls within the category of a "stock" acquisition, a § 7 suit to enjoin it may be brought not only by the Attorney General, but by the Federal Reserve Board as well. See § 11 of the Clayton Act, 15 U. S. C. § 21 (vesting authority in the Board to enforce § 7 "where applicable to banks"). In an attempt to retain some semblance of the structure erected by Congress in the Bank Merger Act, the Court states that it "supplanted . . . whatever authority the FRB may have acquired under § 11, by virtue of the amendment of § 7, to enforce § 7 against bank mergers." *Ante,* p. 344, note 22. Since both the Attorney General and the Federal Reserve Board have purely advisory roles where a bank merger will result in a national bank, the Court's reasoning with respect to the effect of the Bank Merger Act upon enforcement authority should apply with equal force to both.

[27] Indeed the Court has erected a simple yardstick in order to alleviate the agony of analyzing economic data—control of 30% of a commercial banking market is prohibited. *Ante,* pp. 363–364.

[28] Although § 7 of the Clayton Act is applicable to an outright purchase of bank stock, this form of amalgamation is infrequently used in the banking field and does not involve divestiture problems of the same magnitude as does an asset acquisition.

[29] It is true, as the Court points out (*ante,* p. 354), that Congress, in enacting the Bank Merger Act, agreed that the applicability of the Sherman Act to banking should not be disturbed. See, *e. g.,* 105 Cong. Rec. 8076 (1959). But surely this alone provides no conceivable justification for applying the Clayton Act as well. Apart from the fact that the Sherman Act covers many kinds of restraints besides mergers, one of the sponsors of the Bank Merger Act (Senator Fulbright) expressed his expectation that in a Sherman Act

This frustration of a manifest congressional design is, in my view, a most unwarranted intrusion upon the legislative domain. I submit that *whatever* may have been the congressional purpose in 1950, Congress has now so plainly pronounced its current judgment that bank mergers are not within the reach of § 7 that this Court is duty bound to effectuate its choice.

But I need not rest on this proposition, for, as will now be shown, there is nothing in the 1950 amendment to § 7 or its legislative history to support the conclusion that Congress even then intended to subject bank mergers to this provision of the Clayton Act.

II.

Prior to 1950, § 7 of the Clayton Act read, in pertinent part, as follows:

> "That no 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

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case a bank merger would not be subjected to strict antitrust standards to the exclusion of all other considerations: "And even if the Sherman Act is held to apply to banking and to bank mergers, it seems clear that under the rule of reason spelled out in the Standard Oil case, different considerations will be found applicable, in a regulated field like banking, in determining whether activities would 'unduly diminish competition,' in the words of the Supreme Court in that case." 106 Cong. Rec. 9711 (1960). Moreover, this Court has recognized in other areas that it may be necessary to accommodate the Sherman Act to regulatory policy. *McLean Trucking Co.* v. *United States,* 321 U. S. 67, 83; *Federal Communications Comm'n* v. *RCA Communications, Inc.,* 346 U. S. 86, 91–92. See also *United States* v. *Columbia Steel Co.,* 334 U. S. 495, 527. And of course the Sherman Act is concerned more with existing anticompetitive effects than with future probabilities, and thus would not reach incipient restraints to the same extent as would § 7 of the Clayton Act. See *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 317–318 and notes 32, 33.

> 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."

In 1950 this section was amended to read (the major amendments being indicated in italics):

> "That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital *and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets* of another corporation engaged also in commerce, where *in any line of commerce in any section of the country,* the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

If Congress did intend the 1950 amendment to reach bank mergers, it certainly went at the matter in a very peculiar way. While prohibiting asset acquisitions having the anticompetive effects described in § 7, it limited the applicability of that provision to corporations subject to the jurisdiction of the Federal Trade Commission, which does not include banks. And it reenacted the stock-acquisition provision in the very same language which—as it was fully aware—had been interpreted not to reach the type of merger customarily used in the banking industry. See *infra,* pp. 389–393. In the past this Court has drawn the normal inference that such a reenactment indicates congressional adoption of the prior judicial statutory construction. *E. g., United States* v. *Dixon,* 347 U. S. 381; *Overstreet* v. *North Shore Corp.,* 318 U. S. 125, 131–132.

In this instance, however, the Court holds that the stock-acquisition provision underwent an expansive metamorphosis, so that it now embraces all mergers or consolidations involving an exchange of stock. Since bank mergers usually, if not always, do involve exchanges of stock, the effect of this construction is to rob the Federal Trade Commission provision relating to asset acquisitions of all force as a substantive limitation upon the scope of § 7; according to the Court the purpose of that provision was merely to ensure the Commission's role in the enforcement of § 7. *Ante*, pp. 346–348. In short, under this reasoning bank mergers to all intents and purposes are fully within the reach of § 7.

A more circumspect look at the 1950 amendment of § 7 and its background will show that this construction is not tenable.

The language of the stock-acquisition provision itself is hardly congenial to the Court's interpretation. The PNB-Girard merger is technically a consolidation, governed by § 20 of the national banking laws, 12 U. S. C. (Supp. IV, 1963) § 215. Under that section, the corporate existence of both PNB and Girard, all of their rights, franchises, assets, and liabilities, would be automatically vested in the resulting bank, which would operate under the PNB charter. PNB itself would acquire nothing. Rather, the two banks would be creating a new entity by the amalgamation of their properties, and the subsequent conversion of Girard stock (which would then represent ownership in a nonfunctioning entity) into stock of the resulting bank would simply be part of the mechanics by which ownership in the new entity would be reflected. Clearly this is not a case of a corporation acquiring the stock of another functioning corporation, which is the only situation where "the *effect* of . . . [a stock] acquisition may be substantially to lessen competition." (Emphasis added.)

There are further crucial differences between a merger and a stock acquisition. A merger normally requires public notice and the approval of the holders of two-thirds of the outstanding shares of each corporation, and dissenting shareholders have the right to receive in cash the appraised value of their shares.[30] A purchase of stock may be done privately, and the only approval involved is that of the individual parties to the transaction. Unlike a merged company, a corporation whose stock is acquired usually remains in business as a subsidiary of the acquiring corporation.[31]

The Government, however, contends that a merger more closely resembles a stock acquisition than an asset acquisition because of one similarity of central importance: the acquisition by one corporation of an immediate voice in the management of the business of another corporation. But this is obviously true *a fortiori* of asset acquisitions of sufficient magnitude to fall within the prohibition of § 7; if a corporation buys the plants, equipment, inventory, etc., of another corporation, it acquires absolute control over, not merely a voice in the management of, another business.

The legislative history of the 1950 amendment also unquestionably negates any inference that Congress in-

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[30] In these respects a merger is precisely the contrary of what § 7 was originally designed to proscribe—the secret acquisition of corporate control. See the Court's opinion, *ante*, p. 338.

[31] That the stock-acquisition provision was not intended to cover mergers is strongly suggested by the second paragraph of § 7: "No corporation shall acquire . . . any part of the stock . . . of one or more corporations . . . where . . . the effect . . . of *the use* of such stock by the voting or granting of proxies . . . may be substantially to lessen competition, or to tend to create a monopoly." 15 U. S. C. § 18. (Emphasis added.) After a merger has been consummated, the resulting corporation holds no stock in any party to the merger; thus there can be in this situation no such thing as a restraint of trade by "the use" of the voting power of acquired stock.

tended to reach bank mergers. It is true that the purpose was "to plug a loophole" in § 7 (95 Cong. Rec. 11485 (1949) (remarks of Representative Celler)). But simply to state this broad proposition does not answer the precise questions presented here: what was the nature of the loophole sought to be closed; what were the means chosen to close it?

The answer to the latter question is unmistakably indicated by the relationship between the 1950 amendment and previous judicial decisions. In *Arrow-Hart & Hegeman Elec. Co.* v. *Federal Trade Comm'n*, 291 U. S. 587, this Court, by a divided vote, ruled on the scope of the Federal Trade Commission's remedial powers under the original Clayton Act. After the Commission had issued a § 7 complaint against a holding company which had been formed by the stockholders of two manufacturing corporations, steps were taken to avoid the Commission's jurisdiction. Two new holding companies were formed, each acquired all the common stock of one of the manufacturing companies, and each issued its stock directly to the stockholders of the original holding company. This company then dissolved and the two new holding companies and their respective manufacturing subsidiaries merged into one corporation. This Court held that the Commission had no authority, after the merger, to order the resulting corporation to divest itself of assets. An essential part of this holding was that the merger in question, which was technically a consolidation similar to that here planned by PNB and Girard, was not a stock acquisition within the prohibitions of § 7: "If the merger of the two manufacturing corporations and the combination of their assets was in any respect a violation of any antitrust law, as to which we express no opinion, it was necessarily a violation of statutory prohibitions other

than those found in the Clayton Act." 291 U. S., at 599; see *id.*, at 595.[32]

This decision, along with two others earlier handed down by this Court (*Thatcher Mfg. Co.* v. *Federal Trade Comm'n* and *Swift & Co.* v. *Federal Trade Comm'n*, decided together with *Federal Trade Comm'n* v. *Western Meat Co.*, 272 U. S. 554), perhaps provided more of a spur to enactment of the "assets" amendment to § 7 than any other single factor. These decisions were universally regarded as opening the unfortunate loophole whereby § 7 could be evaded through the use of an asset acquisition. Representative Celler expressed the view of Congress in this fashion:

> "The result of these decisions has so weakened sections 7 and 11 . . . as to give to the Federal Trade Commission and the Department of Justice merely a paper sword to prevent improper mergers." 95 Cong. Rec. 11485 (1949).[33]

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[32] On this point, the dissenters agreed: "It is true that the Clayton Act does not forbid corporate mergers . . . ." 291 U. S., at 600. See also *United States* v. *Celanese Corp. of America*, 91 F. Supp. 14.

[33] See also Hearings on H. R. 988, H. R. 1240, H. R. 2006, H. R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 38–39 (1949); Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 109–110 (1950): "The loophole sought to be filled resulted from a series of Supreme Court decisions. (*Swift & Co.* v. *FTC* and *Thatcher Mfg. Co.* v. *FTC* (272 U. S. 554); *Arrow-Hart & Hegeman Co.* v. *FTC* (291 U. S. 587).) In these decisions the Supreme Court held that section 7 of the Clayton Act, while prohibiting the acquisition of stock of a competitor, gave the Federal Trade Commission no authority under section 11 to order divestiture of assets which had been acquired before a cease-and-desist order was issued, even though the acquisition resulted from the voting of illegally held stock."

Since this Court's decisions were cast in terms of the scope of the Federal Trade Commission's jurisdiction, Congress, in amending § 7 so as to close that gap, emphasized its expectation—made plain in the committee reports, hearings, and debates—that the Commission would assume the principal role in enforcing the section.[34] Implicit here is that no change in the enforcement powers of the other agencies named in § 11 was contemplated.[35] Of more importance, the legislative history demonstrates that it was the asset-acquisition provision that was designed to plug the loophole created by *Thatcher, Swift,* and *Arrow.* Although *Arrow,* unlike *Thatcher* and *Swift,* involved a consolidation of the same type as the PNB-Girard merger, the members of Congress drew no distinction among these cases, invariably discussing all three of them in the same breath as examples of asset acquisitions.[36] Indeed, the House report stated that

> "the Supreme Court . . . held [in *Arrow*] that if an acquiring corporation secured *title to the physical assets* of a corporation whose stock it had acquired before the Federal Trade Commission issues its final order, the Commission lacks power to direct divestiture of the physical assets . . . ." H. R. Rep. No. 1191, 81st Cong., 1st Sess. 5 (1949). (Emphasis added.)

And on the Senate floor it was pointed out that "the *method* by which . . . [the merger in *Arrow*] had been

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[34] The Federal Trade Commission had assumed primary enforcement responsibility before the 1950 amendment. See Martin, Mergers and the Clayton Act (1959), p. 197.

[35] Compare note 26, *supra.*

[36] See note 33 *supra;* Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 97 (1950). And this Court has, after the 1950 amendment, described *Arrow* as a case involving an asset acquisition. *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 313 and note 20.

accomplished was an innocent one . . . ." 96 Cong. Rec. 16505 (1950). (Emphasis added.) Clearly the understanding of Congress was that a consolidation of two corporations was an acquisition of assets.[37]

Nor did Congress act inadvertently or without purpose in limiting the asset-acquisition provision to corporations subject to the jurisdiction of the Federal Trade Commission, thereby excluding bank mergers. The reports, hearings, and debates on the 1950 amendment reveal that Congress was then concerned with the rising tide of *industrial* concentration—*i. e.*, "the external expansion . . . through mergers, acquisitions, and consolidations" [38] of corporations engaged in manufacturing, mining, merchandising, and of other kindred commercial endeavors. Specialized areas of the economy such as banking were not even considered. Thus the Federal Trade Commission's 1948 report on mergers recounted the statistics on concentration in a multitude of industries—*e. g.*, steel, cement, electrical equipment, food and dairy products, tobacco, textiles, paper, chemicals, rubber—but included not one figure on banking concentration.[39] This report was repeatedly cited and heavily relied on by members of Congress and others to demonstrate the mag-

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[37] The single excerpt quoted by the Court (*ante*, p. 345) casts no doubt on this proposition, for Senator Kilgore's remark occurred in the course of a discussion in which he was trying to make the point that there is no difference in *practical* effect, as opposed to the legal distinction, between a merger and a stock acquisition. Thus at the end of the paragraph quoted by the Court the Senator stated: ". . . I cannot see how on earth you can get the idea that the purchase of the stock of the corporation, all of it, does not carry with it the transfer of all of the physical assets in that corporation." Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 176 (1950).

[38] H. R. Rep. No. 1191, 81st Cong., 1st Sess. 2 (1949).

[39] Federal Trade Commission, The Merger Movement: A Summary Report (1948), *passim*.

nitude of the merger movement and the economic dangers it presented.[40] In the committee hearings the focus was exclusively upon amalgamation in the ordinary commercial fields,[41] and similarly the Senate and House reports spoke solely of industrial concentration as the evil to be remedied.[42] On the floor of the House, Representative Celler indicated the extent of concentration of industrial power:

> "Four companies now have 64 percent of the steel business, four have 82 percent of the copper business, two have 90 percent of the aluminum business, three have 85 percent of the automobile business, two have 80 percent of the electric lamp business, four have 75 percent of the electric refrigerator business, two have 80 percent of the glass business, four have 90 percent of the cigarette business, and so forth.
>
> "The antitrust laws are a complete bust unless we pass this bill." 95 Cong. Rec. 11485 (1949).

The legislatory history is thus singularly devoid of any evidence that Congress sought to deal with the special problem of banking concentration.

I do not mean to suggest, of course, that § 7 of the Clayton Act is thereby rendered applicable only to ordinary commercial and industrial corporations and not to firms in any "regulated" sector of the economy. The

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[40] *E. g.*, Hearings on H. R. 988, H. R. 1240, H. R. 2006, H. R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 39–40 (1949); 95 Cong. Rec. 11503 (1949); 96 Cong. Rec. 16505 (1950).

[41] Hearings on H. R. 2734 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st & 2d Sess. 5–6, 17, 57–59 (1950); Hearings on H. R. 988, H. R. 1240, H. R. 2006, H. R. 2734 before Subcommittee No. 3 of the House Committee on the Judiciary, 81st Cong., 1st Sess. 40, 113 (1949).

[42] S. Rep. No. 1775, 81st Cong., 2d Sess. 3 (1950); H. R. Rep. No. 1191, 81st Cong., 1st Sess. 2–3 (1949).

point is that when Congress included in § 7 asset acquisitions by corporations subject to the Federal Trade Commission's jurisdiction, and at the same time continued in § 11 the Federal Reserve Board's jurisdiction over banks, it was not acting irrationally. Rather, the absence of any mention of banks in the legislative history of the 1950 amendment, viewed in light of the prior congressional treatment of banking as a distinctive area with special characteristics and needs, compels the conclusion that bank mergers were simply not then regarded as part of the loophole to be plugged.[43]

This conclusion is confirmed by a number of additional considerations. It was not until *after* the passage of the 1950 amendment of § 7 that Representative Celler, its co-sponsor, requested the staff of the Antitrust Subcommittee of the House Committee on the Judiciary "to prepare a report indicating the concentration existing in our banking system." Staff of Subcommittee No. 5, House Committee on the Judiciary, 82d Cong., 2d Sess., Report on Bank Mergers and Concentration of Banking Facilities III (1952). The introduction to the report reveals that:

> "On March 21, 1945, the Board of Governors of the Federal Reserve System wrote to the chairman of the Committee on the Judiciary requesting that the provisions of H. R. 2357, Seventy-ninth Congress, first session, one of the early predecessors of the Celler Antimerger Act, be extended so as to include corporations subject to the jurisdiction of the Federal Reserve Board under section 11 of the Clayton Act. Because of the revisions made in subsequent versions of antimerger bills, however, it became impracticable

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[43] It is interesting to note that in the same year in which § 7 was amended Congress passed an act *facilitating* certain kinds of bank mergers which had theretofore been prohibited. See note 11, *supra*, and accompanying text.

> to include within the scope of the act corporations other than those subject to regulation by the Federal Trade Commission. Banks, which are placed squarely within the authority of the Federal Reserve Board by section 11 of the Clayton Act, are therefore circumscribed insofar as mergers are concerned only by the old provisions of section 7, and certain additional statutes which do not presently concern themselves substantively with the question of competition in the field of banking." *Id.*, at VII.

It is also worth noting that in 1956 Representative Celler himself introduced another amendment to § 7, explaining that "all the bill [H. R. 5948] does is plug a loophole in the present law dealing with bank mergers . . . . This loophole exists because section 7 of the Clayton Act prohibits bank mergers . . . only if such mergers are accomplished by stock acquisition." 102 Cong. Rec. 2109 (1956). The bill read in pertinent part: "[N]o bank . . . shall acquire . . . the whole or any part of the assets of another corporation engaged also in commerce . . . ." *Ibid.* The amendment passed the House but was defeated in the Senate.

For all these reasons, I think the conclusion is inescapable that § 7 of the Clayton Act does not apply to the PNB-Girard merger. The Court's contrary conclusion seems to me little better than a *tour de force*.[44]

Memorandum of MR. JUSTICE GOLDBERG.

I agree fully with my Brother HARLAN that § 7 of the Clayton Act has no application to bank mergers of the type involved here, and I therefore join in the conclusions expressed in his opinion on that point. However, while I

[44] Since the Court does not reach the Sherman Act aspect of this case, it would serve no useful purpose for me to do so.

thus dissent from the Court's holding with respect to the applicability of the Clayton Act to this merger, I wish to make clear that I do not necessarily dissent from its judgment invalidating the merger. To do so would require me to conclude in addition that on the record as it stands the Government has failed to prove a violation of the Sherman Act, which is fully applicable to the commercial banking business. In my opinion there is a substantial Sherman Act issue in this case, but since the Court does not reach it and since my views relative thereto would be superfluous in light of today's disposition of the case, I express no ultimate conclusion concerning it. Compare *Rescue Army* v. *Municipal Court of Los Angeles,* 331 U. S. 549, 585 (Murphy, J., dissenting); *Poe* v. *Ullman,* 367 U. S. 497, 555 (STEWART, J., dissenting).

SHERBERT *v.* VERNER ET AL., MEMBERS OF SOUTH CAROLINA EMPLOYMENT SECURITY COMMISSION, ET AL.

APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA.

No. 526. Argued April 24, 1963.—Decided June 17, 1963.

Appellant, a member of the Seventh-Day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment because she would not work on Saturday, and she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act, which provides that a claimant is ineligible for benefits if he has failed, without good cause, to accept available suitable work when offered him. The State Commission denied appellant's application on the ground that she would not accept suitable work when offered, and its action was sustained by the State Supreme Court. *Held:* As so applied, the South Carolina statute abridged appellant's right to the free exercise of her religion, in violation of the First Amendment, made applicable to the states by the Fourteenth Amendment. Pp. 399–410.

(a) Disqualification of appellant for unemployment compensation benefits, solely because of her refusal to accept employment in which she would have to work on Saturday contrary to her religious belief, imposes an unconstitutional burden on the free exercise of her religion. Pp. 403–406.

(b) There is no compelling state interest enforced in the eligibility provisions of the South Carolina statute which justifies the substantial infringement of appellant's right to religious freedom under the First Amendment. Pp. 406–409.

(c) This decision does not foster the "establishment" of the Seventh-Day Adventist religion in South Carolina contrary to the First Amendment. Pp. 409–410.

240 S. C. 286, 125 S. E. 2d 737, reversed.

William D. Donnelly argued the cause and filed briefs for appellant.

Daniel R. McLeod, Attorney General of South Carolina, argued the cause for appellees. With him on the brief was *Victor S. Evans,* Assistant Attorney General.

Briefs of *amici curiae,* urging reversal, were filed by *Morris B. Abram, Edwin J. Lukas, Arnold Forster, Melvin L. Wulf, Paul Hartman, Theodore Leskes* and *Sol Rabkin* for the American Jewish Committee et al., and by *Leo Pfeffer, Lewis H. Weinstein, Albert Wald, Shad Polier, Ephraim S. London, Samuel Lawrence Brennglass* and *Jacob Sheinkman* for the Synagogue Council of America et al.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith.[1] When she was unable to obtain other employment because from conscientious scruples she would not take Saturday work,[2] she filed a claim for

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[1] Appellant became a member of the Seventh-day Adventist Church in 1957, at a time when her employer, a textile-mill operator, permitted her to work a five-day week. It was not until 1959 that the work week was changed to six days, including Saturday, for all three shifts in the employer's mill. No question has been raised in this case concerning the sincerity of appellant's religious beliefs. Nor is there any doubt that the prohibition against Saturday labor is a basic tenet of the Seventh-day Adventist creed, based upon that religion's interpretation of the Holy Bible.

[2] After her discharge, appellant sought employment with three other mills in the Spartanburg area, but found no suitable five-day work available at any of the mills. In filing her claim with the Commission, she expressed a willingness to accept employment at other mills, or even in another industry, so long as Saturday work was not required. The record indicates that of the 150 or more Seventh-day Adventists in the Spartanburg area, only appellant and one other have been unable to find suitable non-Saturday employment.

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unemployment compensation benefits under the South Carolina Unemployment Compensation Act.[3] That law provides that, to be eligible for benefits, a claimant must be "able to work and . . . available for work"; and, fur-

[3] The pertinent sections of the South Carolina Unemployment Compensation Act (S. C. Code, Tit. 68, §§ 68–1 to 68–404) are as follows:

"§ 68–113. Conditions of eligibility for benefits.—An unemployed insured worker shall be eligible to receive benefits with respect to any week only if the Commission finds that: . . .

"(3) He is able to work and is available for work, but no claimant shall be considered available for work if engaged in self-employment of such nature as to return or promise remuneration in excess of the weekly benefit amounts he would have received if otherwise unemployed over such period of time. . . .

"§ 68–114. Disqualification for benefits.—Any insured worker shall be ineligible for benefits: . . .

"(2) *Discharge for misconduct.*—If the Commission finds that he has been discharged for misconduct connected with his most recent work prior to filing a request for determination of insured status or a request for initiation of a claim series within an established benefit year, with such ineligibility beginning with the effective date of such request, and continuing not less than five nor more than the next twenty-two consecutive weeks (in addition to the waiting period), as determined by the Commission in each case according to the seriousness of the misconduct . . . .

"(3) *Failure to accept work.*—(a) If the Commission finds that he has failed, without good cause, (i) either to apply for available suitable work, when so directed by the employment office or the Commission, (ii) to accept available suitable work when offered him by the employment office or the employer or (iii) to return to his customary self-employment (if any) when so directed by the Commission, such ineligibility shall continue for a period of five weeks (the week in which such failure occurred and the next four weeks in addition to the waiting period) as determined by the Commission according to the circumstances in each case . . . .

"(b) In determining whether or not any work is suitable for an individual, the Commission shall consider the degree of risk involved to his health, safety and morals, his physical fitness and prior training, his experience and prior earnings, his length of unemployment and prospects for securing local work in his customary occupation and the distance of the available work from his residence."

ther, that a claimant is ineligible for benefits "[i]f . . . he has failed, without good cause . . . to accept available suitable work when offered him by the employment office or the employer . . . ." The appellee Employment Security Commission, in administrative proceedings under the statute, found that appellant's restriction upon her availability for Saturday work brought her within the provision disqualifying for benefits insured workers who fail, without good cause, to accept "suitable work when offered . . . by the employment office or the employer . . . ." The Commission's finding was sustained by the Court of Common Pleas for Spartanburg County. That court's judgment was in turn affirmed by the South Carolina Supreme Court, which rejected appellant's contention that, as applied to her, the disqualifying provisions of the South Carolina statute abridged her right to the free exercise of her religion secured under the Free Exercise Clause of the First Amendment through the Fourteenth Amendment. The State Supreme Court held specifically that appellant's ineligibility infringed no constitutional liberties because such a construction of the statute "places no restriction upon the appellant's freedom of religion nor does it in any way prevent her in the exercise of her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience." 240 S. C. 286, 303–304, 125 S. E. 2d 737, 746.[4] We noted probable

[4] It has been suggested that appellant is not within the class entitled to benefits under the South Carolina statute because her unemployment did not result from discharge or layoff due to lack of work. It is true that unavailability for work for some personal reasons not having to do with matters of conscience or religion has been held to be a basis of disqualification for benefits. See, *e. g., Judson Mills* v. *South Carolina Unemployment Compensation Comm'n,* 204 S. C. 37, 28 S. E. 2d 535; *Stone Mfg. Co.* v. *South Carolina Employment Security Comm'n,* 219 S. C. 239, 64 S. E. 2d 644. But appellant claims that the Free Exercise Clause prevents the State from basing the denial of benefits upon the "personal reason" she gives for not working on

jurisdiction of appellant's appeal. 371 U. S. 938. We reverse the judgment of the South Carolina Supreme Court and remand for further proceedings not inconsistent with this opinion.

I.

The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell* v. *Connecticut,* 310 U. S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso* v. *Watkins,* 367 U. S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler* v. *Rhode Island,* 345 U. S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock* v. *Pennsylvania,* 319 U. S. 105; *Follett* v. *McCormick,* 321 U. S. 573; cf. *Grosjean* v. *American Press Co.,* 297 U. S. 233. On the other hand,

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Saturday. Where the consequence of disqualification so directly affects First Amendment rights, surely we should not conclude that every "personal reason" is a basis for disqualification in the absence of explicit language to that effect in the statute or decisions of the South Carolina Supreme Court. Nothing we have found in the statute or in the cited decisions, cf. *Lee* v. *Spartan Mills,* 7 CCH Unemployment Ins. Rep. S. C. ¶ 8156 (C. P. 1944), and certainly nothing in the South Carolina Court's opinion in this case so construes the statute. Indeed, the contrary seems to have been that court's basic assumption, for if the eligibility provisions were thus limited, it would have been unnecessary for the court to have decided appellant's constitutional challenge to the application of the statute under the Free Exercise Clause.

Likewise, the decision of the State Supreme Court does not rest upon a finding that appellant was disqualified for benefits because she had been "discharged for misconduct"—by reason of her Saturday absences—within the meaning of § 68–114 (2). That ground was not adopted by the South Carolina Supreme Court, and the appellees do not urge in this Court that the disqualification rests upon that ground.

the Court has rejected challenges under the Free Exercise Clause to governmental regulation of certain overt acts prompted by religious beliefs or principles, for "even when the action is in accord with one's religious convictions, [it] is not totally free from legislative restrictions." *Braunfeld* v. *Brown,* 366 U. S. 599, 603. The conduct or actions so regulated have invariably posed some substantial threat to public safety, peace or order. See, *e. g., Reynolds* v. *United States,* 98 U. S. 145; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Prince* v. *Massachusetts,* 321 U. S. 158; *Cleveland* v. *United States,* 329 U. S. 14.

Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate . . . ." *NAACP* v. *Button,* 371 U. S. 415, 438.

II.

We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end, of our

inquiry.[5] For "[i]f 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." *Braunfeld* v. *Brown, supra,* at 607. Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.[6] *American*

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[5] In a closely analogous context, this Court said:
". . . the fact that no direct restraint or punishment is imposed upon speech or assembly does not determine the free speech question. Under some circumstances, indirect 'discouragements' undoubtedly have the same coercive effect upon the exercise of First Amendment rights as imprisonment, fines, injunctions or taxes. A requirement that adherents of particular religious faiths or political parties wear identifying arm-bands, for example, is obviously of this nature." *American Communications Assn.* v. *Douds,* 339 U. S. 382, 402. Cf. *Smith* v. *California,* 361 U. S. 147, 153–155.

[6] See for examples of conditions and qualifications upon governmental privileges and benefits which have been invalidated because of their tendency to inhibit constitutionally protected activity, *Steinberg* v. *United States,* 143 Ct. Cl. 1, 163 F. Supp. 590; *Syrek* v. *Cali-*

Communications Assn. v. *Douds,* 339 U. S. 382, 390; *Wieman* v. *Updegraff,* 344 U. S. 183, 191–192; *Hannegan* v. *Esquire, Inc.,* 327 U. S. 146, 155–156. For example, in *Flemming* v. *Nestor,* 363 U. S. 603, 611, the Court recognized with respect to Federal Social Security benefits that "[t]he interest of a covered employee under the Act is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." In *Speiser* v. *Randall,* 357 U. S. 513, we emphasized that conditions upon public benefits cannot be sustained if they so operate, whatever their purpose, as to inhibit or deter the exercise of First Amendment freedoms. We there struck down a condition which limited the availability of a tax exemption to those members of the exempted class who affirmed their loyalty to the state government granting the exemption. While the State was surely under no obligation to afford such an exemption, we held that the imposition of such a condition upon even a gratuitous benefit inevitably deterred or discouraged the exercise of First Amendment rights of expression and thereby threatened to "produce a result which the State could not command directly." 357 U. S.,

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fornia Unemployment Ins. Board, 54 Cal. 2d 519, 354 P. 2d 625; *Fino* v. *Maryland Employment Security Board,* 218 Md. 504, 147 A. 2d 738; *Chicago Housing Authority* v. *Blackman,* 4 Ill. 2d 319, 122 N. E. 2d 522; *Housing Authority of Los Angeles* v. *Cordova,* 130 Cal. App. 2d 883, 279 P. 2d 215; *Lawson* v. *Housing Authority of Milwaukee,* 270 Wis. 269, 70 N. W. 2d 605; *Danskin* v. *San Diego Unified School District,* 28 Cal. 2d 536, 171 P. 2d 885; *American Civil Liberties Union* v. *Board of Education,* 55 Cal. 2d 167, 359 P. 2d 45; cf. *City of Baltimore* v. *A. S. Abell Co.,* 218 Md. 273, 145 A. 2d 111. See also Willcox, Invasions of the First Amendment Through Conditioned Public Spending, 41 Cornell L. Q. 12 (1955); Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 942–943 (1963); 36 N. Y. U. L. Rev. 1052 (1961); 9 Kan. L. Rev. 346 (1961); Note, Unconstitutional Conditions, 73 Harv. L. Rev. 1595, 1599–1602 (1960).

at 526. "To deny an exemption to claimants who engage in certain forms of speech is in effect to penalize them for such speech." *Id.*, at 518. Likewise, to condition the availability of benefits upon this appellant's willingness to violate a cardinal principle of her religious faith effectively penalizes the free exercise of her constitutional liberties.

Significantly South Carolina expressly saves the Sunday worshipper from having to make the kind of choice which we here hold infringes the Sabbatarian's religious liberty. When in times of "national emergency" the textile plants are authorized by the State Commissioner of Labor to operate on Sunday, "no employee shall be required to work on Sunday . . . who is conscientiously opposed to Sunday work; and if any employee should refuse to work on Sunday on account of conscientious . . . objections he or she shall not jeopardize his or her seniority by such refusal or be discriminated against in any other manner." S. C. Code, § 64–4. No question of the disqualification of a Sunday worshipper for benefits is likely to arise, since we cannot suppose that an employer will discharge him in violation of this statute. The unconstitutionality of the disqualification of the Sabbatarian is thus compounded by the religious discrimination which South Carolina's general statutory scheme necessarily effects.

III.

We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right. It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, "[o]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation," *Thomas* v. *Collins*, 323 U. S. 516, 530.

No such abuse or danger has been advanced in the present case. The appellees suggest no more than a possibility that the filing of fraudulent claims by unscrupulous claimants feigning religious objections to Saturday work might not only dilute the unemployment compensation fund but also hinder the scheduling by employers of necessary Saturday work. But that possibility is not apposite here because no such objection appears to have been made before the South Carolina Supreme Court, and we are unwilling to assess the importance of an asserted state interest without the views of the state court. Nor, if the contention had been made below, would the record appear to sustain it; there is no proof whatever to warrant such fears of malingering or deceit as those which the respondents now advance. Even if consideration of such evidence is not foreclosed by the prohibition against judicial inquiry into the truth or falsity of religious beliefs, *United States* v. *Ballard,* 322 U. S. 78—a question as to which we intimate no view since it is not before us—it is highly doubtful whether such evidence would be sufficient to warrant a substantial infringement of religious liberties. For even if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights.[7] Cf. *Shelton* v. *Tucker,* 364 U. S.

[7] We note that before the instant decision, state supreme courts had, without exception, granted benefits to persons who were physically available for work but unable to find suitable employment solely because of a religious prohibition against Saturday work. *E. g., In re Miller,* 243 N. C. 509, 91 S. E. 2d 241; *Swenson* v. *Michigan Employment Security Comm'n,* 340 Mich. 430, 65 N. W. 2d 709; *Tary* v. *Board of Review,* 161 Ohio St. 251, 119 N. E. 2d 56. Cf. *Kut* v. *Albers Super Markets, Inc.,* 146 Ohio St. 522, 66 N. E. 2d 643, appeal dismissed *sub nom. Kut* v. *Bureau of Unemployment Compensation,* 329 U. S. 669. One author has observed, "the law was settled that

479, 487–490; *Talley* v. *California,* 362 U. S. 60, 64; *Schneider* v. *State,* 308 U. S. 147, 161; *Martin* v. *Struthers,* 319 U. S. 141, 144–149.

In these respects, then, the state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld* v. *Brown, supra.* The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants'] . . . religious beliefs more expensive," 366 U. S., at 605. But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative

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conscientious objections to work on the Sabbath made such work unsuitable and that such objectors were nevertheless available for work. . . . A contrary opinion would make the unemployment compensation law unconstitutional, as a violation of freedom of religion. Religious convictions, strongly held, are so impelling as to constitute good cause for refusal. Since availability refers to suitable work, religious observers were not unavailable because they excluded Sabbath work." Altman, Availability for Work: A Study in Unemployment Compensation (1950), 187. See also Sanders, Disqualification for Unemployment Insurance, 8 Vand. L. Rev. 307, 327–328 (1955); 34 N. C. L. Rev. 591 (1956); cf. Freeman, Able To Work and Available for Work, 55 Yale L. J. 123, 131 (1945). Of the 47 States which have eligibility provisions similar to those of the South Carolina statute, only 28 appear to have given administrative rulings concerning the eligibility of persons whose religious convictions prevented them from accepting available work. Twenty-two of those States have held such persons entitled to benefits, although apparently only one such decision rests exclusively upon the federal constitutional ground which constitutes the basis of our decision. See 111 U. of Pa. L. Rev. 253, and n. 3 (1962); 34 N. C. L. Rev. 591, 602, n. 60 (1956).

problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable.[8] In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits.[9]

IV.

In holding as we do, plainly we are not fostering the "establishment" of the Seventh-day Adventist religion in South Carolina, for the extension of unemployment benefits to Sabbatarians in common with Sunday worshippers reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall. See *School District of Abington Township* v. *Schempp, ante,* p. 203. Nor does the recognition of the appellant's right to unemployment benefits under the state statute serve to abridge any other person's religious liberties. Nor do we, by our decision today, declare the existence of a constitutional right to unemployment benefits on the part

[8] See Note, State Sunday Laws and the Religious Guarantees of the Federal Constitution, 73 Harv. L. Rev. 729, 741–745 (1960).

[9] These considerations also distinguish the quite different case of *Flemming* v. *Nestor, supra,* upon which appellees rely. In that case the Court found that the compelling federal interests which underlay the decision of Congress to impose such a disqualification justified whatever effect the denial of social security benefits may have had upon the disqualified class. See 363 U. S., at 612. And compare *Torcaso* v. *Watkins, supra,* in which an undoubted state interest in ensuring the veracity and trustworthiness of Notaries Public was held insufficient to justify the substantial infringement upon the religious freedom of applicants for that position which resulted from a required oath of belief in God. See 74 Harv. L. Rev. 611, 612–613 (1961); 109 U. of Pa. L. Rev. 611, 614–616 (1961).

of all persons whose religious convictions are the cause of their unemployment. This is not a case in which an employee's religious convictions serve to make him a nonproductive member of society. See note 2, *supra.* Finally, nothing we say today constrains the States to adopt any particular form or scheme of unemployment compensation. Our holding today is only that South Carolina may not constitutionally apply the eligibility provisions so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade and a half ago, namely that no State may "exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, *because of their faith, or lack of it,* from receiving the benefits of public welfare legislation." *Everson* v. *Board of Education,* 330 U. S. 1, 16.

In view of the result we have reached under the First and Fourteenth Amendments' guarantee of free exercise of religion, we have no occasion to consider appellant's claim that the denial of benefits also deprived her of the equal protection of the laws in violation of the Fourteenth Amendment.

The judgment of the South Carolina Supreme Court is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE DOUGLAS, concurring.

The case we have for decision seems to me to be of small dimensions, though profoundly important. The question is whether the South Carolina law which denies unemployment compensation to a Seventh-day Adventist, who, because of her religion, has declined to work on her Sabbath, is a law "prohibiting the free exercise" of religion as those words are used in the First Amendment.

It seems obvious to me that this law does run afoul of that clause.

Religious scruples of Moslems require them to attend a mosque on Friday and to pray five times daily.[1] Religious scruples of a Sikh require him to carry a regular or a symbolic sword. *Rex* v. *Singh,* 39 A. I. R. 53 (Allahabad, 1952). Religious scruples of a Jehovah's Witness teach him to be a colporteur, going from door to door, from town to town, distributing his religious pamphlets. See *Murdock* v. *Pennsylvania,* 319 U. S. 105. Religious scruples of a Quaker compel him to refrain from swearing and to affirm instead. See *King* v. *Fearson,* Fed. Cas. No. 7,790, 14 Fed. Cas. 520; 1 U. S. C. § 1; Federal Rules of Civil Procedure, Rule 43 (d); *United States* v. *Schwimmer,* 279 U. S. 644, 655 (dissenting opinion). Religious scruples of a Buddhist may require him to refrain from partaking of any flesh, even of fish.[2]

The examples could be multiplied, including those of the Seventh-day Adventist whose Sabbath is Saturday and who is advised not to eat some meats.[3]

These suffice, however, to show that many people hold beliefs alien to the majority of our society—beliefs that are protected by the First Amendment but which could easily be trod upon under the guise of "police" or "health" regulations reflecting the majority's views.

Some have thought that a majority of a community can, through state action, compel a minority to observe their particular religious scruples so long as the majority's rule can be said to perform some valid secular function.

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[1] See Shorter Encyclopaedia of Islam (Cornell Press, 1953), 336, 493.

[2] See Narasu, The Essence of Buddhism (3d ed. 1948), 52–55; 6 Encyclopaedia of Religion and Ethics (1913), 63–65.

[3] See Seventh-day Adventists Answer Questions on Doctrine (1957), 149–153, 622–624; Mitchell, Seventh-Day Adventists (1st ed. 1958), 127, 176–178.

That was the essence of the Court's decision in the Sunday Blue Law Cases (*Gallagher* v. *Crown Kosher Market,* 366 U. S. 617; *Braunfeld* v. *Brown,* 366 U. S. 599; *McGowan* v. *Maryland,* 366 U. S. 420), a ruling from which I then dissented (*McGowan* v. *Maryland, supra,* pp. 575–576) and still dissent. See *Arlan's Dept. Store* v. *Kentucky,* 371 U. S. 218.

That ruling of the Court travels part of the distance that South Carolina asks us to go now. She asks us to hold that when it comes to a day of rest a Sabbatarian must conform with the scruples of the majority in order to obtain unemployment benefits.

The result turns not on the degree of injury, which may indeed be nonexistent by ordinary standards. The harm is the interference with the individual's scruples or conscience—an important area of privacy which the First Amendment fences off from government. The interference here is as plain as it is in Soviet Russia, where a churchgoer is given a second-class citizenship, resulting in harm though perhaps not in measurable damages.

This case is resolvable not in terms of what an individual can demand of government, but solely in terms of what government may not do to an individual in violation of his religious scruples. The fact that government cannot exact from me a surrender of one iota of my religious scruples does not, of course, mean that I can demand of government a sum of money, the better to exercise them. For the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.

Those considerations, however, are not relevant here. If appellant is otherwise qualified for unemployment benefits, payments will be made to her not as a Seventh-day Adventist, but as an unemployed worker. Conceivably these payments will indirectly benefit her church,

but no more so than does the salary of any public employee. Thus, this case does not involve the problems of direct or indirect state assistance to a religious organization—matters relevant to the Establishment Clause, not in issue here.

MR. JUSTICE STEWART, concurring in the result.

Although fully agreeing with the result which the Court reaches in this case, I cannot join the Court's opinion. This case presents a double-barreled dilemma, which in all candor I think the Court's opinion has not succeeded in papering over. The dilemma ought to be resolved.

I.

Twenty-three years ago in *Cantwell* v. *Connecticut,* 310 U. S. 296, 303, the Court said that both the Establishment Clause and the Free Exercise Clause of the First Amendment were made wholly applicable to the States by the Fourteenth Amendment. In the intervening years several cases involving claims of state abridgment of individual religious freedom have been decided here—most recently *Braunfeld* v. *Brown,* 366 U. S. 599, and *Torcaso* v. *Watkins,* 367 U. S. 488. During the same period "cases dealing with the specific problems arising under the 'Establishment' Clause which have reached this Court are few in number." [1] The most recent are last Term's *Engel* v. *Vitale,* 370 U. S. 421, and this Term's *Schempp* and *Murray* cases, *ante,* p. 203.

I am convinced that no liberty is more essential to the continued vitality of the free society which our Constitution guarantees than is the religious liberty protected by the Free Exercise Clause explicit in the First Amendment and imbedded in the Fourteenth. And I regret that on

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[1] *McGowan* v. *Maryland,* 366 U. S. 420, 442.

occasion, and specifically in *Braunfeld* v. *Brown, supra,* the Court has shown what has seemed to me a distressing insensitivity to the appropriate demands of this constitutional guarantee. By contrast I think that the Court's approach to the Establishment Clause has on occasion, and specifically in *Engel, Schempp* and *Murray,* been not only insensitive, but positively wooden, and that the Court has accorded to the Establishment Clause a meaning which neither the words, the history, nor the intention of the authors of that specific constitutional provision even remotely suggests.

But my views as to the correctness of the Court's decisions in these cases are beside the point here. The point is that the decisions are on the books. And the result is that there are many situations where legitimate claims under the Free Exercise Clause will run into head-on collision with the Court's insensitive and sterile construction of the Establishment Clause.[2] The controversy now before us is clearly such a case.

Because the appellant refuses to accept available jobs which would require her to work on Saturdays, South Carolina has declined to pay unemployment compensation benefits to her. Her refusal to work on Saturdays is based on the tenets of her religious faith. The Court says that South Carolina cannot under these circumstances declare her to be not "available for work" within the meaning of its statute because to do so would violate her constitutional right to the free exercise of her religion.

Yet what this Court has said about the Establishment Clause must inevitably lead to a diametrically opposite result. If the appellant's refusal to work on Saturdays

[2] The obvious potentiality of such collision has been studiously ignored by the Court, but has not escaped the perception of commentators. See, *e. g.,* Katz, Freedom of Religion and State Neutrality, 20 U. of Chi. L. Rev. 426, 428 (1953); Kauper, Prayer, Public Schools and the Supreme Court, 61 Mich. L. Rev. 1031, 1053 (1963).

were based on indolence, or on a compulsive desire to watch the Saturday television programs, no one would say that South Carolina could not hold that she was not "available for work" within the meaning of its statute. That being so, the Establishment Clause as construed by this Court not only *permits* but affirmatively *requires* South Carolina equally to deny the appellant's claim for unemployment compensation when her refusal to work on Saturdays is based upon her religious creed. For, as said in *Everson* v. *Board of Education,* 330 U. S. 1, 11, the Establishment Clause bespeaks "a government . . . stripped of all power . . . to support, or otherwise to assist any or all religions . . . ," and no State "can pass laws which aid one religion . . . ." *Id.,* at 15. In Mr. Justice Rutledge's words, adopted by the Court today in *Schempp, ante,* p. 217, the Establishment Clause forbids "every form of public aid or support for religion." 330 U. S., at 32. In the words of the Court in *Engel* v. *Vitale,* 370 U. S., at 431, reaffirmed today in the *Schempp* case, *ante,* p. 221, the Establishment Clause forbids the "financial support of government" to be "placed behind a particular religious belief."

To require South Carolina to so administer its laws as to pay public money to the appellant under the circumstances of this case is thus clearly to require the State to violate the Establishment Clause as construed by this Court. This poses no problem for me, because I think the Court's mechanistic concept of the Establishment Clause is historically unsound and constitutionally wrong. I think the process of constitutional decision in the area of the relationships between government and religion demands considerably more than the invocation of broad-brushed rhetoric of the kind I have quoted. And I think that the guarantee of religious liberty embodied in the Free Exercise Clause affirmatively requires government to create an atmosphere of hospitality and accommoda-

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tion to individual belief or disbelief. In short, I think our Constitution commands the positive protection by government of religious freedom—not only for a minority, however small—not only for the majority, however large—but for each of us.

South Carolina would deny unemployment benefits to a mother unavailable for work on Saturdays because she was unable to get a babysitter.[3] Thus, we do not have before us a situation where a State provides unemployment compensation generally, and singles out for disqualification only those persons who are unavailable for work on religious grounds. This is not, in short, a scheme which operates so as to discriminate against religion as such. But the Court nevertheless holds that the State must prefer a religious over a secular ground for being unavailable for work—that state financial support of the appellant's religion is constitutionally required to carry out "the governmental obligation of neutrality in the face of religious differences. . . ."

Yet in cases decided under the Establishment Clause the Court has decreed otherwise. It has decreed that government must blind itself to the differing religious beliefs and traditions of the people. With all respect, I think it is the Court's duty to face up to the dilemma posed by the conflict between the Free Exercise Clause of the Constitution and the Establishment Clause as interpreted by the Court. It is a duty, I submit, which we owe to the people, the States, and the Nation, and a duty which we owe to ourselves. For so long as the resounding but fallacious fundamentalist rhetoric of some of our Establishment Clause opinions remains on our books, to be disregarded at will as in the present case,

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[3] See *Judson Mills* v. *South Carolina Unemployment Compensation Comm'n,* 204 S. C. 37, 28 S. E. 2d 535; *Hartsville Cotton Mill* v. *South Carolina Employment Security Comm'n,* 224 S. C. 407, 79 S. E. 2d 381.

or to be undiscriminatingly invoked as in the *Schempp* case, *ante,* p. 203, so long will the possibility of consistent and perceptive decision in this most difficult and delicate area of constitutional law be impeded and impaired. And so long, I fear, will the guarantee of true religious freedom in our pluralistic society be uncertain and insecure.

II.

My second difference with the Court's opinion is that I cannot agree that today's decision can stand consistently with *Braunfeld* v. *Brown, supra.* The Court says that there was a "less direct burden upon religious practices" in that case than in this. With all respect, I think the Court is mistaken, simply as a matter of fact. The *Braunfeld* case involved a state *criminal* statute. The undisputed effect of that statute, as pointed out by MR. JUSTICE BRENNAN in his dissenting opinion in that case, was that " '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." 366 U. S., at 611.

The impact upon the appellant's religious freedom in the present case is considerably less onerous. We deal here not with a criminal statute, but with the particularized administration of South Carolina's Unemployment Compensation Act. Even upon the unlikely assumption that the appellant could not find suitable non-Saturday employment,[4] the appellant at the worst would be denied

[4] As noted by the Court, "The record indicates that of the 150 or more Seventh-day Adventists in the Spartanburg area, only appellant and one other have been unable to find suitable non-Saturday employment." *Ante,* p. 399, n. 2.

a maximum of 22 weeks of compensation payments. I agree with the Court that the possibility of that denial is enough to infringe upon the appellant's constitutional right to the free exercise of her religion. But it is clear to me that in order to reach this conclusion the Court must explicitly reject the reasoning of *Braunfeld* v. *Brown*. I think the *Braunfeld* case was wrongly decided and should be overruled, and accordingly I concur in the result reached by the Court in the case before us.

MR. JUSTICE HARLAN, whom MR. JUSTICE WHITE joins, dissenting.

Today's decision is disturbing both in its rejection of existing precedent and in its implications for the future. The significance of the decision can best be understood after an examination of the state law applied in this case.

South Carolina's Unemployment Compensation Law was enacted in 1936 in response to the grave social and economic problems that arose during the depression of that period. As stated in the statute itself:

> "Economic insecurity due to unemployment is a serious menace to health, morals and welfare of the people of this State; *involuntary unemployment* is therefore a subject of general interest and concern . . . ; the achievement of social security requires protection against this greatest hazard of our economic life; this can be provided by encouraging the employers *to provide more stable employment and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment,* thus maintaining purchasing power and limiting the serious social consequences of poor relief assistance." § 68–38. (Emphasis added.)

Thus the purpose of the legislature was to tide people over, and to avoid social and economic chaos, during periods when *work was unavailable*. But at the same time there was clearly no intent to provide relief for those who for purely personal reasons were or became *unavailable for work*. In accordance with this design, the legislature provided, in § 68–113, that "[a]n unemployed insured worker shall be eligible to receive benefits with respect to any week *only* if the Commission finds that . . . [h]e is able to work and is available for work . . . ." (Emphasis added.)

The South Carolina Supreme Court has uniformly applied this law in conformity with its clearly expressed purpose. It has consistently held that one is not "available for work" if his unemployment has resulted not from the inability of industry to provide a job but rather from personal circumstances, no matter how compelling. The reference to "involuntary unemployment" in the legislative statement of policy, whatever a sociologist, philosopher, or theologian might say, has been interpreted not to embrace such personal circumstances. See, *e. g.*, *Judson Mills* v. *South Carolina Unemployment Compensation Comm'n,* 204 S. C. 37, 28 S. E. 2d 535 (claimant was "unavailable for work" when she became unable to work the third shift, and limited her availability to the other two, because of the need to care for her four children); *Stone Mfg. Co.* v. *South Carolina Employment Security Comm'n,* 219 S. C. 239, 64 S. E. 2d 644; *Hartsville Cotton Mill* v. *South Carolina Employment Security Comm'n,* 224 S. C. 407, 79 S. E. 2d 381.

In the present case all that the state court has done is to apply these accepted principles. Since virtually all of the mills in the Spartanburg area were operating on a six-day week, the appellant was "unavailable for work," and thus ineligible for benefits, when personal considera-

tions prevented her from accepting employment on a full-time basis in the industry and locality in which she had worked. The fact that these personal considerations sprang from her religious convictions was wholly without relevance to the state court's application of the law. Thus in no proper sense can it be said that the State discriminated against the appellant on the basis of her religious beliefs or that she was denied benefits *because* she was a Seventh-day Adventist. She was denied benefits just as any other claimant would be denied benefits who was not "available for work" for personal reasons.[1]

With this background, this Court's decision comes into clearer focus. What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to *carve out an exception*—and to provide benefits—for those whose unavailability is due to their religious convictions.[2] Such a holding has particular significance in two respects.

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[1] I am completely at a loss to understand note 4 of the Court's opinion. Certainly the Court is not basing today's decision on the unsupported supposition that *some* day, the South Carolina Supreme Court may conclude that there is *some* personal reason for unemployment that may not disqualify a claimant for relief. In any event, I submit it is perfectly clear that South Carolina would not compensate persons who became unemployed for *any* personal reason, as distinguished from layoffs or lack of work, since the State Supreme Court's decisions make it plain that such persons would not be regarded as "available for work" within the manifest meaning of the eligibility requirements. Nor can I understand what this Court means when it says that "if the eligibility provisions were thus limited, it would have been unnecessary for the [South Carolina] court to have decided appellant's constitutional challenge . . . ."

[2] The Court does suggest, in a rather startling disclaimer, *ante*, pp. 409–410, that its holding is limited in applicability to those whose religious convictions do not make them "nonproductive" members of society, noting that most of the Seventh-day Adventists in the Spartanburg area are employed. But surely this disclaimer cannot be

First, despite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld* v. *Brown*, 366 U. S. 599, which held that it did not offend the "Free Exercise" Clause of the Constitution for a State to forbid a Sabbatarian to do business on Sunday. The secular purpose of the statute before us today is even clearer than that involved in *Braunfeld*. And just as in *Braunfeld*—where exceptions to the Sunday closing laws for Sabbatarians would have been inconsistent with the purpose to achieve a uniform day of rest and would have required case-by-case inquiry into religious beliefs—so here, an exception to the rules of eligibility based on religious convictions would necessitate judicial examination of those convictions and would be at odds with the limited purpose of the statute to smooth out the economy during periods of industrial instability. Finally, the indirect financial burden of the present law is far less than that involved in *Braunfeld*. Forcing a store owner to close his business on Sunday may well have the effect of depriving him of a satisfactory livelihood if his religious convictions require him to close on Saturday as well. Here we are dealing only with temporary benefits, amounting to a fraction of regular weekly wages and running for not more than 22 weeks. See §§ 68–104, 68–105. Clearly, any differences between this case and *Braunfeld* cut against the present appellant.[3]

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taken seriously, for the Court cannot mean that the case would have come out differently if none of the Seventh-day Adventists in Spartanburg had been gainfully employed, or if the appellant's religion had prevented her from working on Tuesdays instead of Saturdays. Nor can the Court be suggesting that it will make a value judgment in each case as to whether a particular individual's religious convictions prevent him from being "productive." I can think of no more inappropriate function for this Court to perform.

[3] The Court's reliance on South Carolina Code § 64–4, *ante*, p. 406, to support its conclusion with respect to free exercise, is misplaced. Section 64–4, which is not a part of the Unemployment Compensa-

Second, the implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance. The meaning of today's holding, as already noted, is that the State must furnish unemployment benefits to one who is unavailable for work if the unavailability stems from the exercise of religious convictions. The State, in other words, must *single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated.

It has been suggested that such singling out of religious conduct for special treatment may violate the constitutional limitations on state action. See Kurland, Of Church and State and The Supreme Court, 29 U. of Chi. L. Rev. 1; cf. *Cammarano* v. *United States,* 358 U. S. 498, 515 (concurring opinion). My own view, however, is that at least under the circumstances of this case it would be a permissible accommodation of religion for the State, if it *chose* to do so, to create an exception to its eligibility requirements for persons like the appellant. The constitutional obligation of "neutrality," see *School District of Abington Township* v. *Schempp, ante,* p. 222, is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted, too many areas in which the pervasive activities of the State justify some special provision for religion to prevent it from being submerged by an all-embracing secularism. The State violates its obligation of neutrality

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tion Law, is an extremely narrow provision that becomes operative only during periods of national emergency and thus has no bearing in the circumstances of the present case. And plainly under our decisions in the "Sunday law" cases, appellant can derive no support for her position from the State's general statutory provisions setting aside Sunday as a uniform day of rest.

when, for example, it mandates a daily religious exercise in its public schools, with all the attendant pressures on the school children that such an exercise entails. See *Engel* v. *Vitale,* 370 U. S. 421; *School District of Abington Township* v. *Schempp, supra.* But there is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's.

For very much the same reasons, however, I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area. See, *e. g., Braunfeld* v. *Brown, supra; Cleveland* v. *United States,* 329 U. S. 14; *Prince* v. *Massachusetts,* 321 U. S. 158; *Jacobson* v. *Massachusetts,* 197 U. S. 11; *Reynolds* v. *United States,* 98 U. S. 145. Such compulsion in the present case is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant's religion and in light of the direct financial assistance to religion that today's decision requires.

For these reasons I respectfully dissent from the opinion and judgment of the Court.[4]

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[4] Since the Court states, *ante,* p. 410, that it does not reach the appellant's "equal protection" argument, based upon South Carolina's emergency Sunday-work provisions, §§ 64–4, 64–6, I do not consider it appropriate for me to do so.

HEAD, DOING BUSINESS AS LEA COUNTY PUBLISHING CO., ET AL. *v.* NEW MEXICO BOARD OF EXAMINERS IN OPTOMETRY.

APPEAL FROM THE SUPREME COURT OF NEW MEXICO.

No. 392. Argued April 15–16, 1963.—Decided June 17, 1963.

One of the appellants owns a newspaper and the other a radio station in New Mexico close to the Texas border and much of the area served by both the newspaper and the radio station lies in Texas. Both appellants were enjoined by a New Mexico State Court from accepting or publishing within the State of New Mexico a Texas optometrist's advertising found to be in violation of a New Mexico statute regulating advertising by optometrists. The Supreme Court of New Mexico affirmed. *Held:*

1. The New Mexico statute, as applied here to prevent the publication in New Mexico of the proscribed advertising, does not impose a constitutionally prohibited burden on interstate commerce. Pp. 427–429.

2. New Mexico's jurisdiction to regulate professional advertising practices in the manner here involved has not been preempted with respect to radio advertising by the Federal Communications Act. Pp. 429–432.

3. The statute here involved does not deprive appellants of property without due process of law or violate their privileges and immunities of national citizenship contrary to the Fourteenth Amendment. P. 432, n. 12.

4. Appellants' contention that the injunction constitutes an invalid restraint upon freedom of speech protected by the Fourteenth Amendment is not properly before this Court, since it was not made in the state courts or reserved in the notice of appeal to this Court. P. 433, n. 12.

70 N. M. 90, 370 P. 2d 811, affirmed.

Carol J. Head argued the cause and filed briefs for appellants.

Earl E. Hartley, Attorney General of New Mexico, and *Robert F. Pyatt,* Special Assistant Attorney General, argued the cause and filed a brief for appellee.

By special leave of Court, *Solicitor General Cox* argued the cause for the United States, as *amicus curiae,* urging reversal as to appellant Permian Basin Radio Corp. With him on the brief were *Assistant Attorney General Loevinger, Bruce J. Terris, Lionel Kestenbaum, Max D. Paglin, Daniel R. Ohlbaum* and *Ruth V. Reel.*

Ellis Lyons, Leonard J. Emmerglick, Harold Kohn and *William P. MacCracken, Jr.* filed a brief for the American Optometric Association, Inc., as *amicus curiae,* urging affirmance.

Opinion of the Court by MR. JUSTICE STEWART, announced by MR. JUSTICE WHITE.

This case comes to us on appeal from the Supreme Court of New Mexico. One of the appellants, Agnes K. Head, owns a newspaper in Hobbs, New Mexico. The other appellant, Permian Basin Radio Corporation, owns and operates a radio station there. Hobbs is in the southeastern corner of the State, close to the Texas border, and much of the area served by both the radio station and the newspaper lies in Texas. The appellants were enjoined from accepting or publishing within the State of New Mexico a Texas optometrist's advertising found to be in violation of New Mexico law. The appellants claim that the state law, as applied, imposes an unlawful burden on interstate commerce. Permian also argues that regulation of advertising by radio has been preempted by the Communications Act of 1934.[1] We noted probable jurisdiction, 371 U. S. 900, and invited the Solicitor General to express the Government's views concerning the question of federal preemption. We have concluded that the judgment should be affirmed.

Section 67–7–13 of the New Mexico Statutes Annotated deals generally with the practice of optometry. It pro-

[1] 48 Stat. 1064, as amended, 47 U. S. C. § 151 *et seq.*

hibits several varieties of unauthorized practice, and forbids even licensed practitioners from employing certain sales techniques, such as house-to-house canvassing, peddling on streets or highways, or offering lenses and frames as premiums.[2] It also prohibits:

> "(m) Advertising by any means whatsoever the quotation of any prices or terms on eyeglasses, spectacles, lenses, frames or mountings, or which quotes discount to be offered on eyeglasses, spectacles, lenses, frames or mountings or which quotes 'moderate prices,' 'low prices,' 'lowest prices,' 'guaranteed glasses,' 'satisfaction guaranteed,' or words of similar import."

The purpose of this provision, according to the Supreme Court of New Mexico, is to "protect . . . citizens against the evils of price-advertising methods tending to satisfy the needs of their pocketbooks rather than the remedial requirements of their eyes." 70 N. M. 90, 94, 370 P. 2d 811, 813. Similar laws have been enacted in many States to assure high standards of professional competence.[3]

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[2] "(i) Either in person or by or through solicitors or agents giving or offering to give to any person eyeglasses, spectacles or lenses, either with or without frames or mountings, as a premium or inducement for any subscription to any book, set of books, magazines, magazine, periodical or other publication, or as a premium or inducement for the purchase of any goods, wares or merchandise.

. . . . . .

"(k) The making of a house to house canvass either in person or through solicitors or associates for the purpose of selling, advertising or soliciting the sale of eyeglasses, spectacles, lenses, frames, mountings, eye examinations or optometrical services.

"(l) The peddling of eyeglasses, spectacles or lenses from house to house or on the streets or highways, notwithstanding any law for the licensing of peddlers."

[3] See Ark. Stat. Ann. § 72–815 (1957 Replacement); Cal. Bus. & Professions Code § 3129; Del. Code Ann., Tit. 24, § 2113; Fla. Stat. Ann. §§ 463.11, 463.14; Hawaii Rev. Laws § 68–9 (d) (1960 Supp.);

The facts stated in the complaint were not disputed. Appellants received and published advertisements from Abner Roberts, an optometrist who resided and conducted his business in the State of Texas, just a few miles east of Hobbs. In the words of the complaint, this advertising consisted of "the quotation of prices on eyeglasses and spectacles, and of the quotation of discounts to be offered on eyeglasses and spectacles." The appellants conceded that the advertising violated § 67–7–13 (m). Finding the statute applicable and violated, the trial court enjoined each of the appellants "from accepting or publishing within the State of New Mexico advertising of any nature from Abner Roberts which quotes prices or terms on eyeglasses . . . or which quotes moderate prices, low prices, lowest prices, guaranteed glasses, satisfaction guaranteed, or words of similar import . . . ." The Supreme Court of New Mexico affirmed, ruling that the injunction did not unlawfully burden interstate commerce and that the State's jurisdiction had not been ousted by federal legislation. 70 N. M. 90, 370 P. 2d 811.

I.

Without doubt, the appellants' radio station and newspaper are engaged in interstate commerce, and the injunction in this case has unquestionably imposed some

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Ind. Stat. Ann. §§ 63–1018a (e), 63–1019 (f) (1961); Ky. Rev. Stat. § 320.300; La. Rev. Stat. § 37:1063; Mich. Stat. Ann. § 14.648 (i) (1961 Supp.); Minn. Stat. Ann. § 148.57 (3); Mo. Ann. Stat. § 336.110; Mont. Rev. Codes § 66–1302 (11); Neb. Rev. Stat. § 71–148; Nev. Rev. Stat. § 636:300 (10); N. J. Stat. Ann. § 45:12–11 (h) (1962 Supp.); N. C. Gen. Stat. § 90–124 (9); N. Dak. Cent. Code § 43–13–29; Okla. Stat. Ann., Tit. 59, § 943; Ore. Rev. Stat. § 683.140 (6); Pa. Stat. Ann., Tit. 63, § 237; R. I. Gen. Laws § 5–35–22; S. C. Code of Laws § 56–1075; S. Dak. Code § 27.0707 (6) (1960 Supp.); Tenn. Code Ann. § 63–815; Va. Code § 54–388, par. 2 (d); Wash. Rev. Code Ann. § 18.53.140; W. Va. Code § 2937 (1961); Wis. Stat. Ann. § 153.10.

restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce. As we said in *Huron Portland Cement Co.* v. *City of Detroit,* 362 U. S. 440, upholding the application of a Detroit smoke abatement ordinance to ships engaged in interstate and international commerce: "In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when 'conferring upon Congress the regulation of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution.' *Sherlock* v. *Alling,* 93 U. S. 99, 103; *Austin* v. *Tennessee,* 179 U. S. 343; *Louisville & Nashville R. Co.* v. *Kentucky,* 183 U. S. 503; *The Minnesota Rate Cases,* 230 U. S. 352; *Boston & Maine R. Co.* v. *Armburg,* 285 U. S. 234; *Collins* v. *American Buslines, Inc.,* 350 U. S. 528." 362 U. S., at 443–444.

Like the smoke abatement ordinance in the *Huron* case, the statute here involved is a measure directly addressed to protection of the public health, and the statute thus falls within the most traditional concept of what is compendiously known as the police power.[4] The legitimacy of state legislation in this precise area has been expressly established. *Williamson* v. *Lee Optical Co.,* 348 U. S.

[4] The case is not one, therefore, in which the State seeks to justify a statute as a health measure on the attenuated theory that the economic well-being of a profession or industry will assure better performance in the public interest. See *Baldwin* v. *G. A. F. Seelig, Inc.,* 294 U. S. 511, 522–523. Compare *Semler* v. *Dental Examiners,* 294 U. S. 608.

483. A state law may not be struck down on the mere showing that its administration affects interstate commerce in some way. "State regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." *Huron Portland Cement Co.* v. *City of Detroit, supra,* at 448.

It has not been suggested that the statute, applicable alike to "any person" within the State of New Mexico, discriminates against interstate commerce as such. Nor can we find that the legislation impinges upon an area of interstate commerce which by its nature requires uniformity of regulation. The appellants have pointed to no regulations of other States imposing conflicting duties, nor can we readily imagine any. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines,* 372 U. S. 714. We hold that the New Mexico statute, as applied here to prevent the publication in New Mexico of the proscribed price advertising, does not impose a constitutionally prohibited burden upon interstate commerce.[5]

II.

In dealing with the contention that New Mexico's jurisdiction to regulate radio advertising has been preempted by the Federal Communications Act, we may begin by noting that the validity of this claim cannot be judged by reference to broad statements about the "comprehensive" nature of federal regulation under the Federal Com-

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[5] The appellants have argued that the decree below will have the effect of preventing communication between the Texas optometrist and Texas residents. A similar argument was rejected in *Railway Express Agency* v. *New York,* 336 U. S. 106, which held valid a local ordinance prohibiting the display of advertising on trucks which also operated in other States.

munications Act.[6] "[T]he 'question whether Congress and its commissions acting under it have so far exercised the exclusive jurisdiction that belongs to it as to exclude the State, must be answered by a judgment upon the particular case.' Statements concerning the 'exclusive jurisdiction' of Congress beg the only controversial question: whether Congress intended to make its jurisdiction exclusive." *California* v. *Zook,* 336 U. S. 725, 731. *Kelly* v. *Washington,* 302 U. S. 1, 10–13. In areas of the law not inherently requiring national uniformity,[7] our decisions are clear in requiring that state statutes, otherwise valid, must be upheld unless there is found "such actual conflict between the two schemes of regulation that both cannot stand in the same area, [or] evidence of a congressional design to preempt the field." *Florida Avocado Growers* v. *Paul,* 373 U. S. 132, 141.

The specific provisions of the federal statute chiefly relied upon to support Permian's claim are those governing the granting, renewal, and revocation of broadcasting licenses.[8] Under the broad standard of "public interest, convenience, and necessity," the Federal Communications Commission may consider a wide variety of factors in passing upon the fitness of an applicant. It is argued that the content of advertising is one of the factors which may be considered, and there is evidence that the Commission

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[6] *E. g., National Broadcasting Co.* v. *United States,* 319 U. S. 190, 213 ("wide licensing and regulatory powers"), *id.,* at 217 ("comprehensive powers to promote and realize the vast potentialities of radio"); *Federal Communications Comm'n* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 137 ("unified and comprehensive regulatory system for the industry").

It is to be noted that this case in no way involves the Commission's jurisdiction over technical matters such as a frequency allocation, over which federal control is clearly exclusive. 47 U. S. C. § 301.

[7] See *Hines* v. *Davidowitz,* 312 U. S. 52.

[8] See 47 U. S. C. §§ 303 (j), 307 (a), (d), 308 (a), 309 (a), and 312.

itself has on occasion so interpreted its authority.[9] Further, the United States argues that the Commission has the authority to promulgate general regulations concerning the subject of advertising for the guidance of broadcasters. See *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284, 289–290. This grant of federal power, it is argued, is sufficient to oust state regulation of radio advertising.

Assuming this to be a correct statement of the Commission's authority, we are nevertheless not persuaded that the federal legislation in this field has excluded the application of a state law of the kind here involved. The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authority to supplant all the detailed state regulation of professional advertising practices, particularly when the grant of power to the Commission was accompanied by no substantive standard other than the "public interest, convenience, and necessity." [10] The Solicitor General has conceded that the power of license revocation is not a plausible substitute for state law dealing with "traditional" torts or crimes committed through the use of radio. We can find no material difference with respect to the less "traditional" statutory violation here involved. In the absence of

[9] We have been cited to specific instances in which the content of advertising analogous to that involved in this case has been considered. See, *e. g.*, *Farmers & Bankers Life Ins. Co.*, 2 F. C. C. 455; *WSBC, Inc.*, 2 F. C. C. 293; *Oak Leaves Broadcasting Station, Inc.*, 2 F. C. C. 298. And see *KFKB Broadcasting Assn.* v. *Federal Radio Comm'n*, 60 App. D. C. 79, 47 F. 2d 670.

[10] See *Interstate Commerce Comm'n* v. *Los Angeles*, 280 U. S. 52, 68–70. Compare *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, which held state censorship of motion pictures shown on television preempted by those provisions of the federal act expressly dealing with "communications containing profane or obscene words, language, or meaning." 47 U. S. C. § 303 (m)(1)(D).

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positive evidence of legislative intent to the contrary, we cannot believe Congress has ousted the States from an area of such fundamentally local concern.

Finally, there has been no showing of any conflict between this state law and the federal regulatory system, or that the state law stands as an obstacle to the full effectiveness of the federal statute. No specific federal regulations even remotely in conflict with the New Mexico law have been called to our attention. The Commission itself has apparently viewed state regulation of advertising as complementing its regulatory function, rather than in any way conflicting with it.[11] As in *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U. S. 714, at 724, we are satisfied that the state statute "at least so long as any power the [Commission] may have remains 'dormant and unexercised,' will not frustrate any part of the purpose of the federal legislation." [12]

Affirmed.

MR. JUSTICE DOUGLAS concurs in the result.

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[11] Our attention has been directed to the following statement of Commission policy:

"In those localities and states where the sale of alcoholic beverages is prohibited by local or state statutes, such advertising by radio in those areas would, of course, not be in the public interest, since adherence to the laws of the state in which a station is located, especially laws expressive of the public policy of the state or locality on subjects relative to health, safety, and morals, is an important aspect of operation in the public interest. Obviously, the same is true with respect to those areas where advertising of alcoholic beverages is prohibited by law." F. C. C. Letter to Sen. Edwin C. Johnson, Chairman of the Senate Committee on Interstate and Foreign Commerce, August 11, 1949, 5 Pike & Fischer Radio Reg. 593–594.

[12] The appellants urge three additional grounds for reversal. Each may be disposed of briefly. First, both appellants urge that the state statute deprives them of property, in violation of the Due Process Clause. That claim is foreclosed by *Williamson* v. *Lee Optical Co.*, 348 U. S. 483. See also *Ferguson* v. *Skrupa*, 372 U. S. 726. The

MR. JUSTICE BRENNAN, concurring.

I agree that the attack on the New Mexico statute as an unreasonable burden on interstate commerce has no merit and therefore join Part I of the Court's opinion. The attack based on the Supremacy Clause—the contention that the Federal Communications Act preempts the subject matter of this state regulation—is not, however, so easily answered. Although I conclude that it too cannot prevail, I think it is appropriate that I state separately my reasons for reaching that result. For only recently we held, in *Farmers Educational & Cooperative Union* v. *WDAY, Inc.*, 360 U. S. 525, that the Communications Act displaced the state law of defamation insofar as that law directly conflicted with the "equal time" aims of § 315. Cf. *Radio Station WOW, Inc.*, v. *Johnson*, 326 U. S. 120; *Allen B. Dumont Labs.* v. *Carroll*, 184 F. 2d 153. What reasons arise from the relevant state and federal legislation governing advertising which require a different conclusion in this case?

I.

I agree that, as the Court says, the New Mexico statute is not displaced by the FCC's powers "governing the granting, renewal, and revocation of broadcasting

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appellant Head claims that denial of her right to do business with Abner Roberts is a violation of her privileges and immunities of national citizenship. But the Privileges and Immunities Clause of the Fourteenth Amendment does not create a naked right to conduct a business free of otherwise valid state regulation. *Madden* v. *Kentucky*, 309 U. S. 83, 92–93. Finally, it is contended that the injunction constitutes an invalid restraint upon freedom of speech protected by the Fourteenth Amendment. This argument was not made to the state courts, nor was it reserved in the notice of appeal to this Court. Under Rule 10, par. 2, of the Rules of this Court, "Only the questions set forth in the notice of appeal or fairly comprised therein will be considered by the court." See also Rule 15, par. 1 (c)(1).

licenses." If that were the only sanction which the Commission might apply to the advertising practices which the New Mexico statute forbids, the basis for any claim of the federal statute's preemptive effect would be removed. For the Commission has long disclaimed the effectiveness of attempting to police minor deviations and indiscretions in programming and advertising by the use of "the cumbersome weapons of criminal penalties and license refusal and revocation." *Regents of the University System of Georgia* v. *Carroll*, 338 U. S. 586, 602.[1] This obstacle led the Congress in 1960, on the recommendations

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[1] See H. R. Rep. No. 1800, 86th Cong., 2d Sess. 16 ("The principal administrative sanctions which the FCC is presently authorized to invoke against licensees who flout the law are license revocation and cease and desist orders. Revocation, of course, amounts to a death sentence for the licensee. It may also have a serious effect upon the community served by the licensee. Because of its severity, it has seldom if ever been invoked."). See also, *e. g.*, Smead, Freedom of Speech by Radio and Television (1959), 3; Note, State Regulation of Radio and Television, 73 Harv. L. Rev. 386, 390 (1959); Note, Broadcast Licensee's Past Conduct as a Determinant of the Public Interest, 23 U. of Pitt. L. Rev. 157, 160 (1961). The comment of one author is particularly apposite to the question of this case: "The great reluctance of the Commission to exercise its power of revocation, its lack of power to suspend licenses and its recognition of the importance of commercial advertising to radio broadcasting, make it customary for broadcast advertising to be considered by the Commission only on applications for renewal of station licenses." 2 Socolow, The Law of Radio Broadcasting (1939), 1005.

Not only was the drastic nature of the "death sentence" a deterrent to its application against lesser violations—in addition, it was suggested that licensing controls constituted at best only indirect regulation of the parties primarily at fault in cases of advertising excesses or abuses—the networks and the sponsors themselves—and were therefore inequitable as well as unduly harsh. See Deceptive Practices in the Broadcasting Media, December 30, 1959, 19 Pike & Fischer Radio Reg. 1901, 1918; Note, The Regulation of Advertising, 56 Col. L. Rev. 1018, 1049 (1956).

of the Commission and the Attorney General,[2] to amend the Communications Act to authorize the Commission to impose money forfeitures, 47 U. S. C. § 503 (b), and to grant short-term licenses, 47 U. S. C. § 307 (d). The amendments also strengthened the Commission's preexisting power to issue cease-and-desist orders, 47 U. S. C. § 312 (b). The Commission was thus expressly given more discriminating tools "in dealing with violations in situations where revocation or suspension does not appear to be appropriate." [3]

The Commission has been prompt to apply its new sanctions. Some stations "whose violation records indicated need for closer supervision" have been limited to

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[2] The Attorney General, in his letter to the President, summarized his recommendation as follows:
"Second, as a practical matter, the one sanction expressly conferred by statute upon the Federal Communications Commission for use against a broadcast licensee who fails to operate in the public interest is to withdraw his broadcasting license permanently—a sanction so severe that it has been imposed only rarely. The Federal Communications Commission should be expressly authorized also to impose less severe sanctions for actions violating the Communications Act or regulations issued pursuant to it. Such sanctions, for example, could include temporary suspension or conditional licenses." Deceptive Practices in the Broadcasting Media, Report to the President by the Attorney General, December 30, 1959, 19 Pike & Fischer Radio Reg. 1901, 1905. See also, for the Commission's view prior to 1960, Hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce on S. 1333, 80th Cong., 1st Sess. 14, 51.

[3] H. R. Rep. No. 1800, 86th Cong., 2d Sess. 17; see also S. Rep. No. 1857, 86th Cong., 2d Sess. 4, 8–10. In addition to the three sanctions provided by the Communications Act amendments of 1960, the House bill had also originally provided for a Commission power to suspend licenses for minor violations, for periods not to exceed 10 days. The Senate Committee, however, recommended against the provision for suspension, and it was dropped from the final bill. See generally, concerning the scope and provisions of the 1960 amendments, Enforcement Provisions of the Communications Act, 18 Fed. Communications B. J. 45 (1963).

short-term licenses.[4] Forfeitures have been imposed for "violations that do not warrant revocation proceedings"; [5] and cease-and-desist orders have been issued for the first time in broadcast cases.[6] Thus infractions which would heretofore have gone formally unregulated are apparently now being dealt with because the Commission may impose sanctions more commensurate with the gravity of the offense.

This is not to say that before the 1960 amendments the Commission never found the cancellation power useful in curbing some abuses now policed under the less drastic sanctions. Indeed, the Commission's informal policing of minor complaints had some success precisely because the "death sentence" could be imposed. "The licensing power of the FCC," one commentator has said, "hangs like a constant Damocles' sword over broadcasting." [7] The Commission regularly reported to Congress that a great number of complaints about programming or

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[4] See 28 F. C. C. Ann. Rep. 47–48 (1962); New York Times, July 14, 1961, p. 37, col. 2. Although under the Communications Act of 1934 the Commission presumably possessed the power to issue licenses for terms shorter than the statutory maximum, a formal rule provided that maximum-period licenses would be regularly granted. The purpose of the amendment was, therefore, simply to reaffirm the existence of the power to issue licenses for less than the statutory three-year maximum. See H. R. Rep. No. 1800, 86th Cong., 2d Sess. 8–9.

[5] See 28 F. C. C. Ann. Rep. 46–47 (1962). At least one of the forfeiture proceedings reported by the Commission in its most recent report concerned the advertising practices of a licensee, who paid a forfeiture of $5,000. See *id.*, at 54.

[6] See 27 F. C. C. Ann. Rep. 37, 40 (1961). Although provision was made for cease-and-desist orders in 1952, see 66 Stat. 717, until the 1960 amendment this sanction was invoked only in cases involving technical violations.

[7] Schwartz, Antitrust and the FCC: The Problem of Network Dominance, 107 U. of Pa. L. Rev. 753, 769 (1959).

advertising were readily resolved by "informal adjustment," without need for recourse to formal hearings, much less to revocation proceedings.[8] The Commission, it appears, though sparingly invoking the cancellation power, had "powerful informal sanctions working in its favor, for the constant theoretical threat of license revocation at renewal time is always present . . . . [I]f a complaint arises in the programming field that accuses a station of violating FCC standards the mere notification of the respondent of the fact of the complaint would result in immediate settlement in many cases." [9]

It seems to me, then, that a conclusion of nondisplacement of the state statute at bar by the Federal Communications Act can rest neither upon the practical inability of the FCC to police those practices which the State has forbidden, nor upon any want of authority in the Commission to regulate the subject matter of the New Mexico statute. Actually, the Commission has concerned itself with the content of radio advertising almost from the time that federal regulation of commercial broadcasting began. Advertising abuses in the early days of radio were a constant source of embarrassment and concern to the Commission and its predecessor, the Federal Radio Com-

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[8] See 2 F. C. C. Ann. Rep. 19 (1936); 4 F. C. C. Ann. Rep. 69 (1938); 7 F. C. C. Ann. Rep. 27 (1941); Smead, Freedom of Speech by Radio and Television (1959), 30 and n. 63; Note, The Regulation of Advertising, 56 Col. L. Rev. 1018, 1048 (1956). One author has suggested that "[t]he net result has been regulation of programming by raised eyebrow." Note, Broadcast Licensee's Past Conduct as a Determinant of the Public Interest, 23 U. of Pitt. L. Rev. 157, 170 (1961). It has also been noted that speeches and informal statements by individual Commissioners have often had significant impact upon programming and other activities of licensees. Note, Television Programming, Communication Research, and the FCC, 23 U. of Pitt. L. Rev. 993, 996 (1962).

[9] Woll, Administrative Law: The Informal Process (1963), 139.

mission.[10] One of the principal abuses complained of was the very aspect of commercial sponsorship with which the New Mexico statute is concerned—"direct" or price advertising. The First Annual Radio Conference, meeting in 1922 at the invitation of Secretary Hoover, strongly recommended "that direct advertising in radio broadcasting service be absolutely prohibited . . . ." [11] At least one station lost its license during the '20's because, among other abuses, it had indulged excessively in "direct advertising, including the quoting of prices." [12] And until the passage of the Communications Act in 1934, members of the Commission and of Congress continued to hope that broadcasting free of all commercials—or at least devoid of direct advertising, one form of sponsorship particularly objected to—might become a commercial reality.[13] Even

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[10] See Emery, Broadcasting and Government: Responsibilities and Regulations (1961), 11–13; Moser and Lavine, Radio and the Law (1947), §§ 42, 43; Perry, Weak Spots in the American System of Broadcasting, 177 Annals Am. Acad. Pol. & Soc. Sci. 22, 24–25 (1935).

[11] Quoted in Federal Communications Commission, Public Service Responsibility of Broadcast Licensees (1946), 41.

[12] *Ibid.* The Commission explained its refusal to prohibit all direct advertising as follows: "The Commission is not fully convinced that it has heard both sides of the matter, but is willing to concede that in some localities the quoting of direct merchandise prices may serve as a sort of local market, and in that community a service may thus be rendered. That such is not the case generally, however, the commission knows from thousands and thousands of letters which it has had from all over the country complaining of such practices." 2 F. R. C. Ann. Rep. 168–169 (1928).

[13] See, *e. g.*, Hearings before Senate Committee on Interstate Commerce on S. 6, 71st Cong., 1st Sess., pt. 5, p. 192; *id.*, pt. 6, p. 230. One may only speculate what might have been the course of American broadcasting had such a prohibition been imposed. For recent difficulties which Sweden has experienced under a general ban on radio advertising, see New York Times, April 2, 1961, p. 1, col. 3; *id.*, April 3, 1961, p. 8, col. 4.

representatives of the industry shared this hope for a time.[14]

The advent of the 1930's apparently foreclosed the possibility of radio without commercials, and the Commission shifted its attention to a more discriminating appraisal of the content of advertising over the air. As early as 1928, for example, the General Counsel of the Radio Commission held that abuses in network cigarette advertising—while not a sufficient basis for revocation proceedings against an individual licensee—might on renewal militate against the requisite finding of broadcasting in "the public interest." [15] During the mid-1930's, moreover, the Commission repeatedly warned that advertising excesses and the use of commercial material offensive to the listening public might constitute grounds for

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[14] Hearings before Senate Committee on Interstate Commerce on S. 6, 71st Cong., 2d Sess., pt. 13, pp. 1705–1706. Compare Durstine, The Future of Radio Advertising in the United States, 177 Annals Am. Acad. Pol. & Soc. Sci. 147, 149 (1935).

[15] Opinion No. 32, 1928–1929 Opinions of the General Counsel, Federal Radio Commission, 77, 81–82. The General Counsel also rejected the contention that such consideration of a licensee's past advertising practices might amount to censorship, partly on the ground of a "necessary distinction between restrictions placed upon the transmission of intelligence for which there is a general public demand and need and limitations imposed upon broadcasting propaganda, intended to obtain commercial success, for which there is no such demand or need." *Id.*, at 81.

Shortly after the issuance of the General Counsel's opinion, the Chairman of the Federal Radio Commission was asked by Senator Dill during his appearance before the Senate Commerce Committee whether he thought the Commission had sufficient power "through its power of regulation and its determination of public interest to handle objectionable advertising." The Chairman replied, "I think so, Senator Dill, because we have had little trouble about it, even without direct power. We have been able to improve some programs." Hearings before Senate Committee on Interstate Commerce on S. 6, 71st Cong., 1st Sess., pt. 6, p. 230.

the cancellation of a license.[16] However, no license appears to have been withdrawn solely for that reason. Rather, the possibility of cancellation seems to have been employed as a threat, and an effective one, for the Commission continued to report its satisfaction that many complaints of this nature were settled through the use of warnings and other informal sanctions outside the formal administrative machinery. Recourse to these informal solutions seems to have been extensive at least until 1940.

Since World War II, however, the Commission has apparently followed a policy which puts less emphasis upon regulation of the content and quality of commercials. In its 1946 "Blue Book," the Commission, although cataloguing various advertising abuses, including several which directly involved content, expressly disavowed any intention to regulate directly "advertising excesses other than an excessive ratio of advertising time to program time . . . ." [17] The "Blue Book" stated, regarding the other forms of abuse: "The Commission has no desire to concern itself with the particular length, content, or irritating qualities of particular commercial plugs." [18] There

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[16] See, *e. g., Knickerbocker Broadcasting Co.*, 2 F. C. C. 76; *WSBC, Inc.*, 2 F. C. C. 293; *Hammond-Calumet Broadcasting Corp.*, 2 F. C. C. 321; *Oak Leaves Broadcasting Station, Inc.*, 2 F. C. C. 298; *Farmers & Bankers Life Ins. Co.*, 2 F. C. C. 455. In *Ben S. McGlashan*, 2 F. C. C. 145, 152, the Commission dismissed as "manifestly contrary to the law" the suggestion that "licensees should not have the duty of examining into the propriety of advertising to be broadcast . . . ." Cf. *KFKB Broadcasting Assn., Inc.*, v. *Federal Radio Comm'n*, 60 App. D. C. 79, 47 F. 2d 670. See generally Moser and Lavine, Radio and the Law (1947), § 43; Note, Governmental Regulation of the Program Content of Television Broadcasting, 19 Geo. Wash. L. Rev. 312, 317 (1951).

[17] Federal Communications Commission, Public Service Responsibility of Broadcast Licensees (1946), 47.

[18] *Id.*, at 56.

are more recent signs of renewed attention to the subject of advertising content, but nothing appears to approach the pervasive superintendence of the 1930's.[19] In any event the FCC has seemed content to leave to the Federal Trade Commission the regulation of much of the field, particularly the policing of false, misleading or deceptive advertising designed for radio and television broadcast. While the FCC has consistently warned its licensees that the continued broadcasting of material found by the FTC to be deceptive or misleading "would raise serious questions as to whether such stations are operating in the public interest," its policy seems to have been to leave the matter of direct and immediate sanctions largely to the Trade Commission.[20]

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[19] See, *e. g., WREC Broadcasting Service,* 10 Pike & Fischer Radio Reg. 1323, 1350–1351, 1358–1359; *Liberty Television, Inc.,* 30 F. C. C. 411, 414; 28 F. C. C. Ann. Rep. 54–55 (1962). Cf. Public Notice, "Double Billing" Practices, March 7, 1962, 23 Pike & Fischer Radio Reg. 175; *Sam Morris,* 11 F. C. C. 197; Hale and Hale, Competition or Control II: Radio and Television Broadcasting, 107 U. of Pa. L. Rev. 585, 603–607 (1959).

[20] Liaison Between FCC and FTC Relating to False and Misleading Radio and TV Advertising, Feb. 21, 1957, 14 Pike & Fischer Radio Reg. 1262.

The Trade Commission first assumed responsibility for radio advertising in 1934, see 2 Socolow, The Law of Radio Broadcasting (1939), §§ 540–542; Davis, Regulation of Radio Advertising, 177 Annals Am. Acad. Pol. & Soc. Sci. 154, 156–157 (1935). The FCC also instituted during the 1930's a policy of referring misleading and deceptive advertising complaints to the Trade Commission. See 6 F. C. C. Ann. Rep. 55 (1940); 7 F. C. C. Ann. Rep. 27 (1941). Since 1957 there has been a particularly close liaison between the two agencies with respect to advertising matters, see Deceptive Practices in the Broadcasting Media, 19 Pike & Fischer Radio Reg. 1901, 1923; 27 F. C. C. Ann. Rep. 40 (1961). The FCC has also announced a policy of keeping its licensees informed of applicable rulings of the Trade Commission, 28 F. C. C. Ann. Rep. 44 (1962). For surveys of the Trade Commission's present regulation of radio and television advertising, see generally Emery,

II.

It is against this pattern of federal regulation that we must apply in this case the settled tests by which we determine whether federal legislation has displaced state regulation of a given subject matter. Under the first test the subject matter, here radio and television broadcasting, is clearly not one "by its very nature admitting only of national supervision . . . ." *Florida Lime & Avocado Growers, Inc.*, v. *Paul*, 373 U. S. 132, 143. Nothing in our decisions which have required particular state regulations to yield to the Communications Act suggests such

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Broadcasting and Government: Responsibilities and Regulations (1961), 58–65; Smead, Freedom of Speech by Radio and Television (1959), 31–33; 37 Notre Dame Law. 524 (1962); 36 St. John's L. Rev. 274 (1962); 10 U. C. L. A. L. Rev. 417 (1963).

In view of the activity of the Federal Trade Commission in matters of radio and television advertising, it might be argued that the Supremacy Clause question should be judged by the powers and sanctions of that agency instead of by those of the FCC. Several answers may be made to that suggestion. First, the remedial powers of the Trade Commission are only very rarely accorded preemptive effect, *e. g.*, *Bedno* v. *Fast*, 6 Wis. 2d 471, 95 N. W. 2d 396. Second, broadcasters and publishers are expressly exempted from the criminal penalties against false and deceptive advertising, 15 U. S. C. § 54 (b). Thus, FTC regulation of advertising over the air tends to be indirect, the sanctions being imposed upon the sponsor, and, occasionally, upon the advertising agency. See, *e. g.*, *Colgate-Palmolive Co.* v. *Federal Trade Comm'n*, 310 F. 2d 89. Third, it appears that the FTC is neither equipped for nor desirous of assuming exclusive responsibility for essentially local advertising abuses, particularly where the state regulation complements the federal prohibitions. See Comment, State Control of Bait Advertising, 69 Yale L. J. 830, 845–846 (1960). Finally, federal preemption would threaten to disrupt unduly the existing schemes of state and local regulation of advertising in an area in which no overriding need for federal uniformity appears, Note, The Regulation of Advertising, 56 Col. L. Rev. 1018, 1076 (1956), and in which there may even be some doubt as to the FTC's jurisdiction, see 29 Geo. Wash. L. Rev. 808, 811–813 (1961).

a view of the regulatory field. Cf. *Farmers Educational & Cooperative Union* v. *WDAY, Inc., supra.* Although in *Radio Station WOW, Inc.*, v. *Johnson, supra,* at 131–132, we decreed the displacement of state law in some respects, we recognized that state regulation in other respects might be constitutional.

The second test, whether there is evidence of congressional intent exclusively to occupy the field, is apposite but the requisite evidence is lacking. We have said, to be sure, that "[n]o state lines divide the radio waves, and national regulation is not only appropriate but essential to the efficient use of radio facilities." *Federal Radio Comm'n* v. *Nelson Bros. Bond & Mortgage Co.,* 289 U. S. 266, 279. But that language should not be read as construing the Communications Act to mandate the ouster of all local regulation the application of which might in any way prevent perfect national uniformity.[21] Indeed, even the Solicitor General, in his brief as *amicus curiae,* concedes as much by his recognition that Congress intended the survival of certain "traditional" state powers and remedies—particularly common-law tort and traditional criminal sanctions.

Rather than mandate ouster of state regulations, several provisions of the Communications Act suggest a congressional design to leave standing various forms of state regulation, including the form embodied in the New Mexico statute. First, the Act contains a "saving clause," 47 U. S. C. § 414, providing that "Nothing in this chapter

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[21] Compare, *e. g., Kroeger* v. *Stahl,* 248 F. 2d 121, with, *e. g., Western Union Telegraph Co.* v. *State,* 207 Ga. 675, 63 S. E. 2d 878; *National Broadcasting Co.* v. *Board of Public Utility Comm'rs,* 25 F. Supp. 761; *RCA Communications, Inc.*, v. *Patchogue Broadcasting Co., Inc.*, 19 Pike & Fischer Radio Reg. 2071. See generally Emery, Broadcasting and Government: Responsibilities and Regulations (1961), 72–73; Note, State Regulation of Radio Lotteries, 1952 Wis. L. Rev. 177, 180–181.

contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." Of course such a general provision does not resolve specific problems, *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U. S. 658, 671, n. 22, but its inclusion in the statute plainly is inconsistent with congressional displacement of the state statute unless a finding of that meaning is unavoidable.[22] Second, the statutory regulation of radio and television broadcasting is far less comprehensive than the regulation in the very same title of telephone and telegraph facilities, *Federal Communications Comm'n* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 474—yet even as to those means of communications some subjects and remedies are saved to state regulation. Finally, Congress has enacted detailed regulations of some broadcasting practices (not including that regulated by the New Mexico statute)—*e. g.*, the manner in which sponsorship must be identified and announced, 47 U. S. C. § 317; the uttering of any "obscene, indecent, or profane language" over the air, 18 U. S. C. § 1464; and the transmission of communications known to contain fraudulent matter, 18 U. S. C. § 1343; cf. 47 U. S. C. § 509. While the failure expressly to regulate *nondeceptive* advertising surely does not deprive the FCC of all such jurisdiction, that failure argues against a congressional design that state regulation was to be ousted. Cf. *Federal Communications Comm'n* v. *American Broadcasting Co.*, 347 U. S. 284.

This brings me to the third test—whether as a practical matter "both regulations can be enforced without impairing the federal superintendence of the field . . . ." *Flor-*

[22] See Note, State Regulation of Radio and Television, 73 Harv. L. Rev. 386, 387–388 (1959); Note, Governmental Regulation of the Program Content of Television Broadcasting, 19 Geo. Wash. L. Rev. 312, 322–323 (1951).

ida Lime & Avocado Growers, Inc., v. *Paul, supra,* at 142. It is the application of this criterion which reveals the basic difference between this case and *WDAY*. We held there that the strong federal interest represented by the "equal time" obligation which § 315 imposes upon broadcasters with respect to political candidates would be frustrated if not altogether defeated by the survival of state remedies against the broadcaster for allegedly defamatory political broadcasts. Thus the conflict in operation between the federal and state laws which converged in that case made it inevitable that the state law should yield in the interests of a particular federal regulatory scheme.

The instant case, by contrast, presents no such conflict or dissonance. The New Mexico law is one designed principally to protect the State's consumers against a local evil by local application to forbid certain forms of advertising in all mass media. Such legislation, whether concerned with the health and safety of consumers, or with their protection against fraud and deception, embodies a traditional state interest of the sort which our decisions have consistently respected. *Rice* v. *Santa Fe Elevator Corp.*, 331 U. S. 218, 230. Nor is such legislation required to yield simply because it may in some degree restrict the activities of one who holds a federal license. Cf. *Huron Portland Cement Co.* v. *Detroit,* 362 U. S. 440, 447–448.

A conclusion that the state regulation is ousted by the federal requires, under this third test, a showing of conflict either in purpose or in operation between the state and federal regulations involved. The contrary of such a showing is made here, for the FCC, in determining whether a licensee's operation has served the public interest, considers whether he has complied with state and local regulations governing advertising [23]—in other words,

[23] See Letter of Acting Chairman Paul A. Walker to Senator Edwin C. Johnson, August 11, 1949, 5 Pike & Fischer Radio Reg. 593, 594.

the Commission accords important deference to the continued operation of state law in this field. Moreover, the National Association of Broadcasters has also consistently counseled obedience to state law on such matters. The Association, in its extensive Codes of Good Practices for both radio and television, unmistakably enjoins each member to "refuse the facilities of his station to an advertiser where he has good reason to doubt the integrity of the advertiser, the truth of the advertising representations, or the compliance of the advertiser with the spirit and purpose of all applicable legal requirements"; [24] the Television Code, moreover, expressly enjoins: "Diligence should be exercised to the end that advertising copy accepted . . . complies with pertinent Federal, state and local laws." [25]

Finally, a practical consideration militates strongly against giving the federal statute preemptive effect in the absence of a clear congressional mandate. Even if the FCC is generally able and willing to regulate advertising abuses, the agency would understandably desire to share with state agencies the responsibility for policing the myriad local and occasional violations of the canons of advertising. Otherwise the burden might well become so heavy as to produce a "no-man's land," cf. *Guss* v. *Utah Labor Board,* 353 U. S. 1, in which there would be at best selective policing of the various advertising abuses and excesses which are now very extensively regulated by state law.[26] That could only mean a partial exemption

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[24] Quoted in Emery, Broadcasting and Government: Responsibilities and Regulations (1961), 430, 445.

[25] *Id.,* at 445.

[26] See generally Moser and Lavine, Radio and the Law (1947), c. V; Note, State Regulation of Radio Lotteries, 1952 Wis. L. Rev. 177; State Legislation Affecting Radio and Television, 1951–1952, 12 Fed. Communications B. J. 261 (1952); Note, State Control of Bait Advertising, 69 Yale L. J. 830 (1960).

of radio and television, alone among the media, from local regulations and a denial of the protection which consumers rightly expect from government.[27]

III.

Our holding today intimates no view of the constitutionality of several other superficially similar forms of state regulation of broadcasting. First, nothing here said suggests that a system of state regulation, although not in direct conflict with federal law, would pass muster if it were so pervasive and so burdensome upon broadcasters as to interfere substantially with the overall purposes of federal regulation. Cf. *Allen B. Dumont Labs.* v. *Carroll, supra.* Second, nothing said answers the problem of the situation, factually closer to that at bar but legally quite distinct, which would be presented if a State in which nationwide network material originates sought to restrict network advertising under a statute enacted for the protection only of that State's consumers. Such regulation might well exceed the scope of the State's legitimate interests and involve a constitutionally illegitimate attempt to control communications beyond its borders. Cf. *Bibb* v. *Navajo Freight Lines, Inc.,* 359 U. S. 520; *Southern Pacific Co.* v. *Arizona,* 325 U. S. 761, 775. Third, nothing said here may be read to sustain the constitutionality of applications of local advertising regulations which threaten to make it impossible for a local

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[27] This is not to suggest that a statute which formally exempted certain media from penalties upon certain types of advertising would necessarily represent any violation of the Equal Protection Clause. See *Packer Corp.* v. *Utah,* 285 U. S. 105, 108–110. Cf. Calif. Bus. & Prof. Code § 17502, which was amended in 1951 to exempt from the prohibitions against false and deceptive advertising a newspaper or radio station which "broadcasts or publishes an advertisement in good faith, without knowledge of its false, deceptive, or misleading character."

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station to transmit network broadcasts because of their sponsorship.[28] While the State's interest might be no different from that protected by this New Mexico statute, the more drastic effect of the regulation upon the exercise of the broadcaster's federal license and his access to network material might well require a different result. All that the Court decides today is that this New Mexico statute may constitutionally be enforced against radio broadcasters equally with other news media doing business in New Mexico.

[28] See Note, State Regulation of Radio and Television, 73 Harv. L. Rev. 386, 393–395 (1959).

Syllabus.

ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE, *v.* FLEUTI.

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

No. 248. Argued March 26, 1963.—
Decided June 17, 1963.

Respondent is an alien who was admitted to this country for permanent residence in 1952 and has been here continuously since, except for a visit of "about a couple hours" duration to Ensenada, Mexico, in 1956. After administrative proceedings, he was ordered deported on the ground that, at the time of his return in 1956, he was "afflicted with psychopathic personality," within the meaning of § 212 (a) (4) of the Immigration and Nationality Act of 1952, and, therefore, was excludable under § 241 (a) (1). The District Court sustained the deportation order; but the Court of Appeals set it aside on the ground that, as applied to respondent, § 212 (a) (4) was unconstitutionally vague. *Held:*

1. This Court ought not to pass on the constitutionality of § 212 (a) (4), as applied to respondent, unless such adjudication is unavoidable; and there is a threshold question as to whether respondent's return to this country from his afternoon trip to Mexico in 1956 constituted an "entry" within the meaning of § 101 (a) (13) of the Immigration and Nationality Act of 1952, so as to subject him to deportation for a condition existing at that time but not at the time of his original admission before the 1952 Act became effective. Pp. 451–452.

2. It would be inconsistent with the general ameliorative purpose of Congress in enacting § 101 (a) (13) to hold that an innocent, casual and brief excursion by a resident alien outside this country's borders was "intended" as a departure disruptive of his resident alien status so as to subject him to the consequences of an "entry" into the country on his return. Pp. 452–462.

3. Because attention was not previously focused upon the application of § 101 (a) (13) to this case, and the record contains no detailed description or characterization of respondent's trip to

Mexico in 1956, the judgment below is vacated and the case is remanded for further consideration of the application of that section in the light of this opinion. Pp. 462–463.

302 F. 2d 652, judgment vacated and case remanded.

Philip R. Monahan argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller* and *Maurice A. Roberts.*

Hiram W. Kwan argued the cause and filed a brief for respondent.

Mr. Justice Goldberg delivered the opinion of the Court.

Respondent Fleuti is a Swiss national who was originally admitted to this country for permanent residence on October 9, 1952, and has been here continuously since except for a visit of "about a couple hours" duration to Ensenada, Mexico, in August 1956. The Immigration and Naturalization Service, of which petitioner Rosenberg is the Los Angeles District Director, sought in April 1959 to deport respondent on the ground that at the time of his return in 1956 he "was within one or more of the classes of aliens excludable by the law existing at the time of such entry," Immigration and Nationality Act of 1952, § 241 (a)(1), 66 Stat. 204, 8 U. S. C. § 1251 (a)(1). In particular, the Service alleged that respondent had been "convicted of a crime involving moral turpitude," § 212 (a)(9), 66 Stat. 182, 8 U. S. C. § 1182 (a)(9), before his 1956 return, and had for that reason been excludable when he came back from his brief trip to Mexico. A deportation order issued on that ground, but it was discovered a few months later that the order was invalid, because the crime was a petty offense not of the magnitude encompassed within the statute. The deportation proceedings were thereupon reopened and a new charge was lodged against respondent: that he had been excludable

at the time of his 1956 return as an alien "afflicted with psychopathic personality," § 212 (a)(4), 66 Stat. 182, 8 U. S. C. § 1182 (a)(4), by reason of the fact that he was a homosexual. Deportation was ordered on this ground and Fleuti's appeal to the Board of Immigration Appeals was dismissed, whereupon he brought the present action for declaratory judgment and review of the administrative action. It was stipulated that among the issues to be litigated was the question whether § 212 (a)(4) is "unconstitutional as being vague and ambiguous." The trial court rejected respondent's contentions in this regard and in general, and granted the Government's motion for summary judgment. On appeal, however, the United States Court of Appeals for the Ninth Circuit set aside the deportation order and enjoined its enforcement, holding that as applied to Fleuti § 212 (a)(4) was unconstitutionally vague in that homosexuality was not sufficiently encompassed within the term "psychopathic personality." 302 F. 2d 652.

The Government petitioned this Court for certiorari, which we granted in order to consider the constitutionality of § 212 (a)(4) as applied to respondent Fleuti. 371 U. S. 859. Upon consideration of the case, however, and in accordance with the long-established principle that "we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable," *Spector Motor Service, Inc.*, v. *McLaughlin*, 323 U. S. 101, 105; see also *Alma Motor Co.* v. *Timken-Detroit Axle Co.*, 329 U. S. 129; *Neese* v. *Southern R. Co.*, 350 U. S. 77; *Mackey* v. *Mendoza-Martinez*, 362 U. S. 384, we have concluded that there is a threshold issue of statutory interpretation in the case, the existence of which obviates decision here as to whether § 212 (a)(4) is constitutional as applied to respondent.

That issue is whether Fleuti's return to the United States from his afternoon trip to Ensenada, Mexico, in

August 1956 constituted an "entry" within the meaning of § 101 (a)(13) of the Immigration and Nationality Act of 1952, 66 Stat. 167, 8 U. S. C. § 1101 (a)(13), such that Fleuti was excludable for a condition existing at that time even though he had been permanently and continuously resident in this country for nearly four years prior thereto. Section 101 (a)(13), which has never been directly construed by this Court in relation to the kind of brief absence from the country that characterizes the present case,[1] reads as follows:

> "The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary: *Provided,* That no person whose departure from the United States was occasioned by deportation proceedings, extradition, or other legal process shall be held to be entitled to such exception."

The question we must consider, more specifically, is whether Fleuti's short visit to Mexico can possibly be regarded as a "departure to a foreign port or place . . . [that] was not intended," within the meaning of the

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[1] Although there is dictum on the point of *Bonetti* v. *Rogers,* 356 U. S. 691, 698–699, we regard it as not fully considered, since resolution of the issue was not crucial to decision of the case. Compare *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206, 213.

exception to the term "entry" created by the statute. Whether the 1956 return was within that exception is crucial, because Fleuti concededly was not excludable as a "psychopathic personality" at the time of his 1952 entry.[2]

The definition of "entry" as applied for various purposes in our immigration laws was evolved judicially, only becoming encased in statutory form with the inclusion of § 101 (a) (13) in the 1952 Act. In the early cases there was developed a judicial definition of "entry" which had harsh consequences for aliens. This viewpoint was expressed most restrictively in *United States ex rel. Volpe* v. *Smith*, 289 U. S. 422, in which the Court, speaking through Mr. Justice McReynolds, upheld deportation of an alien who, after 24 years of residence in this country following a lawful entry, was held to be excludable on his return from "a brief visit to Cuba," *id.*, at 423. The Court stated that "the word 'entry' . . . includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." *Id.*, at 425.[3] Although cases in the lower courts applying the

[2] The 1952 Act became effective on December 24, 1952, and Fleuti entered the country for permanent residence on October 9, 1952, a fact which is of significance because § 241 (a) (1) of the Act only commands the deportation of aliens "excludable by the law existing at the time of such entry . . . ." Hence, since respondent's homosexuality did not make him excludable by any law existing at the time of his 1952 entry, it is critical to determine whether his return from a few hours in Mexico in 1956 was an "entry" in the statutory sense. If it was not, the question whether § 212 (a) (4) could constitutionally be applied to him need not be resolved.

[3] Previous cases which contain the same general kind of language, but which are distinguishable on their facts, are *Lapina* v. *Williams*, 232 U. S. 78; *Lewis* v. *Frick*, 233 U. S. 291; *United States ex rel. Claussen* v. *Day*, 279 U. S. 398; *United States ex rel. Polymeris* v. *Trudell*, 284 U. S. 279; and *United States ex rel. Stapf* v. *Corsi*, 287 U. S. 129. The only one of these cases which involved an absence from the country as extremely brief as Fleuti's is *Lewis* v. *Frick*, and

strict re-entry doctrine to aliens who had left the country for brief visits to Canada or Mexico or elsewhere were numerous,[4] many courts applied the doctrine in such instances with express reluctance and explicit recognition of its harsh consequences,[5] and there were a few instances in which district judges refused to hold that aliens who had been absent from the country only briefly had made "entries" upon their return.[6]

Reaction to the severe effects produced by adherence to the strict definition of "entry" resulted in a substantial inroad being made upon that definition in 1947 by a decision of the Second Circuit and a decision of this Court. The Second Circuit, in an opinion by Judge Learned Hand, refused to allow a deportation which depended on the alien's being regarded as having re-entered this coun-

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in that case deportation was premised on the fact that on his return from the trip in issue the alien had sought to bring a woman into the country for an immoral purpose. 233 U. S., at 297–300.

[4] *E. g., Ex parte Parianos,* 23 F. 2d 918 (C. A. 9th Cir. 1928); *United States ex rel. Medich* v. *Burmaster,* 24 F. 2d 57 (C. A. 8th Cir. 1928); *Cahan* v. *Carr,* 47 F. 2d 604 (C. A. 9th Cir. 1931), cert. denied, 283 U. S. 862; *Zurbrick* v. *Borg,* 47 F. 2d 690 (C. A. 6th Cir. 1931); *Taguchi* v. *Carr,* 62 F. 2d 307 (C. A. 9th Cir. 1932); *Ward* v. *De Barros,* 75 F. 2d 34 (C. A. 1st Cir. 1935); *Guarneri* v. *Kessler,* 98 F. 2d 580 (C. A. 5th Cir. 1938), cert. denied, 305 U. S. 648; *Del Castillo* v. *Carr,* 100 F. 2d 338 (C. A. 9th Cir. 1938); *United States ex rel. Kowalenski* v. *Flynn,* 17 F. 2d 524 (D. C. W. D. N. Y. 1927); *United States ex rel. Siegel* v. *Reimer,* 23 F. Supp. 643 (D. C. S. D. N. Y.), aff'd, 97 F. 2d 1020 (C. A. 2d Cir. 1938).

[5] *E. g., Jackson* v. *Zurbrick,* 59 F. 2d 937 (C. A. 6th Cir. 1932); *Zurbrick* v. *Woodhead,* 90 F. 2d 991 (C. A. 6th Cir. 1937); *United States ex rel. Ueberall* v. *Williams,* 187 F. 470 (D. C. S. D. N. Y. 1911); *Guimond* v. *Howes,* 9 F. 2d 412 (D. C. D. Maine 1925); *Ex parte Piazzola,* 18 F. 2d 114 (D. C. W. D. N. Y. 1926).

[6] *In re Michael Bonadino,* D. C. W. D. N. Y., unreported, Dec. 20, 1924; *United States ex rel. Valenti* v. *Karmuth,* 1 F. Supp. 370 (D. C. N. D. N. Y. 1932); *Annello ex rel. Annello* v. *Ward,* 8 F. Supp. 797 (D. C. D. Mass. 1934).

try after having taken an overnight sleeper from Buffalo to Detroit on a route lying through Canada. *Di Pasquale* v. *Karnuth,* 158 F. 2d 878. Judge Hand recognized that the alien "acquiesced in whatever route the railroad might choose to pull the car," *id.*, at 879, but held that it would be too harsh to impute the carrier's intent to the alien, there being no showing that the alien knew he would be entering Canada. "Were it otherwise," Judge Hand went on, "the alien would be subjected without means of protecting himself to the forfeiture of privileges which may be, and often are, of the most grave importance to him." *Ibid.* If there were a duty upon aliens to inquire about a carrier's route, it "would in practice become a trap, whose closing upon them would have no rational relation to anything they could foresee as significant. We cannot believe that Congress meant to subject those who had acquired a residence, to the sport of chance, when the interests at stake may be so momentous." *Ibid.* Concluding, Judge Hand said that if the alien's return were held to be an "entry" under the circumstances, his "vested interest in his residence" would

> "be forfeited because of perfectly lawful conduct which he could not possibly have supposed would result in anything of the sort. Caprice in the incidence of punishment is one of the indicia of tyranny, and nothing can be more disingenuous than to say that deportation in these circumstances is not punishment. It is well that we should be free to rid ourselves of those who abuse our hospitality; but it is more important that the continued enjoyment of that hospitality once granted, shall not be subject to meaningless and irrational hazards." *Ibid.*

Later the same year this Court, because of a conflict between *Di Pasquale* and *Del Guercio* v. *Delgadillo,* 159 F. 2d 130 (C. A. 9th Cir. 1947), granted certiorari in the

latter case and reversed a deportation order affecting an alien who, upon rescue after his intercoastal merchant ship was torpedoed in the Caribbean during World War II, had been taken to Cuba to recuperate for a week before returning to this country. *Delgadillo* v. *Carmichael,* 332 U. S. 388. The Court pointed out that it was "the exigencies of war, not his voluntary act," *id.,* at 391, which put the alien on foreign soil, adding that "[w]e might as well hold that if he had been kidnapped and taken to Cuba, he made a statutory 'entry' on his voluntary return. Respect for law does not thrive on captious interpretations." *Ibid.* Since "[t]he stakes are indeed high and momentous for the alien who has acquired his residence here," *ibid.,* the Court held that

> "[w]e will not attribute to Congress a purpose to make his right to remain here dependent on circumstances so fortuitous and capricious as those upon which the Immigration Service has here seized. The hazards to which we are now asked to subject the alien are too irrational to square with the statutory scheme." *Ibid.*

The increased protection of returning resident aliens which was brought about by the *Delgadillo* decision, both in its result and in its express approval of *Di Pasquale,* was reflected in at least two subsequent lower-court decisions prior to the enactment of § 101 (a)(13). In *Yukio Chai* v. *Bonham,* 165 F. 2d 207 (C. A. 9th Cir. 1947), the court held that no "entry" had occurred after a ship carrying a resident alien back from seasonal cannery work in Alaska made an unscheduled stop in Vancouver, B. C., and in *Carmichael* v. *Delaney,* 170 F. 2d 239 (C. A. 9th Cir. 1948), the court held that a resident alien returning from wartime service with the United States Maritime Service during which he had stopped at many foreign ports made no "entry" because all of the movements of

the ship to which he had been assigned were pursuant to Navy orders.[7]

It was in light of all of these developments in the case law that § 101 (a)(13) was included in the immigration laws with the 1952 revision. As the House and Senate Committee Reports, the relevant material from which is quoted in the margin,[8] make clear, the major congressional

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[7] It should be pointed out, however, that the Ninth Circuit has, subsequent to the decisions cited in the text, held specifically that length of time outside the country is still irrelevant to the question of "entry." *Schoeps* v. *Carmichael,* 177 F. 2d 391 (C. A. 9th Cir. 1949), cert. denied, 339 U. S. 914; *Pimental-Navarro* v. *Del Guercio,* 256 F. 2d 877 (C. A. 9th Cir. 1958).

[8] The House and Senate Committee Reports preceding enactment of the bill both contained the following relevant paragraph:

"Section 101 (a)(13) defines the term 'entry.' Frequent reference is made to the term 'entry' in the immigration laws, and many consequences relating to the entry and departure of aliens flow from its use, but the term is not precisely defined in the present law. Normally an entry occurs when the alien crosses the border of the United States and makes a physical entry, and the question of whether an entry has been made is susceptible of a precise determination. However, for the purposes of determining the effect of a subsequent entry upon the status of an alien who has previously entered the United States and resided therein, the preciseness of the term 'entry' has not been found to be as apparent. Earlier judicial constructions of the term in the immigration laws, as set forth in *Volpe* v. *Smith* (289 U. S. 422 (1933)), generally held that the term 'entry' included any coming of an alien from a foreign country to the United States whether such coming be the first or a subsequent one. More recently, the courts have departed from the rigidity of that rule and have recognized that an alien does not make an entry upon his return to the United States from a foreign country where he had no intent to leave the United States (*Di Pasquale* v. *Karnuth,* 158 F. 2d 878 (C. C. A. 2d 1947)), or did not leave the country voluntarily (*Delgadillo* v. *Carmichael,* 332 U. S. 388 (1947)). The bill defines the term 'entry' as precisely as practicable, giving due recognition to the judicial precedents. Thus any coming of an alien from a foreign port or place or an outlying possession into the United States is to be considered an entry, whether voluntary or otherwise, unless the

concern in codifying the definition of "entry" was with "the status of an alien who has previously entered the United States and resided therein . . . ." This concern was in the direction of ameliorating the harsh results visited upon resident aliens by the rule of *United States ex rel. Volpe* v. *Smith, supra,* as is indicated by the recognition that "the courts have departed from the rigidity of . . . [the earlier] rule," and the statement that "[t]he bill . . . [gives] due recognition to the judicial precedents." It must be recognized, of course, that the only liberalizing decisions to which the Reports referred specifically were *Di Pasquale* and *Delgadillo,* and that there is no indication one way or the other in the legislative history of what Congress thought about the problem of resident aliens who leave the country for insignificantly short periods of time. Nevertheless, it requires but brief consideration of the policies underlying § 101 (a)(13), and of certain other aspects of the rights of returning resident aliens, to conclude that Congress, in approving the judicial undermining of *Volpe, supra,* and the relief brought about by the *Di Pasquale* and *Delgadillo* decisions, could not have meant to limit the meaning of the exceptions it created in § 101 (a)(13) to the facts of those two cases.

The most basic guide to congressional intent as to the reach of the exceptions is the eloquent language of *Di Pasquale* and *Delgadillo* themselves, beginning with the recognition that the "interests at stake" for the resident alien are "momentous," 158 F. 2d, at 879, and that "[t]he stakes are indeed high and momentous for the alien who has acquired his residence here," 332 U. S., at 391. This

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Attorney General is satisfied that the departure of the alien, other than a deportee, from this country was unintentional or was not voluntary." H. R. Rep. No. 1365, 82d Cong., 2d Sess. 32 (1952); S. Rep. No. 1137, 82d Cong., 2d Sess. 4 (1952).

general premise of the two decisions impelled the more general conclusion that "it is . . . important that the continued enjoyment of . . . [our] hospitality once granted, shall not be subject to meaningless and irrational hazards." 158 F. 2d, at 879. See also *Delgadillo, supra,* at 391. Coupling these essential principles of the two decisions explicitly approved by Congress in enacting § 101 (a)(13) with the more general observation, appearing in *Delgadillo* as well as elsewhere,[9] that "[d]eportation can be the equivalent of banishment or exile," it is difficult to conceive that Congress meant its approval of the liberalization wrought by *Di Pasquale* and *Delgadillo* to be interpreted mechanistically to apply only to cases presenting factual situations identical to what was involved in those two decisions.

The idea that the exceptions to § 101 (a)(13) should be read nonrestrictively is given additional credence by the way in which the immigration laws define what constitutes "continuous residence" for an alien wishing to be naturalized. Section 316 of the 1952 Act, 66 Stat. 242–243, 8 U. S. C. § 1427, which liberalized previous law in some respects, provides that an alien who wishes to seek naturalization does not begin to endanger the five years of "continuous residence" in this country which must precede his application until he remains outside the country for six months, and does not damage his position by cumulative temporary absences unless they total over half of the five years preceding the filing of his petition for naturalization. This enlightened concept of what constitutes a meaningful interruption of the continuous residence which must support a petition for naturalization, reflecting as it does a congressional judgment that an

[9] See *Ng Fung Ho* v. *White,* 259 U. S. 276, 284; *Bridges* v. *Wixon,* 326 U. S. 135, 147; *Fong Haw Tan* v. *Phelan,* 333 U. S. 6, 10; *Barber* v. *Gonzales,* 347 U. S. 637, 642–643.

alien's status is not necessarily to be endangered by his absence from the country, strengthens the foundation underlying a belief that the exceptions to § 101 (a)(13) should be read to protect resident aliens who are only briefly absent from the country. Of further, although less specific, effect in this regard is this Court's holding in *Kwong Hai Chew* v. *Colding,* 344 U. S. 590, that the returning resident alien is entitled as a matter of due process to a hearing on the charges underlying any attempt to exclude him, a holding which supports the general proposition that a resident alien who leaves this country is to be regarded as retaining certain basic rights.

Given that the congressional protection of returning resident aliens in § 101 (a)(13) is not to be woodenly construed, we turn specifically to construction of the exceptions contained in that section as they relate to resident aliens who leave the country briefly. What we face here is another harsh consequence of the strict "entry" doctrine which, while not governed directly by *Delgadillo,* nevertheless calls into play the same considerations, pp. 454–456, 458–459, *supra,* which led to the results specifically approved in the Congressional Committee Reports. It would be as "fortuitous and capricious," and as "irrational to square with the statutory scheme," *Delgadillo, supra,* at 391, to hold that an alien may necessarily be deported because he falls into one of the classes enumerated in § 212 (a) when he returns from "a couple hours" visit to Mexico as it would have been to uphold the order of deportation in *Delgadillo.* Certainly when an alien like Fleuti who has entered the country lawfully and has acquired a residence here steps across a border and, in effect, steps right back, subjecting him to exclusion for a condition for which he could not have been deported had he remained in the country seems to be placing him at the mercy of the "sport of chance" and the "meaningless and irrational hazards" to which Judge Hand alluded. *Di*

Pasquale, supra, at 879. In making such a casual trip the alien would seldom be aware that he was possibly walking into a trap, for the insignificance of a brief trip to Mexico or Canada bears little rational relation to the punitive consequence of subsequent excludability. There are, of course, valid policy reasons for saying that an alien wishing to retain his classification as a permanent resident of this country imperils his status by interrupting his residence too frequently or for an overly long period of time, but we discern no rational policy supporting application of a re-entry limitation in all cases in which a resident alien crosses an international border for a short visit.[10] Certainly if that trip is innocent, casual, and brief, it is consistent with all the discernible signs of congressional purpose to hold that the "departure . . . was not intended" within the meaning and ameliorative intent of the exception to § 101 (a)(13). Congress unquestionably has the power to exclude all classes of undesirable aliens from this country, and the courts are charged with enforcing such exclusion when Congress has directed it, but we do not think Congress intended to exclude aliens long resident in this country after lawful entry who have merely stepped across an international border and returned in "about a couple of hours." Such a holding would be inconsistent with the general purpose of

[10] Compare Bernard, American Immigration Policy (1950), 296; Gordon, When Does an Alien Enter the United States? 9 Fed. B. J. 248, 250, 258–259 (1948); Hofstein, The Returning Resident Alien, 10 Intra. L. Rev. 271, 273, 280 (1955); Konvitz, Civil Rights in Immigration (1953), 92; Maslow, Recasting Our Deportation Law: Proposals for Reform, 56 Col. L. Rev. 309, 327–329 (1956); Report of the President's Commission on Immigration and Naturalization, Whom We Shall Welcome (1953), 179–180, 199–200; Note, Rights of Aliens in Exclusion Proceedings, 3 Utah L. Rev. 349, 350 n. 20 (1953); Note, Limitations on Congressional Power to Deport Resident Aliens Excludable as Psychopaths at Time of Entry, 68 Yale L. J. 931, 937–938 n. 25 (1959).

Congress in enacting § 101 (a)(13) to ameliorate the severe effects of the strict "entry" doctrine.

We conclude, then, that it effectuates congressional purpose to construe the intent exception to § 101 (a)(13) as meaning an intent to depart in a manner which can be regarded as meaningfully interruptive of the alien's permanent residence. One major factor relevant to whether such intent can be inferred is, of course, the length of time the alien is absent. Another is the purpose of the visit, for if the purpose of leaving the country is to accomplish some object which is itself contrary to some policy reflected in our immigration laws, it would appear that the interruption of residence thereby occurring would properly be regarded as meaningful. Still another is whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country. Although the operation of these and other possibly relevant factors remains to be developed "by the gradual process of judicial inclusion and exclusion," *Davidson* v. *New Orleans*, 96 U. S. 97, 104, we declare today simply that an innocent, casual, and brief excursion by a resident alien outside this country's borders may not have been "intended" as a departure disruptive of his resident alien status and therefore may not subject him to the consequences of an "entry" into the country on his return. The more civilized application of our immigration laws given recognition by Congress in § 101 (a)(13) and other provisions of the 1952 Act protects the resident alien from unsuspected risks and unintended consequences of such a wholly innocent action. Respondent here, so far as appears from the record, is among those to be protected. However, because attention was not previously focused upon the application of § 101 (a)(13) to the case, the record contains no detailed description or characterization of his

trip to Mexico in 1956, except for his testimony that he was gone "about a couple hours," and that he was "just visiting; taking a trip." That being the case, we deem it appropriate to remand the case for further consideration of the application of § 101 (a)(13) to this case in light of our discussion herein. If it is determined that respondent did not "intend" to depart in the sense contemplated by § 101 (a)(13), the deportation order will not stand and adjudication of the constitutional issue reached by the court below will be obviated. The judgment of the Court of Appeals is therefore vacated and the case remanded with directions that the parties be given leave to amend their pleadings to put in issue the question of "entry" in accordance with the foregoing, and for further proceedings consistent herewith.

So ordered.

MR. JUSTICE CLARK, with whom MR. JUSTICE HARLAN, MR. JUSTICE STEWART and MR. JUSTICE WHITE join, dissenting.

I dissent from the Court's judgment and opinion because "statutory construction" means to me that the Court can *construe* statutes but not that it can *construct* them. The latter function is reserved to the Congress, which clearly said what it meant and undoubtedly meant what it said when it defined "entry" for immigration purposes as follows:

> "The term 'entry' means any coming of an alien into the United States, from a foreign port or place or from an outlying possession, whether voluntarily or otherwise, except that an alien having a lawful permanent residence in the United States shall not be regarded as making an entry into the United States for the purposes of the immigration laws if the alien proves to the satisfaction of the Attorney General

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> that his departure to a foreign port or place or to an outlying possession was not intended or reasonably to be expected by him or his presence in a foreign port or place or in an outlying possession was not voluntary. . . ." 8 U. S. C. § 1101 (a)(13).

That this definition of "entry" includes the respondent's entry after his brief trip to Mexico in 1956 is a conclusion which seems to me inescapable. The conclusion is compelled by the plain meaning of the statute, its legislative history, and the consistent interpretation by the federal courts. Indeed, the respondent himself did not even question that his return to the United States was an "entry" within the meaning of § 101 (a)(13). Nonetheless, the Court has rewritten the Act *sua sponte,* creating a definition of "entry" which was suggested by many organizations during the hearings prior to its enactment but which was rejected by the Congress. I believe the authorities discussed in the Court's opinion demonstrate that "entry" as defined in § 101 (a)(13) cannot mean what the Court says it means, but I will add a few words of explanation.

The word "entry" had acquired a well-defined meaning for immigration purposes at the time the Immigration and Nationality Act was passed in 1952. The leading case was *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422 (1933), which held that an alien who had resided continuously in the United States for 26 years except for a brief visit to Cuba made an "entry" at the time of his return from Cuba. The Court there stated that the word "entry" in the Immigration Act of 1917 "includes any coming of an alien from a foreign country into the United States whether such coming be the first or any subsequent one." *Id.,* at 425. That conclusion was based on sound authority, since the Court had earlier held that a resident alien who crossed the river from Detroit to Windsor, Canada, and returned on the same day made

an "entry" upon his return. *Lewis* v. *Frick,* 233 U. S. 291 (1914).

The federal courts in numerous cases were called upon to apply this definition of "entry" and did so consistently, specifically recognizing that the brevity of one's stay outside the country was immaterial to the question of whether his return was an "entry." See, *e. g., United States ex rel. Kowalenski* v. *Flynn,* 17 F. 2d 524 (D. C. W. D. N. Y. 1927); *Schoeps* v. *Carmichael,* 177 F. 2d 391 (C. A. 9th Cir. 1949). A related but obviously distinguishable question did create difficulties for the courts, however, leading to conflicting opinions among the Circuits as to whether a resident alien makes an "entry" when he had no intent to leave the country or did not leave voluntarily. It was decided by this Court in *Delgadillo* v. *Carmichael,* 332 U. S. 388 (1947), which held that an alien whose ship had been torpedoed and sunk, after which he was rescued and taken to Cuba for a week, did not make an "entry" on his return to the United States. The Court discussed the *Volpe* case but distinguished it and others on the ground that "those were cases where the alien plainly expected or planned to enter a foreign port or place. Here he was catapulted into the ocean, rescued, and taken to Cuba. He had no part in selecting the foreign port as his destination." *Id.,* at 390. The Court specifically relied on *Di Pasquale* v. *Karnuth,* 158 F. 2d 878 (C. A. 2d Cir. 1947), where an alien who had ridden a sleeping car from Buffalo to Detroit, without knowledge that the train's route was through Canada, was held not to have made an "entry" upon his arrival in Detroit.

These cases and others discussed by the Court establish the setting in which the Immigration and Nationality Act was passed in 1952. The House and Senate reports quoted by the Court show that the Congress recognized the courts' difficulty with the rule that "any coming" of

an alien into the United States was an "entry," even when the departure from the country was unintentional or involuntary. The reports discuss the broad rule of the *Volpe* case and the specific limitations of the *Di Pasquale* and *Delgadillo* cases, citing those cases by name, and conclude with the following language:

> "The bill defines the term 'entry' as precisely as practicable, giving due recognition to the judicial precedents. Thus any coming of an alien from a foreign port or place or an outlying possession into the United States is to be considered an entry, whether voluntary or otherwise, unless the Attorney General is satisfied that the departure of the alien, other than a deportee, from this country was unintentional or was not voluntary." H. R. Rep. No. 1365, 82d Cong., 2d Sess. 32; S. Rep. No. 1137, 82d Cong., 2d Sess. 4.

Thus there is nothing in the legislative history or in the statute itself which would exempt the respondent's return from Mexico from the definition of "entry." Rather, the statute in retaining the definition expressed in *Volpe* seems clearly to cover respondent's entry, which occurred after he knowingly left the United States in order to travel to a city in Mexico. That the trip may have been "innocent, casual, and brief" does not alter the fact that, in the words of the Court in *Delgadillo,* the respondent "plainly expected or planned to enter a foreign port or place." 332 U. S., at 390.

It is true that this application of the law to a resident alien may be harsh, but harshness is a far cry from the irrationality condemned in *Delgadillo, supra,* at 391. There and in *Di Pasquale* contrary results would have meant that a resident alien, who was not deportable unless he left the country and reentered, could be deported as a result of circumstances either beyond his control or

beyond his knowledge. Here, of course, there is no claim that respondent did not know he was leaving the country to enter Mexico and, since one is presumed to know the law, he knew that his brief trip and reentry would render him deportable. The Congress clearly has chosen so to apply the long-established definition, and this Court cannot alter that legislative determination in the guise of statutory construction. Had the Congress not wished the definition of "entry" to include a return after a brief but voluntary and intentional trip, it could have done so. The Court's discussion of § 316 of the Act shows that the Congress knows well how to temper rigidity when it wishes. Nor can it be said that the Congress was unaware of the breadth of its definition. Even aside from the evidence that it was aware of the judicial precedents, numerous organizations unsuccessfully urged that the definition be narrowed to accomplish what the Court does today. Thus, it was urged that the Act's definition of "entry" "should, we believe, be narrowed so that it will not be applicable to an alien returning from abroad, after a temporary absence, to an unrelinquished domicile here." [1] Other groups complained also that "[t]he term 'entry' is defined to mean any coming of an alien into the United States. It is recommended that this be narrowed to provide that a return, after a temporary absence, to an unrelinquished domicile, shall not constitute a new entry." [2] Despite such urging, however, the Congress made no change in the definition. Further, this Court

[1] Statement of Edward J. Ennis, Representing the American Civil Liberties Union, printed in Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 716, H. R. 2379, and H. R. 2816, 82d Cong., 1st Sess. 143.

[2] Recommendations and Suggestions With Respect to Titles I and II of S. 716 and H. R. 2379, printed in Joint Hearings, *supra,* note 1, at 617. See also Testimony of Stanley H. Lowell on Behalf of Americans for Democratic Action, *id.,* at 445.

in 1958 specifically recognized that the word "entry" retained its plain meaning, stating that "a resident alien who leaves the country for any period, however brief, does make a new entry on his return . . . ." *Bonetti* v. *Rogers*, 356 U. S. 691, 698.

All this to the contrary notwithstanding, the Court today decides that one does not really intend to leave the country unless he plans a long trip, or his journey is for an illegal purpose, or he needs travel documents in order to make the trip. This is clearly contrary to the definition in the Act and to any definition of "intent" that I was taught.[3]

What the Court should do is proceed to the only question which either party sought to resolve: whether the deportation order deprived respondent of due process of law in that the term "afflicted with psychopathic personality," as it appears in § 212 (a)(4) of the Act, is unconstitutionally vague. Since it fails to do so, I must dissent.

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[3] See, *e. g.*, *Morissette* v. *United States*, 342 U. S. 246 (1952); Hall, General Principles of Criminal Law (2d ed. 1960), 105–145; Prosser, Torts (2d ed. 1955), 29–30.

GASTELUM-QUINONES *v.* KENNEDY, ATTORNEY GENERAL.

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

Nos. 39 and 293. Argued March 19, 1963.—
Decided June 17, 1963.

Petitioner, an alien long resident in this country, was ordered deported on the ground that, for a period in 1949 and 1950, he was a member of the Communist Party, within the meaning of § 241 (a)(6)(C) of the Immigration and Nationality Act of 1952. In the deportation hearing, the evidence consisted solely of the testimony of two government witnesses that, between either late 1948 or early 1949 and the end of 1950 or early 1951, petitioner was a dues-paying member of a club of the Communist Party in Los Angeles and that he attended about 15 meetings of this club, one executive meeting of the group and one area party convention. Petitioner chose to introduce no evidence. *Held:* On the record in this case, the Government did not sustain its burden of establishing that petitioner's association with the Communist Party was meaningful, as contemplated by § 241 (a)(6)(C), and the deportation order cannot stand. *Rowoldt* v. *Perfetto*, 355 U. S. 115. Pp. 470–480.

(a) In deportation cases such as this, the ultimate burden is on the Government to establish that the alien was a meaningful member of the Communist Party; and there is insufficient evidence in this record to support such a finding. Pp. 473–478.

(b) Because deportation is a drastic sanction and because the Government's witnesses might well have been able, if asked, to testify concerning the character of petitioner's association with the Party, the deportation order cannot be sustained on a bare inference based upon petitioner's failure to produce or elicit evidence in response to the Government's proof that he paid dues to the Party and attended some meetings. Pp. 479–480.

Reversed.

David Rein argued the cause for petitioner. With him on the briefs was *Joseph Forer*.

Bruce J. Terris argued the cause for respondent. With him on the brief were *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This case, stripped of its procedural complexities, raises the question whether an alien long resident in this country is deportable because, for a period during 1949 and 1950, he paid dues to and attended several meetings of a club of the Communist Party in Los Angeles. The Immigration and Naturalization Service sought and obtained an order for petitioner's deportation on the ground that these facts established petitioner's membership in the Communist Party of the United States within the meaning of § 241 (a)(6)(C) of the Immigration and Nationality Act of 1952, 66 Stat. 163, 204–205, 8 U. S. C. § 1251 (a)(6)(C).[1] Whether membership was so established turns on the application of two decisions of this Court which construed the immediate predecessor of § 241 (a)(6)(C), § 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006, 1008. In *Galvan* v. *Press,* 347 U. S. 522, 528, it was held that deportability on the ground of Communist Party membership turns on whether the alien was "aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization . . . ," and

[1] "(a) Any alien in the United States . . . shall, upon the order of the Attorney General, be deported who—

. . . . . .

"(6) is or at any time has been after entry, a member of any of the following classes of aliens:

. . . . . .

"(C) Aliens who are members of or affiliated with (i) the Communist Party of the United States . . . ."

in *Rowoldt* v. *Perfetto,* 355 U. S. 115, 120, it was held, in elaboration of *Galvan,* that the alien must have had a "meaningful association" with the Communist Party in order to be deportable. The evidence in the record, to which the standards set forth in these decisions must be applied, was all elicited at hearings before the Service's special inquiry officer in 1956. This evidence consists solely of the testimony of two government witnesses, petitioner having chosen to introduce no evidence.

The special inquiry officer entered a deportation order against petitioner on February 28, 1957. The Board of Immigration Appeals dismissed petitioner's appeal on November 14, 1957, on the ground that the record established his voluntary membership in the Communist Party. A few weeks later, this Court decided *Rowoldt* v. *Perfetto, supra,* and petitioner asked the Board to reconsider its decision in light of the opinion in that case. The Board denied the application, pointing out that the record as it stood still supported the deportation order. It did, however, order a reopening of the proceedings before the special inquiry officer so that petitioner might have a chance to offer rebuttal testimony and thereby bring himself, possibly, within the framework of the *Rowoldt* decision.

At the reopened hearing, however, petitioner's counsel took the position that on the record as it stood the Government had failed to establish Communist Party membership in the sense contemplated by the *Rowoldt* decision, and therefore chose not to offer further evidence. The Government also offered no additional evidence. The special inquiry officer reaffirmed his previous decision and the Board of Immigration Appeals on May 18, 1959, dismissed petitioner's appeal. Petitioner thereupon filed an action in Federal District Court for review of the deportation order. That court granted the Government's motion for summary judgment and dismissed the action. The United States Court of Appeals for the District of

Columbia Circuit affirmed the dismissal, 109 U. S. App. D. C. 267, 286 F. 2d 824, and this Court denied a petition for certiorari, 365 U. S. 871.

Petitioner read the Court of Appeals' opinion as suggesting that § 241 (a)(6)(C) would not have applied to him if he had introduced evidence that he had not personally advocated the forcible overthrow of the Government.[2] He therefore moved before the Board of Immigration Appeals that the deportation hearing be reopened to permit him to introduce evidence that he did not personally advocate the violent overthrow of the Government. The Board of Immigration Appeals heard oral argument on the motion and, on August 1, 1961, denied it.

Petitioner then brought the present action in the District Court, praying that the Board be ordered to reopen the deportation hearing and that the Attorney General and his agents be enjoined from enforcing the outstanding deportation order. A preliminary injunction to the latter effect was also requested. The court denied the motion for preliminary injunction on August 14, 1961, and the Court of Appeals summarily affirmed this denial on September 13. Petitioner filed a petition for certiorari in this Court to review the denial of preliminary injunctive relief, and THE CHIEF JUSTICE ordered deportation stayed until the petition should be disposed of. Meanwhile, summary judgment was granted the Government on the merits of petitioner's complaint, which was thereupon dismissed, a disposition which was summarily affirmed by the Court of Appeals on February 23, 1962. Petitioner filed an additional petition for certiorari to review this judgment. We granted both petitions. 371 U. S. 860. No. 39 involves the preliminary injunction,

[2] There is no dispute before this Court, nor could there be, that under *Galvan, supra,* at 528, the absence of personal advocacy of violent overthrow is not by itself a bar to deportability under § 241 (a)(6)(C). See pp. 473–474, *infra.*

and No. 293 relates to the ultimate dismissal of petitioner's complaint on the merits.

In determining whether, on the record before us, the Government has fulfilled its burden of proving that petitioner was a "member" of the Communist Party of the United States within the meaning of § 241 (a)(6)(C), we must recognize at the outset what the history of the times amply demonstrates,[3] that some Americans have joined the Communist Party without understanding its nature as a distinct political entity. The *Rowoldt* decision, as well as other decisions of this Court, reflects that there is a great practical and legal difference between those who firmly attach themselves to the Communist Party being aware of all of the aims and purposes attributed to it, and those who temporarily join the Party, knowing nothing of its international relationships and believing it to be a group solely trying to remedy unsatisfactory social or economic conditions, carry out trade-union objectives, eliminate racial discrimination, combat unemployment, or alleviate distress and poverty.[4] Although the Court specifically recognized in *Galvan, supra,* at 528, that "support, or even demonstrated knowledge, of the Communist Party's advocacy of violence was not intended to be a prerequisite to deportation," it did condition deportability on the alien's awareness of the "distinct and active political" nature of the Communist Party, *ibid.* This, together with the requirement of "meaningful association" enunciated in *Rowoldt, supra,* at 120, led the Court to declare later that in *Galvan* and *Rowoldt* it

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[3] See, *e. g.,* Aaron, Writers on the Left (1961), 149–160; Decter, The Profile of Communism (1961), 50–51; Ernst and Loth, Report on the American Communist (1952), *passim;* Glazer, The Social Basis of American Communism (1961), 115 and *passim.*

[4] Compare *Yates* v. *United States,* 354 U. S. 298, 327–333; *Scales* v. *United States,* 367 U. S. 203, 222–223, 230–255; *Noto* v. *United States,* 367 U. S. 290.

had "had no difficulty in interpreting 'membership' . . . as meaning more than the mere voluntary listing of a person's name on Party rolls." *Scales* v. *United States,* 367 U. S. 203, 222.

The operation in practice of this wise distinction is illustrated by *Rowoldt,* to which we think the present case is analogous on its facts. In *Rowoldt,* the sole evidence in the record was Rowoldt's statement to an inspector of the Immigration and Naturalization Service, in the course of which he admitted voluntary membership but said nothing which indicated that he had been aware while a member that the Communist Party was a "distinct and active political organization." Mr. Justice Frankfurter, speaking for the Court, concluded that "[f]rom his own testimony in 1947, which is all there is, the dominating impulse to his 'affiliation' with the Communist Party may well have been wholly devoid of any 'political' implications." 355 U. S., at 120. The Court therefore decided that the record was too insubstantial to support the order of deportation. The same is true here. The testimony of the two government witnesses establishes only that between either late 1948 or early 1949 and the end of 1950 or early 1951 petitioner was a dues-paying member of a club of the Communist Party in Los Angeles, and that he attended about 15 meetings of his Party club, one executive meeting of the group, and one area Party convention.

One witness, Scarletto, testified to having joined the Communist Party in Los Angeles in 1947 "under the supervision of the F. B. I." At a date which he did not recall, but which he thought was in late 1948 or early 1949, Scarletto was assigned to the El Sereno Club, which "was one of the large divisions [of the Communist Party] which was split up later." There were "approximately 32 members in the El Sereno Club at that time," and Scarletto was the press director of the club. Scarletto was only in the El Sereno Club for "a few months" when

it "was split up into smaller units for security reasons." During these few months, Scarletto testified, he was introduced to petitioner at an El Sereno Club meeting and saw him there one other time. Since attendance at club meetings was restricted to Communist Party members, Scarletto inferred that petitioner was a member of the Party.

Scarletto was next assigned, some time in early 1949, to the Mexican Concentration Club, which, he testified, was also a unit of the Communist Party of the United States. Petitioner, he said, was put into the same new group. Scarletto shortly became organization secretary of this group, a job which, among other things, gave him the duty of collecting dues, and he testified that he collected dues from petitioner. Scarletto left the Concentration Club in early 1951, when he was transferred by the Party "to the underground."

Concentration Club meetings were held weekly. Petitioner, Scarletto testified, "just went once in awhile, but he was a regular member." Over the approximately two-year period of Scarletto's membership in the Concentration Club, during which he attended "most" of its meetings, he testified that he saw petitioner at "about 15" meetings. All but "a couple" of these, he said, were restricted to Communist Party members. Although meetings were held in members' homes, Scarletto did not recall any at petitioner's home and said that he himself had never been in petitioner's home. Scarletto did not remember whether petitioner ever held "an official position" in either the El Sereno Club or the Mexican Concentration Club. Finally, Scarletto, who attended Communist Party conventions in the Los Angeles area with some regularity, recalled seeing petitioner at one such convention. He said he himself attended these conventions in an official capacity, but did not know in what capacity petitioner attended, except that membership in the Party was a prerequisite to attendance.

The other witness, one Elorriaga, testified that he, too, joined the Communist Party in Los Angeles in 1947. He, too, was a member of the El Sereno Club, but did not meet petitioner until he was assigned to a smaller unit "known as the Forty-Fifth Concentration," which apparently was the same entity as the "Mexican Concentration Club" discussed by Scarletto. Elorriaga did not recall petitioner as being a member of the El Sereno Club. Elorriaga's testimony as to the frequency of petitioner's attendance at Concentration Club meetings was contradictory. After having testified on direct examination that he saw petitioner at three or four meetings a month, Elorriaga radically revised his estimate the next day on redirect examination to say that he saw petitioner at "about two or three meetings" in total, adding that "I was present at one meeting in 1951 and another in 1949 with . . . [petitioner]." [5] The over-all lack of precision of Elorriaga's answers to questions concerning petitioner is also suggested by a comparison of his assertion that petitioner must have been an official of the club "because he attended a few [of its] executive meetings," with his immediately following admission that he himself remembered being present at only one executive meeting with petitioner.

The evidence contained in the record is thus extremely insubstantial in demonstrating the "meaningful" char-

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[5] Elorriaga's testimony on direct examination was as follows:

"Q. Now you say you met him in meetings of that club, how often would you say you saw the respondent in meetings of that club?

"A. How often, about maybe three or four meetings a month."

One possible explanation of the apparent contradiction is that Elorriaga understood the question on direct examination as merely an inquiry into how often club meetings were held, and answered accordingly. This is borne out to some extent by the fact that the witness gave his "revised" answer to the question on two separate occasions, some minutes apart, during the redirect examination.

acter of petitioner's association with the Party, either directly, by showing that he was, during the time of his membership, sensible to the Party's nature as a political organization, or indirectly, by showing that he engaged in Party activities to a degree substantially supporting an inference of his awareness of the Party's political aspect.[6]

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[6] Since some activities may be engaged in without the requisite awareness, satisfaction of the Government's burden as to the ultimate fact of "meaningful association" by evidence of activities instead of by direct evidence of awareness of the Party's "distinct and active political" nature must be based upon evidence of activities sufficient to give substantial support to an inference of the alien's awareness of the Party's political aspect. The sole aspect of the witness Scarletto's testimony which might have implied that petitioner's association with the Party was "meaningful" was his reference to having seen petitioner at one Los Angeles area convention of the Party. However, in contrast to the testimony in *Niukkanen* v. *McAlexander*, 362 U. S. 390, note 7, *infra*, Scarletto neither described what petitioner would have heard at the convention nor suggested that there was any prerequisite such as officership or executive responsibility to petitioner's attendance at the convention. Scarletto said that the nature of such conventions generally was that "they would have discussions on what was going on in the Party, and what drives were coming up," but did not elaborate this statement with reference to the convention that petitioner attended or to what petitioner did there. Scarletto could only be sure that petitioner had to be a member to be present. The only facet of Elorriaga's testimony which touched upon the qualitative aspect of petitioner's membership was his statement that he had seen petitioner at one executive board meeting of the Party unit. However, in contrast to the testimony in *Galvan*, *supra*, at 524, 529, he only supposed petitioner to have been an "official of the club" because of petitioner's presence at an executive meeting which Elorriaga thought was "probably" limited to "officials of the club," and he did not elaborate specifically upon the significance of petitioner's presence at the one meeting, making only the general statement that "[a]t this time I cannot say definitely the purpose [of that meeting] but it was either organizational or to form an agenda for the regular meeting." Thus, none of the testimony of either Scarletto or Elorriaga was significantly probative of petitioner's "meaningful association" with the Party.

In one sense, indeed, this record is even less substantial in support of the deportation order than was the record in *Rowoldt,* because, although Rowoldt stated that he joined thinking the Party's aim was "to get something to eat for the people," 355 U. S., at 117, it was also true that he had worked as a salesman in a bookstore which was "an official outlet for communist literature," *id.,* at 118, and that he showed some awareness of Communist philosophy and tactics in response to questioning by the immigration inspector. Bearing in mind that the ultimate burden in deportation cases such as this is on the Government, it is apparent that here, as in *Rowoldt,* there is insufficient evidence to support the deportation order.[7]

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[7] This Court's later *per curiam* decision in *Niukkanen* v. *McAlexander,* 362 U. S. 390, in no way qualified the meaning of *Rowoldt,* since the evidence in the record in *Niukkanen* clearly showed "meaningful association." See *Niukkanen* v. *McAlexander,* 265 F. 2d 825 (C. A. 9th Cir. 1959). Two witnesses testified for the Government. Both confirmed Niukkanen's Party membership and his regular attendance at meetings. In addition, one witness testified that Niukkanen helped in the distribution of a Communist-controlled trade-union newspaper edited by the witness, and actively participated in discussions at the newspaper office and elsewhere pertaining to policies of the Communist Party and circulation of the newspaper as a Communist organ. This witness also testified that Niukkanen had attended a regional "plenum" of the Party—a meeting wherein all aspects of regional Party activities were reported on. Such a meeting, said the witness, was only for the "anointed people," the "top fraction" in the Party, to which, the witness added, Niukkanen belonged. The other witness, who had been a member of the same unit of the Party as Niukkanen, added that Niukkanen, although never an officer of the unit, was a member of its executive board.

Nor is *Galvan, supra,* which was decided before *Rowoldt,* inconsistent with either that case or the present one. Mr. Justice Frankfurter, who wrote the Court's opinions in both *Galvan* and *Rowoldt,* stated in *Rowoldt* that "[t]he differences on the facts between *Galvan* v. *Press, supra,* and this case are too obvious to be detailed." 355 U. S., at 121.

As against the slimness of the evidence that it introduced, the Government seeks the benefit of an inference, based upon petitioner's failure to produce or elicit evidence in response to the Government's proof that he paid dues to the Party and attended some meetings, that his association with the Party was "more than the mere voluntary listing of . . . [his] name on Party rolls." *Scales, supra,* at 222. It is a sufficient answer to the Government's argument to point out that, as recognized in *Galvan, supra,* at 530, and *Rowoldt, supra,* at 120, deportation is a drastic sanction, one which can destroy lives and disrupt families, and that a holding of deportability must therefore be premised upon evidence of "meaningful association" more directly probative than a mere inference based upon the alien's silence.[8] Moreover, the fact is that the Government might well have asked its two witnesses about petitioner's knowledge of the Party as a political entity and about the qualitative nature of petitioner's activities in the Party. If it were the fact that petitioner was more aware of the Party's nature than this record shows, the Government's witnesses could likely have given testimony, either about petitioner's knowledge or about his Party activities, which would have tended to prove that awareness. With the facts concerning the nature of petitioner's association perhaps near at hand, and in light of both the possibility that those facts would not be consistent with a finding of "meaningful association" and the harshness of the deportation sanction, we cannot sustain petitioner's deportation upon a bare inference which the Government would have us derive from petitioner's failure to introduce evidence in

[8] In the present case, for example, deportation would remove a man who has resided in this country since 1920 when he came from Mexico as a 10-year-old boy, and has raised and supported a family who are all American citizens.

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response to the Government's proof of his dues-paying membership and sometime attendance at Party meetings.

We are hence confronted with a case in which the Government did not sustain its burden of establishing that petitioner was a meaningful member of the Party as contemplated by § 241 (a)(6)(C). To paraphrase the holding of *Rowoldt, supra,* at 120: from the testimony of the two government witnesses, which is all there is, the dominating impulse to petitioner's affiliation with the Communist Party may well have been wholly devoid of any "political" implications. We hold that, on the record before us, the deportation order against petitioner is not supported by substantial evidence, *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, and therefore cannot stand.[9]

Judgment reversed.

MR. JUSTICE WHITE, whom MR. JUSTICE CLARK, MR. JUSTICE HARLAN and MR. JUSTICE STEWART join, dissenting.

Petitioner is charged with being an alien who after entry had become a member of the Communist Party, and thus subject to deportation under § 241 (a)(6)(C) of the Immigration and Nationality Act of 1952. Hearings were held from April through July 1956, at which the United States introduced testimony of two witnesses as to petitioner's affiliation with Communist Party units in Los Angeles from 1949 to 1951, but petitioner refused to answer any question concerning his membership in the

[9] Our disposition of the case makes it unnecessary to consider petitioner's contention that "at least the spirit" of 28 U. S. C. § 46 was violated when the panel of the Court of Appeals assigned to hear petitioner's appeal in the current series of proceedings transferred the appeal instead to the same panel which had heard his first appeal, 109 U. S. App. D. C. 267, 286 F. 2d 824, it being clearly predictable that one of the three judges on that panel would not participate, since he had been unable to participate in the disposition of the first appeal.

Communist Party. The special inquiry officer found petitioner deportable under § 241 (a)(6)(C) and the Board of Immigration Appeals dismissed the petitioner's appeal on November 14, 1957, holding that the evidence established a prima facie case of membership which petitioner made no attempt to rebut. On January 13, 1958, after this Court's decision in *Rowoldt* v. *Perfetto,* 355 U. S. 115, the Board of Immigration Appeals reconsidered petitioner's case in light of *Rowoldt.* Noting that, unlike the petitioner in *Rowoldt,* petitioner here had offered no evidence which would upset the normal inference of political awareness flowing from his two-year association with the Communist Party at a time when the purposes and activities of the Party were a matter of public record, the Board granted petitioner's request to reopen the proceedings in order that he might present testimony which would bring him within *Rowoldt.* At the reopened hearings, however, petitioner offered no evidence but merely introduced a statement asserting that the existing record did not establish meaningful membership and suggesting that the Government present additional evidence. The special inquiry officer, after reexamining the record, adhered to his original conclusion that the evidence showed voluntary, meaningful membership in the Communist Party. On appeal to the Board of Immigration Appeals, that body, after examining the record again, reaffirmed its decision that the testimony established meaningful membership within the *Rowoldt* case. Petitioner filed a petition for declaratory and injunctive relief in the District Court to review the deportation order and, after still another examination of the order and the supporting record, the court granted the Board's motion for summary judgment. The Court of Appeals held that "the findings of the Board that [petitioner's] Party membership was meaningful is established by the record," 109 U. S. App. D. C. 267, 271, 286 F. 2d 824, 828,

and affirmed. In a petition for certiorari to this Court, petitioner argued that the evidence was insufficient to support the deportation order, but certiorari was denied, 365 U. S. 871.

Petitioner thereupon commenced the proceedings which bring the case before us today. He filed a motion to reopen the proceedings before the Board of Immigration Appeals on the ground that he should be permitted to testify that he never personally advocated the overthrow of the Government by force and violence. While not disputing that an inquiry into whether an alien personally advocated violent overthrow is immaterial in deportation proceedings, *Galvan* v. *Press*, 347 U. S. 522, petitioner nonetheless insisted upon introducing the testimony because, as he read the opinion of the Court of Appeals, 109 U. S. App. D. C. 267, 286 F. 2d 824, proof that an alien did not personally espouse the cause of violent overthrow of the Government would save him from deportation under § 241 (a)(6)(C). The Board of Immigration Appeals declined to reopen the proceedings again, because in its view the Court of Appeals did not announce the rule on which petitioner relied and because *Galvan* v. *Press* and *Rowoldt* v. *Perfetto* so clearly held that proof of such a personal commitment to the tenet of violent overthrow was not required for deportation proceedings. After reviewing the record for the third time, the Board concluded that "there is uncontradicted testimony to show that a voluntary meaningful membership existed." Petitioner filed his second action for judicial review, contending that the refusal to reopen the hearings so that he could submit his testimony was "erroneous, unconstitutional and illegal." The District Court, finding no abuse of discretion in the Board's refusal to reopen the proceedings, declined to disturb the deportation order. The Court of Appeals affirmed, the case was brought here and the Court now reverses. I respectfully dissent.

First. The issue tendered to the District Court was whether the Board of Immigration Appeals should have reopened the record to allow petitioner to present evidence of the kind stated in the affidavit attached to the complaint. Both the District Court and the Court of Appeals upheld the Board's refusal to reopen the proceedings. The Court here does not disagree, nor does it suggest that the evidence which petitioner sought to add to the record was in any way material to the question of deportability under the statute. Instead, it decides that the record does not show meaningful or voluntary membership, thus resurrecting an issue supposedly settled in previous proceedings in this case, an issue which the courts below time after time decided contrary to the view now taken by this Court and an issue which the Court itself previously declined to review by certiorari. A wise use of the Court's powers would confine decision here to the issue presented to the District Court, rather than afford repeated review of previously decided matters and so call into question the integrity of the administrative and judicial process.

Second. Shaughnessy v. *Pedreiro,* 349 U. S. 48, held that an alien could, by bringing an action for declaratory judgment and injunction, secure judicial review of a "final" order of deportation under § 10 of the Administrative Procedure Act. This is such an action, as the complaint expressly states, and affirmance of the order of deportation is required in this case unless the administrative findings are not supported by substantial evidence. Although the order must "be set aside when the record before a Court . . . clearly precludes the Board's decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both," review under § 10 does not "mean that even as to matters not requiring expertise a court may displace the Board's

choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it *de novo*." *Universal Camera Corp.* v. *Labor Board,* 340 U. S. 474, 488, 490. "It is . . . immaterial that the facts permit the drawing of diverse inferences. The [agency] alone is charged with the duty of initially selecting the inference which seems most reasonable and [its] choice, if otherwise sustainable, may not be disturbed by a reviewing court." *Cardillo* v. *Liberty Mutual Co.,* 330 U. S. 469, 478.

If *Galvan* v. *Press* and *Rowoldt* v. *Perfetto* are not to be overruled, or substantially modified, neither of which petitioner has requested here, and if the substantial evidence rule is not to be abandoned, there is ample basis on this record to sustain the finding of voluntary, meaningful membership. Petitioner was a regular dues-paying member of the Party, at least from 1949 to 1951, and there is no evidence that his membership terminated at the latter date. When the Party was reorganized into smaller units, petitioner was transferred to a new group and he was seen 15 times ("it could be 15, it could be more") at meetings of the unit which were restricted to Party members. "He was an official of the club because he attended a few executive meetings of the Forty-Fifth," at one of which he was seen by the government witness. This meeting was "either organizational or to form an agenda for the regular meeting." Attendance at executive meetings was restricted "to Party members and probably officials of the club." At one time petitioner was transferred out of the Mexican Concentration Club "for some other job." Petitioner was also known to have attended at least one Party convention, attendance at which was restricted to Party members—"you had to face the panel and give your club, your position of that club, and be identified by members that were on the, on this panel, before you were admitted." At the conventions,

"they would have discussions on what was going on in the Party, and what drives were coming up."

These facts are sufficient basis for the Board's finding of voluntary, meaningful membership.* After regular attendance at Party meetings and functions, and regular financial support for its activities, it is rather fanciful to believe petitioner was still unaware of the political nature of the Communist Party. It is doubtful that the meetings were so ineptly run or structured.

To be sure, facts purporting to show voluntary membership can be explained away and rendered meaningless by further facts as in *Rowoldt*. But here petitioner did not testify and did not attempt to characterize or to limit the significance of his association with the Party. In the circumstances "it is enough that the alien joined the Party, aware that he was joining an organization known as the Communist Party which operates as a distinct and active political organization, and that he did so of his own free will. A fair reading of the legislation requires that this scope be given to what Congress enacted . . . ." *Galvan* v. *Press*, 347 U. S., at 528.

I would therefore affirm the repeated holdings of the courts below, made after several thorough examinations of the record. "This is not the place to review a conflict

*The Court is concerned about the insufficiency of the "direct" and "indirect" evidence of awareness and participation. The record, though, contains "direct" evidence from Scarletto, who saw petitioner at Party meetings and at a convention, and who testified that at such conventions "they would have discussions on what was going on in the Party." Elorriaga stated that he saw petitioner at an executive meeting "either organizational or to form an agenda for the regular meeting." Both witnesses testified "directly" that petitioner was a dues-paying member and attended Party meetings. To me this uncontradicted testimony plainly is "direct" evidence that petitioner was aware of the distinct and active political nature of the Communist Party or at the very least sufficient "indirect" evidence from which an inference of meaningful membership could be drawn.

of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way." *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 503. "We do no more on the issue of insubstantiality than decide that the Court of Appeals has made a 'fair assessment' of the record." *Federal Trade Comm'n* v. *Standard Oil Co.*, 355 U. S. 396, 401; *Peurifoy* v. *Commissioner*, 358 U. S. 59, 61; *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502. "This Court will intervene only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 491.

CHAMBERLIN ET AL. *v.* DADE COUNTY BOARD OF PUBLIC INSTRUCTION ET AL.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 520. Decided June 17, 1963.

Judgment vacated and case remanded.
Reported below: 143 So. 2d 21.

Leo Pfeffer and *Howard W. Dixon* for appellants.

George C. Bolles for appellees.

PER CURIAM.

The judgment is vacated and the case is remanded to the Supreme Court of Florida for further consideration in light of *Murray* v. *Curlett* and *School District of Abington Township* v. *Schempp, ante,* p. 203, both decided this day.

JAMIESON *v.* CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 1016. Decided June 17, 1963.

Appeal dismissed and certiorari denied.
Reported below: 311 F. 2d 506.

Charles W. Jamieson, appellant, *pro se.*

Solicitor General Cox, Assistant Attorney General Douglas and *Sherman L. Cohn* for appellee.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

ROBINSON ET AL. *v.* HUNTER ET AL.

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

No. 5, Misc. Decided June 17, 1963.

194 F. Supp. 423, affirmed.

L. W. Holt, Henry Halvor Jones and *Simon Lawrence Cain* for appellants.

Robert Y. Button, Attorney General of Virginia, and *R. D. McIlwaine III,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

WALKER *v.* WALKER, WARDEN, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 180, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 302 F. 2d 265.

Petitioner *pro se.*

Jack P. F. Gremillion, Attorney General of Louisiana, and *Scallan E. Walsh,* Assistant Attorney General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

DAVIS *v.* BANMILLER, WARDEN.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 3, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 289 F. 2d 925.

Petitioner *pro se.*

John A. F. Hall 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 vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

LAUGHNER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 712, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *A. G. Spicola, Jr.,* Assistant Attorney General, 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 vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

MAYS *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 871, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: See 205 Cal. App. 2d 798, 23 Cal. Rptr. 605.

Petitioner *pro se*.

Stanley Mosk, Attorney General of California, and *William E. James*, Assistant Attorney General, 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 vacated and the case is remanded for further consideration in light of *Douglas* v. *California*, 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinions in *Douglas* v. *California*, 372 U. S., at 358, 360.

BRADLEY *v.* IOWA.

APPEAL FROM THE SUPREME COURT OF IOWA.

No. 934, Misc. Decided June 17, 1963.

Appeal dismissed and certiorari denied.
Reported below: 254 Iowa 211, 116 N. W. 2d 439.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

PAIGE *v.* NORTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 884, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Thomas Wade Bruton, Attorney General of North Carolina, and *Ralph Moody,* Assistant Attorney General, 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 vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

ACUFF *v.* TEXAS.

APPEAL FROM THE COURT OF CRIMINAL APPEALS OF TEXAS.

No. 1348, Misc. Decided June 17, 1963.

Appeal dismissed for want of a substantial federal question.
Reported below: 172 Tex. Cr. R. 176, 354 S. W. 2d 939.

Appellant *pro se.*

Waggoner Carr, Attorney General of Texas, and *Sam R. Wilson, Linward Shivers, Allo B. Crow, Jr.* and *Gilbert J. Pena,* Assistant Attorneys General, for appellee.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

BRYANT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 901, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, 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 vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

KOVNER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 1136, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 149 So. 2d 550.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

CHAVEZ *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 1113, Misc. Decided June 17, 1963.

Appeal dismissed and certiorari denied.
Reported below: 208 Cal. App. 2d 248, 24 Cal. Rptr. 895.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

TRAUB *v.* CONNECTICUT.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ERRORS OF CONNECTICUT.

No. 1285, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 150 Conn. 169, 187 A. 2d 230.

Petitioner *pro se.*

John D. LaBelle and *Harry W. Hultgren, Jr.* 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 vacated and the case is remanded for further consideration in light of *Wong Sun* v. *United States,* 371 U. S. 471, and *Ker* v. *California, ante,* p. 23.

AUFLICK *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

No. 979, Misc. Decided June 17, 1963.

Motion for leave to file petition for writ of habeas corpus denied; certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *A. G. Spicola, Jr.,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. 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, certiorari is granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

SIDENER *v.* CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 1372, Misc. Decided June 17, 1963.

Appeal dismissed and certiorari denied.

Reported below: 58 Cal. 2d 645, 375 P. 2d 641.

PER CURIAM.

The appeal is dismissed. Treating the papers whereon the appeal was taken as a petition for writ of certiorari, certiorari is denied.

DAVIS, TRUSTEE, *v.* SOJA, INTERNAL REVENUE AGENT.

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

No. 271. Decided June 17, 1963.

Judgment vacated and case remanded to District Court with directions to dismiss complaint as moot.

Reported below: 303 F. 2d 601.

Walter J. Rockler for petitioner.

Solicitor General Cox for respondent.

PER CURIAM.

It appearing from the joint suggestion of mootness that this case is moot, the judgment of the United States Court of Appeals for the Seventh Circuit is vacated and the case is remanded to the United States District Court for the Northern District of Illinois with directions to dismiss the complaint as moot.

699-272 O-63-35

CARDINAL SPORTING GOODS CO., INC., ET AL. *v.* EAGLETON, ATTORNEY GENERAL OF MISSOURI, ET AL.

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

No. 904. Decided June 17, 1963.

Judgment vacated and case remanded with directions to dismiss complaint as moot.

Reported below: 213 F. Supp. 207.

Norman Diamond for appellants.

Samuel H. Liberman for appellees.

PER CURIAM.

It appearing from the motion to dismiss that this case is moot, the judgment of the United States District Court for the Eastern District of Missouri is vacated and the case is remanded with directions to dismiss the complaint as moot.

REGALADO *v.* CALIFORNIA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 10, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: See 193 Cal. App. 2d 437, 14 Cal. Rptr. 217.

Petitioner *pro se.*

Stanley Mosk, Attorney General of California, *William E. James,* Assistant Attorney General, and *S. Clark Moore,* Deputy Attorney General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment of the Supreme Court of California is vacated and the case is remanded for further consideration in light of *Ker* v. *California, ante,* p. 23, and *McDonald* v. *United States,* 335 U. S. 451.

MR. JUSTICE HARLAN concurs in the result.

DEARHART *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 48, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Reno S. Harp III, Assistant Attorney General of Virginia, 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 vacated and the case is remanded for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinions in *Douglas* v. *California,* 372 U. S., at 358, 360.

HARRIS *v.* CALIFORNIA ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

No. 135, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: See 199 Cal. App. 2d 474, 18 Cal. Rptr. 708.

Petitioner *pro se.*

Stanley Mosk, Attorney General of California, and *William E. James,* Assistant Attorney General, for respondents.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinions in *Douglas* v. *California,* 372 U. S., at 358, 360.

DANIELS ET AL. *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 485, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.

Theodore J. St. Antoine for petitioners.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Peterson* v. *City of Greenville,* 373 U. S. 244.

MR. JUSTICE HARLAN concurs in the result on the premises stated in his separate opinion in *Peterson* v. *City of Greenville* and *Avent* v. *North Carolina,* 373 U. S., at 248.

JONES *v.* CALIFORNIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 649, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 204 Cal. App. 2d 722, 22 Cal. Rptr. 499.

Petitioner *pro se.*

Stanley Mosk, Attorney General of California, and *William E. James,* Assistant Attorney General, 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 vacated and the case is remanded for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinions in *Douglas* v. *California,* 372 U. S., at 358, 360.

SCOTT *v.* UNITED STATES.

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

No. 694, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Julia P. Cooper* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. In light of the suggestion of the Solicitor General the judgment is vacated and the case is remanded for reconsideration of the request for a transcript of record.

BONE *v.* UNITED STATES.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

No. 716, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 305 F. 2d 772.

Petitioner *pro se.*

Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg and *Richard W. Schmude* for the United States.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded for further consideration in light of *Sanders* v. *United States,* 373 U. S. 1.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN would deny certiorari on the basis of their dissent in *Sanders* v. *United States,* 373 U. S., at 23.

DEARHART *v.* VIRGINIA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

No. 745, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Reno S. Harp III, Assistant Attorney General of Virginia, 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 vacated and the case is remanded for further consideration in light of *Douglas* v. *California,* 372 U. S. 353, and *Burns* v. *Ohio,* 360 U. S. 252.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN concur in the result.

HERB *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 751, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, 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 vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

HOLMES *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 780, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, 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 vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

PALMER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

No. 788, Misc. Decided June 17, 1963.

Certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, 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 vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

BAXLEY *v.* WAINWRIGHT, CORRECTIONS DIRECTOR.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF HABEAS CORPUS.

No. 810, Misc. Decided June 17, 1963.

Motion for leave to file petition for writ of habeas corpus denied; certiorari granted; judgment vacated; and case remanded.

Petitioner *pro se.*

Richard W. Ervin, Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted. 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, certiorari is granted. The judgment is vacated and the case is remanded for further consideration in light of *Gideon* v. *Wainwright,* 372 U. S. 335.

HEAD *v.* CALIFORNIA.

ON MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI.

No. 872, Misc. Decided June 17, 1963.

Motion for leave to file petition for writ of certiorari denied; certiorari granted; judgment vacated; and case remanded.

Reported below: See 208 Cal. App. 2d 360, 25 Cal. Rptr. 124.

Petitioner *pro se.*

Stanley Mosk, Attorney General of California, *William E. James,* Assistant Attorney General, and *A. Wallace Tashima,* Deputy Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* is granted but the motion for leave to file petition for writ of certiorari is denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is granted. The judgment is vacated and the case is remanded for further consideration in light of *Douglas* v. *California,* 372 U. S. 353.

MR. JUSTICE CLARK and MR. JUSTICE HARLAN dissent for the reasons stated in their dissenting opinions in *Douglas* v. *California,* 372 U. S., at 358, 360.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 509 and 801 were purposely omitted, in order to make it possible to publish the *per curiam* decisions and 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.

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ORDERS FROM JUNE 10 THROUGH JUNE 17, 1963.

JUNE 10, 1963.

Miscellaneous Orders.

No. 1170, Misc. DANDY *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Motion for leave to file petition for writ of certiorari denied.

No. 984, Misc. ANDERSON *v.* HOLMAN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *John C. Tyson III*, Assistant Attorney General, for respondent.

No. 766, Misc. LEAMER *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT;

No. 1007, Misc. HAMLIN *v.* CALIFORNIA;

No. 1175, Misc. TERRY *v.* DICKSON, WARDEN; and

No. 1439, Misc. THOMAS *v.* HERITAGE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1028, Misc. BARNACKIE *v.* WARDEN, MARYLAND PENITENTIARY, 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.

Nos. 1442, Misc., and 1448, Misc. IN RE WILSON. Motions for leave to file petitions for writs of mandamus denied.

Probable Jurisdiction Noted.

No. 460. WMCA, INC., ET AL. *v.* SIMON, SECRETARY OF STATE OF NEW YORK, ET AL. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Leonard B. Sand* and *Max Gross* for appellants. *Louis J. Lefkowitz,* Attorney General of New York, *Irving Galt,* Assistant Solicitor General, and *Sheldon Raab,* Deputy Assistant Attorney General, for Simon et al.; *Leo A. Larkin* and *Benjamin Offner* for Screvane et al.; *Bertram Harnett* for Nickerson; and *Francis J. Morgan* for Berman, appellees. Reported below: 208 F. Supp. 368.

No. 507. WESBERRY ET AL. *v.* SANDERS, GOVERNOR OF GEORGIA, ET AL. Appeal from the United States District Court for the Northern District of Georgia. Probable jurisdiction noted. *DeJongh Franklin* for appellants. *Eugene Cook,* Attorney General of Georgia, and *Paul Rodgers* and *Donald E. Payton,* Assistant Attorneys General, for appellees. Reported below: 206 F. Supp. 276.

No. 508. REYNOLDS, JUDGE, ET AL. *v.* SIMS ET AL.;

No. 540. VANN ET AL. *v.* FRINK, SECRETARY OF STATE OF ALABAMA, ET AL.; and

No. 610. MCCONNELL ET AL. *v.* FRINK, SECRETARY OF STATE OF ALABAMA, ET AL. Appeals from the United States District Court for the Middle District of Alabama. Probable jurisdiction noted. The cases are consolidated and a total of two hours is allowed for oral argument. *Thomas G. Gayle, Joseph E. Wilkinson, Jr.* and *McLean Pitts* for appellants in No. 508. *David J. Vann* and *Robert S. Vance,* appellants, *pro se,* in No. 540. *John W. McConnell, Jr.* for appellants in No. 610. *Charles Morgan, Jr., George Peach Taylor* and *Jerome A. Cooper* for appellees. Reported below: 208 F. Supp. 431.

No. 797. DAVIS, SECRETARY, STATE BOARD OF ELECTIONS, ET AL. *v.* MANN ET AL. Appeal from the United States District Court for the Eastern District of Virginia. Probable jurisdiction noted. *Robert Y. Button,* Attorney General of Virginia, *R. D. McIlwaine III,* Assistant Attorney General, *David J. Mays* and *Henry T. Wickham* for appellants. *Edmund D. Campbell* and *E. A. Prichard* for Mann et al., and *Henry E. Howell, Jr.* and *Sidney H. Kelsey* for Glanville et al., appellees. Reported below: 213 F. Supp. 577.

No. 950. WRIGHT ET AL. *v.* ROCKEFELLER, GOVERNOR OF NEW YORK, ET AL. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. *Justin N. Feldman* and *Jerome T. Orans* for appellants. *Louis J. Lefkowitz,* Attorney General of New York, *Irving Galt,* Assistant Solicitor General, and *Sheldon Raab,* Deputy Assistant Attorney General, for Rockefeller et al., and *Jawn A. Sandifer* for Powell, appellees. Reported below: 211 F. Supp. 460.

No. 748. ROBINSON ET AL. *v.* FLORIDA. Appeal from the Supreme Court of Florida. Probable jurisdiction noted. *Tobias Simon* and *Howard W. Dixon* for appellants. *Richard W. Ervin,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for appellee. Reported below: 144 So. 2d 811.

No. 993. UNITED STATES *v.* WARD BAKING CO. ET AL. Appeal from the United States District Court for the Middle District of Florida. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Lionel Kestenbaum* for the United States. *John B. Miller* and *Charles L. Gowen* for appellees. Reported below: —— F. Supp. ——.

No. 554. MARYLAND COMMITTEE FOR FAIR REPRESENTATION ET AL. *v.* TAWES, GOVERNOR OF MARYLAND, ET AL. Appeal from the Court of Appeals of Maryland. Probable jurisdiction noted. *Alfred L. Scanlan, John B. Wright* and *Johnson Bowie* for appellants. *Thomas B. Finan,* Attorney General of Maryland, and *Joseph S. Kaufman,* Deputy Attorney General, for appellees. *Alfred H. Carter, Douglas H. Moore, Jr.* and *Richard J. Sincoff* for Montgomery County, Maryland, as *amicus curiae,* in support of appellants. Reported below: 229 Md. 406, 184 A. 2d 715.

Certiorari Granted. (*See also No. 20, ante, p. 97; No. 29, ante, p. 98; No. 60, ante, p. 99; No. 79, ante, p. 100; No. 362, ante, p. 101; No. 429, ante, p. 102; No. 251, Misc., ante, p. 105; No. 264, Misc., ante, p. 93; No. 647, Misc., ante, p. 106; No. 648, Misc., ante, p. 107; and No. 754, Misc., ante, p. 108.*)

No. 90. BARR ET AL. *v.* CITY OF COLUMBIA. Supreme Court of South Carolina. Certiorari granted. *Jack Greenberg, James M. Nabrit III, Matthew J. Perry* and *Lincoln C. Jenkins, Jr.* for petitioners. *Daniel R. McLeod,* Attorney General of South Carolina, for respondent. Reported below: 239 S. C. 395, 123 S. E. 2d 521.

No. 921. NATIONAL LABOR RELATIONS BOARD *v.* FRUIT & VEGETABLE PACKERS & WAREHOUSEMEN, LOCAL 760, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *David Previant, Hugh Hafer* and *Richard P. Donaldson* for respondents. *Alfred J. Schweppe* and *Mary Ellen Krug* for charging party in support of the petition. Reported below: 113 U. S. App. D. C. 356, 308 F. 2d 311.

No. 159. BOUIE ET AL. *v.* CITY OF COLUMBIA. Supreme Court of South Carolina. Certiorari granted. *Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Matthew J. Perry* and *Lincoln C. Jenkins, Jr.* for petitioners. *Daniel R. McLeod,* Attorney General of South Carolina, for respondent. Reported below: 239 S. C. 570, 124 S. E. 2d 332.

No. 167. BELL ET AL. *v.* MARYLAND. Court of Appeals of Maryland. Certiorari granted. *Jack Greenberg, Constance Baker Motley, Derrick A. Bell, Jr.* and *Juanita Jackson Mitchell* for petitioners. *Thomas B. Finan,* Attorney General of Maryland, and *Loring E. Hawes,* Assistant Attorney General, for respondent. Reported below: 227 Md. 302, 176 A. 2d 771.

No. 1053. NATIONAL LABOR RELATIONS BOARD *v.* SERVETTE, INC. C. A. 9th Cir. Certiorari granted. *Solicitor General Cox, Stuart Rothman, Dominick L. Manoli* and *Norton J. Come* for petitioner. Reported below: 310 F. 2d 659.

No. 583, Misc. FERGUSON ET AL. *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 Tenth Circuit granted. Case transferred to the appellate docket. Petitioners *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 307 F. 2d 787.

No. 775, Misc. MASSIAH *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 Second Circuit granted. Case transferred to the

appellate docket. *Robert J. Carluccio* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Kirby W. Patterson* for the United States. Reported below: 307 F. 2d 62.

Certiorari Denied. (*See also No. 992, ante, p. 104; No. 1008, ante, p. 94; No. 1040, ante, p. 94; No. 1378, Misc., ante, p. 96; and No. 1028, Misc., supra.*)

No. 686. BENSON *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *William B. McKesson* for respondent. Reported below: 206 Cal. App. 2d 519, 23 Cal. Rptr. 908.

No. 908. ROSEE *v.* BOARD OF TRADE OF THE CITY OF CHICAGO ET AL. C. A. 7th Cir. Certiorari denied. *Bernard H. Sokol* for petitioner. *Howard Ellis, Don H. Reuben* and *John E. Angle* for respondents. Reported below: 311 F. 2d 524.

No. 924. WELLINGTON EQUITY FUND ET AL. *v.* TAUSSIG ET UX.; and

No. 1033. TAUSSIG ET UX. *v.* WELLINGTON EQUITY FUND, INC., ET AL. C. A. 3d Cir. Certiorari denied. *Daniel Mungall, Jr.* for petitioners in No. 924 and respondents in No. 1033. *Edwin P. Rome, Morris L. Weisberg* and *Floyd H. Crews* for petitioners in No. 1033 and respondents in No. 924. Reported below: 313 F. 2d 472.

No. 1032. LEE *v.* WESTERN WOOL PROCESSORS, INC. C. A. 10th Cir. Certiorari denied. *Omer Griffin* for petitioner. *Bernard L. Trott* for respondent. Reported below: 313 F. 2d 13.

No. 1043. WALKER *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William J. Dammarell* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 313 F. 2d 236.

No. 1047. PROCTER & GAMBLE MANUFACTURING CO. *v.* INDEPENDENT SOAP WORKERS OF SACRAMENTO, CALIFORNIA. C. A. 9th Cir. Certiorari denied. *Richard W. Barrett, Jack G. Evans* and *Guy Farmer* for petitioner. *Archibald Marison Mull, Jr.* and *Patrick J. McCarthy* for respondent. Reported below: 314 F. 2d 38.

No. 1048. SILVERSTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Boris Kostelanetz* and *Raymond Rubin* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 314 F. 2d 789.

No. 1049. SEIDMAN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Frank B. Cahn II* and *Paul A. Dorf* for petitioner. Reported below: 230 Md. 305, 187 A. 2d 109.

No. 1051. RITHOLZ *v.* OGILVIE, SHERIFF. Supreme Court of Illinois. Certiorari denied. *Charles A. Bellows* for petitioner. *Daniel P. Ward* and *Elmer C. Kissane* for respondent. Reported below: 26 Ill. 2d 455, 187 N. E. 2d 241.

No. 1052. SIRIMARCO *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Walter L. Gerash* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 315 F. 2d 699.

No. 1054. LaCamera *v.* Pennsylvania. Supreme Court of Pennsylvania. Certiorari denied. *Pearse O'Connor* for petitioner.

No. 1055. Schwartz *v.* Heyden Newport Chemical Corp. et al. Court of Appeals of New York. Certiorari denied. *Julius Schein* for petitioner. *Harmon Duncombe* for respondent Heyden Newport Chemical Corp. Reported below: 12 N. Y. 2d 212, 188 N. E. 2d 142.

No. 1056. Trumbull Asphalt Co. of Delaware *v.* National Labor Relations Board. C. A. 7th Cir. Certiorari denied. *Harold T. Halfpenny* and *Mary M. Shaw* for petitioner. *Solicitor General Cox, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 314 F. 2d 382.

No. 1057. Appleton Electric Co. *v.* Janecko. Supreme Court of Illinois. Certiorari denied. *Charles I. Calisoff* for petitioner. *Irving S. Abrams* for respondent.

No. 1063. Simmons *v.* Washington ex rel. Carroll. Supreme Court of Washington. Certiorari denied. *Laurence D. Regal* for petitioner. *James E. Kennedy* for respondent. Reported below: 61 Wash. 2d 146, 377 P. 2d 421.

No. 1014. Burdikoff et al. *v.* Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio, et al. Court of Appeals of Ohio, Lorain County. Certiorari denied. Mr. Justice Douglas is of the opinion that certiorari should be granted. *John R. Vintilla* for petitioners. *Ralph Montgomery Arkush* and *Charles H. Tuttle* for respondents. Reported below: 117 Ohio App. 1, 189 N. E. 2d 451.

No. 909. PEPERSACK, WARDEN, *v.* HALL. Motion of respondent for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied. *Thomas B. Finan,* Attorney General of Maryland, and *Robert F. Sweeney,* Assistant Attorney General, for petitioner. *William F. Mosner* for respondent. Reported below: 313 F. 2d 483.

No. 978. SYLVIA *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Paul T. Smith* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 312 F. 2d 145.

No. 1041. GENERAL ELECTRIC CO. ET AL. *v.* PUBLIC SERVICE CO. OF NEW MEXICO ET AL. C. A. 10th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *John F. Shafroth, Winston S. Howard, James T. Paulantis, William A. Sloan, Benjamin F. Stapleton, Luis D. Rovira, Josiah G. Holland, William C. McClearn, Joseph G. Hodges, Richard M. Davis, Ross L. Malone* and *Richard T. Conway* for petitioners. Reported below: 315 F. 2d 306.

No. 1046. HOLOVACHKA *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Robert J. Downing* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Norman Sepenuk* for the United States. Reported below: 314 F. 2d 345.

No. 929, Misc. PHILLIPS *v.* NASH. C. A. 7th Cir. Certiorari denied. Reported below: 311 F. 2d 513.

No. 660, Misc. McKee *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Reported below: 25 Ill. 2d 553, 185 N. E. 2d 682.

No. 852, Misc. Hyde *v.* New York. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *William I. Siegel* for respondent.

No. 922, Misc. Draper *v.* Washington et al. C. A. 9th Cir. Certiorari denied. Reported below: 310 F. 2d 691.

No. 926, Misc. Jurkiewicz *v.* Jordan, District Director, Immigration and Naturalization Service, et al. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondents.

No. 930, Misc. Doty *v.* Presiding Judge of District Court of Wright County, Iowa. Supreme Court of Iowa. Certiorari denied.

No. 939, Misc. Jackson *v.* Anderson, Jail Superintendent. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Isabel L. Blair* for respondent.

No. 1030, Misc. Lipscomb *v.* United States. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 312 F. 2d 891.

No. 1041, Misc. Stevens *v.* Continental Can Co., Inc. C. A. 6th Cir. Certiorari denied. *Frank C. Sibley* for petitioner. *Rockwell T. Gust* for respondent. Reported below: 308 F. 2d 100.

No. 943, Misc. SMITH *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. Reported below: 313 F. 2d 663.

No. 945, Misc. MOORE, ALIAS PHILLIPS, *v.* HOLMAN, WARDEN. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondent. Reported below: 274 Ala. 276, 147 So. 2d 835.

No. 963, Misc. KANE *v.* NEW YORK. 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.

No. 996, Misc. SHIPLEY *v.* OREGON. Supreme Court of Oregon. Certiorari denied. *Jonathan U. Newman* for petitioner. *George Van Hoomissen* for respondent. Reported below: 232 Ore. 354, 375 P. 2d 237.

No. 1043, Misc. PRICE *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 362 S. W. 2d 608.

No. 1069, Misc. MCBRIDE *v.* ALASKA. Supreme Court of Alaska. Certiorari denied.

No. 1076, Misc. DONNELL *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied.

No. 1092, Misc. POWERS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1099, Misc. STEVENS *v.* NORTHWESTERN NATIONAL CASUALTY CO. OF MILWAUKEE. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Robert B. Gosline* for respondent. Reported below: 305 F. 2d 513.

No. 1120, Misc. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Albert E. Jenner, Jr.* and *Thomas P. Sullivan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 311 F. 2d 721.

No. 1121, Misc. GOFORTH *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 314 F. 2d 868.

No. 1138, Misc. SAMMARCO *v.* LAVALLEE, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 1139, Misc. MAY *v.* FIDELITY & DEPOSIT CO. OF MARYLAND. C. A. 10th Cir. Certiorari denied. *Bentley M. McMullin* for petitioner. Reported below: 313 F. 2d 23.

No. 1144, Misc. FLETCHER *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. Reported below: 313 F. 2d 137.

No. 1171, Misc. NEMIRE *v.* NEW YORK. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 17 App. Div. 2d 874, 233 N. Y. S. 2d 253.

No. 1151, Misc. ROHRLICH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1155, Misc. MALLORY *v.* REINCKE, ACTING WARDEN. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 1162, Misc. DEMEULENAERE ET AL. *v.* ROCKWELL MANUFACTURING CO. ET AL. C. A. 2d Cir. Certiorari denied. *Barry A. Witchell* for petitioners. *Robert L. Clare, Jr.* and *Mathias F. Correa* for respondents. Reported below: 312 F. 2d 209.

No. 1165, Misc. MCDONALD *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1166, Misc. TOLER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 26 Ill. 2d 100, 185 N. E. 2d 874.

No. 1174, Misc. WILLIAMS *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1191, Misc. FRITZBERG *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Reported below: 149 So. 2d 356.

No. 1192, Misc. FONSECA *v.* NEW YORK. Appellate Division, Supreme Court of New York, Third Judicial Department. Certiorari denied. Reported below: 18 App. Div. 2d 726, 234 N. Y. S. 2d 277.

No. 1201, Misc. WILSON *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Reported below: 230 Md. 650, 187 A. 2d 879.

No. 1196, Misc. GOMEZ *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1203, Misc. CRAWLEY *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1204, Misc. LOSIEAU *v.* NEBRASKA. Supreme Court of Nebraska. Certiorari denied. Reported below: 174 Neb. 320, 117 N. W. 2d 775.

No. 1206, Misc. TRAILOR *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 1212, Misc. BROWNE *v.* UNITED STATES. C. A. 2d 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: 313 F. 2d 197.

No. 1215, Misc. ELDER *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 25 Ill. 2d 612, 186 N. E. 2d 27.

No. 1216, Misc. GREEN *v.* BETO, CORRECTIONS DIRECTOR, ET AL. C. A. 5th Cir. Certiorari denied.

No. 1218, Misc. TILLMAN *v.* PATE, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 1219, Misc. DAVENPORT *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1233, Misc. MCDANIEL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Carman F. Ball* and *Irma R. Thorn* for respondent.

No. 1221, Misc. THOMPSON *v.* MARONEY, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 1225, Misc. ALMEIDA *v.* RUNDLE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 409 Pa. 460, 187 A. 2d 266.

No. 1229, Misc. POPE *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1231, Misc. STRICKLAND *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1234, Misc. CLAYTON *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1238, Misc. OTTEY *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1241, Misc. LEIGH *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent.

No. 1249, Misc. LEIGH *v.* HOOVER, DIRECTOR, FEDERAL BUREAU OF INVESTIGATION. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent.

No. 1243, Misc. DUKE *v.* SUPERINTENDENT, STATE HOSPITAL No. 1. Supreme Court of Missouri. Certiorari denied.

No. 1283, Misc. LEIGH *v.* ANDERSON, JAIL SUPERINTENDENT, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondents.

No. 1247, Misc. THORNTON *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 38 N. J. 380, 185 A. 2d 9.

No. 1252, Misc. RICKS *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 314 F. 2d 339.

No. 1254, Misc. GAITO *v.* PRASSE, CORRECTION COMMISSIONER, ET AL. C. A. 3d Cir. Certiorari denied. Reported below: 312 F. 2d 169.

No. 1255, Misc. JACKSON *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 1259, Misc. RUCKLE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 230 Md. 580, 187 A. 2d 836.

No. 1263, Misc. MONTES *v.* HERITAGE, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent. Reported below: 314 F. 2d 332.

No. 1291, Misc. CIRILLO *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Reported below: 17 App. Div. 2d 978, 234 N. Y. S. 2d 339.

No. 1260, Misc. BENNETT *v.* ILLINOIS. Circuit Court of Will County, Illinois. Certiorari denied.

No. 1284, Misc. LEIGH *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondent.

No. 1304, Misc. LEIGH *v.* GARRETT, CHIEF PROBATION OFFICER. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent.

No. 1326, Misc. TERRY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1340, Misc. EDWARDS *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 1352, Misc. TUCKER *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 362 S. W. 2d 509.

No. 1354, Misc. HENDRICKSON *v.* PENNSYLVANIA STATE BOARD OF PAROLE. Supreme Court of Pennsylvania. Certiorari denied. *Daniel Harrison Greene* for petitioner. Reported below: 409 Pa. 204, 185 A. 2d 581.

No. 1377, Misc. WOLFE *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied. Reported below: 313 F. 2d 393.

No. 1211, Misc. WALDON *v.* IOWA. Petition for writ of certiorari to the Supreme Court of Iowa and for other relief denied.

Rehearing Denied.

No. 871. PROGRESS DEVELOPMENT CORP. *v.* DEERFIELD PARK DISTRICT, 372 U. S. 968;

No. 878. FOREMAN ET UX. *v.* CITY OF BELLEFONTAINE, 373 U. S. 63;

No. 844, Misc. BENT *v.* UNITED STATES, 373 U. S. 917; and

No. 857, Misc. SPAMPINATO *v.* CITY OF NEW YORK ET AL., 372 U. S. 980. Petitions for rehearing denied.

No. 809. KARPEL *v.* CALIFORNIA, 372 U. S. 703. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 960. LUCAS *v.* STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. ET AL., 373 U. S. 922. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

Dismissal Under Rule 60.

No. 1182, Misc. BOWIE *v.* CALIFORNIA. On petition for writ of certiorari to the Supreme Court of California. Petition dismissed pursuant to Rule 60 of the Rules of this Court.

JUNE 14, 1963.

Miscellaneous Order.

No. ——. SALTER ET AL. *v.* CITY OF JACKSON. The petition for stay and dissolution of an injunction issued by a state court submitted to MR. JUSTICE BLACK, and by him submitted to the full Court, and after due consideration is denied by the Court. *Robert L. Carter, Jack Young, R. Jess Brown, Jack Greenberg, Derrick A. Bell, William R. Ming* and *Frank D. Reeves* for petitioners. *Thomas H. Watkins* for respondent.

Certiorari Denied.

No. 1414, Misc. ASHLEY *v.* CALIFORNIA. The application for a stay having been presented to MR. JUSTICE DOUGLAS was presented by him to the Court and denied by the Court. Petition for writ of certiorari to the Supreme Court of California denied. Reported below: 59 Cal. 2d 339, 379 P. 2d 496.

Dismissal Under Rule 60.

No. 1265, Misc. MOSS ET AL. *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. Dismissed pursuant to Rule 60 of the Rules of this Court. *Sidney Szerlip* for petitioners. Reported below: 311 F. 2d 462.

JUNE 17, 1963.

Miscellaneous Orders.

No. ——. OPPENHEIMER *v.* CALIFORNIA. The motion for the appointment of counsel is denied.

No. 8, ORIGINAL. ARIZONA *v.* CALIFORNIA ET AL., 373 U. S. 546. The motion of the State of California for an extension of time to file a petition for rehearing is granted and the time is extended to September 16, 1963. It is ordered that the time for the submission of a proposed decree fixed by the opinion of this Court of June 3, 1963, be extended for a period of thirty days thereafter or following the action of the Court on any petition for rehearing submitted by the State of California. THE CHIEF JUSTICE took no part in the consideration or decision of this motion and order.

No. 415, Misc. PETERSON *v.* ALLEN CIRCUIT COURT ET AL., 372 U. S. 596. The motion to reopen is denied.

No. 26. GRIFFIN ET AL. *v.* MARYLAND. Certiorari, 370 U. S. 935, to the Court of Appeals of Maryland. Argued November 5 and 7, 1962. Restored to the calendar for reargument, 373 U. S. 920. The motion of petitioners to remove this case from the summary calendar is denied. *Joseph L. Rauh, Jr.* on the motion.

No. 65. WEYERHAEUSER STEAMSHIP CO. *v.* UNITED STATES, 372 U. S. 597. The judgment of this Court is recalled and a new judgment shall issue assessing costs in this Court against the United States, with directions to the District Court to assess the costs below and interest as that court shall order in accordance with the statute.

No. 403. BANCO NACIONAL DE CUBA *v.* SABBATINO, RECEIVER, ET AL. Certiorari, 372 U. S. 905, to the United States Court of Appeals for the Second Circuit. The motion of Compania Azucarera Vertientes-Camaguey de Cuba for leave to file briefs in support of the motion to substitute and on the merits and for leave to participate in oral argument on the merits is granted. *John A. Wilson* on the motion. *Victor Rabinowitz* for petitioner in opposition to the motion.

No. 606. NEW YORK TIMES CO. *v.* SULLIVAN; and
No. 609. ABERNATHY ET AL. *v.* SULLIVAN. Certiorari, 371 U. S. 946, to the Supreme Court of Alabama. The motion of American Civil Liberties Union for leave to file a brief, as *amicus curiae,* is granted. *Edward S. Greenbaum, Harriet F. Pilpel* and *Melvin L. Wulf* on the motion.

No. 1540, Misc. WHITING ET AL. *v.* EUDOFF, U. S. MARSHAL. Motion for leave to file petition for writ of habeas corpus denied. *T. Emmett McKenzie* and *Frank D. Reeves* for petitioners.

No. 1170. FERGUSON ET AL. *v.* UNITED STATES. Certiorari, *ante*, p. 805, to the United States Court of Appeals for the Tenth Circuit. The motion for the appointment of counsel is granted and it is ordered that *A. Kenneth Pye, Esquire*, of Washington, District of Columbia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioners in this case.

No. 1019, Misc. BRISTOW *v.* WARDEN, MARYLAND PENITENTIARY;

No. 1023, Misc. PETERSEN *v.* HERITAGE, WARDEN;

No. 1320, Misc. MELENDEZ *v.* HERITAGE, WARDEN;

No. 1342, Misc. LOPEZ *v.* HERITAGE, WARDEN;

No. 1349, Misc. HORNBECK *v.* NEW YORK PAROLE BOARD;

No. 1380, Misc. SUAREZ *v.* HERITAGE, WARDEN;

No. 1381, Misc. GONZALEZ *v.* HERITAGE, WARDEN;

No. 1449, Misc. WILLIAMS *v.* ANDERSON ET AL.;

No. 1453, Misc. WELLS *v.* MAXWELL, WARDEN;

No. 1457, Misc. BONHAM *v.* UNITED STATES;

No. 1464, Misc. REECE *v.* RHAY, PENITENTIARY SUPERINTENDENT;

No. 1482, Misc. CANTRELL *v.* MAXWELL, WARDEN;

No. 1514, Misc. WINSTON *v.* WARDEN, U. S. PENITENTIARY;

No. 1544, Misc. FOLENIUS *v.* SACKS, WARDEN, ET AL.; and

No. 1559, Misc. DUNCAN *v.* ROBBINS, WARDEN, ET AL. Motions for leave to file petitions for writs of habeas corpus denied.

No. 1186, Misc. WHITE *v.* UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Cox* for respondents.

No. 1321, Misc. GREGORY *v.* UNITED STATES. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 1299, Misc. HESTON *v.* GREEN, CORRECTIONAL SUPERINTENDENT;

No. 1324, Misc. CROW *v.* NASH, WARDEN;

No. 1364, Misc. GREEN *v.* NEW JERSEY;

No. 1433, Misc. BASSETT *v.* TAHASH, WARDEN;

No. 1495, Misc. MATUZEK *v.* EYMAN, WARDEN; and

No. 1549, Misc. COFIELD *v.* HOLMAN, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied. Treating the papers submitted as petitions for writs of certiorari, certiorari is denied.

No. 876, Misc. MILANI *v.* SUPREME COURT OF ILLINOIS. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *William G. Clark*, Attorney General of Illinois, for respondent.

No. 1220, Misc. GOODSON *v.* TENNESSEE EX REL. CRIMINAL COURT OF SHELBY COUNTY;

No. 1345, Misc. KOBS *v.* HOTT ET AL.;

No. 1427, Misc. BLACK *v.* BETO, CORRECTIONS DIRECTOR;

No. 1474, Misc. IN RE WILSON; and

No. 1492, Misc. MACHIN *v.* SUPREME COURT OF WASHINGTON. Motions for leave to file petitions for writs of mandamus denied.

No. 1230, Misc. DISILVESTRO *v.* CLARK ET AL., JUDGES. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Cox*, *Assistant Attorney General Douglas* and *Morton Hollander* for respondents.

No. 1135. PRESTON *v.* UNITED STATES. Certiorari, 373 U. S. 931, to the United States Court of Appeals for the Sixth Circuit. The motion for the appointment of counsel is granted and it is ordered that *Francis M. Shea, Esquire,* of Washington, District of Columbia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for petitioner in this case.

No. 1426, Misc. ADAY ET AL. *v.* UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN ET AL. Motion for leave to file petition for writ of mandamus denied. *Stanley Fleishman* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for respondents.

No. 1150, Misc. BYERS *v.* PARKER, CHIEF JUSTICE. Motion for leave to file petition for writ of mandamus and for other relief denied. Petitioner *pro se. William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent.

Probable Jurisdiction Noted.

No. 746. A. L. MECHLING BARGE LINES, INC., ET AL. *v.* UNITED STATES ET AL.; and

No. 747. BOARD OF TRADE OF CHICAGO *v.* UNITED STATES ET AL. Appeals from the United States District Court for the Northern District of Illinois. Probable jurisdiction noted. *Edward B. Hayes* for appellants in No. 746. *Harold E. Spencer, Richard M. Freeman* and *J. S. Chartrand* for appellant in No. 747. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Robert B. Hummel* for the United States; *Robert W. Ginnane* and *H. Neil Garson* for the Interstate Commerce Commission; *Richard J. Murphy* for the New

York Central Railroad Co.; and *Leo P. Day* for McNabb Grain Co. et al., appellees. Reported below: 209 F. Supp. 744.

No. 590. UNITED STATES *v.* FIRST NATIONAL BANK & TRUST CO. OF LEXINGTON ET AL. Appeal from the United States District Court for the Eastern District of Kentucky. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Larry L. Williams* and *Melvin Spaeth* for the United States. *James Park, R. W. Keenon* and *Clinton M. Harbison* for appellees. Reported below: 208 F. Supp. 457.

No. 1071. GENERAL MOTORS CORP. *v.* WASHINGTON ET AL. Appeal from the Supreme Court of Washington. Motions of National Association of Manufacturers of the United States of America; Magazine Publishers Association, Inc.; Electronic Industries Association; National Coal Association; and Automobile Manufacturing Association, Inc., for leave to file briefs, as *amici curiae,* granted. Probable jurisdiction noted. *Aloysius F. Power, Donald K. Barnes, Thomas J. Hughes* and *Dewitt Williams* for appellant. *John J. O'Connell,* Attorney General of Washington, *John W. Riley,* Special Assistant Attorney General, and *James A. Furber, Timothy R. Malone* and *Lloyd W. Peterson,* Assistant Attorneys General, for appellees. *Lambert H. Miller* and *Alan M. Nedry* for National Association of Manufacturers of the United States of America; *Richard Joyce Smith* for Magazine Publishers Association, Inc.; *Harry G. Mason* for Electronic Industries Association; *Robert E. Lee Hall* and *Richard L. Hirshberg* for National Coal Association; and *Louis F. Dahling* and *Richard D. Rohr* for Automobile Manufacturers Association, Inc., as *amici curiae,* in support of appellant. Reported below: 60 Wash. 2d 862, 376 P. 2d 843.

Certiorari Granted. (*See also No. 3, Misc., ante, p. 489; No. 10, Misc., ante, p. 497; No. 48, Misc., ante, p. 498; No. 135, Misc., ante, p. 499; No. 180, Misc., ante, p. 488; No. 485, Misc., ante, p. 500; No. 649, Misc., ante, p. 501; No. 694, Misc., ante, p. 502; No. 712, Misc., ante, p. 489; No. 716, Misc., ante, p. 503; No. 745, Misc., ante, p. 504; No. 751, Misc., ante, p. 505; No. 780, Misc., ante, p. 506; No. 788, Misc., ante, p. 507; No. 810, Misc., ante, p. 508; No. 871, Misc., ante, p. 490; No. 872, Misc., ante, p. 509; No. 884, Misc., ante, p. 491; No. 901, Misc., ante, p. 492; No. 979, Misc., ante, p. 494; No. 1136, Misc., ante, p. 492; and No. 1285, Misc., ante, p. 493.*)

No. 1084. Reisman et al., doing business as Trammell, Rand & Nathan, *v.* Caplin, Commissioner of Internal Revenue, et al. United States Court of Appeals for the District of Columbia Circuit. Certiorari granted. *Hans A. Nathan* and *Warren E. Magee* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Norman Sepenuk* for respondent Caplin. Reported below: —— U. S. App. D. C. ——, 317 F. 2d 123.

No. 1064. Platt, Chief Judge, U. S. District Court, *v.* Minnesota Mining & Manufacturing Co. C. A. 7th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Loevinger* and *Robert B. Hummel* for petitioner. *John T. Chadwell, Jean Engstrom* and *John L. Connolly* for respondent. Reported below: 314 F. 2d 369.

No. 1010. Compco Corporation *v.* Day-Brite Lighting, Inc. C. A. 7th Cir. Certiorari granted. *Horace Dawson* for petitioner. *Owen J. Ooms* for respondent. Reported below: 311 F. 2d 26.

No. 996. LOCAL UNION No. 721, UNITED PACKINGHOUSE, FOOD & ALLIED WORKERS, AFL–CIO, *v.* NEEDHAM PACKING CO., DOING BUSINESS AS SIOUX CITY DRESSED BEEF. Supreme Court of Iowa. Certiorari granted. *Eugene Cotton, Richard F. Watt* and *Harry H. Smith* for petitioner. *Alfred L. Scanlan* and *Jesse E. Marshall* for respondent. Reported below: 254 Iowa 882, 119 N. W. 2d 141.

No. 1020. SEARS, ROEBUCK & Co. *v.* STIFFEL COMPANY. C. A. 7th Cir. Certiorari granted. *Will Freeman* and *Frank H. Marks* for petitioner. *Warren C. Horton* and *Max R. Kraus* for respondent. Reported below: 313 F. 2d 115.

No. 746, Misc. STONER *v.* CALIFORNIA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the District Court of Appeal of California, Second Appellate District, granted. Review is limited to the question of whether evidence was admitted which had been obtained by an unlawful search and seizure. Case transferred to the appellate docket. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, and *William E. James,* Assistant Attorney General, for respondent. Reported below: 205 Cal. App. 2d 108, 22 Cal. Rptr. 718.

No. 811, Misc. FALLEN *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 Fifth Circuit granted. Case transferred to the appellate docket. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 306 F. 2d 697.

Certiorari Denied. (*See also No. 1016, ante, p. 487; No. 934, Misc., ante, p. 490; No. 1113, Misc., ante, p. 493; No. 1372, Misc., ante, p. 494; and Misc. Nos. 1299, 1324, 1364, 1433, 1495 and 1549, ante, p. 822.*)

No. 172. Ove Gustavsson Contracting Co., Inc., *v.* Floete, Administrator of General Services Administration, et al. C. A. 2d Cir. Certiorari denied. *Anthony B. Cataldo* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle* and *John G. Laughlin, Jr.* for respondents. Reported below: 299 F. 2d 655.

No. 500. School Board of Charlottesville, Virginia, et al. *v.* Dillard et al. C. A. 4th Cir. Certiorari denied. *John S. Battle, John S. Battle, Jr.* and *Richard L. Williams* for petitioners. Reported below: 308 F. 2d 920.

No. 697. Baltimore & Ohio Railroad Co. *v.* Payne, Administratrix. C. A. 6th Cir. Certiorari denied. *Alexander H. Hadden* for petitioner. *Abraham Freedman* for respondent. Reported below: 309 F. 2d 546.

No. 745. Martufi *v.* Fraser. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *John W. Karr* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Guilfoyle, Alan S. Rosenthal* and *Mark R. Joelson* for respondent.

No. 893. Tatum *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *Buck C. Miller* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Sam R. Wilson, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 363 S. W. 2d 932.

No. 883. STATNI BANKA CESKOSLOVENSKA *v.* WOLCHOK, RECEIVER. Court of Appeals of New York. Certiorari denied. *Lemuel Skidmore* for petitioner. *Sigmund Timberg* for respondent. *Solicitor General Cox* filed a memorandum for the United States in support of respondent. Reported below: 12 N. Y. 2d 784, 186 N. E. 2d 678.

No. 895. FISHER *v.* CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. *Albert G. Avery* for petitioner. *Leo A. Larkin, Seymour B. Quel* and *Fred Iscol* for respondent. Reported below: 312 F. 2d 890.

No. 913. BANMILLER, WARDEN, *v.* SCOLERI. C. A. 3d Cir. Certiorari denied. *James C. Crumlish, Jr., Louis F. McCabe* and *Arlen Specter* for petitioner. Reported below: 310 F. 2d 720.

No. 945. FARBER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Bernard J. Long* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Gilbert E. Andrews* for respondent. Reported below: 312 F. 2d 729.

No. 1017. DONATO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *J. B. Tietz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 314 F. 2d 67.

No. 1058. GREENE *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Morris Lavine* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for respondent. Reported below: 313 F. 2d 148.

No. 1044. WAPNICK *v.* UNITED STATES; and

No. 1074. LAFAZIA ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Herbert S. Siegal* for petitioner in No. 1044. *Joseph Brill* and *Jacob W. Friedman* for petitioners in No. 1074. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 315 F. 2d 96.

No. 1059. SARELAS *v.* ALEXANDER ET AL. Appellate Court of Illinois, First District. Certiorari denied. *Peter S. Sarelas,* petitioner, *pro se.* Reported below: 37 Ill. App. 2d 436, 186 N. E. 2d 63.

No. 1061. UNION OBREROS CERVECERIA CORONA *v.* VEGA. Supreme Court of Puerto Rico. Certiorari denied. *Ginoris Vizcarra* for petitioner. Reported below: —— P. R. ——.

No. 1062. SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, ATLANTIC, GULF, LAKES & INLAND WATERS DISTRICT, PUERTO RICO DIVISION, AFL–CIO, *v.* CASTRO. Supreme Court of Puerto Rico. Certiorari denied. *Ginoris Vizcarra* for petitioner. Reported below: —— P. R. ——.

No. 1065. HALLIBURTON COMPANY ET AL. *v.* NORTON DRILLING CO. ET AL. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* and *René H. Himel, Jr.* for petitioners. Reported below: 302 F. 2d 431; 313 F. 2d 380.

No. 1066. GORIN ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Paul T. Smith* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 313 F. 2d 641.

No. 1067. MAIER BREWING CO. ET AL. *v.* FLEISCHMANN DISTILLING CORP. ET AL. C. A. 9th Cir. Certiorari denied. *Murray M. Chotiner* for petitioners. *Moses Lasky, William C. Cannon* and *Porter R. Chandler* for respondents. Reported below: 314 F. 2d 149.

No. 1068. MAIN *v.* FLORIDA. District Court of Appeal of Florida, Third District. Certiorari denied. *Alfred M. Carvajal* for petitioner. Reported below: 143 So. 2d 221.

No. 1072. QUINTERO *v.* SINCLAIR REFINING CO. C. A. 5th Cir. Certiorari denied. *W. A. Combs* for petitioner. *William C. Harvin* for respondent. Reported below: 311 F. 2d 217.

No. 1073. SIKES ET AL. *v.* RUTLAND, ADMINISTRATOR. C. A. 4th Cir. Certiorari denied. *A. Frank Lever, Jr.* for petitioners. *Henry Hammer* for respondent. Reported below: 311 F. 2d 538.

No. 1075. TENNESSEAN NEWSPAPERS, INC., *v.* VENN. C. A. 6th Cir. Certiorari denied. *Cecil Sims* for petitioner. *J. Vaulx Crockett* and *Caruthers Ewing* for respondent. Reported below: 313 F. 2d 639.

No. 1076. PROCTER & GAMBLE INDEPENDENT UNION OF PORT IVORY, N. Y., *v.* PROCTER & GAMBLE MANUFACTURING CO. C. A. 2d Cir. Certiorari denied. *Martin J. Loftus* for petitioner. *Jack G. Evans* and *Guy Farmer* for respondent. Reported below: 312 F. 2d 181.

No. 1079. BOVARD *v.* UNITED STATES. Court of Claims. Certiorari denied. *James R. Murphy* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: — Ct. Cl. —, — F. 2d —.

No. 1080. LITZINGER *v.* PULITZER PUBLISHING CO. Supreme Court of Missouri. Certiorari denied. *Albert H. Hamel* for petitioner. *Lewis C. Green* for respondent. Reported below: 356 S. W. 2d 81.

No. 1082. STATES MARINE LINES, INC., *v.* FEDERAL MARITIME COMMISSION ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Herman Goldman, Elkan Turk* and *Elkan Turk, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Loevinger, Robert B. Hummel, Irwin A. Seibel* and *Robert E. Mitchell* for the United States and the Federal Maritime Commission, and *Richard W. Kurrus* for Isbrandtsen Co., Inc., respondents. Reported below: 114 U. S. App. D. C. 225, 313 F. 2d 906.

No. 1083. PAINTER *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *David M. Baker* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 314 F. 2d 939.

No. 1086. HOLAHAN, TRUSTEE IN BANKRUPTCY, *v.* JACKSON ET AL. C. A. 9th Cir. Certiorari denied. *John W. Bryan* for petitioner. *Frank E. Flynn* and *Allan K. Perry* for respondents. Reported below: —— F. 2d ——.

No. 1087. SHAW-BARTON, INC., *v.* JOHN BAUMGARTH CO. C. A. 7th Cir. Certiorari denied. *Frank J. Foley* for petitioner. *Morris Spector* and *A. Bradley Eben* for respondent. Reported below: 313 F. 2d 167.

No. 1088. BAILEY *v.* SANDELL, INC. District Court of Appeal of California, Fifth Appellate District. Certiorari denied. *John C. Burke* for petitioner. *Richard Z. Lamberson* for respondent. Reported below: 212 Cal. App. 2d 920, 28 Cal. Rptr. 413.

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No. 1097. JAMES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Henry Lincoln Johnson, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: —— U. S. App. D. C. ——, 317 F. 2d 170.

No. 1114. GROSS *v.* JFD MANUFACTURING CO., INC. C. A. 2d Cir. Certiorari denied. *John M. Calimafde* for petitioner. *S. Stephen Baker* for respondent. Reported below: 314 F. 2d 196.

No. 1115. DUNCAN *v.* CONNECTICUT. Supreme Court of Errors of Connecticut. Certiorari denied. *Stanley Kreutzer* for petitioner. *John D. LaBelle* and *Harry W Hultgren, Jr.* for respondent.

No. 1121. WILLOW FARMS DAIRY, INC., ET AL. *v.* FREEMAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 4th Cir. Certiorari denied. *Charles G. Page* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Neil Brooks* for respondents. Reported below: 315 F. 2d 828.

No. 11, Misc. WILLOUGHBY *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Petitioner *pro se. Edwin K. Steers,* Attorney General of Indiana, and *Carl E. Van Dorn,* Deputy Attorney General, for respondent. Reported below: 242 Ind. 183, 167 N. E. 2d 881, 177 N. E. 2d 465.

No. 12, Misc. ALERIA *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Jack E. Goertzen,* Deputy Attorney General, for respondent.

No. 1069. IMPARATO STEVEDORING CORP. *v.* UNITED STATES LINES CO. Motion of the National Association of Stevedores for leave to file brief, as *amicus curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Sidney A. Schwartz* for petitioner. *Joseph M. Cunningham* and *Vernon S. Jones* for respondent. *Martin J. McHugh* and *James M. Leonard* for the National Association of Stevedores, as *amicus curiae,* in support of the petition. Reported below: 311 F. 2d 413.

No. 594, Misc. COFFMAN *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 646, Misc. PUGACH *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se. Isidore Dollinger* and *Walter E. Dillon* for respondent.

No. 698, Misc. MCHENRY *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 308 F. 2d 700.

No. 757, Misc. VANDEVER *v.* PATE, WARDEN. Circuit Court of Jefferson County, Illinois. Certiorari denied. Petitioner *pro se. William G. Clark,* Attorney General of Illinois, for respondent.

No. 715, Misc. BRYANT *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied. Petitioner *pro se. Richard W. Ervin,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 728, Misc. MUENCH *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se*. *Waggoner Carr*, Attorney General of Texas, and *Sam R. Wilson, Gilbert J. Pena* and *Allo B. Crow, Jr.*, Assistant Attorneys General, for respondent. Reported below: 172 Tex. Cr. R. 552, 360 S. W. 2d 149.

No. 759, Misc. WARDEN *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *MacDonald Gallion*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent. Reported below: 274 Ala. 720, 145 So. 2d 815.

No. 830, Misc. SCHAFFER ET AL. *v.* DELAWARE. Supreme Court of Delaware. Certiorari denied. *David Kanner* for petitioners. *W. Laird Stabler, Jr.*, Deputy Attorney General of Delaware, for respondent. Reported below: 54 Del. ——, 184 A. 2d 689.

No. 785, Misc. MARTIN *v.* UNITED STATES. C. A. 10th 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: 309 F. 2d 81.

No. 848, Misc. MCDONALD *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: 310 F. 2d 692.

No. 786, Misc. GAUTHIER *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 205 Cal. App. 2d 419, 22 Cal. Rptr. 888.

No. 704, Misc. SMITH *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 842, Misc. POPEKO *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: 309 F. 2d 752.

No. 829, Misc. JACKSON *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 300 F. 2d 758.

No. 883, Misc. SAILER *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: 309 F. 2d 541.

No. 885, Misc. JONES *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 309 F. 2d 361.

No. 908, Misc. COOPER *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *John T. Corrigan* for respondent.

No. 965, Misc. PARRY-HILL *v.* MCGARRAGHY, 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 Douglas* and *Sherman L. Cohn* for respondent.

No. 910, Misc. MARTIN *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Wm. J. Holloway, Jr.* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *J. F. Bishop* for the United States. Reported below: 309 F. 2d 81.

No. 911, Misc. GRABINA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Irving Younger* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 309 F. 2d 783.

No. 998, Misc. MATOS *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. *Bertrand D. Gerber* for petitioner.

No. 927, Misc. DOUGLAS *v.* MAXWELL, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 174 Ohio St. 92, 186 N. E. 2d 723.

No. 952, Misc. WELCH *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se. Stanley Mosk,* Attorney General of California, and *Robert R. Granucci* and *Albert W. Harris, Jr.,* Deputy Attorneys General, for respondent.

No. 969, Misc. CROCKARD *v.* KENT, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 982, Misc. ROBINSON *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 *Robert G. Maysack* for the United States. Reported below: 313 U. S. App. D. C. 372, 308 F. 2d 327.

No. 923, Misc. DANIELS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 38 N. J. 242, 183 A. 2d 648.

No. 992, Misc. MILLER *v.* TAYLOR, WARDEN. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondent. Reported below: 313 F. 2d 21.

No. 1000, Misc. SHIELDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 310 F. 2d 708.

No. 1026, Misc. ANTIPAS *v.* PEGELOW ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for respondents.

No. 1066, Misc. SAWYER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 312 F. 2d 24.

No. 1068, Misc. KUCHTA ET AL. *v.* RICE ET AL. Supreme Court of New Jersey. Certiorari denied.

No. 1081, Misc. DYKES *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Jerome Powell* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 114 U. S. App. D. C. 189, 313 F. 2d 580.

No. 1072, Misc. WOYKOVSKY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 309 F. 2d 381.

No. 936, Misc. GRAY *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. Reported below: 114 U. S. App. D. C. 77, 311 F. 2d 126.

No. 1084, Misc. PATTERSON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *Samuel Carter McMorris* for petitioner. *Stanley Mosk,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Raymond M. Momboisse,* Deputy Attorney General, for respondent. Reported below: 58 Cal. 2d 848, 377 P. 2d 74.

No. 1083, Misc. FLANAGAN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 308 F. 2d 841.

No. 1089, Misc. ARELLANO-FLORES *v.* ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 9th Cir. Certiorari denied. *Fred Okrand* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 310 F. 2d 118.

No. 1093, Misc. PUGACH *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 1101, Misc. GORDAN *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *A. Kenneth Pye* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 114 U. S. App. D. C. 191, 313 F. 2d 582.

No. 1114, Misc. HICKS *v.* MASSACHUSETTS. Supreme Judicial Court of Massachusetts. Certiorari denied. *John L. Saltonstall, Jr.* for petitioner. *Edward W. Brooke,* Attorney General of Massachusetts, and *James W. Bailey,* Assistant Attorney General, for respondent. Reported below: 345 Mass. 89, 185 N. E. 2d 739.

No. 1149, Misc. TANSIMORE *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 *J. F. Bishop* for the United States. Reported below: —— U. S. App. D. C. ——, 317 F. 2d 899.

No. 1095, Misc. ANGELET *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1104, Misc. DEAN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Reported below: 174 Ohio St. 193, 187 N. E. 2d 884.

No. 1137, Misc. SOREY *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1141, Misc. DOYLE *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 1135, Misc. ALVARADO *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1164, Misc. LEVEY *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. Reported below: 309 F. 2d 890.

No. 1167, Misc. HOWARD *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1176, Misc. TYSON *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1177, Misc. WHITTINGTON *v.* CAMERON, HOSPITAL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent.

No. 1195, Misc. BERRY *v.* CLEMMER, CORRECTIONS DIRECTOR. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 1183, Misc. JENKINS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1200, Misc. VOGELSTEIN, TRADING AS BALTIMORE POSTER CO., *v.* NATIONAL SCREEN SERVICE CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Francis T. Anderson* for petitioner. *Louis Nizer, Louis J. Goffman, W. Bradley Ward* and *Edward W. Mullinix* for respondents. Reported below: 310 F. 2d 738.

No. 1202, Misc. WILLIAMS *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 114 U. S. App. D. C. 135, 312 F. 2d 862.

No. 1205, Misc. DAVENPORT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George N. Leighton* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 312 F. 2d 303.

No. 1207, Misc. CONTEE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Robert C. Heeney* for petitioner. Reported below: 229 Md. 486, 184 A. 2d 823.

No. 1210, Misc. McDOWELL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 313 F. 2d 638.

No. 1213, Misc. SIDES *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se*. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent.

No. 1232, Misc. STEBBINS *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas* and *Morton Hollander* for respondents.

No. 1228, Misc. VIDAL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 209 Cal. App. 2d 442, 25 Cal. Rptr. 868.

No. 1246, Misc. GAINEY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States. Reported below: —— F. 2d ——.

No. 1274, Misc. BYNUM *v.* UNITED STATES ET AL. C. A. 4th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Joseph A. Barry* for the United States et al. Reported below: —— F. 2d ——.

No. 1276, Misc. DE LOUIZE *v.* CALIFORNIA. District Court of Appeal of California, Third Appellate District. Certiorari denied. Reported below: 210 Cal. App. 2d 721, 26 Cal. Rptr. 903.

No. 1282, Misc. IRBY *v.* UNITED STATES. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 114 U. S. App. D. C. 246, 314 F. 2d 251.

No. 1179, Misc. KALEC *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 22 Ill. 2d 505, 177 N. E. 2d 134.

No. 1244, Misc. COOK *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 *Richard W. Schmude* for the United States.

No. 1245, Misc. CHRISTENSEN *v.* HAGEDORN ET AL. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Steven Timonere* and *Arthur F. James* for respondents. Reported below: 174 Ohio St. 98, 186 N. E. 2d 848.

No. 1264, Misc. BLUME *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1267, Misc. MCCANTS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1269, Misc. LEE *v.* PATE, WARDEN, ET AL. C. A. 7th Cir. Certiorari denied.

No. 1272, Misc. EDWARDS *v.* WALLACK, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 1273, Misc. BRABSON *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 1275, Misc. NEAL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1280, Misc. CASTANO *v.* UNITED STATES. C. A. 7th 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: 313 F. 2d 857.

No. 1281, Misc. WHITTINGTON *v.* ANDERSON, JAIL SUPERINTENDENT. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for respondent.

No. 1286, Misc. HOLTZ *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 1278, Misc. JAMES *v.* MAXWELL, WARDEN. Supreme Court of Ohio. Certiorari denied.

No. 1288, Misc. HOLT *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. *Sherwood Slate* for petitioner. *George Thompson,* Attorney General of Wisconsin, *Harold H. Persons, William A. Platz* and *John H. Bowers,* Assistant Attorneys General, and *William J. McCauley* for respondent. Reported below: 17 Wis. 2d 468, 117 N. W. 2d 626.

No. 1289, Misc. SCOTT *v.* DISTRICT OF COLUMBIA. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *Richard J. Scupi, Hal Witt* and *James H. Heller* for petitioner. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondent.

No. 1290, Misc. COLLIER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles B. Evins* for petitioner. *Solicitor General Cox* for the United States. Reported below: 313 F. 2d 157.

No. 1292, Misc. RUCKER *v.* MYERS, WARDEN. C. A. 3d Cir. Certiorari denied. *Stanford Shmukler* for petitioner. Reported below: 311 F. 2d 311.

No. 1294, Misc. CLAY *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 27 Ill. 2d 27, 187 N. E. 2d 719.

No. 1303, Misc. ORTEGA *v.* HEINZE, WARDEN. Supreme Court of California. Certiorari denied.

No. 1295, Misc. SPARKS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 231 Md. 607, 188 A. 2d 559.

No. 1318, Misc. COLBERT *v.* MICHIGAN. C. A. 6th Cir. Certiorari denied. Reported below: —— F. 2d ——.

No. 1325, Misc. CLEMONS *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 *Robert G. Maysack* for the United States. Reported below: 114 U. S. App. D. C. 273, 314 F. 2d 278.

No. 1298, Misc. CASIAS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *James W. Heyer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 315 F. 2d 614.

No. 1305, Misc. BAGGETT *v.* WIMAN, WARDEN, ET AL. C. A. 5th Cir. Certiorari denied. *Patrick W. Richardson* for petitioner. *Richmond M. Flowers,* Attorney General of Alabama, and *John C. Tyson III,* Assistant Attorney General, for respondents. Reported below: 311 F. 2d 564.

No. 1306, Misc. MITCHELL *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 1307, Misc. BELL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1309, Misc. HAWTHORNE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1310, Misc. OLSHEN *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Nathan Kestnbaum* for petitioner.

No. 1311, Misc. HUGHES *v.* TURNER, WARDEN, ET AL. Supreme Court of Utah. Certiorari denied. Reported below: 14 Utah 2d 128, 378 P. 2d 888.

No. 1312, Misc. KESSINGER *v.* OKLAHOMA ET AL. Court of Criminal Appeals of Oklahoma. Certiorari denied. Reported below: 377 P. 2d 981.

No. 1313, Misc. DARNELL *v.* WALKER, WARDEN. Supreme Court of Louisiana. Certiorari denied.

No. 1314, Misc. SEXTON *v.* NASH, WARDEN. Supreme Court of Missouri. Certiorari denied.

No. 1315, Misc. YOUNG *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 1316, Misc. HARTLESS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 1319, Misc. COLON *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Guy W. Calissi* for respondent.

No. 1327, Misc. ABBOTT *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1331, Misc. DAVIS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Edward W. Rothe* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 311 F. 2d 495.

No. 1328, Misc. SLIVA *v.* RUNDLE, WARDEN. Supreme Court of Pennsylvania. Certiorari denied.

No. 1332, Misc. WILLIAMS *v.* LAVALLEE, WARDEN. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, and *Anthony J. Lokot,* Assistant Attorney General, for respondent.

No. 1334, Misc. MILLS *v.* TINSLEY, WARDEN. C. A. 10th Cir. Certiorari denied. *Samuel D. Menin* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent. Reported below: 314 F. 2d 311.

No. 1336, Misc. SIRES *v.* COLE, JUDGE, ET AL. C. A. 9th Cir. Certiorari denied. Reported below: 314 F. 2d 340.

No. 1338, Misc. HOOPER *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. Petitioner *pro se*. *Richard W. Ervin,* Attorney General of Florida, for respondent.

No. 1339, Misc. CORREA *v.* NEW YORK. Supreme Court of New York, New York County. Certiorari denied. *Ephraim London* and *Martin Garbus* for petitioner.

No. 1341, Misc. RAINSBERGER *v.* LAMB, SHERIFF. C. A. 9th Cir. Certiorari denied. *Samuel S. Lionel* for petitioner. *Charles L. Garner* for respondent. Reported below: 313 F. 2d 195.

No. 1351, Misc. CLARK *v.* MATTINGLY. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. *David Applestein* for petitioner. *Cornelius H. Doherty* for respondent.

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No. 1343, Misc. PERRY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1344, Misc. HITCHCOCK *v.* ARIZONA. C. A. 9th Cir. Certiorari denied.

No. 1346, Misc. JACKSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 1350, Misc. PUCKETT *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 1353, Misc. MCCARTNEY *v.* UNITED STATES. C. A. 7th 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: 311 F. 2d 475.

No. 1356, Misc. GRIMALDI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1357, Misc. CIPOLLA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1359, Misc. WHITE *v.* UNITED STATES. Court of Claims. Certiorari denied. *David C. Shapard* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States.

No. 1360, Misc. WILSON *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: 313 F. 2d 317.

No. 1361, Misc. STEELE *v.* FAY, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 1362, Misc. AMATO *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. 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: 17 App. Div. 2d 1033.

No. 1363, Misc. SADNESS *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Reported below: 312 F. 2d 559.

No. 1366, Misc. SCHWARTZ *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied.

No. 1368, Misc. TRUJILLO *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. Petitioner *pro se.* *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John E. Bush,* Assistant Attorney General, for respondent. Reported below: 151 Colo. ——, 377 P. 2d 948.

No. 1369, Misc. HALL *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 25 Ill. 2d 297, 185 N. E. 2d 143.

No. 1370, Misc. CRUME *v.* BETO, CORRECTIONS DIRECTOR, ET AL. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1371, Misc. CAMPBELL *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 1373, Misc. HARVEY *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 1375, Misc. Woods *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Reported below: 26 Ill. 2d 582, 187 N. E. 2d 692.

No. 1376, Misc. Sostre *v.* Wilkins, Warden. C. A. 2d Cir. Certiorari denied.

No. 1379, Misc. Jackson *v.* United States. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 311 F. 2d 686.

No. 1382, Misc. Forbes *v.* City of Philadelphia. C. A. 3d Cir. Certiorari denied.

No. 1383, Misc. Draper et al. *v.* Washington et al. Supreme Court of Washington. Certiorari denied.

No. 1384, Misc. Petersen *v.* LaVallee, Warden. Court of Appeals of New York. Certiorari denied.

No. 1385, Misc. Ray *v.* Heinze, Warden. Supreme Court of California. Certiorari denied.

No. 1386, Misc. Miller *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 1387, Misc. Zilka *v.* Sanctis Construction, Inc. Supreme Court of Pennsylvania. Certiorari denied. *Edward O. Spotts* for petitioner. *Charles E. Pledger, Jr.* and *Justin L. Edgerton* for respondent. Reported below: 409 Pa. 396, 186 A. 2d 897.

No. 1390, Misc. Ikerd *v.* Illinois. Supreme Court of Illinois. Certiorari denied. Reported below: 26 Ill. 2d 573, 188 N. E. 2d 12.

No. 1388, Misc. McCabe *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1392, Misc. Alday *v.* Eyman, Warden, et al. Supreme Court of Arizona. Certiorari denied.

No. 1393, Misc. Bozeyowski *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied.

No. 1394, Misc. Lynch *v.* Washington. Supreme Court of Washington. Certiorari denied.

No. 1396, Misc. Zimmer *v.* Langlois, Warden. Supreme Court of Rhode Island. Certiorari denied. Reported below: —— R. I. ——, 188 A. 2d 89.

No. 1397, Misc. Rohr *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 1398, Misc. Withers *v.* Nash, Warden. Supreme Court of Missouri. Certiorari denied.

No. 1399, Misc. Pearson *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 1400, Misc. Williams *v.* Fay et al. C. A. 2d Cir. Certiorari denied.

No. 1402, Misc. Franklin *v.* Russell, Correctional Superintendent. Supreme Court of Pennsylvania. Certiorari denied.

No. 1404, Misc. McCloskey *v.* Director, Patuxent Institution. Court of Appeals of Maryland. Certiorari denied. Reported below: 230 Md. 635, 187 A. 2d 833.

No. 1405, Misc. PARKER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Carman F. Ball* and *Irma R. Thorn* for respondent.

No. 1406, Misc. HORNBECK *v.* WILKINS, WARDEN. Court of Appeals of New York. Certiorari denied.

No. 1408, Misc. YARBRAY *v.* BETO, CORRECTIONS DIRECTOR. Court of Criminal Appeals of Texas. Certiorari denied.

No. 1409, Misc. GORDON, ALIAS SMITH, *v.* MISSISSIPPI. Supreme Court of Mississippi. Certiorari denied. *Melvin L. Wulf* for petitioner. Reported below: —— Miss. ——, 149 So. 2d 475.

No. 1410, Misc. GRIFFIN *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 1411, Misc. KERN *v.* BANMILLER, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1412, Misc. CRIDER *v.* MAXWELL, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 174 Ohio St. 190, 187 N. E. 2d 875.

No. 1413, Misc. JACKSON *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 1415, Misc. DRAPER ET AL. *v.* WASHINGTON ET AL. Supreme Court of Washington. Certiorari denied.

No. 1420, Misc. BISIGNANO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Richard F. Plechner* for petitioner. Reported below: 39 N. J. 156, 188 A. 2d 10.

No. 1418, Misc. DIAZ *v.* CALIFORNIA. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. Reported below: 208 Cal. App. 2d 41, 24 Cal. Rptr. 887.

No. 1443, Misc. SMITH *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 1446, Misc. BEELER *v.* BOMAR, WARDEN. Supreme Court of Tennessee, Middle Division. Certiorari denied.

No. 1460, Misc. POTTS *v.* TENNESSEE. Supreme Court of Tennessee, Middle Division. Certiorari denied. *Knox Bigham* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent.

No. 1416, Misc. COURNOW *v.* CUNNINGHAM, PENITENTIARY SUPERINTENDENT. Supreme Court of Appeals of Virginia. Certiorari denied.

No. 1421, Misc. WEISS *v.* HUNNA. C. A. 2d Cir. Certiorari denied. Petitioner *pro se.* *Frank G. Wittenberg* for respondent. Reported below: 312 F. 2d 711.

No. 1422, Misc. SEYMOUR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se.* *Louis J. Lefkowitz,* Attorney General of New York, and *Anthony J. Lokot,* Assistant Attorney General, for respondent.

No. 1423, Misc. RABURN *v.* COX, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 314 F. 2d 856.

No. 1424, Misc. EUBANKS *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied.

No. 1425, Misc. ROBERTS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1428, Misc. ADAMS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 1430, Misc. ALLEN *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *John C. Tyson III*, Assistant Attorney General, for respondent.

No. 1431, Misc. MOHLER *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Felicia Dubrovsky* for the United States. Reported below: 312 F. 2d 228.

No. 1434, Misc. LEWIS *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 1435, Misc. WOOD *v.* MARONEY, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 1437, Misc. REED *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 314 F. 2d 458.

No. 1438, Misc. BROWN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 27 Ill. 2d 23, 187 N. E. 2d 728.

No. 1454, Misc. GREENE *v.* KROPP, WARDEN. Supreme Court of Michigan. Certiorari denied.

No. 1441, Misc. CEPEDA *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 1445, Misc. MANN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 27 Ill. 2d 135, 188 N. E. 2d 665.

No. 1450, Misc. WILLIAMS *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 39 N. J. 471, 189 A. 2d 193.

No. 1456, Misc. PAUL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 1461, Misc. COX *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 22 Ill. 2d 534, 177 N. E. 2d 211.

No. 1467, Misc. MILLER *v.* GUTHRIE. Supreme Court of Errors of Connecticut. Certiorari denied.

No. 1472, Misc. HARPER *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 1481, Misc. WILLIAMS *v.* HOLMAN, WARDEN. Supreme Court of Alabama. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *John C. Tyson III*, Assistant Attorney General, for respondent.

No. 1523, Misc. LAWRENSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: —— F. 2d ——.

No. 1503, Misc. De La O *v.* California. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Stanley Mosk,* Attorney General of California, *William E. James,* Assistant Attorney General, and *Gordon Ringer,* Deputy Attorney General, for respondent. Reported below: 59 Cal. 2d 128, 378 P. 2d 793.

No. 840, Misc. Jennings *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice Goldberg took no part in the consideration or decision of this petition. *Jerry D. Anker* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 1365, Misc. Kapsalis *v.* United States. C. A. 7th Cir. Certiorari denied. Mr. Justice Goldberg took no part in the consideration or decision of this petition. *Frank G. Uriell* and *William A. Carey* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 313 F. 2d 875.

No. 1178, Misc. Whaley *v.* Kirby et al. District Court of Appeal of California, Fourth Appellate District. Certiorari denied. The Chief Justice took no part in the consideration or decision of this petition. Reported below: 208 Cal. App. 2d 232, 25 Cal. Rptr. 50.

No. 1256, Misc. Scarbeck *v.* United States. United States Court of Appeals for the District of Columbia Circuit. Certiorari denied. Mr. Justice White took no part in the consideration or decision of this petition. *Samuel C. Klein* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Robert S. Brady* for the United States. Reported below: —— U. S. App. D. C. ——, 317 F. 2d 546.

No. 1322, Misc. COLLINS *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 145 Ct. Cl. 382.

No. 1300, Misc. GLOUSER *v.* VAN ALSTINE, CLERK, U. S. DISTRICT COURT. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit and for other relief denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for respondent. Reported below: 313 F. 2d 199.

No. 1333, Misc. SOBELL *v.* UNITED STATES. Motion for leave to use the record in Nos. 111 and 112, October Term, 1952, granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. MR. JUSTICE WHITE took no part in the consideration or decision of this motion and petition. *Eleanor Jackson Piel, Marshall Perlin* and *Frank J. Donner* for petitioner. *Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Lee B. Anderson* for the United States. Reported below: 314 F. 2d 314.

Rehearing Denied.

No. 84, October Term, 1960. COHEN *v.* HURLEY, 366 U. S. 117. Motion for leave to file a petition for rehearing denied. MR. JUSTICE WHITE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion.

No. 884. HELBROS WATCH CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION, 372 U. S. 976. Motion for leave to file a petition for rehearing denied.

No. 24. HALLIBURTON OIL WELL CEMENTING CO. *v.* REILY, COLLECTOR OF REVENUE OF LOUISIANA, 373 U. S. 64;

No. 45. FLORIDA LIME & AVOCADO GROWERS, INC., ET AL. *v.* PAUL, DIRECTOR OF THE DEPARTMENT OF AGRICULTURE OF CALIFORNIA, ET AL., 373 U. S. 132, 929;

No. 229. GUTIERREZ *v.* WATERMAN STEAMSHIP CORP., 373 U. S. 206;

No. 305. WHIPPLE ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE, 373 U. S. 193;

No. 877. SHOTT *v.* OHIO, 373 U. S. 240;

No. 937. ILLINOIS ET AL. *v.* UNITED STATES ET AL., 373 U. S. 378;

No. 949. FLORA CONSTRUCTION CO. *v.* GRAND JUNCTION STEEL FABRICATING CO. ET AL., 373 U. S. 240;

No. 977, Misc. STURGES *v.* CALIFORNIA ET AL., 373 U. S. 926;

No. 1024, Misc. CEPERO *v.* UNITED STATES CONGRESS ET AL., 373 U. S. 545;

No. 1227, Misc. CEPERO *v.* UNITED STATES, 373 U. S. 544; and

No. 1193, Misc. FREEMAN *v.* OREGON, 373 U. S. 919. Petitions for rehearing denied.

No. 981, October Term, 1961. MCCUE ET AL. *v.* UNITED STATES, 370 U. S. 939. Motion for leave to file a petition for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion.

No. 958. JIMENEZ *v.* HIXON, U. S. MARSHAL, ET AL., 373 U. S. 914. Petition for rehearing denied. MR. JUSTICE BLACK and MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 720, Misc. MORGAN *v.* UNITED STATES, 373 U. S. 917. Petition for a rehearing and for other relief denied.

No. 97. Baltimore & Ohio Railroad Co. et al. *v.* Boston & Maine Railroad et al., 373 U. S. 372;

No. 98. Maryland Port Authority et al. *v.* Boston & Maine Railroad et al., 373 U. S. 372;

No. 99. Interstate Commerce Commission *v.* Boston & Maine Railroad et al., 373 U. S. 372; and

No. 1046. Holovachka *v.* United States, *ante,* p. 809. Petitions for rehearing denied. Mr. Justice White took no part in the consideration or decision of these petitions.

No. 77, Misc. Stevenson *v.* United States, 371 U. S. 835, 936. Motion for leave to file a second petition for rehearing denied. Mr. Justice Goldberg took no part in the consideration or decision of this motion.

AMENDMENTS TO
RULES OF CIVIL PROCEDURE
FOR THE
UNITED STATES DISTRICT COURTS

Effective July 1, 1963

The following amendments to the Rules of Civil Procedure for the United States District Courts were prescribed by the Supreme Court of the United States on January 21, 1963, pursuant to 28 U. S. C. § 2072, and they were reported to Congress by THE CHIEF JUSTICE on the same day, *post*, p. 863. An additional amendment fixing the effective date was adopted on March 18, 1963, and reported to Congress by THE CHIEF JUSTICE on March 19, 1963, *post*, p. 871.

The amendments became effective on July 1, 1963, as provided in amended Rule 86 (e), *post*, p. 893.

For earlier publications of the Rules of Civil Procedure and the amendments thereto, see 308 U. S. 645, 308 U. S. 642, 329 U. S. 839, 335 U. S. 919, 341 U. S. 959, 368 U. S. 1009.

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

JANUARY 21, 1963.

To the Senate and House of Representatives of the United States of America in Congress assembled:

By direction of the Supreme Court, I have the honor to report to the Congress the attached amendments to the Rules of Civil Procedure for the United States District Courts, which have been adopted by the Supreme Court, pursuant to Title 28, U. S. C., Sec. 2072.

Accompanying these amendments is the Report of the Judicial Conference of the United States, submitted to the Court for its consideration pursuant to Title 28, U. S. C., Sec. 331.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS have filed the attached statement.

Respectfully,

(Signed) EARL WARREN,
Chief Justice of the United States.

699-272 O-63-40

SUPREME COURT OF THE UNITED STATES

MONDAY, JANUARY 21, 1963.

ORDERED:

1. That the Rules of Civil Procedure be, and they hereby are, amended by including therein Forms Number 30, 31 and 32, and the amendments to Rules 4, 5, 6, 7, 12, 13, 14, 15, 24, 25, 26, 28, 30, 41, 49, 50, 52, 56, 58, 71A, 77, 79, 81, and 86 and to Forms Number 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 16, 18, 21, 22–A and 22–B, as hereinafter set forth.

2. That THE CHIEF JUSTICE be authorized to transmit these amendments to Congress in accordance with the provisions of Title 28, U. S. C., Sec. 2072.

Statement of MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are opposed to the submission of these rules [1] to the Congress under a statute which permits them to "take effect" and to repeal "all laws in conflict with such rules" without requiring any affirmative consideration, action, or approval of the rules by Congress or by the President.[2] We believe that while some of the Rules of Civil Procedure are simply housekeeping details,[3] many determine matters so

[1] See our earlier statements in 368 U. S. 1012–1014 and 346 U. S. 946–947.

[2] 28 U. S. C. § 2072 gives this Court the power to prescribe rules of practice and procedure for Federal District Courts and further provides that such rules

"shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

"All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

[3] See 368 U. S. 1012.

substantially affecting the rights of litigants in lawsuits that in practical effect they are the equivalent of new legislation which, in our judgment, the Constitution requires to be initiated in and enacted by the Congress [4] and approved by the President.[5] The Constitution, as we read it, provides that all laws shall be enacted by the House, the Senate, and the President, not by the mere failure of Congress to reject proposals of an outside agency. Even were there not this constitutional limitation, the authorizing statute itself qualifies this Court's power by imposing upon it a solemn responsibility not to submit rules that "abridge, enlarge or modify any substantive right" and by specifically charging the Court with the duty to "preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution." [6] Our chief objections to the rules relate essentially to the fact that many of their provisions do "abridge, enlarge or modify" substantive rights and do not "preserve the right of trial by jury" but actually encroach upon it.

(1) (a) Rule 50 (a) is amended by making the order of a judge granting a motion for a directed verdict effective without submitting the question to the jury at all. It was pointed out in *Galloway* v. *United States,* 319 U. S. 372, 396, 401–407 (dissenting opinion), how judges have whittled away or denied the right of trial by jury through the devices of directed verdicts and judgments notwithstanding verdicts. Although the amendment here is not itself a momentous one, it gives formal sanction to the process by which the courts have been wresting from juries the power to render verdicts. Since we do not

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[4] "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." U. S. Const., Art. I, § 1.

[5] "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; . . ." U. S. Const., Art. I, § 7.

[6] 28 U. S. C. § 2072.

approve of this sapping of the Seventh Amendment's guarantee of a jury trial, we cannot join even this technical *coup de grace*.

(b) The proposed amendment to 50 (c) in practical effect vests appellate courts with more power than they have had to grant or deny new trials. The Court in *Cone* v. *West Virginia Pulp & Paper Co.*, 330 U. S. 212, 217–218, and *Globe Liquor Co.* v. *San Roman*, 332 U. S. 571, refused to construe the federal rules then existing to allow Courts of Appeals to interfere with trial judges' discretion to grant new trials. To the extent that jury verdicts are to be set aside and new trials granted, we believe that those who hear the evidence, the trial judges, are the ones who should primarily exercise such discretion.

(c) The proposed amendment to Rule 56 (e) imposes additional burdens upon litigants to protect against summary judgments rendered without hearing evidence on the part of witnesses who are confronted by the persons against whom they testify so that these persons can subject the witnesses to cross-examination. The summary judgment procedure, while justified in some cases, is made a handy instrument to let judges rather than juries try lawsuits and to let those judges try cases not on evidence of witnesses subjected to cross-examination but on ex parte affidavits obtained by parties. Most trial lawyers would agree, we think, that a litigant can frequently obtain in an actual trial favorable testimony which could not have been secured by affidavits or even by depositions.

(d) If there are to be amendments, Rule 49 should be repealed. That rule authorizes judges to require juries to return "only a special verdict in the form of a special written finding upon each issue of fact" or to answer "written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict" in addition to rendering the general verdict. Such devices are used to impair or wholly take away the power of a jury to render a general verdict. One of the ancient, fundamental reasons for having general jury verdicts was to preserve the

right of trial by jury as an indispensable part of a free government. Many of the most famous constitutional controversies in England revolved around litigants' insistence, particularly in seditious libel cases, that a jury had the right to render a general verdict without being compelled to return a number of subsidiary findings to support its general verdict. Some English jurors had to go to jail because they insisted upon their right to render general verdicts over the repeated commands of tyrannical judges not to do so. Rule 49 is but another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases according to their own judgments. A scrutiny of the special verdict and written interrogatory cases in appellate courts will show the confusion that necessarily results from the employment of these devices and the ease with which judges can use them to take away the right to trial by jury. We believe that Rule 49 should be repealed, not amplified.

(2) There is a proposal to amend Rule 41, which provides for dismissal of actions. We believe that, if the rules are to be changed, a major amendment to this rule is required in the interest of justice. Before dismissing a plaintiff's action for failure of his lawyer to prosecute, the trial judge should be required to have notice served on the plaintiff himself. The hardship that can result from the absence of such requirement is shown by *Link* v. *Wabash R. Co.,* 370 U. S. 626. Link's lawyer failed to appear in response to a judge's order for a pre-trial conference, and the judge dismissed the case. As pointed out in the dissent, plaintiff had been severely injured, and a fair system of justice should not have penalized him because his lawyer, through neglect or any other reason, failed to appear when ordered. It would do a defendant no injury for the court to refuse to dismiss any apparently bona fide case until the plaintiff has actually had notice that some failure of his lawyer has irked the judge.

(3) MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS object to the changes in Rule 4, which for the first time permit a Federal District Court to obtain jurisdiction over a defendant by service of process outside the State or over his property by garnishment or attachment, under the circumstances and in the manner prescribed by state law. Those changes will apparently have little effect insofar as "federal question" litigation is concerned, since 28 U. S. C. § 1391 (b) requires such suits to be brought "only in the judicial district where all defendants reside . . . ." Diversity actions, however, may be greatly increased, for the effect of proposed 4 (e) is not limited to suits authorized by such statutes as the Federal Interpleader Act, 28 U. S. C. § 1335. See Proposed Amendments to the Rules of Civil Procedure for the United States District Courts, approved by the Judicial Conference of the United States on September 19–20, 1962, pp. 5–8; 28 U. S. C. § 1391 (a); Fed. Rules Civ. Proc. 1. We see no justification for an increase in the number of diversity cases. We also see no reason why the extent of a Federal District Court's personal jurisdiction should depend upon the existence or nonexistence of a state "long-arm" statute. Moreover, at present a state court action commenced by attachment or garnishment can get into a District Court only if a nonresident defendant chooses to appear and remove the case, see 28 U. S. C. § 1441, and there is no good reason, absent a congressional finding, why this should be changed.

Instead of recommending changes to the present rules, we recommend that the statute authorizing this Court to prescribe Rules of Civil Procedure, if it is to remain a law, be amended to place the responsibility upon the Judicial Conference rather than upon this Court. Since the statute was first enacted in 1934, 48 Stat. 1064, the Judicial Conference has been enlarged and improved and is now very active in its surveillance of the work of the federal courts and in recommending appropriate legisla-

tion to Congress. The present rules produced under 28 U. S. C. § 2072 are not prepared by us but by Committees of the Judicial Conference designated by THE CHIEF JUSTICE, and before coming to us they are approved by the Judicial Conference pursuant to 28 U. S. C. § 331.[7] The Committees and the Conference are composed of able and distinguished members and they render a high public service. It is they, however, who do the work, not we, and the rules have only our imprimatur. The only contribution that we actually make is an occasional exercise of a veto power. If the rule-making for Federal District Courts is to continue under the present plan, we believe that the Supreme Court should not have any part in the task; rather, the statute should be amended to substitute the Judicial Conference. The Judicial Conference can participate more actively in fashioning the rules and affirmatively contribute to their content and design better than we can. Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid.

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[7] "The Conference shall also carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law. Such changes in and additions to those rules as the Conference may deem desirable to promote simplicity in procedure, fairness in administration, the just determination of litigation, and the elimination of unjustifiable expense and delay shall be recommended by the Conference from time to time to the Supreme Court for its consideration and adoption, modification or rejection, in accordance with law."

LETTER OF TRANSMITTAL

SUPREME COURT OF THE UNITED STATES

WASHINGTON, D. C.

MARCH 19, 1963.

To the Senate and House of Representatives of the United States of America in Congress assembled:

By direction of the Supreme Court, I have the honor to transmit the attached amendment to the amendments to the Rules of Civil Procedure for the United States District Courts, which I transmitted to the Congress January 21, 1963.

Respectfully,

(Signed) EARL WARREN,
Chief Justice of the United States.

SUPREME COURT OF THE UNITED STATES

MONDAY, MARCH 18, 1963

IT IS ORDERED (1) That paragraph (e) of Rule 86 of the Rules of Civil Procedure, as adopted January 21, 1963, is amended to read as follows:

> (e) EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on January 21, 1963, and transmitted to the Congress on January 21, 1963, shall take effect on July 1, 1963. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

(2) That THE CHIEF JUSTICE be authorized to transmit this amendment to Congress in accordance with the provisions of Title 28, U. S. C., Sec. 2072.

(3) That this amendment shall take effect at the expiration of 90 days after it has been reported by THE CHIEF JUSTICE to Congress.

AMENDMENTS TO RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

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AMENDMENTS TO RULES OF CIVIL PROCEDURE

FOR THE

UNITED STATES DISTRICT COURTS

Rule 4. Process

(b) Same: Form. The summons shall be signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint. When, under Rule 4 (e), service is made pursuant to a statute or rule of court of a state, the summons, or notice, or order in lieu of summons shall correspond as nearly as may be to that required by the statute or rule.

(d) Summons: Personal Service.

(4) Upon the United States, by delivering a copy of the summons and of the complaint to the United States attorney for the district in which the action is brought or to an assistant United States attorney or clerical employee designated by the United States attorney in a writing filed with the clerk of the court and by sending a copy of the summons and of the complaint by registered or certified mail to the Attorney General of the United States at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered or certified mail to such officer or agency.

(7) Upon a defendant of any class referred to in paragraph (1) or (3) of this subdivision of this rule, it is also sufficient if the summons and complaint are served in the manner prescribed by any statute of the United States or in the manner prescribed by the law of the state in which the district court is held for the service of summons or other like process upon any such defendant in an action brought in the courts of general jurisdiction of that state.

(e) SAME: SERVICE UPON PARTY NOT INHABITANT OF OR FOUND WITHIN STATE. Whenever a statute of the United States or an order of court thereunder provides for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state in which the district court is held, service may be made under the circumstances and in the manner prescribed by the statute or order, or, if there is no provision therein prescribing the manner of service, in a manner stated in this rule. Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

(f) TERRITORIAL LIMITS OF EFFECTIVE SERVICE. All process other than a subpoena may be served anywhere within the territorial limits of the state in which the district court is held, and, when authorized by a statute of the United States or by these rules, beyond the territorial limits of that state. In addition, persons who are brought in as parties pursuant to Rule 13 (h) or Rule 14, or as additional parties to a pending action pursuant to Rule 19, may be served in the manner stated in paragraphs (1)–(6)

of subdivision (d) of this rule at all places outside the state but within the United States that are not more than 100 miles from the place in which the action is commenced, or to which it is assigned or transferred for trial; and persons required to respond to an order of commitment for civil contempt may be served at the same places. A subpoena may be served within the territorial limits provided in Rule 45.

(i) Alternative Provisions for Service in a Foreign Country.

(1) Manner. When the federal or state law referred to in subdivision (e) of this rule authorizes service upon a party not an inhabitant of or found within the state in which the district court is held, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made: (A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or (B) as directed by the foreign authority in response to a letter rogatory, when service in either case is reasonably calculated to give actual notice; or (C) upon an individual, by delivery to him personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or (D) by any form of mail, requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or (E) as directed by order of the court. Service under (C) or (E) above may be made by any person who is not a party and is not less than 18 years of age or who is designated by order of the district court or by the foreign court. On request, the clerk shall deliver the summons to the plaintiff for transmission to the person or the foreign court or officer who will make the service.

(2) Return. Proof of service may be made as prescribed by subdivision (g) of this rule, or by the law of the foreign country, or by order of the court. When service is made pursuant to subparagraph (1)(D) of this subdivision, proof of service shall include a receipt signed by the addressee or other evidence of delivery to the addressee satisfactory to the court.

Rule 5. Service and Filing of Pleadings and Other Papers

(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

Rule 6. Time

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

As used in this rule and in Rule 77 (c), "legal holiday" includes New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States, or by the state in which the district court is held.

(b) ENLARGEMENT. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order or (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 50 (b), 52 (b), 59 (b), (d) and (e), 60 (b), and 73 (a) and (g), except to the extent and under the conditions stated in them.

RULE 7. PLEADINGS ALLOWED; FORM OF MOTIONS

(a) PLEADINGS. There shall be a complaint and an answer; a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under the provisions of Rule 14; and a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or a third-party answer.

RULE 12. DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED—BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS

(a) WHEN PRESENTED. A defendant shall serve his answer within 20 days after the service of the summons

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and complaint upon him, except when service is made under Rule 4 (e) and a different time is prescribed in the order of court under the statute of the United States or in the statute or rule of court of the state. A party served with a pleading stating a cross-claim against him shall serve an answer thereto within 20 days after the service upon him. The plaintiff shall serve his reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by the court, within 20 days after service of the order, unless the order otherwise directs. The United States or an officer or agency thereof shall serve an answer to the complaint or to a cross-claim, or a reply to a counterclaim, within 60 days after the service upon the United States attorney of the pleading in which the claim is asserted. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within 10 days after the service of the more definite statement.

Rule 13. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by

which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Rule 14. Third-Party Practice

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defendant, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him. The third-party plaintiff need not obtain leave to make the service if he files the third-party complaint not later than 10 days after he serves his original answer. Otherwise he must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his defenses to the third-party plaintiff's claim as provided in Rule 12 and his counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert his defenses as provided in Rule 12 and his counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any

person not a party to the action who is or may be liable to him for all or part of the claim made in the action against the third-party defendant.

RULE 15. AMENDED AND SUPPLEMENTAL PLEADINGS

(d) SUPPLEMENTAL PLEADINGS. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor.

RULE 24. INTERVENTION

(c) PROCEDURE. A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. When the constitutionality of an act of Congress affecting the public interest is drawn in question in any action to which the United States or an officer, agency, or employee thereof is not a party, the court shall notify the Attorney General of the United States as provided in Title 28, U. S. C., § 2403.

RULE 25. SUBSTITUTION OF PARTIES

(a) DEATH.

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representa-

tives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons, and may be served in any judicial district. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

Rule 26. Depositions Pending Action

(e) Objections to Admissibility. Subject to the provisions of Rules 28 (b) and 32 (c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

Rule 28. Persons Before Whom Depositions May Be Taken

(b) In Foreign Countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the

deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in [here name the country]." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

(f) CERTIFICATION AND FILING BY OFFICER; COPIES; NOTICE OF FILING.

(1) The officer shall certify on the deposition that the witness was duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

RULE 41. DISMISSAL OF ACTIONS

(b) INVOLUNTARY DISMISSAL: EFFECT THEREOF. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the

court shall make findings as provided in Rule 52 (a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits.

RULE 49. SPECIAL VERDICTS AND INTERROGATORIES

(b) GENERAL VERDICT ACCOMPANIED BY ANSWER TO INTERROGATORIES. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

RULE 50. MOTION FOR A DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT

(a) MOTION FOR DIRECTED VERDICT: WHEN MADE; EFFECT. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer

evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

(b) MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

(c) SAME: CONDITIONAL RULINGS ON GRANT OF MOTION.

(1) If the motion for judgment notwithstanding the verdict, provided for in subdivision (b) of this rule, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it

should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

(2) The party whose verdict has been set aside on motion for judgment notwithstanding the verdict may serve a motion for a new trial pursuant to Rule 59 not later than 10 days after entry of the judgment notwithstanding the verdict.

(d) SAME: DENIAL OF MOTION. If the motion for judgment notwithstanding the verdict is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling him to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment notwithstanding the verdict. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial shall be granted.

RULE 52. FINDINGS BY THE COURT

(a) EFFECT. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions

the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41 (b).

RULE 56. SUMMARY JUDGMENT

(c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(e) FORM OF AFFIDAVITS; FURTHER TESTIMONY; DEFENSE REQUIRED. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits.

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Rule 58. Entry of Judgment

Subject to the provisions of Rule 54 (b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79 (a). Entry of the judgment shall not be delayed for the taxing of costs. Attorneys shall not submit forms of judgment except upon direction of the court, and these directions shall not be given as a matter of course.

Rule 71A. Condemnation of Property

(d) Process.

(3) Service of Notice.

(i) Personal service. Personal service of the notice (but without copies of the complaint) shall be made in accordance with Rule 4 (c) and (d) upon a defendant who resides within the United States or its territories or insular possessions and whose residence is known.

RULE 77. DISTRICT COURTS AND CLERKS

(c) CLERK'S OFFICE AND ORDERS BY CLERK. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, and legal holidays, but a district court may provide by local rule or order that its clerk's office shall be open for specified hours on Saturdays or particular legal holidays other than New Year's Day, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Veterans Day, Thanksgiving Day, and Christmas Day. All motions and applications in the clerk's office for issuing mesne process, for issuing final process to enforce and execute judgments, for entering defaults or judgments by default, and for other proceedings which do not require allowance or order of the court are grantable of course by the clerk; but his action may be suspended or altered or rescinded by the court upon cause shown.

(d) NOTICE OF ORDERS OR JUDGMENTS. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 73 (a).

RULE 79. BOOKS AND RECORDS KEPT BY THE CLERK AND ENTRIES THEREIN

(a) CIVIL DOCKET. The clerk shall keep a book known as "civil docket" of such form and style as may be prescribed by the Director of the Administrative Office of the

United States Courts with the approval of the Judicial Conference of the United States, and shall enter therein each civil action to which these rules are made applicable. Actions shall be assigned consecutive file numbers. The file number of each action shall be noted on the folio of the docket whereon the first entry of the action is made. All papers filed with the clerk, all process issued and returns made thereon, all appearances, orders, verdicts, and judgments shall be entered chronologically in the civil docket on the folio assigned to the action and shall be marked with its file number. These entries shall be brief but shall show the nature of each paper filed or writ issued and the substance of each order or judgment of the court and of the returns showing execution of process. The entry of an order or judgment shall show the date the entry is made. When in an action trial by jury has been properly demanded or ordered the clerk shall enter the word "jury" on the folio assigned to that action.

Rule 81. Applicability in General

(a) To What Proceedings Applicable.

(4) These rules do not alter the method prescribed by the Act of February 18, 1922, c. 57, § 2 (42 Stat. 388), U. S. C., Title 7, § 292; or by the Act of June 10, 1930, c. 436, § 7 (46 Stat. 534), as amended, U. S. C., Title 7, § 499g (c), for instituting proceedings in the United States district courts to review orders of the Secretary of Agriculture; or prescribed by the Act of June 25, 1934, c. 742, § 2 (48 Stat. 1214), U. S. C., Title 15, § 522, for instituting proceedings to review orders of the Secretary of the Interior; or prescribed by the Act of February 22, 1935, c. 18, § 5 (49 Stat. 31), U. S. C., Title 15, § 715d (c), as extended, for instituting proceedings to review orders of petroleum control boards; but the conduct of such proceedings in the district courts shall be made to conform to these rules so far as applicable.

(6) These rules apply to proceedings for enforcement or review of compensation orders under the Longshoremen's and Harbor Workers' Compensation Act, Act of March 4, 1927, c. 509, §§ 18, 21 (44 Stat. 1434, 1436), as amended, U. S. C., Title 33, §§ 918, 921, except to the extent that matters of procedure are provided for in that Act. The provisions for service by publication and for answer in proceedings to cancel certificates of citizenship under the Act of June 27, 1952, c. 477, Title III, c. 2, § 340 (66 Stat. 260), U. S. C., Title 8, § 1451, remain in effect.

(c) Removed Actions. These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, he shall answer or present the other defenses or objections available to him under these rules within 20 days after the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief upon which the action or proceeding is based, or within 20 days after the service of summons upon such initial pleading, then filed, or within 5 days after the filing of the petition for removal, whichever period is longest. If at the time of removal all necessary pleadings have been served, a party entitled to trial by jury under Rule 38 shall be accorded it, if his demand therefor is served within 10 days after the petition for removal is filed if he is the petitioner, or if he is not the petitioner within 10 days after service on him of the notice of filing the petition. A party who, prior to removal, has made an express demand for trial by jury in accordance with state law, need not make a demand after removal. If state law applicable in the court from which the case is removed does not require the parties to make express demands in order to claim trial by jury, they need not make demands after removal unless the court directs that they do so within a

specified time if they desire to claim trial by jury. The court may make this direction on its own motion and shall do so as a matter of course at the request of any party. The failure of a party to make demand as directed constitutes a waiver by him of trial by jury.

(f) REFERENCES TO OFFICER OF THE UNITED STATES. Under any rule in which reference is made to an officer or agency of the United States, the term "officer" includes a district director of internal revenue, a former district director or collector of internal revenue, or the personal representative of a deceased district director or collector of internal revenue.

RULE 86. EFFECTIVE DATE

(e) EFFECTIVE DATE OF AMENDMENTS. The amendments adopted by the Supreme Court on January 21, 1963, and transmitted to the Congress on January 21, 1963, shall take effect on July 1, 1963. They govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.

FORM 3. COMPLAINT ON A PROMISSORY NOTE

1. Allegation of jurisdiction.

2. Defendant on or about June 1, 1935, executed and delivered to plaintiff a promissory note [in the following words and figures: (here set out the note verbatim)]; [a copy of which is hereto annexed as Exhibit A]; [whereby defendant promised to pay to plaintiff or order on June 1, 1936 the sum of ..... dollars with interest thereon at the rate of six percent. per annum].

3. Defendant owes to plaintiff the amount of said note and interest.

Wherefore plaintiff demands judgment against defendant for the sum of ..... dollars, interest, and costs.

Signed: .....
Attorney for Plaintiff.

Address: .....

[Explanatory Note unchanged.]

FORM 4. COMPLAINT ON AN ACCOUNT

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ..... dollars according to the account hereto annexed as Exhibit A.

Wherefore (etc. as in Form 3).

FORM 5. COMPLAINT FOR GOODS SOLD AND DELIVERED

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ..... dollars for goods sold and delivered by plaintiff to defendant between June 1, 1936 and December 1, 1936.

Wherefore (etc. as in Form 3).

[Explanatory Note unchanged.]

FORM 6. COMPLAINT FOR MONEY LENT

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ..... dollars for money lent by plaintiff to defendant on June 1, 1936.

Wherefore (etc. as in Form 3).

FORM 7. COMPLAINT FOR MONEY PAID BY MISTAKE

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ..... dollars for money paid by plaintiff to defendant by mistake on June 1, 1936, under the following circumstances: [here state the circumstances with particularity—see Rule 9 (b)].

Wherefore (etc. as in Form 3).

FORM 8. COMPLAINT FOR MONEY HAD AND RECEIVED

1. Allegation of jurisdiction.

2. Defendant owes plaintiff ..... dollars for money had and received from one G. H. on June 1, 1936, to be paid by defendant to plaintiff.

Wherefore (etc. as in Form 3).

FORM 9. COMPLAINT FOR NEGLIGENCE

[Amend the "Wherefore" clause to read as follows:]

Wherefore plaintiff demands judgment against defendant in the sum of ..... dollars and costs.

FORM 10. COMPLAINT FOR NEGLIGENCE WHERE PLAINTIFF IS UNABLE TO DETERMINE DEFINITELY WHETHER THE PERSON RESPONSIBLE IS C. D. OR E. F. OR WHETHER BOTH ARE RESPONSIBLE AND WHERE HIS EVIDENCE MAY JUSTIFY A FINDING OF WILFULNESS OR OF RECKLESSNESS OR OF NEGLIGENCE

[Amend the "Wherefore" clause to read as follows:]

Wherefore plaintiff demands judgment against C. D. or against E. F. or against both in the sum of ..... dollars and costs.

FORM 11. COMPLAINT FOR CONVERSION

1. Allegation of jurisdiction.

2. On or about December 1, 1936, defendant converted to his own use ten bonds of the ..... Company (here insert brief identification as by number and issue) of the value of ..... dollars, the property of plaintiff.

Wherefore plaintiff demands judgment against defendant in the sum of ..... dollars, interest, and costs.

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FORM 12. COMPLAINT FOR SPECIFIC PERFORMANCE OF CONTRACT TO CONVEY LAND

[Amend the "Wherefore" clause to read as follows:]

Wherefore plaintiff demands (1) that defendant be required specifically to perform said agreement, (2) damages in the sum of one thousand dollars, and (3) that if specific performance is not granted plaintiff have judgment against defendant in the sum of ..... dollars.

FORM 13. COMPLAINT ON CLAIM FOR DEBT AND TO SET ASIDE FRAUDULENT CONVEYANCE UNDER RULE 18 (b)

[Amend the "Wherefore" clause to read as follows:]

Wherefore plaintiff demands:

(1) That plaintiff have judgment against defendant C. D. for ..... dollars and interest; (2) that the aforesaid conveyance to defendant E. F. be declared void and the judgment herein be declared a lien on said property; (3) that plaintiff have judgment against the defendants for costs.

FORM 16. COMPLAINT FOR INFRINGEMENT OF PATENT

[Amend the "Wherefore" clause to read as follows:]

Wherefore plaintiff demands a preliminary and final injunction against continued infringement, an accounting for damages, and an assessment of interest and costs against defendant.

FORM 18. COMPLAINT FOR INTERPLEADER AND DECLARATORY RELIEF

[Amend the second paragraph of the complaint to read as follows:]

2. On or about June 1, 1935, plaintiff issued to G. H. a policy of life insurance whereby plaintiff promised to pay to K. L. as beneficiary the sum of ..... dollars upon the death of G. H. The policy required the payment by G. H. of a stipulated premium on June 1, 1936, and annually thereafter as a condition precedent to its continuance in force.

FORM 21. ANSWER TO COMPLAINT SET FORTH IN FORM 8, WITH COUNTERCLAIM FOR INTERPLEADER

[Amend the first paragraph of the Counterclaim for Interpleader to read as follows:]

1. Defendant received the sum of ..... dollars as a deposit from E. F.

FORM 22–A. SUMMONS AND COMPLAINT AGAINST THIRD-PARTY DEFENDANT

[The contents of Form 22 are eliminated down to and including the words "Exhibit A," thus eliminating the motion and notice of motion.]

United States District Court for the Southern District of New York

Civil Action, File Number .....

A. B., Plaintiff
v.
C. D., Defendant and Third-Party Plaintiff
v.
E. F., Third-Party Defendant
} Summons

To the above-named Third-Party Defendant:

You are hereby summoned and required to serve upon....., plaintiff's attorney whose address is ....., and upon ....., who is attorney for C. D., defendant and third-party plaintiff, and whose address is ....., an answer to the third-party complaint which is herewith served upon you within 20 days after the service of this summons upon you exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the third-party complaint. There is also served upon you herewith a copy of the complaint of the plaintiff which you may but are not required to answer.

.....
Clerk of Court.

[Seal of District Court]
Dated .....

United States District Court for the Southern District of New York

Civil Action, File Number .....

A. B., Plaintiff
v.
C. D., Defendant and Third-Party Plaintiff
v.
E. F., Third-Party Defendant
} Third-Party Complaint

1. Plaintiff A. B. has filed against defendant C. D. a complaint, a copy of which is hereto attached as "Exhibit A."

2. (Here state the grounds upon which C. D. is entitled to recover from E. F., all or part of what A. B. may recover from C. D. The statement should be framed as in an original complaint.)

Wherefore C. D. demands judgment against third-party defendant E. F. for all sums [1] that may be adjudged against defendant C. D. in favor of plaintiff A. B.

Signed: .....
Attorney for C. D., Third-Party Plaintiff.

Address: .....

[1] Make appropriate change where C. D. is entitled to only partial recovery-over against E. F.

FORM 22–B. MOTION TO BRING IN THIRD-PARTY DEFENDANT

Defendant moves for leave, as third-party plaintiff, to cause to be served upon E. F. a summons and third-party complaint, copies of which are hereto attached as Exhibit X.

Signed: .....
Attorney for Defendant C. D.

Address: .....

Notice of Motion

(Contents the same as in Form 19. The notice should be addressed to all parties to the action.)

Exhibit X

(Contents the same as in Form 22–A.)

FORM 30. SUGGESTION OF DEATH UPON THE RECORD UNDER RULE 25 (a)(1)

[NEW]

A. B. [describe as a party, or as executor, administrator, or other representative or successor of C. D., the deceased party] suggests upon the record, pursuant to Rule 25 (a)(1), the death of C. D. [describe as party] during the pendency of this action.

FORM 31. JUDGMENT ON JURY VERDICT

[NEW]

United States District Court for the Southern District of New York

Civil Action, File Number .....

A. B., Plaintiff
v.
C. D., Defendant
} Judgment

This action came on for trial before the Court and a jury, Honorable John Marshall, District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged

[that the plaintiff A. B. recover of the defendant C. D. the sum of ....., with interest thereon at the rate of ... per cent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C. D. recover of the plaintiff A. B. his costs of action.]

Dated at New York, New York, this ..... day of ....., 19..

.....
Clerk of Court.

EXPLANATORY NOTE

1. This Form is illustrative of the judgment to be entered upon the general verdict of a jury. It deals with the cases where there is a general jury verdict awarding the plaintiff money damages or finding for the defendant, but is adaptable to other situations of jury verdicts.

2. The clerk, unless the court otherwise orders, is required forthwith to prepare, sign, and enter the judgment upon a general jury verdict without awaiting any direction by the court. The form of the judgment upon a special verdict or a general verdict accompanied by answers to interrogatories shall be promptly approved by the court, and the clerk shall thereupon enter it. See Rule 58, as amended.

3. The Rules contemplate a simple judgment promptly entered. See Rule 54 (a). Every judgment shall be set forth on a separate document. See Rule 58, as amended.

4. Attorneys are not to submit forms of judgment unless directed in exceptional cases to do so by the court. See Rule 58, as amended.

FORM 32. JUDGMENT ON DECISION BY THE COURT

[NEW]

United States District Court for the Southern District of New York

Civil Action, File Number .....

A. B., Plaintiff
v.
C. D., Defendant
} Judgment

This action came on for [trial] [hearing] before the Court, Honorable John Marshall, District Judge, presiding, and the issues having been duly [tried] [heard] and a decision having been duly rendered,

It is Ordered and Adjudged

[that the plaintiff A. B. recover of the defendant C. D. the sum of ....., with interest thereon at the rate of .... per cent as provided by law, and his costs of action.]

[that the plaintiff take nothing, that the action be dismissed on the merits, and that the defendant C. D. recover of the plaintiff A. B. his costs of action.]

Dated at New York, New York, this ..... day of ....., 19..

.....
Clerk of Court.

EXPLANATORY NOTE

1. This Form is illustrative of the judgment to be entered upon a decision of the court. It deals with the cases of decisions by the court awarding a party only money damages or costs, but is adaptable to other decisions by the court.

2. The clerk, unless the court otherwise orders, is required forthwith, without awaiting any direction by the court, to prepare, sign, and enter the judgment upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied. The form of the judgment upon a decision by the court granting other relief shall be promptly approved by the court, and the clerk shall thereupon enter it. See Rule 58, as amended.

3. See also paragraphs 3–4 of the Explanatory Note to Form 31.

STATEMENT SHOWING THE NUMBER OF CASES FILED, DISPOSED OF, AND REMAINING ON DOCKETS, AT CONCLUSION OF OCTOBER TERMS—1960, 1961, AND 1962

	ORIGINAL			APPELLATE			MISCELLANEOUS			TOTALS		
Terms	1960	1961	1962	1960	1961	1962	1960	1961	1962	1960	1961	1962
Number of cases on dockets	12	13	15	1,046	1,062	1,182	1,255	1,510	1,627	2,313	2,585	2,824
Number disposed of during terms	1	0	*7	887	860	972	1,040	1,297	1,371	1,928	2,157	2,350
Number remaining on dockets	11	13	8	159	202	210	215	213	256	385	428	474

	TERMS		
	1960	1961	1962
Distribution of cases disposed of during terms:			
Original cases	1	0	*7
Appellate cases on merits	259	195	282
Petitions for certiorari	628	665	690
Miscellaneous docket applications	1,040	1,297	1,371

	TERMS		
	1960	1961	1962
Distribution of cases remaining on dockets:			
Original cases	11	13	8
Appellate cases on merits	85	118	108
Petitions for certiorari	74	84	102
Miscellaneous docket applications	215	213	256

JUNE 19, 1963.

*This figure includes 3 cases finally disposed of by Court action and 4 cases which have been dropped from the docket as there is no matter with respect to them pending before the Court.

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2. *Deportation—Communist Party membership—Sufficiency of evidence.*—Evidence in deportation hearing held insufficient to establish that alien's association with Communist Party was meaningful, as contemplated by § 241 (a)(6)(C) of Immigration and Nationality Act of 1952, and deportation order could not stand. Gastelum-Quinones v. Kennedy, p. 469.

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