UNITED STATES REPORTS

VOLUME 379

CASES ADJUDGED

IN

THE SUPREME COURT

AT

OCTOBER TERM, 1964

OCTOBER 5, 1964, THROUGH FEBRUARY 1, 1965

HENRY PUTZEL, jr.
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.[1]
SHERMAN MINTON, Associate Justice.
CHARLES E. WHITTAKER, Associate Justice.

NICHOLAS deB. KATZENBACH, Acting Attorney General.[2]
ARCHIBALD COX, Solicitor General.
JOHN F. DAVIS, Clerk.
HENRY PUTZEL, jr., Reporter of Decisions.
T. PERRY LIPPITT, Marshal.
HELEN NEWMAN, Librarian.

*Notes on p. iv.

NOTES.

[1] Mr. Justice Burton, who retired effective October 13, 1958 (358 U. S. VII) died on October 28, 1964. See *post*, p. IX.

[2] Upon the resignation of Attorney General Robert F. Kennedy on September 3, 1964, Mr. Katzenbach, who had been Deputy Attorney General, became Acting Attorney General. He was nominated by President Johnson on January 28, 1965, to be Attorney General.

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.)

PROCEEDINGS ON THE DEATH OF MR. HERBERT HOOVER.

SUPREME COURT OF THE UNITED STATES.

TUESDAY, OCTOBER 20, 1964.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG.

Mr. Solicitor General Cox addressed the Court as follows:

MR. CHIEF JUSTICE:

It is with sadness that I inform the Court of the death, late this morning, of Herbert Hoover, the thirty-first President of the United States. He served his country unstintingly and with great distinction both before and after, as well as during, his Presidency. His death, while not wholly unanticipated, will be a shock not only to his fellow countrymen but also to millions of people in other lands whose suffering after the ravages of war he did so much to ease.

I move that the Court do now recess as a mark of respect to the memory of the former President.

THE CHIEF JUSTICE said:

Mr. Solicitor General:

It is with sadness that the Court receives from you the news of the passing of this great American.

President Hoover had a long and purposeful life—one of dedicated service to this Nation and to the world.

People of every race on every continent of the earth are indebted to him for alleviating much of their suffering which resulted from the two most devastating wars in history.

I am sure they, too, will mourn his passing, as we do.

It is appropriate that you, Mr. Solicitor General, should make this motion, and the Court takes some consolation from the fact that it can, in granting it, pay its respect and veneration to his memory. Accordingly, the Court will transact no further business today and will stand adjourned until tomorrow.

DEATH OF MR. JUSTICE BURTON.

SUPREME COURT OF THE UNITED STATES.

MONDAY, NOVEMBER 9, 1964.

Present: MR. CHIEF JUSTICE WARREN, MR. JUSTICE BLACK, MR. JUSTICE DOUGLAS, MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE BRENNAN, MR. JUSTICE STEWART, MR. JUSTICE WHITE, and MR. JUSTICE GOLDBERG.

THE CHIEF JUSTICE said:

It is with profound regret that the Court announces the passing of our colleague and dear friend, Harold Hitz Burton.

Mr. Justice Burton has gone from us, but for years before passing on he made a valiant fight against crippling disease with courage and serenity. He retired from the Supreme Court six years ago, but to the end of life he performed devoted service to other courts in the District of Columbia to the extent his diminishing strength would permit.

He served thirteen years on the Supreme Court, and I am sure that in its long history no Justice on the Court has been held in higher esteem by his colleagues. His opinions written for the Court will be a lasting memorial to him, and will long be studied as a part of the development of American jurisprudence. A deeply religious and kindly man, Justice Burton personified good will and devotion to duty.

As a Senator from Ohio and an Associate Justice of the Supreme Court, he has been a part of Washington for almost a quarter of a century.

Justice Burton will be remembered fondly by people in all walks of life.

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CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES

AT

OCTOBER TERM, 1964.

LOUDEN *v.* UTAH.

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

No. 6, Misc. Decided October 12, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 15 Utah 2d 64, 387 P. 2d 240.

George H. Searle for petitioner.

A. Pratt Kesler, Attorney General of Utah, and *Ronald N. Boyce,* Chief 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 Utah for further proceedings in light of *Stoner* v. *California,* 376 U. S. 483.

MR. JUSTICE HARLAN and MR. JUSTICE WHITE are of the opinion that certiorari should be denied.

DAVIS *v.* NEELY ET UX.

APPEAL FROM THE SUPREME COURT OF OKLAHOMA.

No. 68. Decided October 12, 1964.

Appeal dismissed and certiorari denied.
Reported below: 387 P. 2d 494.

John W. Willis for appellant.

Thomas D. Finney, Jr., and *Grant W. Wiprud* for appellees.

PER CURIAM.

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

CITY OF PLANTATION *v.* UTILITIES OPERATING CO., INC.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 72. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 156 So. 2d 842.

Carl A. Hiaasen for appellant.

William E. Miller and *Robert J. Corber* for appellee.

PER CURIAM.

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

SCHACKMAN ET AL. *v.* CALIFORNIA.

APPEAL FROM THE APPELLATE DEPARTMENT, SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES.

No. 105. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.

Burton Marks for appellants.

Roger Arnebergh, Philip E. Grey and *Wm. E. Doran* for appellee.

PER CURIAM.

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

BATTISTA ET AL., TRADING AS NOR-VIEW FARM *v.* MILK CONTROL COMMISSION OF PENNSYLVANIA.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 295. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 413 Pa. 652, 198 A. 2d 840.

Frederick A. Ballard for appellants.

Walter E. Alessandroni, Attorney General of Pennsylvania, and *Anthony W. Novasitis, Jr.*, 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.

ACCELERATED TRANSPORT-PONY EXPRESS, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT.

No. 131. Decided October 12, 1964.

227 F. Supp. 815, affirmed.

Bryce Rea, Jr., and *Louis Lisman* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Robert W. Ginnane and *Betty Jo Christian* for the United States et al.; *W. G. Burnette* for Lynchburg Traffic Bureau; *Arthur A. Arsham* and *John J. C. Martin* for National Small Shipments Traffic Conference, Inc., et al.; and *John M. Cleary, John F. Donelan* and *Dickson R. Loos* for National Industrial Traffic League, appellees.

PER CURIAM.

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

ALVAREZ *v.* CALIFORNIA.

APPEAL FROM THE DISTRICT COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT.

No. 46, Misc. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

AMPCO PRINTING-ADVERTISERS' OFFSET CORP. ET AL. *v.* CITY OF NEW YORK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 152. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 14 N. Y. 2d 11, 197 N. E. 2d 285.

Harold Riegelman and *H. H. Nordlinger* for appellants.

Leo A. Larkin, Stanley Buchsbaum and *Samuel J. Warms* for the City of New York et al., and *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Gustave Soderberg,* Assistant Attorney General, for Lefkowitz, appellees.

PER CURIAM.

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

EDELL *v.* MACK ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 145, Misc. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 13 N. Y. 2d 1001, 195 N. E. 2d 58.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

COOPER-JARRETT, INC., ET AL. *v.* UNITED STATES ET AL.

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

No. 159. Decided October 12, 1964.

226 F. Supp. 318, affirmed.

Kenneth E. Midgley, Thomas J. Hogan, Bryce Rea, Jr., Roland Rice, Homer S. Carpenter and *John S. Fessenden* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel and *Robert W. Ginnane* for the United States et al.; and *Carl E. Enggas, D. Robert Thomas, John F. Donelan, Nuel D. Belnap, Harvey Huston, John A. Daily, Paul R. Duke* and *John M. Cleary* for Eastern Railroads et al., appellees.

PER CURIAM.

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

MALONEY *v.* HOLDEN, JUDGE.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 225, Misc. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

WYCOFF CO., INC. *v.* PUBLIC SERVICE COMMISSION OF UTAH ET AL.

APPEAL FROM THE SUPREME COURT OF UTAH.

No. 238. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 15 Utah 2d 139, 389 P. 2d 57.

Wayne C. Durham for appellant.

A. Pratt Kesler, Attorney General of Utah, *H. Wright Volker,* Assistant Attorney General, and *Keith E. Sohm* for appellees.

PER CURIAM.

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

AGEE *v.* COLUMBUS BAR ASSOCIATION.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 259. Decided October 12, 1964.

Appeal dismissed and certiorari denied.
Reported below: 175 Ohio St. 443, 196 N. E. 2d 98.

George E. Tyack and *Alexander H. Martin, Jr.,* for appellant.

S. Noel Melvin for appellee.

PER CURIAM.

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

YORTY ET AL. *v.* JORDAN, SECRETARY OF STATE OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 250. Decided October 12, 1964.

Appeal dismissed and certiorari denied.

Roger Arnebergh, Bourke Jones and *James A. Doherty* for appellants.

Stanley Mosk, Attorney General of California, *Charles E. Corker* and *Charles A. Barrett,* Assistant Attorneys General, and *Sanford N. Gruskin,* Deputy Attorney General, for appellee.

PER CURIAM.

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

BENNETT *v.* COUNTY OF DADE, FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 275, Misc. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.

PER CURIAM.

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

JURUS *v.* COLUMBUS BAR ASSOCIATION.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 260. Decided October 12, 1964.

Appeal dismissed and certiorari denied.
Reported below: 175 Ohio St. 449, 196 N. E. 2d 94.

George E. Tyack for appellant.

S. Noel Melvin for appellee.

PER CURIAM.

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

LIND *v.* MINNESOTA ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA.

No. 163, Misc. Decided October 12, 1964.

Appeal dismissed.

Appellant *pro se.*

Walter F. Mondale, Attorney General of Minnesota, and *Charles E. Houston* and *Linus J. Hammond,* Assistant Attorneys General, for appellees.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed.

FORD *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 329. Decided October 12, 1964.

Appeal dismissed and certiorari denied.
Reported below: 245 La. 490, 159 So. 2d 129.

Floyd J. Reed for appellant.

PER CURIAM.

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

McILVAINE ET AL. *v.* LOUISIANA.

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

No. 21, Misc. Decided October 12, 1964.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 245 La. 649, 160 So. 2d 566.

Maurice R. Woulfe for petitioners.

Jim Garrison 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 Louisiana for further consideration in light of *Aguilar* v. *Texas,* 378 U. S. 108.

MR. JUSTICE BLACK dissents.

WASMUTH ET AL. *v.* ALLEN, COMMISSIONER OF EDUCATION OF NEW YORK, ET AL.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 402. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 14 N. Y. 2d 391, 200 N. E. 2d 756.

C. Dickerman Williams for appellants.

Louis J. Lefkowitz, Attorney General of New York, and *Paxton Blair,* Solicitor General, for appellees.

PER CURIAM.

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

WRIGHT *v.* ILLINOIS.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

No. 273, Misc. Decided October 12, 1964.

Appeal dismissed and certiorari denied.
Reported below: 30 Ill. 2d 519, 198 N. E. 2d 316.

Appellant *pro se.*

Daniel P. Ward and *Elmer C. Kissane* for appellee.

PER CURIAM.

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

CEPERO *v.* PRESIDENT OF THE UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 176, Misc. Decided October 12, 1964.

Appeal dismissed.

PER CURIAM.

The appeal is dismissed.

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

BINZ *v.* HELVETIA FLORIDA ENTERPRISES, INC.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 181, Misc. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.

Guion T. De Loach for appellant.

Lewis Horwitz for appellee.

PER CURIAM.

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

GAGER *v.* KASDON.

APPEAL FROM THE COURT OF APPEALS OF MARYLAND.

No. 195, Misc. Decided October 12, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 234 Md. 7, 197 A. 2d 837.

Appellant *pro se.*

Hillel Abrams for appellee.

PER CURIAM.

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

744-008 O-65-8

SAFEWAY TRAILS, INC. *v.* FURMAN ET AL.

APPEAL FROM THE SUPREME COURT OF NEW JERSEY.

No. 228. Decided October 19, 1964.

Appeal dismissed and certiorari denied.
Reported below: 41 N. J. 467, 197 A. 2d 366.

William A. Roberts and *Morris J. Levin* for appellant.

Arthur J. Sills, Attorney General of New Jersey, and *Alan B. Handler,* First Assistant Attorney General, for appellees.

PER CURIAM.

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

ALHAMBRA TRUCKING CO. ET AL. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 288. Decided October 19, 1964.

Appeal dismissed for want of a substantial federal question.

Frederick M. Rowe for appellants.

Mary Moran Pajalich for appellee.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

DIXIE FEED & SEED CO., INC., ET AL. *v.* BYRD.

APPEAL FROM THE COURT OF APPEALS OF TENNESSEE.

No. 311. Decided October 19, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: —— Tenn. App. ——, 376 S. W. 2d 745.

W. Neil Thomas, Jr., for appellants.

H. Keith Harber for appellee.

PER CURIAM.

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

BOINEAU ET AL. *v.* THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF SOUTH CAROLINA.

No. 483. Decided October 19, 1964.

235 F. Supp. 175, affirmed.

Ralph E. Becker for appellants.

Daniel R. McLeod, Attorney General of South Carolina, and *Clarence T. Goolsby, Jr.,* and *Everett N. Brandon,* Assistant Attorneys General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

BOHMAN *v.* CITY OF BOSTON REAL ESTATE COMMISSION.

APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS.

No. 312, Misc. Decided October 19, 1964.

Appeal dismissed for want of a substantial federal question.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

BOHMAN *v.* PEUTUCKET FIVE CENT SAVING BANK.

APPEAL FROM THE SUPREME JUDICIAL COURT OF MASSACHUSETTS.

No. 313, Misc. Decided October 19, 1964.

Appeal dismissed for want of a substantial federal question.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

MAMULA *v.* UNITED STEELWORKERS OF AMERICA ET AL.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 327. Decided October 19, 1964.

Appeal dismissed and certiorari denied.
Reported below: 414 Pa. 294, 200 A. 2d 306.

Harry Alan Sherman for appellant.

David E. Feller, Elliot Bredhoff, Jerry D. Anker, Michael H. Gottesman and *Ernest G. Nassar* for appellees.

PER CURIAM.

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

MR. JUSTICE BRENNAN is of the opinion that the appeal should be dismissed, but that in treating the papers as a petition for writ of certiorari, certiorari should be granted.

MR. JUSTICE GOLDBERG took no part in the consideration or decision of this appeal.

GIOVA *v.* ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

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

No. 23. Decided October 26, 1964.

Judgment reversed and case remanded with directions to entertain the petition for review.

Reported below: 308 F. 2d 347.

Fred Okrand for petitioner.

Solicitor General Cox, Assistant Attorney General Miller and *Philip R. Monahan* for respondent.

PER CURIAM.

Upon consideration of the submission of the United States that the judgment of the Court of Appeals should be reversed and the cause remanded with directions to entertain the petition for review, and upon examination of the entire record, the judgment is reversed and the case is remanded to the Court of Appeals with directions to entertain the petition for review.

TANCIL ET AL. *v.* WOOLLS ET AL., JUDGES.

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

No. 386. Decided October 26, 1964.*

230 F. Supp. 156, affirmed.

Allison W. Brown, Jr., for appellants in No. 386 and for appellees in No. 412.

Robert Y. Button, Attorney General of Virginia, *R. D. McIlwaine III,* Assistant Attorney General, *William J. Hassan* and *Ralph G. Louk* for appellants in No. 412.

PER CURIAM.

The motion to affirm in No. 412 is granted and the judgment in both cases is affirmed.

MR. JUSTICE HARLAN is of the opinion that probable jurisdiction should be noted in both cases.

MR. JUSTICE BRENNAN is of the opinion that probable jurisdiction should be noted in No. 386.

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*Together with No. 412, *Virginia Board of Elections et al.* v. *Hamm et al.,* also on appeal from the same court.

SHIPE ET AL. *v.* BRENNAN.

APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

No. 353. Decided October 26, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 414 Pa. 258, 199 A. 2d 467.

Wilhelm E. Shissler for appellants.

James W. Evans for appellee.

PER CURIAM.

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

NATIONAL LABOR RELATIONS BOARD *v.* BURNUP & SIMS, INC.

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

No. 15. Argued October 15, 1964.—Decided November 9, 1964.

Respondent employer discharged two employees upon being erroneously advised that they, while soliciting another employee for union membership, had threatened to dynamite company property if the union did not receive collective bargaining authorization. The Court of Appeals, finding that the employer had acted in good faith, reversed the National Labor Relations Board's holding that the discharges were an unfair labor practice under the National Labor Relations Act. *Held:* Regardless of motive, the employer violated § 8 (a)(1) of the Act since the discharged employees, who were not guilty of misconduct, were engaged in activity which was protected under § 7, and the wrongful discharge would tend to discourage § 7 activity. Pp. 22–24.

322 F. 2d 57, reversed.

Arnold Ordman argued the cause for petitioner. With him on the brief were *Solicitor General Cox, Dominick L. Manoli* and *Norton J. Come.*

Erle Phillips argued the cause and filed a brief for respondent.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Two employees in respondent's plant, Davis and Harmon, undertook to organize the employees who worked there. The Superintendent was advised by another employee, one Pate, that Davis and Harmon, while soliciting him for membership in the union, had told him the union would use dynamite to get in if the union did not acquire the authorizations. Respondent thereafter discharged Davis and Harmon because of these alleged state-

ments. An unfair labor practice proceeding was brought. The Board held that the discharges violated §§ 8 (a)(1) and 8 (a)(3) of the Act,[1] 61 Stat. 136, 140–141, 29 U. S. C. §§ 158 (a)(1) and (a)(3). It found that Pate's charges against Davis and Harmon were untrue and that they had actually made no threats against the company's property; and it concluded that respondent's honest belief in the truth of the statement was not a defense. 137 N. L. R. B. 766, 772–773.

The Court of Appeals refused reinstatement of Davis and Harmon, holding that since the employer acted in good faith, the discharges were not unlawful. 322 F. 2d 57. We granted the petition for certiorari because of a conflict among the Circuits. Cf. with the opinion below *Labor Board* v. *Industrial Cotton Mills,* 208 F. 2d 87; *Labor Board* v. *Cambria Clay Products Co.,* 215 F. 2d 48; *Cusano* v. *Labor Board,* 190 F. 2d 898.

We find it unnecessary to reach the questions raised under § 8 (a)(3) for we are of the view that in the context of this record § 8 (a)(1) was plainly violated, whatever the employer's motive.[2] Section 7 grants employees,

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[1] Sections 8 (a)(1) and (3) read as follows:

"It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

. . . . . .

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . ."

[2] As an alternative ground for its finding that the Act had been violated, the Board held that Pate's allegation was merely "seized up[on]" by the respondent as an "excuse" for the discharges of Davis and Harmon. 137 N. L. R. B. 766, 772–773. The Court of Appeals, however, rejected without discussion this suggestion of the existence of anti-union bias. 322 F. 2d 57, 59, 61. In its petition for writ of certiorari the Board expressly stated that "The propriety of this action [by the Court of Appeals] is not questioned here." In light

inter alia, "the right to self-organization, to form, join, or assist labor organizations." Defeat of those rights by employer action does not necessarily depend on the existence of an anti-union bias. Over and again the Board has ruled that § 8 (a)(1) is violated if an employee is discharged for misconduct arising out of a protected activity, despite the employer's good faith, when it is shown that the misconduct never occurred. See, *e. g., Mid-Continent Petroleum Corp.,* 54 N. L. R. B. 912, 932–934; *Standard Oil Co.,* 91 N. L. R. B. 783, 790–791; *Rubin Bros. Footwear, Inc.,* 99 N. L. R. B. 610, 611.[3] In sum, § 8 (a)(1) is violated if it is shown that the discharged employee was at the time engaged in a protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact, guilty of that misconduct.

That rule seems to us to be in conformity with the policy behind § 8 (a)(1). Otherwise the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees. Union activity often engenders strong emotions and gives rise to active rumors. A protected activity acquires a precarious status if innocent employees can be discharged while engaging in it, even though the employer acts in good faith. It is the tendency of those

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of this concession it is unnecessary for us to determine whether the Board's alternative finding of a discriminatory motivation is supported by substantial evidence.

[3] The *Rubin Bros.* case made a qualification as to burden of proof. Prior thereto the burden was on the employer to prove that the discharged employee was in fact guilty of the misconduct. *Rubin Bros.* said that "once such an honest belief is established, the General Counsel must go forward with evidence to prove that the employees did not, in fact, engage in such misconduct." 99 N. L. R. B., at 611.

discharges to weaken or destroy the § 8 (a)(1) right that is controlling. We are not in the realm of managerial prerogatives. Rather we are concerned with the manner of soliciting union membership over which the Board has been entrusted with powers of surveillance. See *Garment Workers* v. *Labor Board,* 366 U. S. 731, 738–739; *Labor Board* v. *Erie Resistor Corp.,* 373 U. S. 221, 228–229. Had the alleged dynamiting threats been wholly disassociated from § 7 activities quite different considerations might apply.

Reversed.

MR. JUSTICE HARLAN, concurring in part and dissenting in part.

Both the rule adopted by the lower court and that now announced by this Court seem to me unacceptable. On the one hand, it impinges on the rights assured by §§ 7 and 8 (a)(1) to hold, as the Court of Appeals did, that the employee must bear the entire brunt of his honest, but mistaken, discharge. On the other hand, it is hardly fair that the employer should be faced with the choice of risking damage to his business or incurring a penalty for taking honest action to thwart it.

Between these two one-way streets lies a middle two-way course: a rule which would require reinstatement of the mistakenly discharged employee and back pay only as of the time that the employer learned, or should have learned, of his mistake, subject, however, to a valid business reason for refusing reinstatement.[1] Such a rule gives offense neither to any policy of the statute nor to the dictates of fairness to the employer, and in my opinion represents a reasonable accommodation between the two inflexible points of view evinced by the opinions below and here.

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[1] As for example, if a replacement had been hired and the discharged employee unduly delayed in apprising the employer of the mistake.

Since I do not believe that this case presents the rare situation in which the Board can ignore motive,[2] I would vacate the judgment of the Court of Appeals and remand the case to the Board for further appropriate proceedings in light of what I believe to be the proper rule.

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[2] See *Teamsters Local* v. *Labor Board,* 365 U. S. 667, 677 (1961) (concurring opinion). Respondent here had a significant business justification—to avoid dynamiting of a silo—for discharging the employees, unlike the situations presented in *Allis-Chalmers Mfg. Co.* v. *Labor Board,* 162 F. 2d 435; *Cusano* v. *Labor Board,* 190 F. 2d 898, and *Labor Board* v. *Industrial Cotton Mills,* 208 F. 2d 87. See *Teamsters Local, supra,* at 680.

In *Allis-Chalmers* the employer downgraded the status of plant inspectors after they had voted to join a union, and it was apparent that the employer acted only because of the inspectors' membership in the union. There was no business justification for the employer's action except for his feeling that union members should not exercise supervisory powers and the Board was therefore justified in treating this as an unfair labor practice without a specific finding of discriminatory motive.

Cusano involved a mistaken belief by the employer that an employee had made a misstatement about company profits, which might well have been protected campaign "oratory" even if the employee had made the misstatement. Since the employer could simply have denied the truth of the profit figures, there was no business justification for discharging the employee.

Industrial Cotton Mills presents the closest analogy to the case before us. There an employee was refused reinstatement following a strike for alleged strike misconduct—throwing tacks on the street during a strike—which he did not commit. The Court of Appeals recognized the special congressional concern for the right to strike embodied in §§ 2 (3) and 13 of the Act, and held that the employer's lack of antiunion motive was irrelevant. There was also little business justification for punishing the employee after the strike had ended, unlike the fear in this case of future sabotage by the employees.

BROTHERHOOD OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYES *v.* UNITED AIR LINES, INC.

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

No. 31. Argued October 22, 1964.—Decided November 9, 1964.

Certiorari dismissed as improvidently granted.

Reported below: 325 F. 2d 576.

James L. Highsaw, Jr., argued the cause for petitioner. With him on the briefs was *Edward J. Hickey, Jr.*

Stuart Bernstein argued the cause for respondent. With him on the brief were *H. Templeton Brown* and *Robert L. Stern.*

Solicitor General Cox, by special leave of Court, argued the cause for the United States, as *amicus curiae,* urging reversal. With him on the brief were *Assistant Attorney General Douglas* and *Alan S. Rosenthal.*

PER CURIAM.

The writ of certiorari is dismissed as improvidently granted.

MR. JUSTICE HARLAN, believing that the questions which brought this case here should be decided, dissents from the dismissal of the writ.

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

HOOPER *v.* DUNCAN, SUPERINTENDENT, DEPARTMENT OF LIQUOR LICENSES AND CONTROL OF ARIZONA, ET AL.

APPEAL FROM THE SUPREME COURT OF ARIZONA.

No. 393. Decided November 9, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 95 Ariz. 305, 389 P. 2d 706.

Alfred C. Marquez for appellant.

PER CURIAM.

The appeal is dismissed for want of a substantial federal question.

ALBAUGH *v.* TAWES, GOVERNOR OF MARYLAND, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND.

No. 481. Decided November 9, 1964.

233 F. Supp. 576, affirmed.

PER CURIAM.

The judgment is affirmed.

TRAUTWEIN ET AL. *v.* COMMUNITY REDEVELOPMENT AGENCY OF LOS ANGELES.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 416. Decided November 9, 1964.*

Appeals dismissed and certiorari denied.
Reported below: 61 Cal. 2d 21, 389 P. 2d 538.

Frank Wickhem for appellants in No. 416.

Appellants *pro se* in No. 426.

Henry O. Duque for appellee in both cases.

Austin Clapp for John Swigart et al., as *amici curiae*, in support of appellants in No. 426.

PER CURIAM.

The motion of John Swigart et al., for leave to file a brief as *amici curiae* in No. 426 is granted. The motions to dismiss are granted and the appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.

DENMAN ET UX. *v.* WHITE, SECRETARY OF STATE OF MASSACHUSETTS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

No. 379, Misc. Decided November 9, 1964.

PER CURIAM.

The appeal is dismissed.

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*Together with No. 426, *Goldman et ux.* v. *Community Redevelopment Agency of Los Angeles*, also on appeal from the same court.

BRULOTTE ET AL. *v.* THYS CO.

CERTIORARI TO THE SUPREME COURT OF WASHINGTON.

No. 20. Argued October 20, 1964.—Decided November 16, 1964.

The royalty provisions of a patent-licensing agreement which provides for royalties for the use of machines incorporating certain patents are not enforceable for the period beyond the expiration of the last patent incorporated in the machine. *Automatic Radio Co.* v. *Hazeltine,* 339 U. S. 827, distinguished. Pp. 30–34.

62 Wash. 2d 284, 382 P. 2d 271, reversed.

Edward S. Irons argued the cause for petitioners. With him on the briefs was *Charles C. Countryman.*

Elwood Hutcheson argued the cause for respondent. With him on the brief was *George W. Wilkins.*

Solicitor General Cox, Assistant Attorney General Orrick and *Robert B. Hummel* filed a brief for the United States, as *amicus curiae,* urging reversal.

Rufus S. Day, Jr., Robert W. Fulwider and *Robert J. Woolsey* filed a brief for Well Surveys, Inc., as *amicus curiae,* urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Respondent, owner of various patents for hop-picking, sold a machine to each of the petitioners for a flat sum [1] and issued a license for its use. Under that license there is payable a minimum royalty of $500 for each hop-picking season or $3.33⅓ per 200 pounds of dried hops harvested by the machine, whichever is greater. The licenses by their terms may not be assigned nor may the machines be removed from Yakima County.

[1] One petitioner paid $3,125 for "title" to a machine, the other petitioner, $3,300.

The licenses issued to petitioners listed 12 patents relating to hop-picking machines; [2] but only seven were incorporated into the machines sold to and licensed for use by petitioners. Of those seven all expired on or before 1957. But the licenses issued by respondent to them [3] continued for terms beyond that date.

Petitioners refused to make royalty payments accruing both before and after the expiration of the patents. This suit followed. One defense was misuse of the patents through extension of the license agreements beyond the expiration date of the patents. The trial court rendered judgment for respondent and the Supreme Court of Washington affirmed. 62 Wash. 2d 284, 382 P. 2d 271. The case is here on a writ of certiorari. 376 U. S. 905.

We conclude that the judgment below must be reversed insofar as it allows royalties to be collected which accrued after the last of the patents incorporated into the machines had expired.

The Constitution by Art. I, § 8 authorizes Congress to secure "for limited times" to inventors "the exclusive right" to their discoveries. Congress exercised that power by 35 U. S. C. § 154 which provides in part as follows:

> "Every patent shall contain a short title of the invention and a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the right to exclude others from making, using, or selling the invention throughout the United States, referring to the specification for the particulars thereof. . . ."

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[2] All but one of the 12 expired prior to the expiration of the license agreements. The exception was a patent whose mechanism was not incorporated in these machines.

[3] Petitioners purchased their machines from prior purchasers under transfer agreements to which respondent was a party.

The right to make, the right to sell, and the right to use "may be granted or conferred separately by the patentee." *Adams* v. *Burke,* 17 Wall. 453, 456. But these rights become public property once the 17-year period expires. See *Singer Mfg. Co.* v. *June Mfg. Co.,* 163 U. S. 169, 185; *Kellogg Co.* v. *National Biscuit Co.,* 305 U. S. 111, 118. As stated by Chief Justice Stone, speaking for the Court in *Scott Paper Co.* v. *Marcalus Co.,* 326 U. S. 249, 256:

> ". . . any attempted reservation or continuation in the patentee or those claiming under him of the patent monopoly, after the patent expires, whatever the legal device employed, runs counter to the policy and purpose of the patent laws."

The Supreme Court of Washington held that in the present case the period during which royalties were required was only "a reasonable amount of time over which to spread the payments for the use of the patent." 62 Wash. 2d, at 291, 382 P. 2d, at 275. But there is intrinsic evidence that the agreements were not designed with that limited view. As we have seen,[4] the purchase price in each case was a flat sum, the annual payments not being part of the purchase price but royalties for use of the machine during that year. The royalty payments due for the post-expiration period are by their terms for use during that period, and are not deferred payments for use during the pre-expiration period. Nor is the case like the hypothetical ones put to us where non-patented articles are marketed at prices based on use. The machines in issue here were patented articles and the royalties exacted were the same for the post-expiration period as they were for the period of the patent. That is peculiarly significant in this case in view of other provisions

[4] Note 1, *supra.*

of the license agreements. The license agreements prevent assignment of the machines or their removal from Yakima County *after,* as well as before, the expiration of the patents.

Those restrictions are apt and pertinent to protection of the patent monopoly; and their applicability to the post-expiration period is a telltale sign that the licensor was using the licenses to project its monopoly beyond the patent period. They forcefully negate the suggestion that we have here a bare arrangement for a sale or a lease at an undetermined price, based on use. The sale or lease of *unpatented* machines on long-term payments based on a deferred purchase price or on use would present wholly different considerations. Those arrangements seldom rise to the level of a federal question. But patents are in the federal domain; and "whatever the legal device employed" (*Scott Paper Co.* v. *Marcalus Co., supra,* at 256) a projection of the patent monopoly after the patent expires is not enforceable. The present licenses draw no line between the term of the patent and the post-expiration period. The same provisions as respects both use and royalties are applicable to each. The contracts are, therefore, on their face a bald attempt to exact the same terms and conditions for the period after the patents have expired as they do for the monopoly period. We are, therefore, unable to conjecture what the bargaining position of the parties might have been and what resultant arrangement might have emerged had the provision for post-expiration royalties been divorced from the patent and nowise subject to its leverage.

In light of those considerations, we conclude that a patentee's use of a royalty agreement that projects beyond the expiration date of the patent is unlawful *per se.* If that device were available to patentees, the free market visualized for the post-expiration period

would be subject to monopoly influences that have no proper place there.

Automatic Radio Co. v. *Hazeltine,* 339 U. S. 827, is not in point. While some of the patents under that license apparently had expired, the royalties claimed were not for a period when all of them had expired.[5] That license covered several hundred patents and the royalty was based on the licensee's sales, even when no patents were used. The Court held that the computation of royalty payments by that formula was a convenient and reasonable device. We decline the invitation to extend it so as to project the patent monopoly beyond the 17-year period.

A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly. But to use that leverage to project those royalty payments beyond the life of the patent is analogous to an effort to enlarge the monopoly of the patent by tieing the sale or use of the patented article to the purchase or use of unpatented ones. See *Ethyl Gasoline Corp.* v. *United States,* 309 U. S. 436; *Mercoid Corp.* v. *Mid-Continent Inv. Co.,* 320 U. S. 661, 664–665, and cases cited. The exaction of royalties for use of a machine after the patent has expired is an assertion of monopoly power in the post-expiration period when, as we have seen, the patent has entered the public domain. We share the views of the Court of Appeals in *Ar-Tik Systems, Inc.* v. *Dairy Queen, Inc.,* 302 F. 2d 496, 510, that after expiration of the last

[5] The petition for certiorari did not in the questions presented raise the question of the effect of the expiration of any of the patents on the royalty agreement. Also, the Hazeltine license, which covered many patents, exacted royalties for patents never used. But that aspect of the case is likewise not apposite here for the present licensees are farmers using the machines, not manufacturers buying the right to incorporate patents into their manufactured products.

of the patents incorporated in the machines "the grant of patent monopoly was spent" and that an attempt to project it into another term by continuation of the licensing agreement is unenforceable.

Reversed.

MR. JUSTICE HARLAN, dissenting.

The Court holds that the Thys Company unlawfully misused its patent monopoly by contracting with purchasers of its patented machines for royalty payments based on use beyond the patent term. I think that more discriminating analysis than the Court has seen fit to give this case produces a different result.

The patent laws prohibit post-expiration restrictions on the use of patented ideas; they have no bearing on use restrictions upon nonpatented, tangible machines. We have before us a mixed case involving the sale of a tangible machine which incorporates an intangible, patented idea. My effort in what follows is to separate out these two notions, to show that there is no substantial restriction on the use of the Thys *idea*, and to demonstrate that what slight restriction there may be is less objectionable than other post-expiration use restrictions which are clearly acceptable.

I.

It surely cannot be questioned that Thys could have lawfully set a fixed price for its machine and extended credit terms beyond the patent period. It is equally unquestionable, I take it, that if Thys had had no patent or if its patent had expired, it could have sold its machines at a flexible, undetermined price based on use; for example, a phonograph record manufacturer could sell a recording of a song in the public domain to a jukebox owner for an undetermined consideration based on the number of times the record was played.

Conversely it should be equally clear that if Thys licensed another manufacturer to produce hop-picking machines incorporating any of the Thys patents, royalties could not be exacted beyond the patent term. Such royalties would restrict the manufacturer's exploitation of the *idea* after it falls into the public domain, and no such restriction should be valid. To give another example unconnected with a tangible machine, a song writer could charge a royalty every time his song—his idea—was sung for profit during the period of copyright. But once the song falls into the public domain each and every member of the public should be free to sing it.

In fact Thys sells both a machine and the use of an idea. The company should be free to restrict the use of its machine, as in the first two examples given above. It may not restrict the use of its patented idea once it has fallen into the public domain. Whether it has done so must be the point of inquiry.

Consider the situation as of the day the patent monopoly ends. Any manufacturer is completely free to produce Thys-type hop-pickers. The farmer who has previously purchased a Thys machine is free to buy and use any other kind of machine whether or not it incorporates the Thys idea, or make one himself if he is able. Of course, he is not entitled as against Thys to the *free* use of any Thys machine. The Court's opinion must therefore ultimately rest on the proposition that the purchasing farmer is restricted in using his particular machine, embodying as it does an application of the patented idea, by the fact that royalties are tied directly to use.

To test this proposition I again put a hypothetical. Assume that a Thys contract called for neither an initial flat-sum payment nor any annual minimum royalties; Thys' sole recompense for giving up ownership of its

machine was a royalty payment extending beyond the patent term based on use, without any requirement either to use the machine or not to use a competitor's. A moment's thought reveals that, despite the clear restriction on use both before and after the expiration of the patent term, the arrangement would involve no misuse of patent leverage.[1] Unless the Court's opinion rests on technicalities of contract draftsmanship and not on the economic substance of the transaction, the distinction between the hypothetical and the actual case lies only in the cumulative investment consisting of the initial and minimum payments independent of use, which the purchaser obligated himself to make to Thys. I fail to see why this distinguishing feature should be critical. If anything the investment will encourage the purchaser to use his machine in order to amortize the machine's fixed cost over as large a production base as possible. Yet the gravamen of the majority opinion is restriction, not encouragement, of use.

II.

The essence of the majority opinion may lie in some notion that "patent leverage" being used by Thys to exact use payments extending beyond the patent term somehow allows Thys to extract more onerous payments from the farmers than would otherwise be obtainable. If this be the case, the Court must in some way distinguish long-term use payments from long-term installment payments of a flat-sum purchase price. For the danger which it seems to fear would appear to inhere equally in both, and as I read the Court's opinion, the latter type of arrangement is lawful despite the fact that failure to pay an

[1] Installment of a patented, coin-operated washing machine in the basement of an apartment building without charge except that the landlord and his tenants must deposit 25 cents for every use, should not constitute patent misuse.

installment under a conditional sales contract would permit the seller to recapture the machine, thus terminating—not merely restricting—the farmer's use of it. Furthermore, since the judgments against petitioners were based almost entirely on defaults in paying the $500 minimums and not on failures to pay for above-minimum use,[2] any such distinction of extended use payments and extended installments, even if accepted, would not justify eradicating all petitioners' obligations beyond the patent term, but only those based on use above the stated minimums; for the minimums by themselves, being payable whether or not a machine has been used, are precisely identical in substantive economic effect to flat installments.

In fact a distinction should not be accepted based on the assumption that Thys, which exploits its patents by selling its patented machines rather than licensing others to manufacture them, can use its patent leverage to exact more onerous payments from farmers by gearing price to use instead of charging a flat sum. Four possible situations must be considered. The purchasing farmer could overestimate, exactly estimate, underestimate, or have no firm estimate of his use requirements for a Thys machine. If he overestimates or exactly estimates, the farmer will be fully aware of what the machine will cost him in the long run, and it is unrealistic to suppose that in such circumstances he would be willing to pay more to have the machine on use than on straight terms. If the farmer underestimates, the thought may be that Thys will take advantage of him; but surely the farmer is in a better position than Thys or anyone else to estimate his own requirements and is hardly in need of the Court's protection in this respect. If the farmer has no fixed estimate

[2] Petitioner Charvet was indebted to Thys only to the extent of the minimums; petitioner Brulotte was in default approximately $4,500 of which $3,120 was attributable to minimums.

of his use requirements he may have good business reasons entirely unconnected with "patent leverage" for wanting payments tied to use, and may indeed be willing to pay more in the long run to obtain such an arrangement. One final example should illustrate my point:

At the time when the Thys patent term still has a few years to run, a farmer who has been picking his hops by hand comes into the Thys retail outlet to inquire about the mechanical pickers. The salesman concludes his description of the advantages of the Thys machine with the price tag—$20,000. Value to the farmer depends completely on the use he will derive from the machine; he is willing to obligate himself on long credit terms to pay $10,000, but unless the machine can substantially outpick his old hand-picking methods, it is worth no more to him. He therefore offers to pay $2,000 down, $400 annually for 20 years, and an additional payment during the contract term for any production he can derive from the machine over and above the minimum amount he could pick by hand. Thys accepts, and by doing so, according to the majority, commits a *per se* misuse of its patent. I cannot believe that this is good law.[3]

III.

The possibility remains that the Court is basing its decision on the technical framing of the contract and would have treated the case differently if title had been

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[3] The Court also adverts to the provisions in the license agreements prohibiting "assignment of the machines or their removal from Yakima County" (*ante*, p. 32) during the terms of the agreements. Such provisions, however, are surely appropriate to secure performance of what are in effect conditional sales agreements and they do not advance the argument for patent misuse.

Furthermore, it should not be overlooked that we are dealing here with a patent, not an antitrust, case, there being no basis in the record for concluding that Thys' arrangements with its licensees were such as to run afoul of the antitrust laws.

declared to pass at the termination instead of the outset of the contract term, or if the use payments had been verbally disassociated from the patent licenses and described as a convenient means of spreading out payments for the machine. If indeed the impact of the opinion is that Thys must redraft its contracts to achieve the same economic results, the decision is not only wrong, but conspicuously ineffectual.

I would affirm.

SCRANTON, GOVERNOR OF PENNSYLVANIA, ET AL. *v.* DREW ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA.

No. 201. Decided November 16, 1964.

The judgment of the District Court holding invalid certain Pennsylvania apportionment statutes and constitutional provisions vacated and cause remanded for further consideration in the light of supervening decisions. Pp. 40–42.

229 F. Supp. 310, vacated and remanded.

Walter E. Alessandroni, Attorney General of Pennsylvania, and *Edward Friedman* and *Alan Miles Ruben,* Deputy Attorneys General, for appellants. *Marvin Comisky, Thomas D. McBride, Goncer M. Krestal* and *Marshall J. Seidman* for appellees.

PER CURIAM.

The judgment of the District Court appealed from was entered on April 9, 1964, 229 F. Supp. 310 (D. C. M. D. Pa.). The District Court held invalid under the Fourteenth Amendment to the United States Constitution, the Pennsylvania Representative Apportionment Act of January 9, 1964, P. L. 1419, 25 Purdon's Pa. Stat. Ann. §§ 2221–2222 (1963 Supp., including Acts of the 1963 Extra Session), the Pennsylvania Senatorial Apportionment Act of January 9, 1964, P. L. 1432, 25 Purdon's Pa. Stat. Ann. §§ 2217–2220 (1963 Supp., including Acts of the 1963 Extra Session), and the Pennsylvania Constitution's legislative apportionment provisions, Art. II, §§ 16, 17. The court restrained appellants from conducting any future elections under the apportionment acts, but stayed its order pending the disposition of an appeal to this

Court. Thereafter on June 15, 1964, this Court decided *Reynolds* v. *Sims,* 377 U. S. 533, and companion cases: *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633; *Maryland Comm. for Fair Representation* v. *Tawes,* 377 U. S. 656; *Davis* v. *Mann,* 377 U. S. 678; *Roman* v. *Sincock,* 377 U. S. 695; *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U. S. 713. On September 29, 1964, the Supreme Court of Pennsylvania handed down a decision construing the legislative apportionment provisions of the Pennsylvania Constitution, and holding these provisions constitutional as construed. The court, however, declared invalid, under the Fourteenth Amendment to the United States Constitution, the Pennsylvania legislative apportionment laws at issue in this appeal. *Butcher* v. *Bloom,* 415 Pa. 438, 203 A. 2d 556. The Pennsylvania court retained jurisdiction of the case, stating:

> "We have indicated that it is our expectation that the Legislature will proceed in timely fashion to enact reapportionment laws which conform to constitutional requirements. We must recognize, however, that if the General Assembly fails to act in a timely fashion, we shall be obliged to take necessary affirmative action to insure that the 1966 election of Pennsylvania legislators will be conducted pursuant to a constitutionally valid plan. Proper regard for our responsibility compels us to retain jurisdiction of this matter pending legislative action.
>
> "Should the Legislature fail to enact a constitutionally valid plan of reapportionment as soon as practical, but not later than September 1, 1965, we shall take such action as may be appropriate in light of the then existing situation.
>
> "Jurisdiction retained in accordance with this opinion." *Id.,* at 468–469, 203 A. 2d, at 573.

The judgment of the District Court is therefore vacated and the cause is remanded for further consideration in light of the decisions supervening since the entry of the judgment of the District Court.

Vacated and remanded.

BOLES, WARDEN *v.* STEVENSON.

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

No. 298. Decided November 16, 1964.

The District Court granted the petition of respondent, who had been convicted of murder, for a writ of habeas corpus on the ground that the state court used an improper standard for determining voluntariness and that an admission by respondent was involuntary. The District Court ordered his release if the State failed to retry him within a reasonable time; and the Court of Appeals affirmed. *Held:* Where a defendant in a state court has not been afforded an adequate hearing on the voluntariness of his confession, he is not necessarily entitled to a new trial, but he is entitled to a state court hearing under standards designed to insure a proper resolution of the issue. *Jackson* v. *Denno,* 378 U. S. 368, followed. Case is remanded to the District Court to allow the State a reasonable time to provide a hearing or a new trial, failing which respondent is entitled to his release. Pp. 45–46.

Certiorari granted; 331 F. 2d 939, affirmed and remanded.

Charles Robert Sarver and *Claude A. Joyce,* Assistant Attorneys General of West Virginia, for petitioner. *Daniel J. Meador* for respondent.

PER CURIAM.

The respondent, Stevenson, was convicted of murder in the first degree and sentenced to death in the Common Pleas Court of Cabell County, West Virginia. The conviction was affirmed on appeal by the West Virginia Supreme Court of Appeals. *State* v. *Stevenson,* 147 W. Va. 211, 127 S. E. 2d 638. Certiorari was denied here. 372 U. S. 938. He then filed a petition for habeas corpus in the United States District Court. *Stevenson* v. *Boles,* 221 F. Supp. 411. That court issued the writ on the ground that the State Supreme Court of Appeals used an

erroneous standard for determining voluntariness and that an oral admission of guilt contained in the testimony of three state police officers was involuntary. The District Court ordered Stevenson's release conditioned on the failure of the State to retry the defendant within a reasonable time, and the Court of Appeals affirmed. Without reaching the voluntariness of the confession, it held that the defendant was denied a fair and effective resolution of the voluntariness issue at trial when the trial court failed to hold a preliminary examination on this issue and failed to submit it to the jury under appropriate instructions. We grant certiorari and modify the order of the Court of Appeals to conform to our subsequent decision in *Jackson* v. *Denno,* 378 U. S. 368.*

At Stevenson's trial Officer Coleman testified for the State that he, and two other police officers, arrested the defendant and took him to the Atlantic Sea Food Store to show him the badly mutilated body of the victim. On cross-examination Coleman stated that the defendant strongly resisted efforts to confront him with the still undisturbed scene of the crime inside the building. Another of the officers gave the defendant a choice between entering the store or explaining what he knew about the crime. Coleman testified that the defendant then admitted committing the crime. At the conclusion of this testimony the defense moved to strike the oral confession of guilt because it "does not comply with the rules covering the introduction of a confession in that he was not warned that any statement he made may and would be used against him or any of the other requirements on entering of a confession." This motion was overruled without comment and without a hearing on voluntariness. Subsequent motions to exclude the testi-

*The respondent's motion to dispense with the printing of the brief in opposition is granted.

mony of the other two officers in respect to the same challenged admission of guilt were similarly overruled without comment. After this confession was thrice admitted, the defendant took the stand in his own defense and denied ever having made the admission to the officers.

Relying on this denial, the State Supreme Court of Appeals ruled that no preliminary examination was required in this case and that the confession was voluntary.

The practice in West Virginia, when an objection to a confession is interposed, is to hold a preliminary hearing out of the presence of the jury at which the trial judge fully determines the coercion issue. *State* v. *Vance,* 146 W. Va. 925, 124 S. E. 2d 252. In light of this practice, we cannot ascertain on this record whether the trial judge declined to hold a hearing and declined to rule explicitly on voluntariness because he thought there could not be any issue in light of defendant's not-guilty plea, because he thought the confession was in fact voluntary, or because he thought the objections were inadequate or untimely. Hence we do not know if the trial judge decided voluntariness, one way or the other, and, if he did, what standard was relied upon. We think the procedures were not "fully adequate to insure a reliable and clear-cut determination of the voluntariness of the confession." *Jackson* v. *Denno,* 378 U. S. 368, 391.

Hence we agree with the Court of Appeals that the writ should issue. But it does not follow that the State is required to order a new trial. As we held in *Jackson, supra,* where a state defendant has not been given an adequate hearing upon the voluntariness of his confession, he is entitled to a hearing in the state courts under appropriate procedures and standards designed to insure a full and adequate resolution of this issue. "A state defendant should have the opportunity to have all issues which may be determinative of his guilt tried by a state judge or a state jury under appropriate state procedures

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which conform to the requirements of the Fourteenth Amendment." *Rogers* v. *Richmond*, 365 U. S. 534, 547–548. Accordingly the judgment below is modified and the case is remanded to the District Court to allow the State a reasonable time to afford Stevenson a hearing or a new trial, failing which Stevenson is entitled to his release. As so modified, the judgment is affirmed.

MR. JUSTICE BLACK would affirm the judgment of the Court of Appeals affirming the District Court's judgment which ordered Stevenson's release conditioned on the failure of the State to retry the defendant within a reasonable time.

BOYER ET AL. *v.* ELKINS ET AL.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 438. Decided November 16, 1964.

Appeal dismissed for want of a properly presented federal question.
Reported below: 154 Colo. —, 390 P. 2d 460.

George J. Francis for appellants.

Frank A. Bruno and *H. D. Reed* for appellees.

PER CURIAM.

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

ASSOCIATED PRESS ET AL. *v.* WALKER.

APPEAL FROM THE COURT OF APPEAL OF LOUISIANA, SECOND CIRCUIT.

No. 449. Decided November 16, 1964.

Appeal dismissed and certiorari denied.
Reported below: 162 So. 2d 437.

Billy R. Pesnell and *Ashton Phelps* for appellants.

W. Scott Wilkinson for appellee.

PER CURIAM.

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

UNITED STATES ET AL. *v.* POWELL ET AL.

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

No. 54. Argued October 14–15, 1964.—Decided November 23, 1964.

On the ground that the respondent corporate taxpayer's returns had been examined for certain years and that, absent fraud, the statute of limitations barred assessment of additional deficiencies, respondent the taxpayer's president refused to produce records summoned by the Internal Revenue Service (IRS) unless it disclosed its basis for believing that fraud had been committed. The Government brought an enforcement proceeding under § 7604 (b) of the Internal Revenue Code in the District Court, which held that the agent be allowed to re-examine the records. The Court of Appeals reversed, holding that § 7605 (b) barred "unnecessary examination" unless the IRS could show reasonable grounds or probable cause to suspect fraud, a condition not satisfied by the agent's affidavit filed with the enforcement petition that he suspected that the taxpayer had fraudulently overstated expenses. *Held:*

1. Section 7604 (b) does not apply to a non-contumacious refusal like the individual respondent's to comply with a summons; but recommencement of the proceeding will not be required, since the Government sought no prehearing sanctions of arrest and attachment under that statute, which is otherwise similar to §§ 7402 (b) and 7604 (a). The proceeding is therefore considered under those almost identical sections, which give general power to enforce summonses "by appropriate process." Pp. 51–52.

2. In order to enforce a summons for records the Commissioner, either before or after the limitations period has expired, need not show probable cause to suspect fraud. Unless the taxpayer raises a substantial question that judicial enforcement of the summons would abuse the court's process, the Commissioner must only show that the investigation is pursuant and relevant to a legitimate purpose; that the information is not already in the Commissioner's possession; that the Secretary or his delegate has determined that the further examination is necessary, and that the other administrative steps required by the Code have been followed. Pp. 52–58.

325 F. 2d 914, reversed and remanded.

Bruce J. Terris argued the cause for the United States et al. With him on the briefs were *Solicitor General Cox,*

Assistant Attorney General Oberdorfer, Joseph M. Howard, Meyer Rothwacks and *Norman Sepenuk.*

Bernard G. Segal argued the cause for respondents. With him on the brief was *Samuel D. Slade.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

In March 1963, the Internal Revenue Service, pursuant to powers afforded the Commissioner by § 7602 (2) of the Internal Revenue Code of 1954, summoned respondent Powell to appear before Special Agent Tiberino to give testimony and produce records relating to the 1958 and 1959 returns of the William Penn Laundry (the taxpayer), of which Powell was president. Powell appeared before the agent but refused to produce the records. Because the taxpayer's returns had been once previously examined, and because the three-year statute of limitations barred assessment of additional deficiencies for those years [1] except in cases of fraud (the asserted basis for this summons),[2] Powell contended that before he could be forced to produce the records the Service had to indicate some grounds for its belief that a fraud had been committed. The agent declined to give any such indication and the meeting terminated.

Thereafter the Service petitioned the District Court for the Eastern District of Pennsylvania for enforcement of the administrative summons. With this petition the agent filed an affidavit stating that he had been investigating the taxpayer's returns for 1958 and 1959; that based on this investigation the Regional Commissioner

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[1] I. R. C., § 6501 (a).

[2] I. R. C., § 6501 (c) (1), which in relevant part provides: "In the case of a false or fraudulent return with the intent to evade tax, the tax may be assessed, or a proceeding in court for collection of such tax may be begun without assessment, at any time."

of the Service had determined an additional examination of the taxpayer's records for those years to be necessary and had sent Powell a letter to that effect; and that the agent had reason to suspect that the taxpayer had fraudulently falsified its 1958 and 1959 returns by overstating expenses. At the court hearing Powell again stated his objections to producing the records and asked the Service to show some basis for its suspicion of fraud. The Service chose to stand on the petition and the agent's affidavit, and, after argument, the District Court ruled that the agent be given one hour in which to re-examine the records.[3]

The Court of Appeals reversed, 325 F. 2d 914. It reasoned that since the returns in question could only be reopened for fraud, re-examination of the taxpayer's records must be barred by the prohibition of § 7605 (b) of the Code [4] against "unnecessary examination" unless the Service possessed information "which might cause a reasonable man to suspect that there has been fraud in the return for the otherwise closed year"; [5] and whether this standard has been met is to be decided "on the basis of the showing made in the normal course of an adversary proceeding . . . ." [6] The court concluded that the affidavit in itself was not sufficient to satisfy its test of probable cause.[7] Consequently, enforcement of the summons was withheld.

Because of the differing views in the circuits on the standards the Internal Revenue Service must meet to

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[3] The parties subsequently agreed that if the Government was upheld in its claim of right to examine without showing probable cause, the one-hour time limitation would be removed.

[4] See page 52, *infra*.

[5] 325 F. 2d 914, 915–916.

[6] *Id.*, at 916.

[7] "Probable cause" as used in this opinion is meant to include the full range of formulations offered by lower courts.

obtain judicial enforcement of its orders,[8] we granted certiorari, 377 U. S. 929.

We reverse, and hold that the Government need make no showing of probable cause to suspect fraud unless the taxpayer raises a substantial question that judicial enforcement of the administrative summons would be an abusive use of the court's process, predicated on more than the fact of re-examination and the running of the statute of limitations on ordinary tax liability.

I.

This enforcement proceeding was brought by the Government pursuant to § 7604 (b) of the Code.[9] In *Reisman* v. *Caplin*, 375 U. S. 440, decided last Term subsequent to the rendering of the decision below, this Court

[8] Compare *Foster* v. *United States*, 265 F. 2d 183 (C. A. 2d Cir. 1959); *United States* v. *Ryan*, 320 F. 2d 500 (C. A. 6th Cir. 1963), affirmed today, *post*, p. 61, with *O'Connor* v. *O'Connell*, 253 F. 2d 365 (C. A. 1st Cir. 1958), followed in *Lash* v. *Nighosian*, 273 F. 2d 185 (C. A. 1st Cir. 1959); *Globe Construction Co.* v. *Humphrey*, 229 F. 2d 148 (C. A. 5th Cir. 1956); *De Masters* v. *Arend*, 313 F. 2d 79 (C. A. 9th Cir. 1963).

[9] Section 7604 (b) provides:

"Whenever any person summoned under section 6420 (e)(2), 6421 (f)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary or his delegate may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience."

stated that § 7604 (b) "was intended only to cover persons who were summoned and wholly made default or contumaciously refused to comply." 375 U. S., at 448. There was no contumacious refusal in this case. Thus the Government's conceded error in bringing its enforcement proceeding under § 7604 (b) instead of § 7402 (b) or § 7604 (a),[10] each of which grants courts the general power to enforce the Commissioner's summonses "by appropriate process," raises a threshold question whether we must dismiss this case and force the Government to recommence enforcement proceedings under the appropriate sections. Since the Government did not apply for the prehearing sanctions of attachment and arrest peculiar to § 7604 (b), and since these constitute the major substantive differences between the sections, we think it would be holding too strictly to the forms of pleading to require the suit to be recommenced, and therefore treat the enforcement proceeding as having been brought under §§ 7402 (b) and 7604 (a).

II.

Respondent primarily relies on § 7605 (b) to show that the Government must establish probable cause for suspecting fraud, and that the existence of probable cause is subject to challenge by the taxpayer at the hearing.[11] That section provides:

> "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspec-

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[10] The two sections are virtually identical. Section 7402 (b) provides:

"If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data."

[11] See n. 18, *infra*.

tion of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

We do not equate necessity as contemplated by this provision with probable cause or any like notion. If a taxpayer has filed fraudulent returns, a tax liability exists without regard to any period of limitations. Section 7602 authorizes the Commissioner to investigate any such liability.[12] If, in order to determine the existence or nonexistence of fraud in the taxpayer's returns, information in the taxpayer's records is needed which is not already in the Commissioner's possession, we think the examination is not "unnecessary" within the meaning of § 7605 (b). Although a more stringent interpretation is possible, one which would require some showing of cause for suspecting fraud, we reject such an interpretation

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[12] Section 7602 provides:

"For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary or his delegate is authorized—

"(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

"(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

"(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry."

because it might seriously hamper the Commissioner in carrying out investigations he thinks warranted, forcing him to litigate and prosecute appeals on the very subject which he desires to investigate, and because the legislative history of § 7605 (b) indicates that no severe restriction was intended.

Section 7605 (b) first appeared as § 1309 of the Revenue Act of 1921, 42 Stat. 310. Its purpose and operation were explained by the manager of the bill, Senator Penrose, on the Senate floor:

> "Mr. PENROSE. Mr. President, the provision is entirely in the interest of the taxpayer and for his relief from unnecessary annoyance. Since these income taxes and direct taxes have been in force very general complaint has been made, especially in the large centers of wealth and accumulation of money, at the repeated visits of tax examiners, who perhaps are overzealous or do not use the best of judgment in the exercise of their functions. I know that from many of the cities of the country very bitter complaints have reached me and have reached the department of unnecessary visits and inquisitions after a thorough examination is supposed to have been had. This section is purely in the interest of quieting all this trouble and in the interest of the peace of mind of the honest taxpayer.
>
> "Mr. WALSH. . . . So that up to the present time an inspector could visit the office of an individual or corporation and inspect the books as many times as he chose?
>
> "Mr. PENROSE. And he often did so.
>
> "Mr. WALSH. . . . And this provision of the Senate committee seeks to limit the inspection to one visit unless the commissioner indicates that there is necessity for further examination?
>
> "Mr. PENROSE. That is the purpose of the amendment.

"Mr. WALSH. . . . I heartily agree with the beneficial results that the amendment will produce to the taxpayer.

"Mr. PENROSE. I knew the Senator would agree to the amendment, and it will go a long way toward relieving petty annoyances on the part of honest taxpayers." 61 Cong. Rec. 5855 (Sept. 28, 1921).[13]

Congress recognized a need for a curb on the investigating powers of low-echelon revenue agents, and consid-

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[13] Other relevant legislative history to like effect may be found in H. R. Rep. No. 350, 67th Cong., 1st Sess., 16 (1921); S. Rep. No. 275, 67th Cong., 1st Sess., 31 (1921); 61 Cong. Rec. 5202 (Aug. 18, 1921), remarks of Mr. Hawley. The provision was re-enacted in 1926. In the Senate, a substitute measure was adopted which would have limited the Commissioner to two examinations appertaining to returns of any one year. Senator Reed's objection to the original provision was: "By merely claiming fraud the Government at any time can make examination after examination, subject only to one limitation, that it must give notice that it is going to make the examination. That, in ordinary course, is done by the mere writing of a letter," 67 Cong. Rec. 3856 (Feb. 12, 1926). There is no indication in the discussion that the courts were thought to play any significant limiting role. The Senate substitute was ultimately deleted by the Conference Committee and the original provision resubstituted. H. R. Rep. No. 356, 69th Cong., 1st Sess., 55. The section was re-enacted in 1939 and 1954 without substantial change and without further elaboration of the congressional intent. Respondent contends that in re-enacting the provision, Congress must have been aware of, and acquiesced in, decisions of lower courts that a showing of probable cause is required. *In re Andrews' Tax Liability,* 18 F. Supp. 804 (1937); *Zimmermann* v. *Wilson,* 105 F. 2d 583 (C. A. 3d Cir. 1939); *In re Brooklyn Pawnbrokers,* 39 F. Supp. 304 (1941); *Martin* v. *Chandis Securities Co.,* 128 F. 2d 731 (C. A. 9th Cir. 1942). These cases represent neither a settled judicial construction, see *In re Keegan,* 18 F. Supp. 746 (1937), nor one which we would be justified in presuming Congress, by its silence, impliedly approved. Compare *Shapiro* v. *United States,* 355 U. S. 1.

ered that it met this need simply and fully by requiring such agents to clear any repetitive examination with a superior. For us to import a probable cause standard to be enforced by the courts would substantially overshoot the goal which the legislators sought to attain. There is no intimation in the legislative history that Congress intended the courts to oversee the Commissioner's determinations to investigate. No mention was made of the statute of limitations [14] and the exception for fraud.

We are asked to read § 7605 (b) together with the limitations sections in such a way as to impose a probable cause standard upon the Commissioner from the expiration date of the ordinary limitations period forward. Without some solid indication in the legislative history that such a gloss was intended, we find it unacceptable.[15] Our reading of the statute is said to render the first clause of § 7605 (b) surplusage to a large extent, for, as interpreted, the clause adds little beyond the relevance and materiality requirements of § 7602. That clause does appear to require that the information sought is not already within the Commissioner's possession, but we think its primary purpose was no more than to emphasize the responsibility of agents to exercise prudent judgment in wielding the extensive powers granted to them by the Internal Revenue Code.[16]

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[14] Revenue Act of 1921, § 250 (d), 42 Stat. 265, provided a four-year period of limitation on ordinary tax liability.

[15] The contrary view derives no support from the characterization of the limitations provision as a "statute of repose." The present three-year limitation on assessment of ordinary deficiencies relieves the taxpayer of concern for further assessments of that type, but it by no means follows that it limits the right of the Government to investigate with respect to deficiencies for which no statute of limitations is imposed.

[16] The Court of Appeals appears to have been led astray by the fact that the Government argued its case on the premise that § 7604 (b) was the governing statute.

This view of the statute is reinforced by the general rejection of probable cause requirements in like circumstances involving other agencies. In *Oklahoma Press Pub. Co.* v. *Walling*, 327 U. S. 186, 216, in reference to the Administrator's subpoena power under the Fair Labor Standards Act, the Court said "his investigative function, in searching out violations with a view to securing enforcement of the Act, is essentially the same as the grand jury's, or the court's in issuing other pretrial orders for the discovery of evidence, and is governed by the same limitations," and accordingly applied the view that inquiry must not be " 'limited . . . by forecasts of the probable result of the investigation.' " In *United States* v. *Morton Salt Co.*, 338 U. S. 632, 642–643, the Court said of the Federal Trade Commission, "It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." While the power of the Commissioner of Internal Revenue derives from a different body of statutes, we do not think the analogies to other agency situations are without force when the scope of the Commissioner's power is called in question.[17]

III.

Reading the statutes as we do, the Commissioner need not meet any standard of probable cause to obtain enforcement of his summons, either before or after the three-year statute of limitations on ordinary tax liabilities has expired. He must show that the investigation will be conducted pursuant to a legitimate purpose, that the inquiry may be relevant to the purpose, that the

[17] See 1 Davis, Administrative Law, § 3.12 (1958).

information sought is not already within the Commissioner's possession, and that the administrative steps required by the Code have been followed—in particular, that the "Secretary or his delegate," after investigation, has determined the further examination to be necessary and has notified the taxpayer in writing to that effect. This does not make meaningless the adversary hearing to which the taxpayer is entitled before enforcement is ordered.[18] At the hearing he "may challenge the summons on any appropriate ground," *Reisman* v. *Caplin,* 375 U. S. 440, at 449.[19] Nor does our reading of the statutes mean that under no circumstances may the court inquire into the underlying reasons for the examination. It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused.[20] Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation. The burden of showing an abuse of the court's process is on the taxpayer, and it is not met by a mere showing, as was made in this case, that the statute of limitations for ordinary deficiencies has run or that the records in question have already been once examined.

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[18] Because § 7604 (a) contains no provision specifying the procedure to be followed in invoking the court's jurisdiction, the Federal Rules of Civil Procedure apply, *Martin* v. *Chandis Securities Co.*, 128 F. 2d 731. The proceedings are instituted by filing a complaint, followed by answer and hearing. If the taxpayer has contumaciously refused to comply with the administrative summons and the Service fears he may flee the jurisdiction, application for the sanctions available under § 7604 (b) might be made simultaneously with the filing of the complaint.

[19] See 1 Davis, Administrative Law, § 3.12 (1958).

[20] See Jaffe, The Judicial Enforcement of Administrative Orders, 76 Harv. L. Rev. 865 (1963).

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion. *It is so ordered.*

MR. JUSTICE DOUGLAS, with whom MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG concur, dissenting.

Congress, by the three-year statute of limitations that bars assessments of tax deficiencies except (so far as relevant here) in case of fraud, 26 U. S. C. §§ 6501 (a) and (c), has brought into being a "statute of repose" [1] that I would respect more highly than my Brethren. I would respect it by requiring the District Court to be satisfied that the Service is not acting capriciously in reopening the closed tax period. Since the agency must go to the court for process to compel the production of the records for the closed tax period, I would insist that the District Court act in a judicial capacity, free to disagree with the administrative decision unless that minimum standard is met.[2]

Oklahoma Press Pub. Co. v. *Walling,* 327 U. S. 186, does not seem to me to be relevant. It dealt with the usual investigative powers of administrative agencies; and as the Court said in that case, Congress set no standards for administrative action which the judiciary first had to weigh and appraise.[3] *Id.,* 215–216. Here

[1] See the remarks of Senators Smith, Ashurst, and Reed in 67 Cong. Rec. 3852–3853.

[2] The First Circuit requires the Commissioner to show that "a reasonable basis exists for a suspicion of fraud," *O'Connor* v. *O'Connell,* 253 F. 2d 365, 370; the Ninth Circuit requires that the decision to investigate for fraud appear as "a matter of rational judgment based on the circumstances of the particular case," *De Masters* v. *Arend,* 313 F. 2d 79, 90; the Third Circuit requires that the agent's suspicion of fraud be "reasonable" in the eyes of the District Court. 325 F. 2d 914, 916.

[3] The case is more like *United States* v. *Morton Salt Co.,* 338 U. S. 632, where, as respects the power of the Federal Trade Commission

we have a congressional "statute of repose" embodied in the three-year statute of limitations. I would make it meaningful by protecting it from invasion by mere administrative *fiat*. Where the limitations period has expired, an examination is presumptively "unnecessary" within the meaning of § 7605 (b)—a presumption the Service must overcome. That is to say, a re-examination of the taxpayer's records after the three-year period is "unnecessary" within the meaning of § 7605 (b), unless the District Court is shown something more than mere caprice for believing fraud was practiced on the revenue. Without that minimum safeguard the statutory status of repose becomes rather meaningless.

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to require issuance of "special" reports, the Court reserved the right to prevent the "arbitrary" exercise of that administrative power. *Id.*, at 654.

RYAN *v.* UNITED STATES.

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

No. 12. Argued October 14, 1964.—Decided November 23, 1964.

Government need not show probable cause for suspecting fraud in order to examine taxpayer's records for closed years. *United States* v. *Powell, ante,* p. 48, followed. P. 62.

320 F. 2d 500, affirmed.

William R. Bagby argued the cause and filed briefs for petitioner.

Bruce J. Terris argued the cause for the United States. On the brief were *Solicitor General Cox, Acting Assistant Attorney General Jones, Joseph M. Howard* and *Norman Sepenuk.*

MR. JUSTICE HARLAN delivered the opinion of the Court.

In August 1961, Internal Revenue Agent Whelan issued a summons to taxpayer Ryan ordering him to produce his books for the years 1942 through 1953 inclusive. Ryan appeared but refused to produce the records, claiming that because tax liability for those years was long since barred except for fraud,[1] the agent had no right to examine the records unless he could show grounds for suspecting fraud.

The Government then instituted an enforcement proceeding in a federal district court pursuant to § 7402 (b) of the Internal Revenue Code of 1954.[2] The complaint alleged that on the basis of estimated net worth calcula-

[1] I. R. C., § 6501. See *United States* v. *Powell,* decided today, *ante,* p. 48, at p. 49, note 2.

[2] See *id.,* at p. 52, note 10.

tions the agent strongly suspected fraud, and that examination of the records for the years in question was relevant and material in determining its existence. The taxpayer answered, putting the question of probable cause in issue, and, in addition, stating that he had not received the letter required by § 7605 (b) informing him that the Secretary or his delegate had determined the examination to be necessary.[3]

At the hearing the District Judge clearly indicated his opinion that the Government need not show probable cause for suspecting fraud, and ordered Ryan to produce those records which he had available. Although the hearing confirmed Ryan's assertion that no "necessity letter" had been sent to him, the judge made no mention of this, probably because counsel did not press the point.

The Court of Appeals affirmed, 320 F. 2d 500, on the theory that no full-scale showing of probable cause need be made. Except for the records relating to the year 1945, which appeared to have been once previously examined, the court ruled that no necessity letter was required by § 7605 (b) because the Government had made no previous examination of those years.

We granted certiorari, 376 U. S. 904, on the only issue raised by petitioner, whether the Government must show probable cause for its examination of the records.[4] On that issue we sustain the judgment of the Court of Appeals for the reasons given in *United States* v. *Powell,* decided today, *ante,* p. 48.

Affirmed.

MR. JUSTICE STEWART and MR. JUSTICE GOLDBERG concur in the result, because they believe that through the

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[3] See *id.,* at p. 52.

[4] The propriety of the court's interpretation of the necessity letter requirement of § 7605 (b) is, therefore, not before us. See *Trailmobile Co.* v. *Whirls,* 331 U. S. 40, 48.

testimony of Internal Revenue Agent Whelan a sufficient showing was made that the Government was not proceeding capriciously in this case.

MR. JUSTICE DOUGLAS dissents for the reasons given in his separate opinion in *United States* v. *Powell, ante,* p. 59.

GARRISON *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 4. Argued April 22, 1964.—Restored to the calendar for reargument June 22, 1964.—Reargued October 19, 1964.—Decided November 23, 1964.

Appellant, a District Attorney in Louisiana, during a dispute with certain state court judges of his parish, accused them at a press conference of laziness and inefficiency and of hampering his efforts to enforce the vice laws. A state court convicted him of violating the Louisiana Criminal Defamation Statute, which in the context of criticism of official conduct includes punishment for true statements made with "actual malice" in the sense of ill-will as well as false statements if made with ill-will or without reasonable belief that they were true. The state supreme court affirmed the conviction, holding that the statute did not unconstitutionally abridge appellant's rights of free expression. *Held:*

1. The Constitution limits state power to impose sanctions for criticism of the official conduct of public officials, in criminal cases as in civil cases, to false statements concerning official conduct made with knowledge of their falsity or with reckless disregard of whether they were false or not. *New York Times Co.* v. *Sullivan,* 376 U. S. 254, followed. Pp. 67–75.

2. Appellant's accusations concerned the judges' official conduct and did not become private defamation because they might also have reflected on the judges' private character. Pp. 76–77.

244 La. 787, 154 So. 2d 400, reversed.

Eberhard P. Deutsch reargued the cause for appellant. With him on the briefs was *René H. Himel, Jr.*

Jack P. F. Gremillion, Attorney General of Louisiana, reargued the cause for appellee. With him on the briefs were *M. E. Culligan* and *John E. Jackson, Jr.,* Assistant Attorneys General.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Appellant is the District Attorney of Orleans Parish, Louisiana. During a dispute with the eight judges of

the Criminal District Court of the Parish, he held a press conference at which he issued a statement disparaging their judicial conduct. As a result, he was tried without a jury before a judge from another parish and convicted of criminal defamation under the Louisiana Criminal Defamation Statute.[1] The principal charges alleged to

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[1] La. Rev. Stat., 1950, Tit. 14:

"§ 47. Defamation

"Defamation is the malicious publication or expression in any manner, to anyone other than the party defamed, of anything which tends:

"(1) To expose any person to hatred, contempt, or ridicule, or to deprive him of the benefit of public confidence or social intercourse; or

"(2) To expose the memory of one deceased to hatred, contempt, or ridicule; or

"(3) To injure any person, corporation, or association of persons in his or their business or occupation.

"Whoever commits the crime of defamation shall be fined not more than three thousand dollars, or imprisoned for not more than one year, or both.

"§ 48. Presumption of malice

"Where a non-privileged defamatory publication or expression is false it is presumed to be malicious unless a justifiable motive for making it is shown.

"Where such a publication or expression is true, actual malice must be proved in order to convict the offender.

"§ 49. Qualified privilege

"A qualified privilege exists and actual malice must be proved, regardless of whether the publication is true or false, in the following situations:

"(1) Where the publication or expression is a fair and true report of any judicial, legislative, or other public or official proceeding, or of any statement, speech, argument, or debate in the course of the same.

"(2) Where the publication or expression is a comment made in the reasonable belief of its truth, upon,

"(a) The conduct of a person in respect to public affairs; or

"(b) A thing which the proprietor thereof offers or explains to the public.

"(3) Where the publication or expression is made to a person interested in the communication, by one who is also interested or who

be defamatory were his attribution of a large backlog of pending criminal cases to the inefficiency, laziness, and excessive vacations of the judges, and his accusation that, by refusing to authorize disbursements to cover the expenses of undercover investigations of vice in New Orleans, the judges had hampered his efforts to enforce the vice laws. In impugning their motives, he said:

> "The judges have now made it eloquently clear where their sympathies lie in regard to aggressive vice investigations by refusing to authorize use of the DA's funds to pay for the cost of closing down the Canal Street clip joints . . . .
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> . . . . . .
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> ". . . This raises interesting questions about the racketeer influences on our eight vacation-minded judges." [2]

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stands in such a relation to the former as to afford a reasonable ground for supposing his motive innocent.

"(4) Where the publication or expression is made by an attorney or party in a judicial proceeding."

La. Rev. Stat., 1962 Cum. Supp., Tit. 14:

"§ 50. Absolute privilege . . . ."

[2] The dispute between appellant and the judges arose over disbursements from a Fines and Fees Fund, which was to be used to defray expenses of the District Attorney's office; disbursements could be made only on motion of the District Attorney and approval by a judge of the Criminal District Court. After appellant took office, one of the incumbent judges refused to approve a disbursement from the Fund for furnishings for appellant's office. When the judge went on vacation prior to his retirement in September 1962, appellant obtained the approval of another judge, allegedly by misrepresenting that the first judge had withdrawn his objection. Thereupon, the eight judges, on October 5, 1962, adopted a rule that no further disbursements of the District Attorney from the Fund would be approved except with the concurrence of five of the eight judges. On October 26, 1962, the judges ruled that disbursements to pay appellant's undercover agents to conduct investigations of commercial vice in the Bourbon and Canal Street districts of New Orleans

The Supreme Court of Louisiana affirmed the conviction, 244 La. 787, 154 So. 2d 400. The trial court and the State Supreme Court both rejected appellant's contention that the statute unconstitutionally abridged his freedom of expression. We noted probable jurisdiction of the appeal. 375 U. S. 900. Argument was first heard in the 1963 Term, and the case was ordered restored to the calendar for reargument, 377 U. S. 986. We reverse.

I.

In *New York Times Co.* v. *Sullivan,* 376 U. S. 254, we held that the Constitution limits state power, in a civil action brought by a public official for criticism of his official conduct, to an award of damages for a false statement "made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U. S., at 279–280. At the outset, we must decide whether, in view of the differing history and purposes of criminal libel, the *New York Times* rule also limits state power to impose criminal sanctions for criticism of the official conduct of public officials. We hold that it does.

Where criticism of public officials is concerned, we see no merit in the argument that criminal libel statutes serve interests distinct from those secured by civil libel laws, and therefore should not be subject to the same limitations.[3] At common law, truth was no defense to criminal

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would not be approved, and expressed doubt as to the legality of such a use of the Fund under the State Constitution. A few days later, on November 1, 1962, the judge, now retired, who had turned down the original motion issued a public statement criticizing appellant's conduct of the office of District Attorney. The next day, appellant held the press conference at which he made the statement for which he was prosecuted.

[3] In affirming appellant's conviction, before *New York Times* was handed down, the Supreme Court of Louisiana relied on statements in *Roth* v. *United States,* 354 U. S. 476, 486–487, and *Beauharnais* v.

libel. Although the victim of a true but defamatory publication might not have been unjustly damaged in reputation by the libel, the speaker was still punishable since the remedy was designed to avert the possibility that the utterance would provoke an enraged victim to a breach of peace. That argument is well stated in Edward Livingston's explanation of the defamation provisions of his proposed penal code for Louisiana:

> "In most cases, the connexion between cause and effect exists between the subject of this chapter and that of a subsequent one—Of Duels. Defamation, either real or supposed, is the cause of most of those combats which no laws have yet been able to suppress. If lawgivers had originally condescended to pay some attention to the passions and feelings of those for whom they were to legislate, these appeals to arms would never have usurped a power superior to the laws; but by affording no satisfaction for the wounded feelings of honour, they drove individuals to avenge all wrongs of that description, denied a place in the code of criminal law. Insults formed a title in that of honour, which claimed exclusive jurisdiction of this offence." Livingston, A System of Penal Law for the State of Louisiana, at 177 (1833).[4]

Illinois, 343 U. S. 250, 266, to the effect that libelous utterances are not within the protection of the First and Fourteenth Amendments, and hence can be punished without a showing of clear and present danger. 244 La., at 833–834, 154 So. 2d, at 416–417. For the reasons stated in *New York Times,* 376 U. S., at 268–269, nothing in *Roth* or *Beauharnais* forecloses inquiry into whether the use of libel laws, civil or criminal, to impose sanctions upon criticism of the official conduct of public officials transgresses constitutional limitations protecting freedom of expression. Whether the libel law be civil or criminal, it must satisfy relevant constitutional standards.

[4] Livingston's Code was not adopted, and is not reflected in the current Louisiana statute. His suggested provisions for defamation appear at pp. 421–425. Of particular interest are Art. 369, exculpat-

Even in Livingston's day, however, preference for the civil remedy, which enabled the frustrated victim to trade chivalrous satisfaction for damages, had substantially eroded the breach of the peace justification for criminal libel laws. In fact, in earlier, more violent, times, the civil remedy had virtually pre-empted the field of defamation; except as a weapon against seditious libel, the criminal prosecution fell into virtual desuetude.[5] Changing mores and the virtual disappearance of criminal libel prosecutions lend support to the observation that ". . . under modern conditions, when the rule of law is generally accepted as a substitute for private physical measures, it can hardly be urged that the maintenance of peace requires a criminal prosecution for private defamation." Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 924 (1963).[6] The absence in the Proposed Official Draft of the Model Penal Code of the American Law Institute of any criminal libel statute on the Louisiana pattern reflects this modern consensus. The ALI Reporters, in explaining the omission, gave cogent evidence of the obsolescence of Livingston's justification:

> "It goes without saying that penal sanctions cannot be justified merely by the fact that defamation is evil

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ing true statements of fact or incorrect opinions as to the qualifications of any person for public office, and Art. 386 (2), exculpating even mistaken observations on the tendencies or motives of official acts of public officers, but not exculpating false allegations of such motives as would be criminal.

[5] 5 Holdsworth, History of English Law, 207–208 (2d ed. 1937); Kelly, Criminal Libel and Free Speech, 6 Kan. L. Rev. 295, 296–303 (1958).

[6] See the letter of Mr. Justice Jackson, when Attorney General of the United States, dated June 11, 1940, and addressed to Senator Millard E. Tydings, 87 Cong. Rec. 5836–5837, in which he stated that the policy of the Attorneys General of the United States was not to prosecute for criticism of public officials.

> or damaging to a person in ways that entitle him to maintain a civil suit. Usually we reserve the criminal law for harmful behavior which exceptionally disturbs the community's sense of security. . . . It seems evident that personal calumny falls in neither of these classes in the U. S. A., that it is therefore inappropriate for penal control, and that this probably accounts for the paucity of prosecutions and the near desuetude of private criminal libel legislation in this country. . . ." Model Penal Code, Tent. Draft No. 13, 1961, § 250.7, Comments, at 44.

The Reporters therefore recommended only narrowly drawn statutes designed to reach words tending to cause a breach of the peace, such as the statute sustained in *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, or designed to reach speech, such as group vilification, "especially likely to lead to public disorders," such as the statute sustained in *Beauharnais* v. *Illinois,* 343 U. S. 250. Model Penal Code, *supra,* at 45. But Louisiana's rejection of the clear-and-present-danger standard as irrelevant to the application of its statute, 244 La., at 833, 154 So. 2d, at 416, coupled with the absence of any limitation in the statute itself to speech calculated to cause breaches of the peace, leads us to conclude that the Louisiana statute is not this sort of narrowly drawn statute.

We next consider whether the historical limitation of the defense of truth in criminal libel to utterances published "with good motives and for justifiable ends" [7]

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[7] The following jurisdictions have constitutional or statutory provisions which make truth a defense if published with good motives and for justifiable ends, or some variant thereof:

Alaska Stat., 1962, § 11.15.320; Ariz. Rev. Stat. Ann., 1956, § 13–353; Cal. Const., 1879, Art. 1, § 9; Cal. Pen. Code, 1955, § 251; D. C. Code Ann., 1961, § 22–2303; Fla. Const., 1885, Declaration of Rights, § 13; Hawaii Rev. Laws, 1955, § 294–6; Idaho Code, 1948,

should be incorporated into the *New York Times* rule as it applies to criminal libel statutes; in particular, we must ask whether this history permits negating the truth defense, as the Louisiana statute does, on a showing of

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§ 18–4803; Ill. Const., 1870, Art. 2, § 4; Ill. Rev. Stat., 1963, Tit. 38, § 27–2; Iowa Const., 1846, Art. I, § 7; Iowa Code, 1962, § 737.4; Kan. Bill of Rights, Const., 1859, § 11; Kan. Gen. Stat. Ann., 1949, § 21–2403; Mass. Gen. Laws Ann., 1959, c. 278, § 8 (without "actual malice"); Mich. Const., 1963, Art. I, § 19; Minn. Stat., 1961, § 634.05; Miss. Const., 1890, Art. 3, § 13; Miss. Code, 1942 (recompiled 1956), § 2269; Mont. Const., 1889, Art. III, § 10; Mont. Rev. Codes Ann., 1947, § 94–2804; Nev. Const., 1864, Art. I, § 9; Nev. Rev. Stat., 1961, § 200.510.3; N. J. Const., 1947, Art. 1, ¶ 6; N. Y. Const., 1938, Art. I, § 8; N. Y. Pen. Code, § 1342; N. D. Const., 1889, Art. I, § 9; N. D. Cent. Code, 1960, § 12–28–04; Ohio Const., 1851, Art. I, § 11; Okla. Const., 1907, Art. 2, § 22; Okla. Stat., 1951, Tit. 21, § 774; Ore. Rev. Stat., 1953, § 163.420; R. I. Const., 1843, Art. I, § 20; R. I. Gen. Laws Ann., 1956, § 9–6–9; S. D. Const., 1889, Art. VI, § 5; S. D. Code, 1939, § 13.3406; Utah Const., 1895, Art I, § 15; Utah Code Ann., 1953, § 77–31–30; Wash. Rev. Code, 1951, § 9.58.020; Wis. Const., 1848, Art. I, § 3; Wis. Stat., 1961, § 942.01 (3); Wyo. Const., 1890, Art. 1, § 20. Cf. England, Lord Campbell's Act, 6 & 7 Vict., c. 96, § 6 (1843) (for the public benefit).

In the following jurisdictions truth does operate as a complete defense:

Colo. Const., 1876, Art. II, § 10; Colo. Rev. Stat. Ann., 1953, § 40–8–13; *Bearman* v. *People,* 91 Colo. 486, 493, 16 P. 2d 425, 427 (1932); Ind. Const., 1851, Art. 1, § 10; *State* v. *Bush,* 122 Ind. 42, 23 N. E. 677 (1890); Mo. Const., 1945, Art. I, § 8; Mo. Rev. Stat., 1959, § 559.440; Neb. Const., 1875, Art. I, § 5; Neb. Rev. Stat., 1943 (1956 reissue), § 28–440; *Razee* v. *State,* 73 Neb. 732, 103 N. W. 438 (1905); N. M. Const., 1911, Art. II, § 17; N. M. Stat. Ann., 1953 (1964 replacement), § 40A–11–1 (false and malicious statement); N. C. Gen. Stat., 1953. § 15–168; S. C. Const., 1895, Art. I, § 21; S. C. Code, 1962, § 16–161; Vt. Stat. Ann., 1958, Tit. 13, § 6560.

The following jurisdictions allow greater scope for the defense of truth where criticism of the official conduct of public officials is concerned:

Ala. Const., 1901, Art. 1, § 12 (but Ala. Code, 1940, Tit. 14, § 350 makes truth a defense); Del. Const., 1897, Art. 1, § 5; Del. Code

malice in the sense of ill-will. The "good motives" restriction incorporated in many state constitutions and statutes to reflect Alexander Hamilton's unsuccessfully urged formula in *People* v. *Croswell,* 3 Johns. Cas. 337, 352 (N. Y. Supreme Court 1804), liberalized the common-law rule denying any defense for truth. See Ray, Truth: A Defense to Libel, 16 Minn. L. Rev. 43, 46–49 (1931); Kelly, Criminal Libel and Free Speech, 6 Kan. L. Rev. 295, 326–328 (1958). We need not be concerned whether this limitation serves a legitimate state interest to the extent that it reflects abhorrence that "a man's forgotten misconduct, or the misconduct of a relation, *in which the public had no interest,* should be wantonly raked up, and published to the world, on the ground of its being true." 69 Hansard, Parliamentary Debates 1230 (3d series) (H. L. June 1, 1843) (Report of Lord Campbell) (emphasis supplied).[8] In any event, where the criticism is of

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Ann., 1953, Tit. 11, § 3506; Ky. Const., 1891, § 9; Me. Const., 1820, Art. I, § 4; Me. Rev. Stat., 1954, c. 130, § 34; *State* v. *Burnham,* 9 N. H. 34, 31 Am. Dec. 217 (1837); Pa. Const., 1874, Art. 1, § 7; Tenn. Const., 1870, Art. 1, § 19; Tenn. Code Ann., 1955, §§ 39–2704, 23–2603; Tex. Const., 1876, Art. 1, § 8; Tex. Code Crim. Proc. Ann., 1954, Art. 13; Tex. Pen. Code Ann., 1953, Arts. 1290 (1), 1290 (4).

The following jurisdictions have constitutional or statutory provisions under which evidence of the truth may be introduced, but it is unclear whether this operates as a complete defense:

Ark. Const., 1874, Art. 2, § 6; Ark. Stat., 1947 (1964 replacement), Tit. 41, § 2403; Conn. Const., 1818, Art. First, § 7; Ga. Const., 1877, § 2–201; Ga. Code Ann., 1953, § 26–2103; Md. Code Ann., 1957, Art. 75, § 5; Va. Code Ann., 1950 (1960 replacement), §§ 18.1–255, 18.1–256.

In one jurisdiction there is no authority in point. See *State* v. *Payne,* 87 W. Va. 102, 104 S. E. 288 (1920).

[8] We recognize that different interests may be involved where purely private libels, totally unrelated to public affairs, are concerned; therefore, nothing we say today is to be taken as intimating any views as to the impact of the constitutional guarantees in the discrete area of purely private libels.

public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.[9] In short, we agree with the New Hampshire court in *State* v. *Burnham,* 9 N. H. 34, 42–43, 31 Am. Dec. 217, 221 (1837):

> "If upon a lawful occasion for making a publication, he has published the truth, and no more, there is no sound principle which can make him liable, even if he was actuated by express malice. . . .
>
> "It has been said that it is lawful to publish truth from good motives, and for justifiable ends. But this rule is too narrow. If there is a lawful occasion—a legal right to make a publication—and the matter true, the end is justifiable, and that, in such case, must be sufficient."

Moreover, even where the utterance is false, the great principles of the Constitution which secure freedom of expression in this area preclude attaching adverse consequences to any except the knowing or reckless falsehood. Debate on public issues will not be uninhibited if the speaker must run the risk that it will be proved in court that he spoke out of hatred; even if he did speak out of hatred, utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth. Under a rule like the Louisiana rule, permitting a finding of malice based on an intent merely to inflict harm, rather than an intent to inflict harm through falsehood, "it becomes a hazardous matter to speak out against a popular politician, with the result that the dishonest and incompetent will be shielded." Noel, Def-

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[9] Even the law of privacy, which evolved to meet Lord Campbell's reservations, recognizes severe limitations where public figures or newsworthy facts are concerned. See *Sidis* v. *F–R Pub. Corp.,* 113 F. 2d 806, 809–810 (C. A. 2d Cir. 1940).

amation of Public Officers and Candidates, 49 Col. L. Rev. 875, 893 (1949). Moreover, "[i]n the case of charges against a popular political figure . . . it may be almost impossible to show freedom from ill-will or selfish political motives." *Id.*, at 893, n. 90. Similar considerations supported our holdings that federal officers enjoy an absolute privilege for defamatory publication within the scope of official duty, regardless of the existence of malice in the sense of ill-will. *Barr* v. *Matteo,* 360 U. S. 564; *Howard* v. *Lyons,* 360 U. S. 593; cf. *Gregoire* v. *Biddle,* 177 F. 2d 579 (C. A. 2d Cir. 1949). What we said of Alabama's civil libel law in *New York Times,* 376 U. S., at 282–283, applies equally to the Louisiana criminal libel rule: "It would give public servants an unjustified preference over the public they serve, if critics of official conduct did not have a fair equivalent of the immunity granted to the officials themselves."

We held in *New York Times* that a public official might be allowed the civil remedy only if he establishes that the utterance was false and that it was made with knowledge of its falsity or in reckless disregard of whether it was false or true. The reasons which led us so to hold in *New York Times,* 376 U. S., at 279–280, apply with no less force merely because the remedy is criminal. The constitutional guarantees of freedom of expression compel application of the same standard to the criminal remedy. Truth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned. And since ". . . erroneous statement is inevitable in free debate, and . . . it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive' . . . ," 376 U. S., at 271–272, only those false statements made with the high degree of awareness of their probable falsity demanded by *New York Times* may be the subject of either civil or criminal sanctions. For speech concerning public affairs is

more than self-expression; it is the essence of self-government. The First and Fourteenth Amendments embody our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan,* 376 U. S., at 270.

The use of calculated falsehood, however, would put a different cast on the constitutional question. Although honest utterance, even if inaccurate, may further the fruitful exercise of the right of free speech, it does not follow that the lie, knowingly and deliberately published about a public official, should enjoy a like immunity. At the time the First Amendment was adopted, as today, there were those unscrupulous enough and skillful enough to use the deliberate or reckless falsehood as an effective political tool to unseat the public servant or even topple an administration. Cf. Riesman, Democracy and Defamation: Fair Game and Fair Comment I, 42 Col. L. Rev. 1085, 1088–1111 (1942). That speech is used as a tool for political ends does not automatically bring it under the protective mantle of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected. Calculated falsehood falls into that class of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality. . . ." *Chaplinsky* v. *New Hampshire,* 315 U. S. 568, 572. Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.

II.

We find no difficulty in bringing the appellant's statement within the purview of criticism of the official conduct of public officials, entitled to the benefit of the *New York Times* rule. As the Louisiana Supreme Court viewed the statement, it constituted an attack upon the personal integrity of the judges, rather than on official conduct. In sustaining the finding of the trial court that the appellant's statement was defamatory, the Louisiana Supreme Court held that ". . . the use of the words 'racketeer influences' when applied to anyone suggests and imputes that he has been influenced to practice fraud, deceit, trickery, cheating, and dishonesty"; that "The expression that the judges have enjoyed 300 days vacation out of 19 months suggests and connotes a violation of the 'Deadhead' statute, LSA–R. S. 14:138, Public Payroll Fraud"; that "Other expressions set out in the Bill of Information connote malfeasance in office. LSA–R. S. 14:134; Art. IX, Sec. 1, La. Const. of 1921." The court concluded that "Defendant's expressions . . . are not criticisms of a court trial or of the manner in which any one of the eight judges conducted his court when in session. The expressions charged contain personal attacks upon the integrity and honesty of the eight judges . . . ." 244 La., at 834–835, 154 So. 2d, at 417–418.

We do not think, however, that appellant's statement may be considered as one constituting only a purely private defamation. The accusation concerned the judges' conduct of the business of the Criminal District Court.[10]

[10] In view of our result, we do not decide whether appellant's statement was factual or merely comment, or whether a State may provide any remedy, civil or criminal, if defamatory comment alone, however vituperative, is directed at public officials. The Louisiana courts held that the privilege for fair comment was excluded in the present case by malice or lack of reasonable care, and not by the

Of course, any criticism of the manner in which a public official performs his duties will tend to affect his private, as well as his public, reputation. The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.[11] As the Kansas Supreme Court said in *Coleman* v. *MacLennan,* speaking of candidates:

> "Manifestly a candidate must surrender to public scrutiny and discussion so much of his private character as affects his fitness for office, and the liberal rule requires no more. But in measuring the extent of a candidate's profert of character it should always be remembered that the people have good authority for believing that grapes do not grow on thorns nor figs on thistles." 78 Kan. 711, 739, 98 P. 281, 291 (1908).

III.

Applying the principles of the *New York Times* case, we hold that the Louisiana statute, as authoritatively interpreted by the Supreme Court of Louisiana, incorporates constitutionally invalid standards in the context of criticism of the official conduct of public officials.

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addition of factual assertions. For different formulations of comment, in the context of the common law fair-comment rule, see 1 Harper and James, The Law of Torts, § 5.28, at 458 (1956); Note, Fair Comment, 62 Harv. L. Rev. 1207, 1213 (1949); Restatement, Torts, § 606, Comment *b*, § 567 (1938).

[11] See, *e. g.,* Vernon's Tex. Pen. Code Ann., 1953, Art. 1290 (2).

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For, contrary to the *New York Times* rule, which absolutely prohibits punishment of truthful criticism, the statute directs punishment for true statements made with "actual malice," see LSA–R. S. § 14:48; *State* v. *Cox,* 246 La. 748, 756, 167 So. 2d 352, 355 (1964), handed down after the *New York Times* decision; Bennett, The Louisiana Criminal Code, 5 La. L. Rev. 6, 34 (1942). And "actual malice" is defined in the decisions below to mean "hatred, ill will or enmity or a wanton desire to injure . . . ." 244 La., at 851, 154 So. 2d, at 423. The statute is also unconstitutional as interpreted to cover false statements against public officials. The *New York Times* standard forbids the punishment of false statements, unless made with knowledge of their falsity or in reckless disregard of whether they are true or false. But the Louisiana statute punishes false statements without regard to that test if made with ill-will; even if ill-will is not established, a false statement concerning public officials can be punished if not made in the reasonable belief of its truth. The Louisiana Supreme Court affirmed the conviction solely on the ground that the evidence sufficed to support the trial court's finding of ill-will, enmity, or a wanton desire to injure. But the trial court also rested the conviction on additional findings that the statement was false and not made in the reasonable belief of its truth. The judge said:

> "It is inconceivable to me that the Defendant could have had a reasonable belief, which could be defined as an honest belief, that not one but all eight of these Judges of the Criminal District Court were guilty of what he charged them with in the defamatory statement. These men have been honored . . . with very high offices . . . . It is inconceivable to me that all of them could have been guilty of all of the accusations made against them. Therefore, I do

not believe that the qualified privilege under LSA–R. S., Title 14, Section 49, is applicable . . . ."

This is not a holding applying the *New York Times* test. The reasonable-belief standard applied by the trial judge is not the same as the reckless-disregard-of-truth standard. According to the trial court's opinion, a reasonable belief is one which "an ordinarily prudent man might be able to assign a just and fair reason for"; the suggestion is that under this test the immunity from criminal responsibility in the absence of ill-will disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth.

Reversed.

MR. JUSTICE BLACK, with whom MR. JUSTICE DOUGLAS joins, concurring.

For reasons stated at greater length in my opinions concurring in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 293, and dissenting in *Beauharnais* v. *Illinois,* 343 U. S. 250, 267, as well as in the opinion of MR. JUSTICE DOUGLAS in this case, *infra,* p. 80, I concur in reversing the conviction of appellant Garrison, based as it is purely on his public discussion and criticism of public officials. I believe that the First Amendment, made applicable to the States by the Fourteenth, protects every person from having a State or the Federal Government fine, imprison, or assess damages against him when he has been guilty of no conduct, see *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490, 498, other than expressing an opinion, even though others may believe that his views are unwholesome, unpatriotic, stupid or dangerous. I believe that the Court is mistaken if it thinks that requiring proof that

statements were "malicious" or "defamatory" will really create any substantial hurdle to block public officials from punishing those who criticize the way they conduct their office. Indeed, "malicious," "seditious," and other such evil-sounding words often have been invoked to punish people for expressing their views on public affairs. Fining men or sending them to jail for criticizing public officials not only jeopardizes the free, open public discussion which our Constitution guarantees, but can wholly stifle it. I would hold now and not wait to hold later, compare *Betts* v. *Brady,* 316 U. S. 455, overruled in *Gideon* v. *Wainwright,* 372 U. S. 335, that under our Constitution there is absolutely no place in this country for the old, discredited English Star Chamber law of seditious criminal libel.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BLACK joins, concurring.

I am in hearty agreement with the conclusion of the Court that this prosecution for a seditious libel was unconstitutional. Yet I feel that the gloss which the Court has put on "the freedom of speech" in the First Amendment to reach that result (and like results in other cases) makes that basic guarantee almost unrecognizable.[1]

Recently in *New York Times Co.* v. *Sullivan,* 376 U. S. 254, a majority of the Court held that criticism of an

[1] The Constitution says in the First Amendment that "Congress shall make no law . . . abridging the freedom of speech"; and the Due Process Clause of the Fourteenth Amendment puts the States under the same restraint. There is one school of thought, so far in the minority, which holds that the due process freedom of speech honored by the Fourteenth Amendment is a watered-down version of the First Amendment freedom of speech. See my Brother HARLAN in *Roth* v. *United States,* 354 U. S. 476, 500–503. While that view has never obtained, the construction which the majority has given the First Amendment has been burdened with somewhat the same kind of qualifications and conditions.

official for official conduct was protected from state civil libel laws by the First and Fourteenth Amendments, unless there was proof of actual malice. *Id.*, at 279. We now hold that proof of actual malice is relevant to seditious libel—that seditious libel will lie for a knowingly false statement or one made with reckless disregard of the truth.

If malice is all that is needed, inferences from facts as found by the jury will easily oblige. How can we sit in review on a cold record and find no evidence of malice (cf. *New York Times Co.* v. *Sullivan,* 376 U. S., at 285–288) when it is the commonplace of life that heat and passion subtly turn to malice in actual fact? If "reckless disregard of the truth" is the basis of seditious libel, that nebulous standard could be easily met. The presence of "actual malice" is made critical in seditious libel, as well as in civil actions involving charges against public officials, when in truth there is nothing in the Constitution about it, any more than there is about "clear and present danger."

While the First Amendment remains the same, the gloss which the Court has written on it in this field of the discussion of public issues robs it of much vitality.

Why does "the freedom of speech" that the Court is willing to protect turn out to be so pale and tame?

It is because, as my Brother BLACK has said,[2] the Bill of Rights is constantly watered down through judi-

[2] The Bill of Rights and the Federal Government, in The Great Rights, p. 60 (Cahn ed. 1963):

"In reality this [balancing] approach returns us to the state of legislative supremacy which existed in England and which the Framers were so determined to change once and for all. On the one hand, it denies the judiciary its constitutional power to measure acts of Congress by the standards set down in the Bill of Rights. On the other hand, though apparently reducing judicial powers by saying that acts of Congress may be held unconstitutional only when they are found to have no rational legislative basis, this approach really gives

cial "balancing" of what the Constitution says and what judges think is needed for a well-ordered society.

As Irving Brant recently said: "The balancing test developed in recent years by our Supreme Court does not *disarm* the Government of power to *trench upon* the field in which the Constitution says 'Congress shall make no law.' The balancing test does exactly what is done by its spiritual parent, the British 'common law of seditious libel,' under which (to repeat the words of May), 'Every one was a libeler who outraged the sentiments of the dominant party.'" Seditious Libel: Myth and Reality, 39 N. Y. U. L. Rev. 1, 18–19 (1964).

Beauharnais v. *Illinois*, 343 U. S. 250, a case decided by the narrowest of margins, should be overruled as a misfit in our constitutional system and as out of line with the dictates of the First Amendment. I think it is time to face the fact that the only line drawn by the Constitution is between "speech" on the one side and conduct or overt acts on the other. The two often do blend. I have expressed the idea before: "Freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action as to be an inseparable part of it." *Roth* v. *United States*, 354 U. S., at 514 (dissenting opinion). Unless speech is so brigaded with overt acts of that kind there is nothing that may be punished; and no semblance of such a case is made out here.

I think little need be added to what Mr. Justice Holmes said nearly a half century ago:

> "I wholly disagree with the argument of the Government that the First Amendment left the common

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the Court, along with Congress, a greater power, that of overriding the plain commands of the Bill of Rights on a finding of weighty public interest. In effect, it changes the direction of our form of government from a government of limited powers to a government in which Congress may do anything that courts believe to be 'reasonable.'"

law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798,[3] by repaying fines that it imposed." *Abrams* v. *United States*, 250 U. S. 616, 630 (dissenting opinion).

The philosophy of the Sedition Act of 1798 which punished "false, scandalous and malicious" writings (1 Stat. 596) is today allowed to be applied by the States. Yet Irving Brant has shown that seditious libel was "entirely the creation of the Star Chamber."[4] It is disquieting to know that one of its instruments of destruction is abroad in the land today.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS, CONCURRING.

Excerpt from Madison's Address, January 23, 1799:

"The sedition act presents a scene which was never expected by the early friends of the Constitution. It was then admitted that the State sovereignties were only diminished by powers specifically enumerated, or necessary to carry the specified powers into effect. Now, Federal authority is deduced from implication; and from the

[3] Madison's views on the Sedition Act—a federal enactment—are relevant here, now that the First Amendment is applicable to the States. I have therefore appended his views as an Appendix.

[4] 39 N. Y. U. L. Rev. 1, 11. "What is called today the common-law doctrine of seditious libel is in fact the creation of the Court of Star Chamber, the most iniquitous tribunal in English history. It has been injected into the common law solely by the fiat of Coke and by subsequent decisions and opinions of English judges who perpetuated the vicious procedures by which the Star Chamber stifled criticism of the government and freedom of political opinion. If seditious libel has any genuine common-law affiliation, it is by illegitimate descent from constructive treason and heresy, both of which are totally repugnant to the Constitution of the United States." Brant, *supra*, at 5.

existence of State law, it is inferred that Congress possess a similar power of legislation; whence Congress will be endowed with a power of legislation in all cases whatsoever, and the States will be stripped of every right reserved, by the concurrent claims of a paramount Legislature.

"The sedition act is the offspring of these tremendous pretensions, which inflict a death-wound on the sovereignty of the States.

"For the honor of American understanding, we will not believe that the people have been allured into the adoption of the Constitution by an affectation of defining powers, whilst the *preamble* would admit a construction which would erect the will of Congress into a power paramount in all cases, and therefore limited in none. On the contrary, it is evident that the objects for which the Constitution was formed were deemed attainable only by a particular enumeration and specification of each power granted to the Federal Government; reserving all others to the people, or to the States. And yet it is in vain we search for any specified power embracing the right of legislation against the freedom of the press.

"Had the States been despoiled of their sovereignty by the generality of the preamble, and had the Federal Government been endowed with whatever they should judge to be instrumental towards union, justice, tranquillity, common defence, general welfare, and the preservation of liberty, nothing could have been more frivolous than an enumeration of powers.

"It is vicious in the extreme to calumniate meritorious public servants; but it is both artful and vicious to arouse the public indignation against calumny in order to conceal usurpation. Calumny is forbidden by the laws, usurpation by the Constitution. Calumny injures individuals, usurpation, States. Calumny may be redressed

by the common judicatures; usurpation can only be controlled by the act of society. Ought *usurpation,* which is most mischievous, to be rendered less hateful by *calumny,* which, though injurious, is in a degree less pernicious? But the laws for the correction of calumny were not defective. Every libellous writing or expression might receive its punishment in the State courts, from juries summoned by an officer, who does not receive his appointment from the President, and is under no influence to court the pleasure of Government, whether it injured public officers or private citizens. Nor is there any distinction in the Constitution empowering Congress exclusively to punish calumny directed against an officer of the General Government; so that a construction assuming the power of protecting the reputation of a citizen officer will extend to the case of any other citizen, and open to Congress a right of legislation in every conceivable case which can arise between individuals.

"In answer to this, it is urged that every Government possesses an inherent power of self-preservation, entitling it to do whatever it shall judge necessary for that purpose.

"This is a repetition of the doctrine of implication and expediency in different language, and admits of a similar and decisive answer, namely, that as the powers of Congress are defined, powers inherent, implied, or expedient, are obviously the creatures of ambition; because the care expended in defining powers would otherwise have been superfluous. Powers extracted from such sources will be indefinitely multiplied by the aid of armies and patronage, which, with the impossibility of controlling them by any demarcation, would presently terminate reasoning, and ultimately swallow up the State sovereignties.

"So insatiable is a love of power that it has resorted to a distinction between the freedom and licentiousness of

the press for the purpose of converting the third amendment* of the Constitution, which was dictated by the most lively anxiety to preserve that freedom, into an instrument for abridging it. Thus usurpation even justifies itself by a precaution against usurpation; and thus an amendment universally designed to quiet every fear is adduced as the source of an act which has produced general terror and alarm.

"The distinction between liberty and licentiousness is still a repetition of the Protean doctrine of implication, which is ever ready to work its ends by varying its shape. By its help, the judge as to what is licentious may escape through any constitutional restriction. Under it men of a particular religious opinion might be excluded from office, because such exclusion would not amount to an establishment of religion, and because it might be said that their opinions are licentious. And under it Congress might denominate a religion to be heretical and licentious, and proceed to its suppression. Remember that precedents once established are so much positive power; and that the nation which reposes on the pillow of political confidence, will sooner or later end its political existence in a deadly lethargy. Remember, also, that it is to the press mankind are indebted for having dispelled the clouds which long encompassed religion, for disclosing her genuine lustre, and disseminating her salutary doctrines.

"The sophistry of a distinction between the liberty and the licentiousness of the press is so forcibly exposed in a late memorial from our late envoys to the Minister of the French Republic, that we here present it to you in their own words:

" 'The genious of the Constitution, and the opinion of the people of the United States, cannot be overruled by

*The First Amendment was Article Third in those submitted by Congress to the States on September 25, 1789.

those who administer the Government. Among those principles deemed sacred in America, among those sacred rights considered as forming the bulwark of their liberty, which the Government contemplates with awful reverence and would approach only with the most cautious circumspection, there is no one of which the importance is more deeply impressed on the public mind than the liberty of the press. That this *liberty* is often carried to excess; that it has sometimes degenerated into *licentiousness,* is seen and lamented, *but the remedy has not yet been discovered. Perhaps it is an evil inseparable from the good with which it is allied; perhaps it is a shoot which cannot be stripped from the stalk without wounding vitally the plant from which it is torn. However desirable those measures might be which might correct without enslaving the press, they have never yet been devised in America.* No regulations exist which enable the Government to suppress whatever calumnies or invectives any individual may choose to offer to the public eye, or to punish such calumnies and invectives otherwise than by a legal prosecution in courts which are alike open to all who consider themselves as injured.'

"As if we were bound to look for security from the personal probity of Congress amidst the frailties of man, and not from the barriers of the Constitution, it has been urged that the accused under the sedition act is allowed to prove the truth of the charge. This argument will not for a moment disguise the unconstitutionality of the act, if it be recollected that opinions as well as facts are made punishable, and that the truth of an opinion is not susceptible of proof. By subjecting the truth of opinion to the regulation, fine, and imprisonment, to be inflicted by those who are of a different opinion, the free range of the human mind is injuriously restrained. The sacred obligations of religion flow from the due exercise of opinion, in the solemn discharge of which man is accountable to

his God alone; yet, under this precedent the truth of religion itself may be ascertained, and its pretended licentiousness punished by a jury of a different creed from that held by the person accused. This law, then, commits the double sacrilege of arresting reason in her progress towards perfection, and of placing in a state of danger the free exercise of religious opinions. But where does the Constitution allow Congress to create crimes and inflict punishment, provided they allow the accused to exhibit evidence in his defense? This doctrine, united with the assertion, that sedition is a common law offence, and therefore within the correcting power of Congress, opens at once the hideous volumes of penal law, and turns loose upon us the utmost invention of insatiable malice and ambition, which, in all ages, have debauched morals, depressed liberty, shackled religion, supported despotism, and deluged the scaffold with blood." VI Writings of James Madison, 1790–1802, pp. 333–337 (Hunt ed. 1906).

MR. JUSTICE GOLDBERG, concurring.

I agree with the Court that there is "no difficulty in bringing the appellant's statement within the purview of criticism of the official conduct of public officials . . . ." *Ante,* at 76. In *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 297, I expressed my conviction "that the Constitution accords citizens and press an unconditional freedom to criticize official conduct." *Id.,* at 305. *New York Times* was a civil libel case; this is a criminal libel prosecution. In my view, "[i]f the rule that libel on government has no place in our Constitution is to have real meaning, then libel [criminal or civil] on the official conduct of the governors likewise can have no place in our Constitution." *Id.,* at 299.

BECK *v.* OHIO.

CERTIORARI TO THE SUPREME COURT OF OHIO.

No. 18. Argued October 15, 1964.—Decided November 23, 1964.

Police officers, who had received unspecified "information" and "reports" about petitioner, who knew what he looked like, and that he had a gambling record, stopped petitioner who was driving an automobile. Placing him under arrest, they searched his car, though they had no arrest or search warrant. They found nothing of interest. They took him to a police station, where they found some clearing house slips on his person, for the possession of which he was subsequently tried. His motion to suppress the slips as seized in violation of the Fourth and Fourteenth Amendments was overruled, the slips were admitted into evidence, and he was convicted, his conviction being ultimately sustained on appeal by the Supreme Court of Ohio, which found the search valid as incident to a lawful arrest. *Held:* No probable cause for petitioner's arrest having been shown, the arrest, and therefore necessarily the search for and seizure of the slips incident thereto, were invalid under the Fourth and Fourteenth Amendments. Pp. 91–97.

175 Ohio St. 73, 191 N. E. 2d 825, reversed.

James R. Willis argued the cause for petitioner. With him on the brief was *Jay B. White.*

William T. McKnight argued the cause for respondent. With him on the brief was *Edward V. Cain.*

Bernard A. Berkman and *Melvin L. Wulf* filed a brief for the American Civil Liberties Union et al., as *amici curiae,* urging reversal.

John T. Corrigan filed a brief for the County of Cuyahoga, Ohio, as *amicus curiae,* urging affirmance.

MR. JUSTICE STEWART delivered the opinion of the Court.

On the afternoon of November 10, 1961, the petitioner, William Beck, was driving his automobile in the vicinity

of East 115th Street and Beulah Avenue in Cleveland, Ohio. Cleveland police officers accosted him, identified themselves, and ordered him to pull over to the curb. The officers possessed neither an arrest warrant nor a search warrant. Placing him under arrest, they searched his car but found nothing of interest. They then took him to a nearby police station where they searched his person and found an envelope containing a number of clearing house slips "beneath the sock of his leg." The petitioner was subsequently charged in the Cleveland Municipal Court with possession of clearing house slips in violation of a state criminal statute.[1] He filed a motion to suppress as evidence the clearing house slips in question, upon the ground that the police had obtained them by means of an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments. After a hearing the motion was overruled, the clearing house slips were admitted in evidence, and the petitioner was convicted. His conviction was affirmed by an Ohio Court of Appeals, and ultimately by the Supreme Court of Ohio, with two judges dissenting. 175 Ohio St. 73, 191 N. E. 2d 825. We granted certiorari to consider the petitioner's claim that, under the rule of *Mapp* v. *Ohio,* 367 U. S. 643, the clearing house slips were wrongly ad-

[1] Ohio Revised Code, § 2915.111. Possession of "numbers game" ticket.

"No person shall own, possess, have on or about his person, have in his custody, or have under his control a ticket, order, or device for or representing a number of shares or an interest in a scheme of chance known as 'policy,' 'numbers game,' 'clearing house,' or by words or terms of similar import, located in or to be drawn, paid, or carried on within or without this state.

"Whoever violates this section shall be fined not more than five hundred dollars and imprisoned not more than six months for a first offense; for each subsequent offense, such person shall be fined not less than five hundred nor more than one thousand dollars and imprisoned not less than one nor more than three years."

mitted in evidence against him because they had been seized by the Cleveland police in violation of the Fourth and Fourteenth Amendments. 376 U. S. 905.

Although the police officers did not obtain a warrant before arresting the petitioner and searching his automobile and his person, the Supreme Court of Ohio found the search nonetheless constitutionally valid as a search incident to a lawful arrest. And it is upon that basis that the Ohio decision has been supported by the respondent here. See *Draper* v. *United States,* 358 U. S. 307; *Ker* v. *California,* 374 U. S. 23.

There are limits to the permissible scope of a warrantless search incident to a lawful arrest, but we proceed on the premise that, if the arrest itself was lawful, those limits were not exceeded here. See *Harris* v. *United States,* 331 U. S. 145; *United States* v. *Rabinowitz,* 339 U. S. 56; cf. *Preston* v. *United States,* 376 U. S. 364. The constitutional validity of the search in this case, then, must depend upon the constitutional validity of the petitioner's arrest. Whether that arrest was constitutionally valid depends in turn upon whether, at the moment the arrest was made, the officers had probable cause to make it—whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense. *Brinegar* v. *United States,* 338 U. S. 160, 175–176; *Henry* v. *United States,* 361 U. S. 98, 102. "The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating . . . often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law-abiding citizens at the mercy of the officers' whim or caprice." *Brinegar* v. *United States, supra,* at 176.

In turning to the question of whether or not the record in the case before us can support a finding of probable cause for the petitioner's arrest, it may be well to repeat what was said by MR. JUSTICE CLARK, speaking for eight members of the Court, in *Ker* v. *California:*

> "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." 374 U. S. 23, at 34.

The trial court made no findings of fact in this case. The trial judge simply made a conclusory statement: "A lawful arrest has been made, and this was a search incidental to that lawful arrest." The Court of Appeals merely found "no error prejudicial to the appellant." In the Supreme Court of Ohio, Judge Zimmerman's opinion contained a narrative recital which is accurately

excerpted in the dissenting opinions filed today. But, putting aside the question of whether this opinion can fairly be called the opinion of the court,[2] such a recital in an appellate opinion is hardly the equivalent of findings made by the trier of the facts. In any event, after giving full scope to the flexibility demanded by "a recognition that conditions and circumstances vary just as do investigative and enforcement techniques," we hold that the arrest of the petitioner cannot on the record before us be squared with the demands of the Fourth and Fourteenth Amendments.

The record is meager, consisting only of the testimony of one of the arresting officers, given at the hearing on the motion to suppress. As to the officer's own knowledge of the petitioner before the arrest, the record shows no more than that the officer "had a police picture of him and knew what he looked like," and that the officer knew that the petitioner had "a record in connection with clearing house and scheme of chance." [3] Beyond that, the offi-

[2] For more than 100 years the rule in Ohio has been that its Supreme Court, except for *per curiam* opinions, speaks as a court only through the syllabi of its cases. See Rule VI, 94 Ohio St. ix; 6 Ohio St. viii; 5 Ohio St. vii. "Individual opinions speak the conclusions of their writer. What useful purpose they serve is an open question." *Thackery* v. *Helfrich,* 123 Ohio St. 334, 336, 175 N. E. 449, 450.

[3] It is not entirely clear whether the petitioner had been previously convicted, or only arrested. At one point the officer testified as follows: "I heard reports and found that he has a record in connection with clearing house and scheme of chance. Q. Previous convictions? A. Yes."

Later he testified as follows:

"Q. You indicated that you knew of Mr. Beck's previous record?

"A. Yes, I did.

"Q. What was that, sir?

"A. Three arrests for clearing house violations.

"Q. When was this?

[*Footnote 3 continued on page 94*]

cer testified only that he had "information" that he had "heard reports," that "someone specifically did relate that information," and that he "knew who that person was." There is nowhere in the record any indication of what "information" or "reports" the officer had received, or, beyond what has been set out above, from what source the "information" and "reports" had come. The officer testified that when he left the station house, "I had in mind looking for [the petitioner] in the area of East 115th Street and Beulah, stopping him if I did see him make a stop in that area." But the officer testified to nothing that would indicate that any informer had said that the petitioner could be found at that time and place. Cf. *Draper* v. *United States*, 358 U. S. 307. And the record does not show that the officers saw the petitioner "stop" before they arrested him, or that they saw, heard, smelled, or otherwise perceived anything else to give them ground for belief that the petitioner had acted or was then acting unlawfully.[4]

"A. They were all during the year 1959, I believe.

"Q. All during the year 1959?

"A. Yes.

"Q. Then you didn't have any arrests that you knew of as far as 1960 was concerned?

"A. Not to my knowledge."

[4] "Q. About what time was it that you first saw Mr. Beck?

"A. A few minutes before 1:00 p. m. that afternoon.

"Q. And he was in his automobile?

"A. He was driving his automobile.

"Q. He was proceeding then lawfully down the street?

"A. He was operating north on 115th Street.

"Q. And you stopped him?

"A. We stopped him going east on Beulah.

"Q. You did not stop him for any traffic offense?

"A. No; I did not stop him for that reason.

"Q. You caused him to pull over to the curb?

"A. I identified myself and requested him to pull over to the curb.

[*Footnote 4 continued on page 95*]

No decision of this Court has upheld the constitutional validity of a warrantless arrest with support so scant as this record presents. The respondent relies upon *Draper* v. *United States,* 358 U. S. 307. But in that case the record showed that a named special employee of narcotics agents who had on numerous occasions given reliable information had told the arresting officer that the defendant, whom he described minutely, had taken up residence at a stated address and was selling narcotics to addicts in Denver. The informer further had told the officer that the defendant was going to Chicago to obtain narcotics and would be returning to Denver on one of two trains from Chicago, which event in fact took place. In complete contrast, the record in this case does not contain a single objective fact to support a belief by the officers that the petitioner was engaged in criminal activity at the time they arrested him.

"Q. Then you searched his automobile?

"A. Yes, I did.

"Q. Prior to that, did you indicate to him that he was under arrest?

"A. Not while searching the automobile.

"Q. In other words, you searched the automobile before you placed him under arrest?

"A. I placed him under arrest just as we were searching the automobile.

"Q. Prior to that time, you had not discovered anything that was illegal?

"A. Other than a hunting knife in the automobile, that was it.

"Q. Why then did you place him under arrest?

"A. I placed him under arrest for a clearing house operation, scheme of chance.

"Q. At that time, you had discovered some evidence of a scheme of chance?

"A. I did not.

"Q. At the time you placed him under arrest, you did not have any evidence?

"A. Other than information."

An arrest without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment. "Whether or not the requirements of reliability and particularity of the information on which an officer may act are more stringent where an arrest warrant is absent, they surely cannot be less stringent than where an arrest warrant is obtained. Otherwise, a principal incentive now existing for the procurement of arrest warrants would be destroyed." *Wong Sun* v. *United States,* 371 U. S. 471, 479–480. Yet even in cases where warrants were obtained, the Court has held that the Constitution demands a greater showing of probable cause than can be found in the present record. *Aguilar* v. *Texas,* 378 U. S. 108; *Giordenello* v. *United States,* 357 U. S. 480; [5] *Nathanson* v. *United States,* 290 U. S. 41.[6]

When the constitutional validity of an arrest is challenged, it is the function of a court to determine whether the facts available to the officers at the moment of the arrest would "warrant a man of reasonable caution in the belief" that an offense has been committed. *Carroll* v. *United States,* 267 U. S. 132, 162. If the court is not informed of the facts upon which the arresting officers acted, it cannot properly discharge that function. All that the trial court was told in this case was that the officers knew what the petitioner looked like and knew

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[5] The Court has made clear that the *Giordenello* decision rested upon the Fourth Amendment, rather than upon Rule 4 of the Federal Rules of Criminal Procedure. See *Aguilar* v. *Texas,* 378 U. S. 108, at 112, n. 3.

[6] The *Aguilar* and *Nathanson* cases involved search warrants rather than arrest warrants, but as the Court has said, "The language of the Fourth Amendment, that '. . . no Warrants shall issue, but upon probable cause . . .' of course applies to arrest as well as search warrants." *Giordenello* v. *United States,* 357 U. S. 480, at 485–486.

that he had a previous record of arrests or convictions for violations of the clearing house law. Beyond that, the arresting officer who testified said no more than that someone (he did not say who) had told him something (he did not say what) about the petitioner. We do not hold that the officer's knowledge of the petitioner's physical appearance and previous record was either inadmissible or entirely irrelevant upon the issue of probable cause. See *Brinegar* v. *United States,* 338 U. S. 160, 172–174. But to hold that knowledge of either or both of these facts constituted probable cause would be to hold that anyone with a previous criminal record could be arrested at will.

It is possible that an informer did in fact relate information to the police officer in this case which constituted probable cause for the petitioner's arrest. But when the constitutional validity of that arrest was challenged, it was incumbent upon the prosecution to show with considerably more specificity than was shown in this case what the informer actually said, and why the officer thought the information was credible. We may assume that the officers acted in good faith in arresting the petitioner. But "good faith on the part of the arresting officers is not enough." *Henry* v. *United States,* 361 U. S. 98, 102. If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be "secure in their persons, houses, papers, and effects," only in the discretion of the police.

Reversed.

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

The Supreme Court of Ohio, 175 Ohio St. 73, 74, 191 N. E. 2d 825, 827, "determined" the following facts in this case:

> "The Cleveland police had good reason to believe that defendant was regularly engaged in carrying on

> a scheme of chance involving clearinghouse slips. There was testimony that he had previously been convicted on that score. Information was given to the police by an informer that defendant would be in a certain locality at a certain time pursuing his unlawful activities. He was found in that locality, as predicted, driving an automobile. Police officers stopped the car and searched it, without result. Defendant was then arrested and taken to a police station, and his clothing was examined, resulting in the discovery and seizure of the illegal clearinghouse slips, which formed the basis of the charge against him and his subsequent conviction."

These are the facts upon which Ohio's highest court based its opinion and they have support in the record.

The syllabus rule, Rule VI, peculiar to that State and of which the majority speaks, was promulgated in 1858, 5 Ohio St. vii, and provides:

> "A syllabus of the points decided by the Court in each case, shall be stated, in writing, by the Judge assigned to deliver the opinion of the Court, *which shall be confined to the points of law,* arising from the facts of the case, *that have been determined by the Court.* . . ." (Emphasis supplied.)

As my late Brother of revered memory, Mr. Justice Burton of Ohio, said in the Ohio case of *Perkins* v. *Benguet Consol. Mining Co.,* 342 U. S. 437, 442, n. 3 (1952), "[a] syllabus must be read in the light of the facts in the case, even where brought out in the accompanying opinion rather than in the syllabus itself." The good Justice was only following Ohio's own cases. See *Williamson Heater Co.* v. *Radich,* 128 Ohio St. 124, 190 N. E. 403 (1934); *Perkins* v. *Bright,* 109 Ohio St. 14, 19–20, 141 N. E. 689, 690 (1923); *In re Poage,* 87 Ohio St. 72, 82–83, 100 N. E. 125, 127–128 (1912).

The Court ignores these findings entirely. Where the highest court of a State after detailed and earnest consideration determines the facts and they are reasonably supportable, I would let them stand. And I would, of course, give the same respect to findings of probable cause by United States district courts when approved by United States courts of appeals. Otherwise, this Court will be continually disputing with state and federal courts over the minutiae of facts in every search and seizure case. Especially is this true if the Court disputes the findings *sua sponte* where, as here, no attack is leveled at them.

Believing that the Ohio Supreme Court's findings, set out above, fully support its conclusion that probable cause existed in this case in support of the arrest and the search incident thereto, I would affirm.

MR. JUSTICE HARLAN, dissenting.

Judge Zimmerman of the Supreme Court of Ohio stated as a fact,[1] "Information was given to the police by an informer that defendant would be in a certain locality at a certain time pursuing his unlawful activities. He was found in that locality as predicted, driving an automobile." 175 Ohio St. 73, 74, 191 N. E. 2d 825, 827. I regard this as the crucial point in the case, for if the informant did give the police that information, the fact of its occurrence would sufficiently indicate the informant's reliability to provide a basis for petitioner's arrest,

[1] Although it was Judge Zimmerman's opinion for the Supreme Court of Ohio which articulated the specific finding in question here, that finding must be attributed to the trial court, for we must presume that its conclusion that the arrest was constitutionally permissible was based on the factual findings necessary to support it. If the Court is unwilling to accept this presumption, it should, at least, remand the case to the Ohio courts in order that any question on this score may be set at rest.

Draper v. *United States,* 358 U. S. 307. It is this Court's function, therefore, to determine whether the State's finding is adequately supportable. In doing so it is essential to consider what are the appropriate standards of appellate review.

Generally "our inquiry clearly is limited to a study of the *undisputed* portions of the record." *Thomas* v. *Arizona,* 356 U. S. 390, 402. "[T]here has been complete agreement that any conflict in testimony as to what actually led to a contested confession [or to a contested arrest] is not this Court's concern. Such conflict comes here authoritatively resolved by the State's adjudication." *Watts* v. *Indiana,* 338 U. S. 49, 51–52. See also, *Gallegos* v. *Nebraska,* 342 U. S. 55, 60–61; *Haley* v. *Ohio,* 332 U. S. 596, 597–598. It is equally clear that in cases involving asserted violations of constitutional rights the Court is free to draw its own inferences from established facts, giving due weight to the conclusions of the state court, but not being conclusively bound by them, *Ker* v. *California,* 374 U. S. 23; *Spano* v. *New York,* 360 U. S. 315.

A distinction between facts and inferences may often be difficult to draw, but the guiding principle for this Court should be that when a question is in doubt and demeanor and credibility of witnesses, or contemporaneous understandings of the parties, have a part to play in its resolution, this Court should be extremely slow to upset a state court's inferential findings. The impetus for our exercising *de novo* review of the facts comes from the attitude that unless this Court can fully redetermine the facts of each case for itself, it will be unable to afford complete protection for constitutional rights. But when the "feel" of the trial may have been a proper element in resolving an issue which is unclear on the record, our independent judgment should give way to the greater

capability of the state trial court [2] in determining whether a constitutional right has been infringed.[3] Proper regard for the duality of the American judicial system demands no less.

Federal habeas corpus, which allows a federal court in appropriate circumstances to develop a fresh record, *Townsend* v. *Sain,* 372 U. S. 293, provides a far more satisfactory vehicle for resolving such unclear issues, for the judge can evaluate for himself the on-the-spot considerations which no appellate court can estimate with assurance on a cold record. Those considerations are important to the case at bar.

While I agree that the record is not free from all doubt, I believe that the following selected portions of the testimony of one of the arresting officers are sufficient to carry the day for the State's judgment:

> "Q. Did you have reasonable and probable cause to stop this man?
>
> "A. Yes, I did.
>
> . . . . . .
>
> "Q. Based on his previous record?
>
> "A. Information *and* previous record *and* observation. [Emphasis added.]
>
> . . . . . .
>
> "Q. When you left the Station, did you have in mind stopping Mr. Beck?
>
> "A. I had in mind looking for him in the area of

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[2] See note 1, *supra.*

[3] *Norris* v. *Alabama,* 294 U. S. 587, in which the Court concluded, contrary to a state court finding, that Negroes' names had been unlawfully added to a jury book, would at first glance appear to be an exception, but in fact it proves the rule. The evidence on which the conclusion was based was documentary and no "on-the-spot" considerations were involved.

East 115th Street and Beulah, stopping him if I did see him make a stop in that area.

. . . . . .

"Q. You indicated that you were operating on information?

"A. Yes.

"Q. From whom did you get this information?

. . . . . .

"A. I couldn't divulge that information.

"Q. But someone specifically did relate that information to you?

"A. Yes.

"Q. And you knew who that person was?

"A. Yes."

It is true that the officer never specifically said "The informant told me that Beck was operating in the area of East 115th Street and Beulah," but he did testify that he went looking for Beck in that specific area, that he was acting in part on information, and that his information had been related to him by some specific person whose name he felt privileged not to divulge. I find the state court inference reasonable, even on the basis of the admittedly sparse record before us, that the informant told the officer that Beck was operating in the mentioned area.

Furthermore, in reaching this inference, on-the-spot considerations might well have come into play. There appears to have been no lack of common understanding at trial that the informant had given the officer the crucial information. Petitioner argued in the Ohio Supreme Court, "the pattern is obvious, an officer testifies he had information from a confidential source that a particular person is 'picking up' numbers in a given area and based on that information they arrest such person 'on sight' without a warrant." [4] Judge Zimmerman of the

[4] Reply brief for appellant in the Supreme Court of Ohio, p. 5.

Supreme Court of Ohio found it to be the fact without seeing any need for elaboration. Respondent, in its brief in this Court, assumed it to be the fact.[5] And petitioner raised no question as to this inference in either his petition or brief. Indeed the question is raised for the first time, *sua sponte,* by the Court's opinion.

On this basis I vote to affirm.

[5] Brief for respondent, p. 8.

SCHLAGENHAUF *v.* HOLDER, U. S. DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF INDIANA.

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

No. 8. Argued October 13, 1964.—Decided November 23, 1964.

A bus collided with the rear of a tractor-trailer and a diversity action for damages was brought by certain bus passengers in the District Court. The defendants—the bus company, petitioner its driver, the owners of the tractor and the trailer (hereinafter codefendants), and the tractor driver—filed answers denying negligence. The bus company cross-claimed against codefendants for damage to its bus, claiming that the collision resulted from their negligence. Codefendant tractor owner answered the cross-claim, denied negligence, and alleged that petitioner was "not mentally or physically capable" of driving a bus at the time of the accident and that his negligence proximately caused damage to the bus. Codefendants petitioned the District Court for an order that petitioner submit to multiple mental and physical examinations under Rule 35 (a) of the Federal Rules of Civil Procedure. That Rule provides for an order for examination on motion "for good cause shown" in an action where the mental or physical condition of a party is "in controversy." Codefendant trailer owner answered the bus company's cross-claim and itself cross-claimed against the bus company and petitioner for damage to its trailer, alleging negligence by the bus company and petitioner through the latter's having been permitted to drive the bus despite a known visual deficiency. Respondent District Court Judge over petitioner's opposition granted an order for internal medicine, ophthalmological, neurological and psychiatric examinations of petitioner under Rule 35 (a). To set aside that order petitioner applied for mandamus against respondent in the Court of Appeals, which that court denied. *Held:*

1. Under the circumstances of this case mandamus was an appropriate remedy to review the challenged power of the District Court to order the mental and physical examinations of a defendant. Pp. 109–112.

(a) Though not a substitute for appeal, mandamus is an appropriate remedy for usurpation of power, a substantial issue in

this case, involving as it did the first challenge to a district court's power under Rule 35 (a) to require examination of a defendant. P. 110.

(b) Whether the District Court exceeded its power by holding that petitioner's mental and physical condition was "in controversy" within the meaning of Rule 35 (a) was properly before the Court of Appeals. P. 111.

(c) The Court of Appeals did not resolve the related question whether "good cause" was shown for ordering the examinations, though it should have done so since the allegation of usurpation of power was before it and to do so would avoid piecemeal litigation and settle new and important problems. P. 111.

(d) Since the issues presented here concern construction of the Federal Rules of Civil Procedure, which it is the duty of this Court to formulate and put in force, this Court will consider the merits of such issues and formulate necessary guidelines, rather than remand the cause to the Court of Appeals to reconsider the issue of "good cause." Pp. 111–112.

2. Rule 35 (a) applies to the physical or mental examination of defendants as well as plaintiffs, and as so applied is constitutional, and authorized by the Rules Enabling Act. Pp. 112–114.

3. Though the person to be examined under Rule 35 (a) must be a "party" to the action he need not be an opposing party *vis-à-vis* the movant. Pp. 115–116.

4. The necessarily related requirements of Rule 35 that the mental or physical condition of the party sought to be examined be "in controversy" and that "good cause" be shown for the examination are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case. P. 118.

5. Rule 35 requires discriminating application by the trial judge, who must decide, as an initial matter in each case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's necessarily related requirements of "in controversy" and "good cause." Pp. 118–119.

6. A movant under Rule 35 for a mental or physical examination of a party who has not asserted his mental or physical condition either in support of or in defense of a claim must, by appropriate means, affirmatively show that the condition sought to be examined is really and genuinely in controversy and that good cause exists for the particular examination requested. Pp. 119–120.

7. A sufficient showing was not made in this case to support any except perhaps a visual examination of petitioner and the District Court should reconsider its order, including that for the eye examination, in the light of the guidelines set forth herein. Pp. 120–121.

321 F. 2d 43, vacated and remanded.

Robert S. Smith argued the cause for petitioner. With him on the briefs was *Wilbert McInerney.*

Erle A. Kightlinger argued the cause for respondent. With him on the brief were *Aribert L. Young* and *Keith C. Reese.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

This case involves the validity and construction of Rule 35 (a) of the Federal Rules of Civil Procedure as applied to the examination of a defendant in a negligence action. Rule 35 (a) provides:

> "Physical and Mental Examination of Persons. (a) Order for examination. In an action in which the mental or physical condition of a party is in controversy, the court in which the action is pending may order him to submit to a physical or mental examination by a physician. The order may be made only on motion for good cause shown and upon notice to the party to be examined and to all other parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made."

I.

An action based on diversity of citizenship was brought in the District Court seeking damages arising from personal injuries suffered by passengers of a bus which collided with the rear of a tractor-trailer. The named defendants were The Greyhound Corporation, owner of

the bus; petitioner, Robert L. Schlagenhauf, the bus driver; Contract Carriers, Inc., owner of the tractor; Joseph L. McCorkhill, driver of the tractor;[1] and National Lead Company, owner of the trailer. Answers were filed by each of the defendants denying negligence.

Greyhound then cross-claimed against Contract Carriers and National Lead for damage to Greyhound's bus, alleging that the collision was due solely to their negligence in that the tractor-trailer was driven at an unreasonably low speed, had not remained in its lane, and was not equipped with proper rear lights. Contract Carriers filed an answer to this cross-claim denying its negligence and asserting "[t]hat the negligence of the driver of the . . . bus [petitioner Schlagenhauf] proximately caused and contributed to . . . Greyhound's damages."

Pursuant to a pretrial order, Contract Carriers filed a letter—which the trial court treated as, and we consider to be, part of the answer—alleging that Schlagenhauf was "not mentally or physically capable" of driving a bus at the time of the accident.

Contract Carriers and National Lead then petitioned the District Court for an order directing petitioner Schlagenhauf to submit to both mental and physical examinations by one specialist in each of the following fields:

(1) Internal medicine;
(2) Ophthalmology;
(3) Neurology; and
(4) Psychiatry.

For the purpose of offering a choice to the District Court of one specialist in each field, the petition recommended two specialists in internal medicine, ophthalmology, and psychiatry, respectively, and three specialists in neurology—a total of nine physicians. The petition alleged

[1] In all the pleadings McCorkhill was joined with Contract Carriers. For simplicity, both will be referred to as Contract Carriers.

that the mental and physical condition of Schlagenhauf was "in controversy" as it had been raised by Contract Carriers' answer to Greyhound's cross-claim. This was supported by a brief of legal authorities and an affidavit of Contract Carriers' attorney stating that Schlagenhauf had seen red lights 10 to 15 seconds before the accident, that another witness had seen the rear lights of the trailer from a distance of three-quarters to one-half mile, and that Schlagenhauf had been involved in a prior accident.

The certified record indicates that petitioner's attorneys filed in the District Court a brief in opposition to this petition asserting, among other things, that "the physical and mental condition of the defendant Robert L. Schlagenhauf is not 'in controversy' herein in the sense that these words are used in Rule 35 of the Federal Rules of Civil Procedure; [and] that good cause has not been shown for the multiple examinations prayed for by the cross-defendant . . . ." [2]

While disposition of this petition was pending, National Lead filed its answer to Greyhound's cross-claim and itself "cross-claimed" against Greyhound and Schlagenhauf for damage to its trailer. The answer asserted generally that Schlagenhauf's negligence proximately caused the accident. The cross-claim additionally alleged that Greyhound and Schlagenhauf were negligent

> "[b]y permitting said bus to be operated over and upon said public highway by the said defendant, Robert L. Schlagenhauf, when both the said Greyhound Corporation and said Robert L. Schlagenhauf knew that the eyes and vision of the said Robert L. Schlagenhauf was [*sic*] impaired and deficient."

The District Court, on the basis of the petition filed by Contract Carriers, and without any hearing, ordered

[2] These contentions were renewed by written "Objections and Brief" at the time the corrected order described in note 3 was entered by the District Court.

Schlagenhauf to submit to nine examinations—one by each of the recommended specialists—despite the fact that the petition clearly requested a total of only four examinations.[3]

Petitioner applied for a writ of mandamus in the Court of Appeals against the respondent, the District Court Judge, seeking to have set aside the order requiring his mental and physical examinations. The Court of Appeals denied mandamus, one judge dissenting, 321 F. 2d 43.

We granted certiorari to review undecided questions concerning the validity and construction of Rule 35. 375 U. S. 983.

II.

A threshold problem arises due to the fact that this case was in the Court of Appeals on a petition for a writ of mandamus. Although it is not disputed that we have jurisdiction to review the judgment of the Court of Appeals, 28 U. S. C. § 1254 (1) (1958 ed.), respondent urges that the judgment below dismissing the writ be affirmed on the ground that mandamus was not an appropriate remedy.

"The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts [4] has been to confine an inferior court to a lawful

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[3] After the Court of Appeals denied mandamus, the order was corrected by the District Court to reduce the number of examinations to the four requested. We agree with respondent that the issue of that error has become moot. However, the fact that the District Court ordered nine examinations is not irrelevant, together with all the other circumstances, in the consideration of whether the District Court gave to the petition for mental and physical examinations that discriminating application, which Rule 35 requires. See pp. 119–122, *infra*.

[4] 28 U. S. C. § 1651 (a) (1958 ed.): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary

exercise of its prescribed jurisdiction . . . ," *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21, 26.

It is, of course, well settled, that the writ is not to be used as a substitute for appeal, *Ex parte Fahey*, 332 U. S. 258, 259–260, even though hardship may result from delay and perhaps unnecessary trial, *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 382–383; *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196, 202–203; *Roche* v. *Evaporated Milk Assn., supra*, at 31. The writ is appropriately issued, however, when there is "usurpation of judicial power" or a clear abuse of discretion, *Bankers Life & Casualty Co.* v. *Holland, supra*, at 383.

Here petitioner's basic allegation was lack of power in a district court to order a mental and physical examination of a defendant. That this issue was substantial is underscored by the fact that the challenged order requiring examination of a defendant appears to be the first of its kind in any reported decision in the federal courts under Rule 35,[5] and we have found only one such modern case in the state courts.[6] The Court of Appeals recognized that it had the power to review on a petition for mandamus the basic, undecided question of whether a district court could order the mental or physical examination of a defendant. We agree that, under these unusual circumstances and in light of the authorities, the Court of Appeals had such power.

The petitioner, however, also alleged that, even if Rule 35 gives a district court power to order mental

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or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

[5] But see *Dinsel* v. *Pennsylvania R. Co.*, 144 F. Supp. 880 (D. C. W. D. Pa.), where this issue was considered but the District Court, after consideration of the facts, declined to order an examination.

[6] *Harabedian* v. *Superior Court*, 195 Cal. App. 2d 26, 15 Cal. Rptr. 420 (Dist. Ct. App.).

and physical examinations of a defendant in an appropriate case, the District Court here exceeded that power in ordering examinations when petitioner's mental and physical condition was not "in controversy" and no "good cause" was shown, both as expressly required by Rule 35. As we read its opinion, the Court of Appeals reached the "in controversy" issue and determined it adversely to petitioner. 321 F. 2d, at 51. It did not, however, reach the issue of "good cause," apparently considering that it was not appropriate to do so on a petition for mandamus.[7] *Ibid.*

We recognize that in the ordinary situation where the sole issue presented is the district court's determination that "good cause" has been shown for an examination, mandamus is not an appropriate remedy, absent, of course, a clear abuse of discretion. See *Bankers Life & Casualty Co.* v. *Holland, supra,* at 383. Here, however, the petition was properly before the court on a substantial allegation of usurpation of power in ordering any examination of a defendant, an issue of first impression that called for the construction and application of Rule 35 in a new context. The meaning of Rule 35's requirements of "in controversy" and "good cause" also raised issues of first impression. In our view, the Court of Appeals should have also, under these special circumstances, determined the "good cause" issue, so as to avoid piecemeal litigation and to settle new and important problems.

Thus we believe that the Court of Appeals had power to determine all of the issues presented by the petition for mandamus.[8] Normally, wise judicial administration

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[7] Kiley, J., dissented on this point, concluding that the record disclosed "no adequate basis" for the District Court's exercise of its discretion. 321 F. 2d, at 52.

[8] It is not necessary to determine whether or not a refusal by the Court of Appeals to issue the writ, after consideration of the good-

would counsel remand of the cause to the Court of Appeals to reconsider this issue of "good cause." However, in this instance the issue concerns the construction and application of the Federal Rules of Civil Procedure. It is thus appropriate for us to determine on the merits the issues presented and to formulate the necessary guidelines in this area. See *Van Dusen* v. *Barrack,* 376 U. S. 612. As this Court stated in *Los Angeles Brush Corp.* v. *James,* 272 U. S. 701, 706:

> "[W]e think it clear that where the subject concerns the enforcement of the . . . Rules which by law it is the duty of this Court to formulate and put in force . . . it may . . . deal directly with the District Court . . . ."

See *McCullough* v. *Cosgrave,* 309 U. S. 634.

This is not to say, however, that, following the setting of guidelines in this opinion, any future allegation that the District Court was in error in applying these guidelines to a particular case makes mandamus an appropriate remedy. The writ of mandamus is not to be used when "the most that could be claimed is that the district courts have erred in ruling on matters within their jurisdiction." *Parr* v. *United States,* 351 U. S. 513, 520; see *Bankers Life & Casualty Co.* v. *Holland, supra,* at 382.

III.

Rule 35 on its face applies to all "parties," which under any normal reading would include a defendant. Petitioner contends, however, that the application of the Rule to a defendant would be an unconstitutional invasion of his privacy, or, at the least, be a modification of substantive rights existing prior to the adoption of the

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cause issue, would have been reversible error. The issuance of this extraordinary writ is itself generally a matter of discretion. See *La Buy* v. *Howes Leather Co.,* 352 U. S. 249, 260; *Bankers Life & Casualty Co.* v. *Holland, supra;* 6 Moore, Federal Practice, ¶ 54.10[4] (1953 ed.).

Federal Rules of Civil Procedure and thus beyond the congressional mandate of the Rules Enabling Act.[9]

These same contentions were raised in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, by a plaintiff in a negligence action who asserted a physical injury as a basis for recovery. The Court, by a closely divided vote, sustained the Rule as there applied. Both the majority and dissenting opinions, however, agreed that Rule 35 could not be assailed on constitutional grounds. *Id.*, at 11–12, 17. The division in the Court was on the issue of whether the Rule was procedural or a modification of substantive rights. The majority held that the Rule was a regulation of procedure and thus within the scope of the Enabling Act—the dissenters deemed it substantive. Petitioner does not challenge the holding in *Sibbach* as applied to plaintiffs. He contends, however, that it should not be extended to defendants. We can see no basis under the *Sibbach* holding for such a distinction. Discovery "is not a one-way proposition." *Hickman* v. *Taylor*, 329 U. S. 495, 507. Issues cannot be resolved by a doctrine of favoring one class of litigants over another.

We recognize that, insofar as reported cases show, this type of discovery in federal courts has been applied solely to plaintiffs, and that some early state cases seem to have proceeded on a theory that a plaintiff who seeks redress for injuries in a court of law thereby "waives" his right to claim the inviolability of his person.[10]

However, it is clear that *Sibbach* was not decided on any "waiver" theory. As Mr. Justice Roberts, for the majority, stated, one of the rights of a person "is the right not to be injured in one's person by another's negligence,

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[9] 28 U. S. C. § 2072 (1958 ed.), which provides that the Rules "shall not abridge, enlarge or modify any substantive right . . . ."

[10] For a discussion of these cases, see 8 Wigmore, Evidence, § 2220 (McNaughton Rev. ed. 1961). See also 3 Ohlinger's Federal Practice 490 (1964 ed.).

to redress infraction of which the present action was brought." 312 U. S., at 13. For the dissenters, Mr. Justice Frankfurter pointed out that "[o]f course the Rule is compulsive in that the doors of the federal courts otherwise open may be shut to litigants who do not submit to such a physical examination." *Id.*, at 18.

These statements demonstrate the invalidity of any waiver theory. The chain of events leading to an ultimate determination on the merits begins with the injury of the plaintiff, an involuntary act on his part. Seeking court redress is just one step in this chain. If the plaintiff is prevented or deterred from this redress, the loss is thereby forced on him to the same extent as if the defendant were prevented or deterred from defending against the action.

Moreover, the rationalization of *Sibbach* on a waiver theory would mean that a plaintiff has waived a right by exercising his right of access to the federal courts. Such a result might create constitutional problems. Also, if a waiver theory is espoused, problems would arise as to a plaintiff who originally brought his action in a state court (where there was no equivalent of Rule 35) and then has the case removed by the defendant to federal court.

We hold that Rule 35, as applied to either plaintiffs or defendants to an action, is free of constitutional difficulty and is within the scope of the Enabling Act. We therefore agree with the Court of Appeals that the District Court had power to apply Rule 35 to a party defendant in an appropriate case.

IV.

There remains the issue of the construction of Rule 35. We enter upon determination of this construction with the basic premise "that the deposition-discovery rules are to be accorded a broad and liberal treatment," *Hickman*

v. *Taylor, supra,* at 507, to effectuate their purpose that "civil trials in the federal courts no longer need be carried on in the dark." *Id.,* at 501.

Petitioner contends that even if Rule 35 is to be applied to defendants, which we have determined it must, nevertheless it should not be applied to him as he was not a party in relation to Contract Carriers and National Lead—the movants for the mental and physical examinations—at the time the examinations were sought.[11] The Court of Appeals agreed with petitioner's general legal proposition, holding that the person sought to be examined must be an opposing party *vis-à-vis* the movant (or at least one of them). 321 F. 2d, at 49. While it is clear that the person to be examined must be a party to the case,[12] we are of the view that the Court of Appeals gave an unduly restrictive interpretation to that term. Rule 35 only requires that the person to be examined be a party to the "action," not that he be an opposing party *vis-à-vis* the movant. There is no doubt that Schlagenhauf was a "party" to this "action" by virtue of the original complaint. Therefore, Rule 35 permitted exami-

[11] We have already pointed out, pp. 106–108, *supra,* that at the time of the first petition, Schlagenhauf was a named defendant in the original complaint but was not a named cross-defendant in any pleadings filed by Contract Carriers or National Lead.

[12] Although petitioner was an agent of Greyhound, he was himself a party to the action. He is to be distinguished from one who is not a party but is, for example, merely the agent of a party. This is not only clear in the wording of the Rule, but is reinforced by the fact that this Court has never approved the Advisory Committee's proposed amendment to Rule 35 which would include within the scope of the Rule "an agent or a person in the custody or under the legal control of a party." Advisory Committee on Rules for Civil Procedure, Report of Proposed Amendments, 41–43 (1955). It is not now necessary to determine to what extent, if any, the term "party" includes one who is a "real party in interest" although not a named party to the action. Cf. *Beach* v. *Beach,* 72 App. D. C. 318, 114 F. 2d 479.

nation of him (a party defendant) upon petition of Contract Carriers and National Lead (codefendants), provided, of course, that the other requirements of the Rule were met. Insistence that the movant have filed a pleading against the person to be examined would have the undesirable result of an unnecessary proliferation of cross-claims and counterclaims and would not be in keeping with the aims of a liberal, nontechnical application of the Federal Rules. See *Hickman* v. *Taylor, supra,* at 500–501.

While the Court of Appeals held that petitioner was not a party *vis-à-vis* National Lead or Contract Carriers at the time the examinations were first sought, it went on to hold that he had become a party *vis-à-vis* National Lead by the time of a second order entered by the District Court and thus was a party within its rule. This second order, identical in all material respects with the first, was entered on the basis of supplementary petitions filed by National Lead and Contract Carriers. These petitions gave no new basis for the examinations, except for the allegation that petitioner's mental and physical condition had been additionally put in controversy by the National Lead answer and cross-claim, which had been filed subsequent to the first petition for examinations. Although the filing of the petition for mandamus intervened between these two orders, we accept, for purposes of this opinion, the determination of the Court of Appeals that this second order was the one before it [13] and agree that petitioner was clearly a party at this juncture under any test.

Petitioner next contends that his mental or physical condition was not "in controversy" and "good cause" was not shown for the examinations, both as required by the express terms of Rule 35.

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[13] As stated in note 3, *supra,* thereafter a third order was entered which reduced the number of examinations to the four requested.

The discovery devices sanctioned by Part V of the Federal Rules include the taking of oral and written depositions (Rules 26–32), interrogatories to parties (Rule 33), production of documents (Rule 34), and physical and mental examinations of parties (Rule 35). The scope of discovery in each instance is limited by Rule 26 (b)'s provision that "the deponent may be examined regarding any matter, not privileged, which is *relevant to the subject matter involved* in the pending action" (emphasis added), and by the provisions of Rule 30 (b) permitting the district court, upon motion, to limit, terminate, or otherwise control the use of discovery devices so as to prevent either their use in bad faith or undue "annoyance, embarrassment, or oppression."

It is notable, however, that in none of the other discovery provisions is there a restriction that the matter be "in controversy," and only in Rule 34 is there Rule 35's requirement that the movant affirmatively demonstrate "good cause."

This additional requirement of "good cause" was reviewed by Chief Judge Sobeloff in *Guilford National Bank* v. *Southern R. Co.*, 297 F. 2d 921, 924 (C. A. 4th Cir.), in the following words:

> "Subject to . . . [the restrictions of Rules 26 (b) and 30 (b) and (d)], a party may take depositions and serve interrogatories without prior sanction of the court or even its knowledge of what the party is doing. Only if a deponent refuses to answer in the belief that the question is irrelevant, can the moving party request under Rule 37 a court order requiring an answer.
>
> "Significantly, this freedom of action, afforded a party who resorts to depositions and interrogatories, is not granted to one proceeding under Rules 34 and 35. Instead, the court must decide as an initial matter, and in every case, whether the motion requesting

> production of documents or the making of a physical or mental examination adequately demonstrates good cause. The specific requirement of good cause would be meaningless if good cause could be sufficiently established by merely showing that the desired materials are relevant, for the relevancy standard has already been imposed by Rule 26 (b). Thus, by adding the words '. . . good cause . . . .' the Rules indicate that there must be greater showing of need under Rules 34 and 35 than under the other discovery rules."

The courts of appeals in other cases [14] have also recognized that Rule 34's good-cause requirement is not a mere formality, but is a plainly expressed limitation on the use of that Rule. This is obviously true as to the "in controversy" and "good cause" requirements of Rule 35. They are not met by mere conclusory allegations of the pleadings—nor by mere relevance to the case—but require an affirmative showing by the movant that each condition as to which the examination is sought is really and genuinely in controversy and that good cause exists for ordering each particular examination. Obviously, what may be good cause for one type of examination may not be so for another. The ability of the movant to obtain the desired information by other means is also relevant.

Rule 35, therefore, requires discriminating application by the trial judge, who must decide, as an initial matter in every case, whether the party requesting a mental or physical examination or examinations has adequately demonstrated the existence of the Rule's requirements

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[14] *Hauger* v. *Chicago, R. I. & Pac. R. Co.*, 216 F. 2d 501 (C. A. 7th Cir.); *Martin* v. *Capital Transit Co.*, 83 U. S. App. D. C. 239, 170 F. 2d 811; see *Mitchell* v. *Bass*, 252 F. 2d 513 (C. A. 8th Cir.); *Williams* v. *Continental Oil Co.*, 215 F. 2d 4 (C. A. 10th Cir.); *Alltmont* v. *United States*, 177 F. 2d 971 (C. A. 3d Cir.).

of "in controversy" and "good cause," which requirements, as the Court of Appeals in this case itself recognized, are necessarily related. 321 F. 2d, at 51. This does not, of course, mean that the movant must prove his case on the merits in order to meet the requirements for a mental or physical examination. Nor does it mean that an evidentiary hearing is required in all cases. This may be necessary in some cases, but in other cases the showing could be made by affidavits or other usual methods short of a hearing. It does mean, though, that the movant must produce sufficient information, by whatever means, so that the district judge can fulfill his function mandated by the Rule.

Of course, there are situations where the pleadings alone are sufficient to meet these requirements. A plaintiff in a negligence action who asserts mental or physical injury, cf. *Sibbach* v. *Wilson & Co., supra,* places that mental or physical injury clearly in controversy and provides the defendant with good cause for an examination to determine the existence and extent of such asserted injury. This is not only true as to a plaintiff, but applies equally to a defendant who asserts his mental or physical condition as a defense to a claim, such as, for example, where insanity is asserted as a defense to a divorce action. See *Richardson* v. *Richardson,* 124 Colo. 240, 236 P. 2d 121. See also *Roberts* v. *Roberts,* 198 Md. 299, 82 A. 2d 120; Discovery as to Mental Condition Before Trial, 18 J. Am. Jud. Soc. 47 (1934).

Here, however, Schlagenhauf did not assert his mental or physical condition either in support of or in defense of a claim. His condition was sought to be placed in issue by other parties. Thus, under the principles discussed above, Rule 35 required that these parties make an affirmative showing that petitioner's mental or physical condition was in controversy and that there was good cause for

the examinations requested. This, the record plainly shows, they failed to do.

The only allegations in the pleadings relating to this subject were the general conclusory statement in Contract Carriers' answer to the cross-claim that "Schlagenhauf was not mentally or physically capable of operating" the bus at the time of the accident and the limited allegation in National Lead's cross-claim that, at the time of the accident, "the eyes and vision of . . . Schlagenhauf was [*sic*] impaired and deficient."

The attorney's affidavit attached to the petition for the examinations provided:

> "That . . . Schlagenhauf, in his deposition . . . admitted that he saw red lights for 10 to 15 seconds prior to a collision with a semi-tractor trailer unit and yet drove his vehicle on without reducing speed and without altering the course thereof.
>
> "The only eye-witness to this accident known to this affiant . . . testified that immediately prior to the impact between the bus and truck that he had also been approaching the truck from the rear and that he had clearly seen the lights of the truck for a distance of three-quarters to one-half mile to the rear thereof.
>
> ". . . Schlagenhauf has admitted in his deposition . . . that he was involved in a [prior] similar type rear end collision . . . ."

This record cannot support even the corrected order which required one examination in each of the four specialties of internal medicine, ophthalmology, neurology, and psychiatry.[15] Nothing in the pleadings or affidavit would afford a basis for a belief that Schlagenhauf was suffering from a mental or neurological illness warranting wide-ranging psychiatric or neurological exami-

[15] See note 3, *supra*.

nations. Nor is there anything stated justifying the broad internal medicine examination.[16]

The only specific allegation made in support of the four examinations ordered was that the "eyes and vision" of Schlagenhauf were impaired. Considering this in conjunction with the affidavit, we would be hesitant to set aside a visual examination if it had been the only one ordered.[17] However, as the case must be remanded to the District Court because of the other examinations ordered, it would be appropriate for the District Judge to reconsider also this order in light of the guidelines set forth in this opinion.

The Federal Rules of Civil Procedure should be liberally construed, but they should not be expanded by disregarding plainly expressed limitations. The "good cause" and "in controversy" requirements of Rule 35 make it very apparent that sweeping examinations of a party who has not affirmatively put into issue his own mental or physical condition are not to be automatically ordered merely because the person has been involved in an accident—or, as in this case, two accidents—and a general charge of negligence is lodged. Mental and physical examinations are only to be ordered upon a discriminating application by the district judge of the limitations prescribed by the Rule. To hold otherwise would mean

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[16] Moreover, it seems clear that there was no compliance with Rule 35's requirement that the trial judge delineate the "conditions, and scope" of the examinations. Here the examinations were ordered in very broad, general areas. The internal medicine examination might for example, at the instance of the movant or its recommended physician extend to such things as blood tests, electrocardiograms, gastro-intestinal and other X-ray examinations. It is hard to conceive how some of these could be relevant under any possible theory of the case.

[17] Cf. *Harabedian* v. *Superior Court,* 195 Cal. App. 2d 26, 15 Cal. Rptr. 420 (Dist. Ct. App.). This case should be compared with *Laubscher* v. *Blake,* 7 Cal. App. 2d 376, 46 P. 2d 836 (Dist. Ct. App.).

that such examinations could be ordered routinely in automobile accident cases.[18] The plain language of Rule 35 precludes such an untoward result.

Accordingly, the judgment of the Court of Appeals is vacated and the case remanded to the District Court to reconsider the examination order in light of the guidelines herein formulated and for further proceedings in conformity with this opinion.

Vacated and remanded.

MR. JUSTICE BLACK, with whom MR. JUSTICE CLARK joins, concurring in part and dissenting in part.

I agree with the Court that under Rule 35 (a): (1) a plaintiff and a defendant have precisely the same right to obtain a court order for physical or mental examination of the other party or parties to a lawsuit; (2) before obtaining such an order it must be shown that physical or mental health is "in controversy" as to a relevant and material issue in the case; and (3) such an order "may be made only on motion for good cause shown" after "notice to the party to be examined and to all other parties." Unlike the Court, however, I think this record plainly shows that there *was* a controversy as to Schlagenhauf's mental and physical health and that "good cause" *was* shown for a physical and mental examination of him, unless failure to deny the allegations amounted to an admission that they were true. While the papers filed in connection with this motion were informal, there can be no doubt that other parties in the lawsuit specifically

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[18] From July 1, 1963, through June 30, 1964, almost 10,000 motor vehicle personal injury cases were filed in the federal district courts. Administrative Office of the United States Courts, Annual Report of the Director, C2 (1964). In the Nation at large during 1963, there were approximately 11,500,000 automobile accidents, involving approximately 20,000,000 drivers. National Safety Council, Accident Facts, 40 (1964 ed.).

and unequivocally charged that Schlagenhauf was not mentally or physically capable of operating a motor bus at the time of the collision, and that his negligent operation of the bus caused the resulting injuries and damage. The other parties filed an affidavit based on depositions of Schlagenhauf and a witness stating that Schlagenhauf, driving the bus along a four-lane highway in what apparently was good weather, had come upon a tractor-trailer down the road in front of him. The tractor-trailer was displaying red lights visible for at least half a mile, and Schlagenhauf admitted seeing them. Yet after coming in sight of the vehicle Schlagenhauf continued driving the bus in a straight line, without slowing down, for a full 10 or 15 seconds until the bus struck the tractor-trailer. Schlagenhauf admitted also that he had been involved in the very same kind of accident once before. Schlagenhauf has never at any time in the proceedings denied and he does not even now deny the charges that his mental and physical health and his eyes and vision were impaired and deficient.

In a collision case like this one, evidence concerning very bad eyesight or impaired mental or physical health which may affect the ability to drive is obviously of the highest relevance. It is equally obvious, I think, that when a vehicle continues down an open road and smashes into a truck in front of it although the truck is in plain sight and there is ample time and room to avoid collision, the chances are good that the driver has some physical, mental or moral defect. When such a thing happens twice, one is even more likely to ask, "What is the matter with that driver? Is he blind or crazy?" Plainly the allegations of the other parties were relevant and put the question of Schlagenhauf's health and vision "in controversy." The Court nevertheless holds that these charges were not a sufficient basis on which to rest a court-ordered examination of Schlagenhauf. It says with reference to the

charges of impaired physical or mental health that the charges are "conclusory." I had not thought there was anything strange about pleadings being "conclusory"—that is their function, at least since modern rules of procedure have attempted to substitute simple pleadings for the complicated and redundant ones which long kept the common-law courts in disrepute. I therefore cannot agree that the charges about Schlagenhauf's health and vision were not sufficient upon which to base an order under Rule 35 (a), particularly since he was a party who raised every technical objection to being required to subject himself to an examination but never once denied that his health and vision were bad. In these circumstances the allegations here should be more than enough to show probable cause to justify a court order requiring some kind of physical and mental examination.

While I dissent from the Court's holding that no examination at all was justified by this record, I agree that the order was broader than required. I do so in part because of the arguments made in the dissent in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 16, that physical examinations of people should be ordered by courts only when clearly and unequivocally required by law. By the same reasoning I think the courts should exercise great restraint in administering such a law once it has been enacted, as *Sibbach* held it had been when Rule 35 was approved. For this reason I agree to the Court's judgment remanding the case in order to give Schlagenhauf, if he now chooses, and the other parties an opportunity to produce any relevant facts to aid the District Judge in refashioning an order which will be neither too broad nor too narrow to give all the parties the rights which are theirs.

MR. JUSTICE DOUGLAS, dissenting in part.

While I join the Court in reversing this judgment, I would, on the remand, deny all relief asked under Rule 35.

I do not suppose there is any licensed driver of a car or a truck who does not suffer from some ailment, whether it be ulcers, bad eyesight, abnormal blood pressure, deafness, liver malfunction, bursitis, rheumatism, or what not. If he or she is turned over to the plaintiff's doctors and psychoanalysts to discover the cause of the mishap, the door will be opened for grave miscarriages of justice. When the defendant's doctors examine plaintiff, they are normally interested only in answering a single question: did plaintiff in fact sustain the specific injuries claimed? But plaintiff's doctors will naturally be inclined to go on a fishing expedition in search of *anything* which will tend to prove that the defendant was unfit to perform the acts which resulted in the plaintiff's injury. And a doctor for a fee can easily discover something wrong with any patient—a condition that in prejudiced medical eyes might have caused the accident. Once defendants are turned over to medical or psychiatric clinics for an analysis of their physical well-being and the condition of their psyche, the effective trial will be held there and not before the jury. There are no lawyers in those clinics to stop the doctor from probing this organ or that one, to halt a further inquiry, to object to a line of questioning. And there is no judge to sit as arbiter. The doctor or the psychiatrist has a holiday in the privacy of his office. The defendant is at the doctor's (or psychiatrist's) mercy; and his report may either overawe or confuse the jury and prevent a fair trial.

The Court in *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, was divided when it came to submission of a plaintiff to a compulsory medical examination. The division was not over the constitutional power to require it but only as to whether Congress had authorized a rule to that effect. I accept that point as one governed by *stare decisis*. But no decision that when a *plaintiff* claims damages his "mental or physical condition" is "in controversy," within

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the meaning of Rule 35, governs the present case. The *plaintiff* by suing puts those issues "in controversy." A plaintiff, by coming into court and asserting that he has suffered an injury at the hands of the defendant, has thereby put his physical or mental condition "in controversy." Thus it may be only fair to provide that he may not be permitted to recover his judgment unless he permits an inquiry into the true nature of his condition.

A defendant's physical and mental condition is not, however, immediately and directly "in controversy" in a negligence suit. The issue is whether he was negligent. His physical or mental condition may of course be relevant to that issue; and he may be questioned concerning it and various methods of discovery can be used. But I balk at saying those issues are "in controversy" within the meaning of Rule 35 in every negligence suit or that they may be put "in controversy" by the addition of a few words in the complaint. As I have said, *Sibbach* proceeded on the basis that a plaintiff who seeks a decree of a federal court for his damages may not conceal or make difficult the proof of the claim he makes. The defendant, however, is dragged there; and to find "waiver" of the "inviolability of the person" (*Union Pacific R. Co.* v. *Botsford,* 141 U. S. 250, 252) is beyond reality.

Neither the Court nor Congress up to today has determined that any person whose physical or mental condition is brought into question during some lawsuit must surrender his right to keep his person inviolate. Congress did, according to *Sibbach,* require a plaintiff to choose between his privacy and his purse; but before today it has not been thought that any other "party" had lost this historic immunity. Congress and this Court can authorize such a rule. But a rule suited to purposes of discovery against defendants must be carefully drawn in light of the great potential of blackmail.

The Advisory Committee on Rules for Civil Procedure in its October 1955 Report of Proposed Amendments to the Rules of Civil Procedure for the United States District Courts proposed that Rule 35 be broadened to include situations where the mental or physical condition or "the blood relationship" of a party, or "of an agent or a person in the custody or under the legal control of a party," is "in controversy." We did not adopt that Rule in its broadened form. But concededly the issue with which we are now concerned was not exposed. It needs, in my opinion, full exposure so that if the Rule is to be applied to defendants as well as to plaintiffs, safeguards can be provided in the Rule itself against the awful risks of blackmail that exist in a Rule of that breadth.

This is a problem that we should refer to the Civil Rules Committee of the Judicial Conference so that if medical and psychiatric clinics are to be used in discovery against defendants—whether in negligence, libel, or contract cases—the standards and conditions will be discriminating and precise. If the bus driver in the instant case were not a defendant, could he be examined by doctors and psychiatrists? See *Kropp* v. *General Dynamics Corp.*, 202 F. Supp. 207; 13 Buffalo L. Rev. 623 (1964). Lines must in time be drawn; and I think the new Civil Rules Committee is better equipped than we are to draw them initially.

MR. JUSTICE HARLAN, dissenting.

In my view the Court's holding that mandamus lies in this case cannot be squared with the course of decisions to which the majority at the threshold pays lip service. *Ante,* pp. 109–110. As the Court recognizes, mandamus, like the other extraordinary writs, is available to correct only those decisions of inferior courts which involve a "usurpation of judicial power" or, what is tantamount

thereto, "a clear abuse of discretion"; such a writ "is not to be used as a substitute for appeal." *Ibid.*

Mandamus is found to be an appropriate remedy in this instance, however, because (1) petitioner's challenge was based on an asserted lack of power in the District Court to issue the examination order, and (2) that being so, the Court of Appeals had the right also to inquire into the application of the "in controversy" and "good cause" requirements of Rule 35 (a), particularly since those issues, like the question of "power," were matters of "first impression" which in "these special circumstances" should be determined by the Court of Appeals "so as to avoid piecemeal litigation and to settle new and important problems." *Ante,* p. 111.

For me this reasoning is unacceptable. Of course a court of appeals when confronted with a substantial challenge to the power of a district court to act in the premises may proceed to examine that question without awaiting its embodiment in a final judgment, as the Court of Appeals did here by issuing an order to show cause why a writ of mandamus should not issue. But once it is determined that the challenged power did exist, and that the district court acted within the limit of that power, an extraordinary writ should be denied. I know of no case which suggests that a court of appeals' right to consider such a question at an interlocutory stage of the litigation also draws to the court the right to consider other questions—here the "in controversy" and "good cause" issues—which otherwise would not be examinable upon a petition for an extraordinary writ. Indeed, were an extraordinary writ to issue following a determination that the district court lacked power, that would put an end to the litigation and these questions would never be reached. And, as the Court correctly states, the fact that "hardship may result from delay and perhaps unneces-

sary trial," *ante,* p. 110, is not a factor that makes for the issuance of such a writ.

Manifestly, today's procedural holding, when stripped of its sugar-coating, is born of the Court's belief that the petitioner should not be exposed to the rigors of these examinations before the proper "guidelines" have been established by this tribunal. Understandable as that point of view may be, it can only be indulged at the expense of making a deep inroad into the firmly established federal policy which, with narrow exceptions,[1] permits appellate review only of the final judgments of district courts. To be sure the Court is at pains to warn that what is done today puts an end to future "interlocutory" review of Rule 35 questions. *Ante,* p. 112. Nevertheless, I find it hard to escape the conclusion that this decision may open the door to the extraordinary writs being used to test any question of "first impression," if it can be geared to an alleged lack of "power" in the district court. As such, it seems to me out of keeping with the rule of "finality," with respect to which Congress, wisely I think, has been willing to make only cautious exceptions.[2]

The Court of Appeals having correctly concluded, as this Court now holds and as I agree, that the District Court had power to order the physical and mental examinations of this petitioner, and since I believe that there was no clear abuse of discretion in its so acting, I think the lower court was quite right in denying mandamus, and I would affirm its judgment on that basis.

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[1] See, *e. g.,* 28 U. S. C. §§ 1292 (a)(1), (b) (1958 ed.).

[2] See note 1, *supra.*

INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC. *v.* AMERICAN OIL CO.

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

No. 55. Argued November 9, 1964.—Decided November 23, 1964.

324 F. 2d 903, affirmed by an equally divided Court.

David E. Feller argued the cause for petitioner. With him on the briefs were *William Belshaw, Benedict R. Danko, Elliot Bredhoff, Jerry D. Anker* and *Michael H. Gottesman.*

Frederic D. Anderson argued the cause for respondent. With him on the brief were *Richard P. Tinkham* and *Daniel F. Kelly.*

PER CURIAM.

The judgment is affirmed by an equally divided Court.

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

COLORADO INTERSTATE GAS CO. *v.* STATE CORPORATION COMMISSION OF KANSAS ET AL.

APPEAL FROM THE SUPREME COURT OF KANSAS.

No. 75. Decided November 23, 1964.*

Appeals dismissed and certiorari denied.

Reported below: 192 Kan. 1, 386 P. 2d 266; 192 Kan. 29, 386 P. 2d 288.

Lewis M. Poe, Jr., James Lawrence White and *Malcolm Miller* for appellant in No. 75.

F. Vinson Roach, Patrick J. McCarthy, Mark H. Adams, Mark H. Adams II, Joe Rolston, Conrad C. Mount and *Charles V. Wheeler* for appellants in No. 83.

James D. Conway, Mark H. Adams, Mark H. Adams II, Joe Rolston and *Douglas Gleason* for appellant in No. 140.

Richard C. Byrd and *Dale M. Stucky* for State Corporation Commission of Kansas et al., and *Wendell J. Doggett, Jeff A. Robertson, G. R. Redding* and *Thomas M. Lofton* for Panhandle Eastern Pipe Line Co., appellees.

Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock and *Peter H. Schiff* for the Federal Power Commission, as *amicus curiae*, in opposition.

PER CURIAM.

The motions to dismiss are granted and the appeals are dismissed for want of jurisdiction. Treating the papers whereon the appeals were taken as petitions for writs of certiorari, certiorari is denied.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

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*Together with No. 83, *Northern Natural Gas Co. et al.* v. *State Corporation Commission of Kansas et al.*, and No. 140, *Kansas-Nebraska Natural Gas Co., Inc.* v. *State Corporation Commission of Kansas et al.*, also on appeal from the same court.

NORTHWESTERN PACIFIC RAILROAD CO. *v.* INTERSTATE COMMERCE COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA.

No. 381. Decided November 23, 1964.

228 F. Supp. 690, affirmed.

Randolph Karr for appellant.

Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Arthur J. Murphy, Jr., and *Robert W. Ginnane* for the Interstate Commerce Commission et al.; *J. Thomason Phelps* for Public Utilities Commission of California et al.; *Boris H. Lakusta* for the City of San Rafael et al.; and *Frederick G. Pfrommer* for Atchison, Topeka & Santa Fe Railway Co., appellees.

PER CURIAM.

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

McCULLOCH *v.* CALIFORNIA FRANCHISE TAX BOARD.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 472. Decided November 23, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 61 Cal. 2d 186, 390 P. 2d 412.

Walter L. Nossaman for appellant.

Thomas C. Lynch, Attorney General of California, *Dan Kaufmann,* Assistant Attorney General, and *Ernest P. Goodman* and *Harry W. Low,* Deputy Attorneys General, for appellee.

PER CURIAM.

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

CALHOON, PRESIDENT, OR PETERS, SECRETARY-TREASURER OF DISTRICT NO. 1, NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL–CIO *v.* HARVEY ET AL.

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

No. 17. Argued October 20, 1964.—Decided December 7, 1964.

Under petitioner union's bylaws members could nominate only themselves to office, eligibility for which under the national constitution was limited by specified provisions. Charging that these provisions, which they did not meet, deprived them of "equal rights" to nominate candidates under Title I, § 101 (a)(1), of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), respondent union members sued under § 102 in the District Court to enjoin use of the union's challenged electoral system. That court dismissed the complaint for want of jurisdiction. The Court of Appeals reversed, holding that the combined effect of the eligibility requirements under Title IV, § 401 (e), and the restriction to self-nomination determined whether § 101 (a)(1) had been violated. *Held:*

1. A federal district court has no jurisdiction over a suit by union members under § 102 of the LMRDA charging that the union's eligibility qualifications deprived them of the right to nominate candidates guaranteed by § 101 (a)(1), that provision being directed solely against discrimination in the union's electoral process itself. Pp. 138–139.

2. Eligibility requirements are governed by Title IV, § 401 (e). The exclusive remedy, with exceptions not here relevant, for protecting rights thereunder is a post-election suit by the Secretary of Labor following complaint of a member who has exhausted his union remedies as required by the Act and an investigation by the Secretary showing probable cause of a violation. Pp. 139–141.

324 F. 2d 486, reversed.

David Scribner argued the cause for petitioner. With him on the brief was *Lee Pressman.*

Burton H. Hall argued the cause and filed a brief for respondents.

Briefs of *amici curiae,* urging reversal, were filed by *Solicitor General Cox* for the United States and by *J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

Briefs of *amici curiae,* urging affirmance, were filed by *Melvin L. Wulf* for the American Civil Liberties Union and by *Rowland Watts* for the Workers Defense League.

MR. JUSTICE BLACK delivered the opinion of the Court.

This case raises important questions concerning the powers of the Secretary of Labor and federal courts to protect rights of employees guaranteed by the Labor-Management Reporting and Disclosure Act of 1959.[1]

The respondents, three members of District No. 1, National Marine Engineers' Beneficial Association, filed a complaint in Federal District Court against the union, its president and its secretary-treasurer, alleging that certain provisions of the union's bylaws and national constitution violated the Act in that they infringed "the right of members of defendant District No. 1, NMEBA, to nominate candidates in elections of defendant, which right is guaranteed to each member of defendant, and to each plaintiff, by Section 101 (a)(1) of the LMRDA . . . ." [2] It was alleged that § 102 of Title I of the Act gave the District Court jurisdiction to adjudicate the controversy.[3] The union bylaws com-

[1] 73 Stat. 519, 29 U. S. C. § 401 *et seq.* (1958 ed., Supp. V).

[2] "Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws." 73 Stat. 522, 29 U. S. C. § 411 (a)(1) (1958 ed., Supp. V).

[3] 73 Stat. 523, 29 U. S. C. § 412 (1958 ed., Supp. V).

plained of deprived a member of the right to nominate anyone for office but himself. The national constitution in turn provided that no member could be eligible for nomination or election to a full-time elective office unless he had been a member of the national union for five years and had served 180 days or more of seatime in each of two of the preceding three years on vessels covered by collective bargaining agreements with the national or its subsidiary bodies. On the basis of these allegations respondents asked that the union be enjoined from preparing for or conducting any election until it revised its system of elections so as to afford each of its members a fair opportunity to nominate any persons "meeting fair and reasonable eligibility requirements for any or all offices to be filled by such election." [4]

The union moved to dismiss the complaint on the grounds that (1) the court lacked jurisdiction over the subject matter, and (2) the complaint failed to state a claim upon which relief could be granted. The District Court dismissed for want of "jurisdiction," [5] holding that the alleged conduct of the union, even if true, failed to show a denial of the equal rights of all members of the union to vote for or nominate candidates guaranteed by § 101 (a)(1) of Title I of the Act, so as to give the District Court jurisdiction of the controversy under § 102. The allegations, said the court, showed at most imposition of qualifications of eligibility for nomination and election so restrictive that they might violate § 401 (e) of Title IV by denying members a reasonable opportunity to nominate and vote for candidates.[6] The District

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[4] The complaint also asked for damages.

[5] 221 F. Supp. 545, 550.

[6] "In any election required by this section which is to be held by secret ballot a reasonable opportunity shall be given for the nomination of candidates and every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504

Court further held that it could not exercise jurisdiction to protect § 401 (e) rights because § 402 (a)[7] of Title IV provides a remedy, declared by § 403 to be "exclusive," authorizing members to vindicate such rights by challenging elections after they have been held,[8] and then only by (1) first exhausting all remedies available with the union, (2) filing a complaint with the Secretary of Labor, who (3) may, after investigating the violation alleged in the complaint, bring suit in a United States district court to attack the validity of the election. The Court of Appeals reversed, holding that "the complaint alleged a violation of § 101 (a)(1) and that federal jurisdiction existed under § 102." 324 F. 2d 486, 487.[9] Because of the importance of the questions presented and conflicting views in the courts of appeals and the district courts,[10] we granted certiorari. 375 U. S. 991.

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of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice . . . ." 73 Stat. 533, 29 U. S. C. § 481 (e) (1958 ed., Supp. V).

[7] 73 Stat. 534, 29 U. S. C. § 482 (a) (1958 ed., Supp. V).

[8] Section 403 provides also that "[e]xisting rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected . . . ." 73 Stat. 534, 29 U. S. C. § 483 (1958 ed., Supp. V).

[9] While both courts below referred to the question before us as "jurisdictional," it is obvious that the courts differed as to whether the facts alleged in the complaint stated a "cause of action," thereby raising some of the same problems discussed in *Bell* v. *Hood,* 327 U. S. 678. That question need not concern us here, however.

[10] See, *e. g., Mamula* v. *United Steelworkers,* 304 F. 2d 108 (C. A. 3d Cir.), cert. denied, 371 U. S. 823; *Beckman* v. *International Assn. of Bridge Workers,* 314 F. 2d 848 (C. A. 7th Cir.); *Robins* v. *Rarback,* 325 F. 2d 929 (C. A. 2d Cir.), petition for cert. pending, No. 11, Misc., 1964 Term; *Johnson* v. *San Diego Waiters & Bartenders Union,* 190 F. Supp. 444 (D. C. S. D. Cal.); *Colpo* v. *Highway Truck Drivers & Helpers,* 201 F. Supp. 307 (D. C. D. Del.),

I.

Jurisdiction of the District Court under § 102 of Title I depends entirely upon whether this complaint showed a violation of rights guaranteed by § 101 (a)(1), for we disagree with the Court of Appeals' holding that jurisdiction under § 102 can be upheld by reliance in whole or in part on allegations which in substance charge a breach of Title IV rights. An analysis and understanding of the meaning of § 101 (a)(1) and of the charges of the complaint are therefore essential to a determination of this issue. Respondents charge that the bylaws and constitutional provisions referred to above infringed their right guaranteed by § 101 (a)(1) to nominate candidates. The result of their allegations here, however, is an attempt to sweep into the ambit of their right to sue in federal court if they are denied an equal opportunity to nominate candidates under § 101 (a)(1), a right to sue if they are not allowed to nominate anyone they choose regardless of his eligibility and qualifications under union restrictions. But Title IV, not Title I, sets standards for eligibility and qualifications of candidates and officials and provides its own separate and different administrative and judicial procedure for challenging those standards. And the equal-rights language of § 101 (a)(1) would have to be stretched far beyond its normal meaning to hold that it guarantees members not just a right to "nominate candidates," but a right to nominate anyone, without regard to valid union rules. All that § 101 (a)(1) guarantees is that

> "Every member of a labor organization shall have equal rights and privileges . . . to nominate candidates, to vote in elections or referendums of the labor organization . . . and to participate in the delibera-

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vacated as moot, 305 F. 2d 362 (C. A. 3d Cir.), cert. denied, 371 U. S. 890; *Jackson* v. *International Longshoremen's Assn.*, 212 F. Supp. 79 (D. C. E. D. La.).

> tions and voting . . . subject to reasonable rules and regulations in such organization's constitution and bylaws."

Plainly, this is no more than a command that members and classes of members shall not be discriminated against in their right to nominate and vote. And Congress carefully prescribed that even this right against discrimination is "subject to reasonable rules and regulations" by the union. The complaining union members here have not been discriminated against in any way and have been denied no privilege or right to vote or nominate which the union has granted to others. They have indeed taken full advantage of the uniform rule limiting nominations by nominating themselves for office.[11] It is true that they were denied their request to be candidates, but that denial was not a discrimination against their right to nominate, since the same qualifications were required equally of all members. Whether the eligibility requirements set by the union's constitution and bylaws were reasonable and valid is a question separate and distinct from whether the right to nominate on an equal basis given by § 101 (a)(1) was violated. The District Court therefore was without jurisdiction to grant the relief requested here unless, as the Court of Appeals held, the "*combined* effect of the eligibility requirements and the restriction to self-nomination" is to be considered in determining whether § 101 (a)(1) has been violated.[12]

II.

We hold that possible violations of Title IV of the Act regarding eligibility are not relevant in determining whether or not a district court has jurisdiction under

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[11] It appears that the present union practice is to permit candidates to be nominated by other union members, but that change in procedure does not affect our decision.

[12] 324 F. 2d, at 489. (Emphasis supplied.)

§ 102 of Title I of the Act. Title IV sets up a statutory scheme governing the election of union officers, fixing the terms during which they hold office, requiring that elections be by secret ballot, regulating the handling of campaign literature, requiring a reasonable opportunity for the nomination of candidates, authorizing unions to fix "reasonable qualifications uniformly imposed" for candidates, and attempting to guarantee fair union elections in which all the members are allowed to participate. Section 402 of Title IV, as has been pointed out, sets up an exclusive method for protecting Title IV rights, by permitting an individual member to file a complaint with the Secretary of Labor challenging the validity of any election because of violations of Title IV. Upon complaint the Secretary investigates and if he finds probable cause to believe that Title IV has been violated, he may file suit in the appropriate district court. It is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order best to serve the public interest. Cf. *San Diego Building Trades Council* v. *Garmon,* 359 U. S. 236, 242. In so doing Congress, with one exception not here relevant,[13] decided not to permit individuals to block or delay union elections by filing federal-court suits for violations of Title IV. Reliance on the discretion of the Secretary is in harmony with the general congressional policy to allow unions great latitude in resolving their own internal controversies, and, where that fails, to utilize the agencies of Government most familiar with union problems to aid in bringing about a settlement through discussion before resort to the courts.

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[13] Section 401 (c) of the Act permits suits prior to election in the United States District Courts by any bona fide candidate for union office to enforce the rights, guaranteed by that section, to equal treatment in the distribution of campaign literature and access to membership lists. 73 Stat. 532, 29 U. S. C. § 481 (c) (1958 ed., Supp. V).

Without setting out the lengthy legislative history which preceded the passage of this measure, it is sufficient to say that we are satisfied that the Act itself shows clearly by its structure and language that the disputes here, basically relating as they do to eligibility of candidates for office, fall squarely within Title IV of the Act and are to be resolved by the administrative and judicial procedures set out in that Title.

Accordingly, the judgment of the Court of Appeals is reversed and that of the District Court is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS would affirm the judgment of the Court of Appeals for the reasons stated in its opinion as reported in 324 F. 2d 486.

MR. JUSTICE STEWART, whom MR. JUSTICE HARLAN joins, concurring.

This case marks the first interpretation by this Court of the significant changes wrought by the Labor-Management Reporting and Disclosure Act of 1959 increasing federal supervision of internal union affairs. At issue are subtle questions concerning the interplay between Title I and Title IV of that Act. In part, both seem to deal with the same subject matter: Title I guarantees "equal rights and privileges . . . to nominate candidates"; Title IV provides that "a reasonable opportunity shall be given for the nomination of candidates." Where the two Titles of the legislation differ most substantially is in the remedies they provide. If a Title I right is at issue, the allegedly aggrieved union member has direct, virtually immediate recourse to a federal court to obtain an adjudication of his claim and an injunction if his complaint has merit. 73 Stat. 523, 29 U. S. C. § 412 (1958 ed., Supp. V). Vindication of claims under Title IV may be much more onerous. Federal-court suits can be

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brought only by the Secretary of Labor, and then, only after the election has been held. An additional barrier is thus placed between the union member and the federal court. Remedies shape the significance of rights, and I think the Court too casually forecloses the direct access to a federal court which the Court of Appeals held was given these respondents by Congress.

At the time this case was brought, District 1 of the National Marine Engineers' Beneficial Association (NMEBA) had two rules of direct relevance here governing selection of candidates for election to union office. One rule, of long standing in the union, prescribed that self-nomination was the only manner by which a name could be placed before the membership for election to union office. The second rule, adopted seven months before this election was scheduled to occur, severely limited eligibility for office by requiring that prospective officers must have belonged to the national union for five years and served 180 or more days of sea duty in each of two years during the three-year period before the election.[1] According to the three union members who brought this action, the combination of these rules unreasonably limited their right to nominate. They alleged that, except for those members of the union who fulfilled the strict eligibility requirements, the self-nomination rule emptied of all meaning the equal right to nominate. To be sure, the "right to nominate" continued, but, they say, for the countless union members rendered ineligible for office by the new sea-duty rule, the privilege of turning in one's name for prospective candidacy was meaningless.

The Court precludes the District Court from asserting jurisdiction over this complaint by focusing on the fact

[1] An additional restriction, applicable solely to the post of president, required that all candidates for that office must have served the union in some prior official capacity.

that one of the imposed restrictions speaks in terms of eligibility. And since these are "possible violations of Title IV of the Act regarding eligibility" they "are not relevant in determining whether or not a district court has jurisdiction under § 102 of Title I of the Act." By this reasoning, the Court forecloses early adjudication of claims concerning participation in the election process. But there are occasions when eligibility provisions can infringe upon the right to nominate. Had the NMEBA issued a regulation that only Jesse Calhoon was eligible for office, no one could place great store on the right to self-nomination left to the rest of the membership. This Court long ago recognized the subtle ways by which election rights can be removed through discrimination at a less visible stage of the political process. The decisions in the *Texas Primary Cases* were founded on the belief that the equal right to vote was impaired where discrimination existed in the method of nomination. *Smith* v. *Allwright,* 321 U. S. 649; *Nixon* v. *Herndon,* 273 U. S. 536. See *United States* v. *Classic,* 313 U. S. 299. No less is the equal right to nominate infringed where onerous burdens drastically limit the candidates available for nomination. In scrutinizing devices designed to erode the franchise, the Court has shown impatience with arguments founded in the form of the device. *Gomillion* v. *Lightfoot,* 364 U. S. 339, 345. If Congress has told the courts to protect a union member from infringement of his equal right to nominate, the courts should do so whether such discrimination is sophisticated or simple-minded. *Lane* v. *Wilson,* 307 U. S. 268, 275.

After today, simply by framing its discriminatory rules in terms of eligibility, a union can immunize itself from pre-election attack in a federal court even though it makes deep incursions on the equal right of its members to nominate, to vote, and to participate in the union's internal affairs.

The Court justifies this conclusion by looking to the "structure and language" of the Act. The language is certainly not free from doubt. And the legislative history indicates that the structure can be misleading. What now constitutes Titles II through VI of the Act was substantially contained in the original bill presented to the Senate by Senator Kennedy. Title I, first introduced by Senator McClellan, was the product of doubt that the bill went far enough in guaranteeing internal democracy in union affairs. The concept of Title I—its stress on equal rights and judicial protection—was the subject of great controversy both in the Senate and in the House. Repeated attempts were made by representatives of organized labor, among other groups, to have the strict mandate of this so-called Bill of Rights modified, or eliminated altogether. Despite these efforts to remove Title I, it endured, and indeed was amended to provide stronger remedial provisions than those contained in the original version. As originally introduced, § 102 would have required an aggrieved union member to make his complaint to the Secretary of Labor, exactly the remedy provided by Title IV. The Kuchel amendment, however, substituted the present provision permitting suit by an aggrieved member in a federal district court. When Senator Kuchel introduced this change, he commented:

> "[H]ere is one of the major changes in the proposal. The amendment of the Senator from Arkansas provided that the Secretary of Labor might, on behalf of the injured or aggrieved member, have the right to litigate the alleged grievance and to seek an injunction or other relief. We believe that giving this type of right to the aggrieved employee member himself is in the interest of justice . . . ." II Leg.

Hist., Labor-Management Reporting and Disclosure Act of 1959, 1232.

Senator Clark of Pennsylvania noted that the Kuchel amendment "takes the Federal bureaucracy out of this bill of rights and leaves its enforcement to union members, aided by the courts." II Leg. Hist. 1233.

Nonetheless, the Court finds a "general congressional policy" to avoid judicial resolution of internal union disputes. That policy, the Court says, was designed to limit the power of individuals to block and delay elections by seeking injunctive relief. Such an appraisal might have been accurate before the addition of Title I, but it does not explain the emphasis on prompt judicial remedies there provided. In addition to the injunctive relief authorized by § 102 [2] and the saving provisions of § 103,[3] § 101 (a)(4) modifies the traditional requirement of exhausting internal remedies before resort to litigation.[4] Even § 403 is not conclusive on the elimination of pre-election remedies.[5] At the least, state-court actions

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[2] "SEC. 102. Any person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located."

[3] "SEC. 103. Nothing contained in this title shall limit the rights and remedies of any member of a labor organization under any State or Federal law or before any court or other tribunal, or under the constitution and bylaws of any labor organization."

[4] See *Detroy* v. *American Guild of Variety Artists*, 286 F. 2d 75 (C. A. 2d Cir. 1961).

[5] "SEC. 403. No labor organization shall be required by law to conduct elections of officers with greater frequency or in a different form or manner than is required by its own constitution or bylaws,

may be brought in advance of an election to "enforce the constitution and bylaws." And as to federal courts, it is certainly arguable that recourse through the Secretary of Labor is the exclusive remedy only after the election has been held.[6] By reading Title I rights so narrowly, and by construing Title IV to foreclose absolutely pre-election litigation in the federal courts, the Court sharply reduces meaningful protection for many of the rights which Congress was so assiduous to create.[7] By so simplifying the tangled provisions of the Act, the Court renders it virtually impossible for the aggrieved union member to gain a hearing when it is most necessary—when there is still an opportunity to make the union's rules comport with the requirements of the Act.

My difference with the Court does not reach to the disposition of this particular case. Whether stated in terms

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except as otherwise provided by this title. Existing rights and remedies to enforce the constitution and bylaws of a labor organization with respect to elections prior to the conduct thereof shall not be affected by the provisions of this title. The remedy provided by this title for challenging an election already conducted shall be exclusive."

[6] See Summers, Pre-Emption and the Labor Reform Act—Dual Rights and Remedies, 22 Ohio St. L. J. 119, 138–139 (1961). It would be strange indeed if only state courts were available to enforce the federal law created by the Act during the pre-election period.

[7] The Court's reading of federal-court remedies available under Title I and Title IV is particularly restrictive because of the limited powers of the district judge once the balloting has occurred. Under § 402 (c), the court is confined to setting the election aside only if "the violation of section 401 may have affected the outcome." For the aggrieved union member, this protection may be totally inadequate. The function of nominating a candidate is not always to gain the office. A faction may be vitally interested in appearing on the ballot merely to show that it is part of the political structure of the union. Under the Court's view, until such a faction approaches majority status, judicial relief in the federal courts will be absent. See Summers, Judicial Regulation of Union Elections, 70 Yale L. J. 1221, 1257 (1961).

of restrictions on the right to nominate, or in terms of limitations on eligibility for union office, I think the rules of a labor organization would operate illegally to curtail the members' equal right to nominate within the meaning of Title I only if those rules effectively distorted the basic democratic process. The line might be a shadowy one in some cases. But I think that in this case the respondents did not allege in their complaint nor demonstrate in their affidavits that this line was crossed. I would therefore remand the case to the District Court with directions to dismiss the complaint for failure to state a claim for relief.

GILLESPIE, ADMINISTRATRIX *v.* UNITED STATES STEEL CORP.

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

No. 10. Argued October 13, 1964.—Decided December 7, 1964.

Petitioner, administratrix, whose son died while working on respondent's ship docked in Ohio, sued in a federal district court, claiming for the estate a right to recover damages for the benefit of herself and decedent's dependent brother and sisters for wrongful death. This claim was based on negligence under the Jones Act and on unseaworthiness under the general maritime law coupled with the Ohio wrongful death statute. Petitioner also claimed damages for the estate for decedent's pain and suffering before death based on the Jones Act and the general maritime law, causes of action which she claimed survived under the Jones Act and the Ohio survival statute, respectively. The District Court, upholding respondent's motion to strike, confined the complaint to the Jones Act and eliminated reference to recovery for the benefit of the brother and sisters. Petitioner filed an appeal from the ruling in the Court of Appeals, which respondent sought to dismiss as not being from a "final" decision under 28 U. S. C. § 1291. Petitioner and decedent's dependents then sought mandamus in that court to compel the District Court either to deny the motion to strike or to certify its order granting the motion as appealable under 28 U. S. C. § 1292 (b). The Court of Appeals denied mandamus and affirmed the District Court's order. *Held:*

1. The District Court's order was "final" and appealable under 28 U. S. C. § 1291. Pp. 152–154.

(a) The requirement of finality is to be given a practical rather than a technical construction and does not necessarily mean that an order to be appealable must be the last possible one to be made in a case. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, followed. P. 152.

(b) The inconvenience and costs of piecemeal review must be weighed against the danger of denying justice by delay in deciding the question of finality. Pp. 152–153.

(c) Delay in adjudication of the dependents' rights might work an injustice upon them. P. 153.

(d) This Court will review a trial court's ruling in a case not fully tried where the questions presented are "fundamental to the further conduct of the case." Pp. 153–154.

(e) Though the District Court did not certify its order to strike under § 1292 (b), the Court of Appeals' treatment of the order as final and appealable furthered the congressional policy behind that provision. P. 154.

2. The Jones Act, which bases recovery on negligence and not unseaworthiness, provides the exclusive right of action for wrongful death of a seaman killed in territorial waters of a State in the course of his employment and supersedes all otherwise applicable state death statutes. *Lindgren* v. *United States*, 281 U. S. 38, followed. Pp. 154–155.

3. The right of recovery under the Jones Act depends on § 1 of the Federal Employers' Liability Act (FELA), which excludes beneficiaries of a remote class (here the brother and sisters) if there are beneficiaries in a nearer class (here the mother). *Chicago, B. & Q. R. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, followed. P. 156.

4. Petitioner's cause of action for decedent's pain and suffering before death survived under the Jones Act, through § 9 of the FELA, and will be assumed to have survived under the Ohio survival statute based on the theory of unseaworthiness. Pp. 156–157.

5. Whether or not the estate can recover damages for pain and suffering should abide trial, there being no inflexible rule that where death occurs from drowning the period between accident and death is not sufficiently appreciable to afford a basis for the claim. *The Corsair*, 145 U. S. 335, distinguished. P. 158.

321 F. 2d 518, modified and affirmed.

Jack G. Day argued the cause for petitioner. With him on the brief was *Bernard A. Berkman.*

Thomas V. Koykka argued the cause for respondent. With him on the brief were *McAlister Marshall* and *Robert B. Preston.*

Mr. Justice Black delivered the opinion of the Court.

The petitioner, administratrix of the estate of her son Daniel Gillespie, brought this action in federal court against the respondent shipowner-employer to recover

damages for Gillespie's death, which was alleged to have occurred when he fell and was drowned while working as a seaman on respondent's ship docked in Ohio. She claimed a right to recover for the benefit of herself and of the decedent's dependent brother and sisters under the Jones Act, which subjects employers to liability if by negligence they cause a seaman's injury or death.[1] She also claimed a right of recovery under the Ohio wrongful death statute [2] because the vessel allegedly was not seaworthy as required by the "general maritime law." The complaint in addition sought damages for Gillespie's pain and suffering before he died, based on the Jones Act and the general maritime law, causes of action which petitioner said survived Gillespie's death by force of the Jones Act itself and the Ohio survival statute,[3] respectively. The District Judge, holding that the Jones Act supplied the exclusive remedy, on motion of respondent struck all parts of the complaint which referred to the Ohio statutes or to unseaworthiness. He also struck all reference to recovery for the benefit of the brother and sisters of the decedent, who respondent had argued were

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[1] 41 Stat. 1007, 46 U. S. C. § 688 (1958 ed.):

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located."

[2] Ohio Rev. Code § 2125.01.

[3] Ohio Rev. Code § 2305.21.

not beneficiaries entitled to recovery under the Jones Act while their mother was living.

Petitioner immediately appealed to the Court of Appeals. Respondent moved to dismiss the appeal on the ground that the ruling appealed from was not a "final" decision of the District Court as required by 28 U. S. C. § 1291 (1958 ed.).[4] Thereupon petitioner administratrix, this time joined by the brother and sisters, filed in the Court of Appeals a petition for mandamus or other appropriate writ commanding the District Judge to vacate his original order and enter a new one either denying the motion to strike or in the alternative granting the motion but including also "the requisite written statement to effectively render his said order appealable within the provisions of 28 U. S. C. A. § 1292 (b)," a statute providing for appeal of certain interlocutory orders.[5] Without definitely deciding whether mandamus would have been appropriate in this case or deciding the "close" question of appealability, the Court of Appeals proceeded to determine the controversy "on the merits as though it were submitted on an appeal"; [6] this the court said it felt free to

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[4] "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court."

[5] Section 1292 (b) provides:

"When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

[6] 321 F. 2d 518, 532.

do since its resolution of the merits did not prejudice respondent in any way, because it sustained respondent's contentions by denying the petition for mandamus and affirming the District Court's order.[7] 321 F. 2d 518. Petitioner brought the case here, and we granted certiorari. 375 U. S. 962.

I.

In this Court respondent joins petitioner in urging us to hold that 28 U. S. C. § 1291 (1958 ed.) does not require us to dismiss this case and that we can and should decide the validity of the District Court's order to strike. We agree. Under § 1291 an appeal may be taken from any "final" order of a district court. But as this Court often has pointed out, a decision "final" within the meaning of § 1291 does not necessarily mean the last order possible to be made in a case. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, 545. And our cases long have recognized that whether a ruling is "final" within the meaning of § 1291 is frequently so close a question that decision of that issue either way can be supported with equally forceful arguments, and that it is impossible to devise a formula to resolve all marginal cases coming within what might well be called the "twilight zone" of finality. Because of this difficulty this Court has held that the requirement of finality is to be given a "practical rather than a technical construction." *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U. S., at 546. See also *Brown Shoe Co.* v. *United States,* 370 U. S. 294, 306; *Bronson* v. *Railroad Co.*, 2 Black 524, 531; *Forgay* v. *Conrad*, 6 How. 201, 203. *Dickinson* v. *Petroleum Conversion Corp.*, 338 U. S. 507, 511, pointed out that in deciding the question of finality the most important competing considerations are "the inconvenience and costs

[7] No review is sought in this Court of the denial of the petition for mandamus.

of piecemeal review on the one hand and the danger of denying justice by delay on the other." Such competing considerations are shown by the record in the case before us. It is true that the review of this case by the Court of Appeals could be called "piecemeal"; but it does not appear that the inconvenience and cost of trying this case will be greater because the Court of Appeals decided the issues raised instead of compelling the parties to go to trial with them unanswered. We cannot say that the Court of Appeals chose wrongly under the circumstances. And it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided. Moreover, delay of perhaps a number of years in having the brother's and sisters' rights determined might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands. And while their claims are not formally severable so as to make the court's order unquestionably appealable as to them, cf. *Dickinson* v. *Petroleum Conversion Corp., supra,* there certainly is ample reason to view their claims as severable in deciding the issue of finality, particularly since the brother and sisters were separate parties in the petition for extraordinary relief. Cf. *Swift & Co. Packers* v. *Compania Colombiana Del Caribe, S. A.,* 339 U. S. 684, 688–689; *Gumbel* v. *Pitkin,* 113 U. S. 545, 548. Furthermore, in *United States* v. *General Motors Corp.,* 323 U. S. 373, 377, this Court contrary to its usual practice reviewed a trial court's refusal to permit proof of certain items of damages in a case not yet fully tried, because the ruling was "fundamental to the further conduct of the case." For these same reasons this Court reviewed such a ruling in *Land* v. *Dollar,* 330 U. S. 731, 734, n. 2, and *Larson* v. *Domestic*

& Foreign Commerce Corp., 337 U. S. 682, 685, n. 3, where, as here, the case had not yet been fully tried. And see *Cohen* v. *Beneficial Industrial Loan Corp., supra,* 337 U. S., at 545–547. We think that the questions presented here are equally "fundamental to the further conduct of the case." It is true that if the District Judge had certified the case to the Court of Appeals under 28 U. S. C. § 1292 (b) (1958 ed.), the appeal unquestionably would have been proper; in light of the circumstances we believe that the Court of Appeals properly implemented the same policy Congress sought to promote in § 1292 (b) by treating this obviously marginal case as final and appealable under 28 U. S. C. § 1291 (1958 ed.). We therefore proceed to consider the correctness of the Court of Appeals' judgment.

II.

In 1930 this Court held in *Lindgren* v. *United States,* 281 U. S. 38, that in passing § 33 of the Merchant Marine Act, 1920, now 46 U. S. C. § 688 (1958 ed.), commonly called the Jones Act, Congress provided an exclusive right of action for the death of seamen killed in the course of their employment, superseding all state death statutes which might otherwise be applied to maritime deaths, and, since the Act gave recovery only for negligence, precluding any possible recovery based on a theory of unseaworthiness. A strong appeal is now made that we overrule *Lindgren* because it is said to be unfair and incongruous in the light of some of our later cases which have liberalized the rights of seamen and nonseamen to recover on a theory of unseaworthiness for injuries, though not for death.[8] No one of these cases, however, has cast doubt on the correctness of the inter-

[8] See, *e. g., The Tungus* v. *Skovgaard,* 358 U. S. 588, 595, n. 9; *Pope & Talbot, Inc.* v. *Hawn,* 346 U. S. 406; *Seas Shipping Co.* v. *Sieracki,* 328 U. S. 85; *Mahnich* v. *Southern S. S. Co.,* 321 U. S. 96.

pretation of the Jones Act in *Lindgren,* based as it was on a careful study of the Act in the context of then-existing admiralty principles, decisions and statutes. The opinion in *Lindgren* particularly pointed out that prior to the Jones Act there had existed no federal right of action by statute or under the general maritime law to recover damages for wrongful death of a seaman,[9] though some of the States did by statute authorize a right of recovery which admiralty would enforce.[10] Congress, the *Lindgren* Court held, passed the Jones Act in order to give a uniform right of recovery for the death of every seaman. "It is plain," the Court went on to say, "that the Merchant Marine Act is one of general application intended to bring about the uniformity in the exercise of admiralty jurisdiction required by the Constitution, and necessarily supersedes the application of the death statutes of the several States." 281 U. S., at 44. Thirty-four years have passed since the *Lindgren* decision, and Congress has let the Jones Act stand with the interpretation this Court gave it. The decision was a reasonable one then. It provided the same remedy for injury or death for all seamen, the remedy that was and is provided for railroad workers in the Federal Employers' Liability Act.[11] Whatever may be this Court's special responsibility for fashioning rules in maritime affairs,[12] we do not believe that we should now disturb the settled plan of rights and liabilities established by the Jones Act.

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[9] *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372; *The Harrisburg,* 119 U. S. 199; cf. *The Osceola,* 189 U. S. 158.

[10] *Great Lakes Dredge & Dock Co.* v. *Kierejewski,* 261 U. S. 479; *Western Fuel Co.* v. *Garcia,* 257 U. S. 233; cf. *The Hamilton,* 207 U. S. 398.

[11] 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60 (1958 ed.).

[12] See *Fitzgerald* v. *United States Lines Co.,* 374 U. S. 16, 20–21, and cases there cited.

Petitioner argues further that even if the only available remedy for death is under the Jones Act, the District Judge erred in refusing to hold that the Jones Act provides for damages for death for the benefit of the brother and sisters of the decedent as well as for the mother. Their right of recovery, if any, depends on § 1 of the FELA, 45 U. S. C. § 51 (1958 ed.), which provides that recovery of damages for death shall be:

> "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee . . . ."

In *Chicago, B. & Q. R. Co.* v. *Wells-Dickey Trust Co.*, 275 U. S. 161, 163, this Court, speaking through Mr. Justice Brandeis, held that this provision creates "three classes of possible beneficiaries. But the liability is in the alternative. It is to one of the three; not to the several classes collectively." We are asked to overrule this case so as to give a right of recovery for the benefit of all the members of all three classes in every case of death. Both courts below refused to do so, and we agree. It is enough to say that we adhere to the *Wells-Dickey* holding, among other reasons because we agree that this interpretation of the Act is plainly correct. Cf. *Poff* v. *Pennsylvania R. Co.*, 327 U. S. 399.

One other aspect of this case remains to be mentioned. The complaint sought to recover damages for the estate because "decedent suffered severe personal injuries which caused him excruciating pain and mental anguish prior to his death." Petitioner contends that the seaman's claim for pain and suffering survives his death and can be brought on a theory of unseaworthiness by force of the Ohio survival statute. The District Judge struck the reference to the Ohio survival statute from the complaint, and the Court of Appeals held that there was "no substantial basis, in this case," for a claim for pain and

suffering prior to death. There is, of course, no doubt that the Jones Act through § 9 of the FELA, 45 U. S. C. § 59 (1958 ed.),[13] provides for survival after the death of the seaman of "[a]ny right of action given by this chapter," *i. e.*, of his claim based on a theory of negligence. And we may assume, as we have in the past,[14] that after death of the injured person a state survival statute can preserve the cause of action for unseaworthiness,[15] which would not survive under the general maritime law.[16] In holding that petitioner had not stated a claim entitling her to recovery for the decedent's pain and suffering the Court of Appeals relied on *The Corsair,* 145 U. S. 335, 348, a case brought in a federal court to recover damages under a Louisiana survival statute for alleged pain and suffering prior to death by drowning where there was an interval of "about ten minutes" between the accident and death. The Court held such damages could not be recovered there, saying:

> ". . . there is no averment from which we can gather that these pains and sufferings were not substantially cotemporaneous with her death and inseparable as matter of law from it."

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[13] 36 Stat. 291, 45 U. S. C. § 59 (1958 ed.):

"Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury."

[14] "Presumably any claims, based on unseaworthiness, for damages accrued prior to the decedent's death would survive, at least if a pertinent state statute is effective to bring about a survival of the seaman's right." *Kernan* v. *American Dredging Co.,* 355 U. S. 426, 430, n. 4. See also *Curtis* v. *A. Garcia y Cia.,* 241 F. 2d 30, 36–37 (C. A. 3d Cir.); *Holland* v. *Steag, Inc.,* 143 F. Supp. 203, 205–206 (D. C. D. Mass.).

[15] Cf. *Just* v. *Chambers,* 312 U. S. 383.

[16] *Cortes* v. *Baltimore Insular Line, Inc.,* 287 U. S. 367.

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Plainly this Court did not hold in *The Corsair* that damages cannot ever be recovered for physical and mental pain suffered prior to death by drowning. The case held merely that the averments of the plaintiff there did not justify awarding such damages in an action under the Louisiana survival statute. The Court's language certainly did not preclude allowance of such damages in all circumstances under other laws, or even under the Louisiana statute in a case where pain and suffering were "not substantially cotemporaneous with . . . death and inseparable as matter of law from it." In this day of liberality in allowing amendment of pleadings to achieve the ends of justice,[17] the issue whether the decedent's estate could recover here for pain and suffering prior to death should not have been decided finally by the Court of Appeals on the basis of mere pleading. Therefore the question whether damages can be recovered for pain and suffering prior to death on the facts of this case will remain open. In all other respects the judgment of the Court of Appeals is

Affirmed.

MR. JUSTICE GOLDBERG, dissenting in part.

I agree that this case is properly here, but disagree with the Court on the merits of the basic question presented for decision.

The precise point at issue in this case is whether a suit in a federal court for the death of a seaman resulting from unseaworthiness of a vessel may be maintained against the employer where the death occurs within the waters of a State which provides a statutory remedy for wrongful death.

In deciding this question, the Court today preserves an anomaly in admiralty law which has neither reason nor

[17] See Fed. Rules Civ. Proc. 15; *Foman* v. *Davis*, 371 U. S. 178; *United States* v. *Hougham*, 364 U. S. 310; cf. *Conley* v. *Gibson*, 355 U. S. 41.

justification. A seaman who is either injured or killed while on the high seas is given a remedy for either negligence or unseaworthiness, *Mahnich* v. *Southern S. S. Co.*, 321 U. S. 96, *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 430, n. 4; a seaman who is injured in territorial waters may also sue for either negligence or unseaworthiness, *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221, cf. *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85; an injured seaman may also sue for maintenance and cure and these claims survive his death, see *Kernan* v. *American Dredging Co., supra,* at 430, n. 4; a nonseaman's death in territorial waters gives rise to an action based upon the applicable state wrongful death statute for both negligence and the general maritime doctrine of unseaworthiness, *The Tungus* v. *Skovgaard,* 358 U. S. 588. Only the family survivors of a seaman are left without a remedy for his death within territorial waters caused by failure to maintain a seaworthy vessel. Only they are denied recourse to this rule of absolute liability and relegated to proof of negligence under the Jones Act. This disparity in treatment has been characterized by the lower federal courts as "deplorable," "anomalous," "archaic," "unnecessary," and "hard to understand." See *Fall* v. *Esso Standard Oil Co.*, 297 F. 2d 411, 417 (C. A. 5th Cir.) (Wisdom, J.); *Mortenson* v. *Pacific Far East Line, Inc.*, 148 F. Supp. 71, 73 (D. C. N. D. Cal.); *Gill* v. *United States,* 184 F. 2d 49, 57 (C. A. 2d Cir.) (L. Hand, J., dissenting). I agree with these characterizations.

The Court relies upon *Lindgren* v. *United States*, 281 U. S. 38, and the doctrine of *stare decisis* to justify its holding—a holding which, in my view, is at variance with the general congressional intent in enacting the Jones Act "to provide liberal recovery for injured workers." *Kernan* v. *American Dredging Co.*, 355 U. S. 426, 432. I do not feel that *stare decisis* compels the conclusion reached by the Court, because I believe, first, that the

language of the Court in *Lindgren* is dictum and, second, that even if the language embodied a holding, such a holding should be overruled.

The precise issue before the Court in *Lindgren* was not whether a state wrongful death statute should be applied to supply a remedy for *unseaworthiness*—the issue here presented—but rather whether such a statute should be applied to supply a remedy for negligence.

The libel in *Lindgren,* the Court acknowledged, "does not allege the unseaworthiness of the vessel and is based upon negligence alone . . . ." 281 U. S., at 47.

The actual decision in *Lindgren* of precedential effect is that the Jones Act which provides a remedy for wrongful death due to negligence supersedes state remedies for such negligence. With this precise holding there can be no quarrel. The Jones Act, 41 Stat. 1007, 46 U. S. C. § 688 (1958 ed.), says that "statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable" to seamen's cases. This Court has held that Congress intended that the Federal Employers' Liability Act, 35 Stat. 65, as amended, 45 U. S. C. §§ 51–60 (1958 ed.), replace negligence and related state remedies. *New York Central R. Co.* v. *Winfield,* 244 U. S. 147. The Court in *Lindgren* reasonably concluded that the Jones Act, incorporating the standard of the FELA, supersedes and pre-empts state remedies for negligence. It correctly decided that since the wrongful death before it was "based upon negligence alone" recovery could only be had under the Jones Act and not under the state wrongful death statute. On this precise holding, *Lindgren* is a valid precedent and should be followed.

The Court in *Lindgren,* however, went on to say, at 46–47:

> "In the light of the foregoing decisions and in accordance with the principles therein announced we

conclude that the Merchant Marine Act—adopted by Congress in the exercise of its paramount authority in reference to the maritime law and incorporating in that law the provisions of the Federal Employers' Liability Act—establishes as a modification of the prior maritime law a rule of general application in reference to the liability of the owners of vessels for injuries to seamen extending territorially as far as Congress can make it go; that this operates uniformly within all of the States and is as comprehensive of those instances in which by reference to the Federal Employers' Liability Act it excludes liability, as of those in which liability is imposed; and that, as it covers the entire field of liability for injuries to seamen, it is paramount and exclusive, and supersedes the operation of all state statutes dealing with that subject.

"It results that in the present case no resort can be had to the Virginia Death Statute, either to create a right of action not given by the Merchant Marine Act, or to establish a measure of damages not provided by that Act.

"Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this suggestion is that the prior maritime law, as herein above stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel."

It is apparent from this statement itself that the Court's observation that the Jones Act pre-empted state remedies for death resulting from unseaworthiness, as

distinguished from negligence, was purely and simply *obiter dictum.* Cf. *The Tungus* v. *Skovgaard, supra,* at 606–607 (opinion of MR. JUSTICE BRENNAN). Even the English courts, which hold to a doctrine of *stare decisis* more rigid than our own, hold that *obiter dicta* are in no wise controlling.[1] Surely the rule of *stare decisis* should not preclude consideration of whether such dicta were originally supported by logic and have withstood the test of time.

In fact, much of the reasoning supporting the *Lindgren* dictum has been rejected in subsequent decisions of this Court. The Court's rationale in *Lindgren* for its conclusion that the Jones Act pre-empted remedies for wrongful death resulting from unseaworthiness, as well as negligence, was in part that the Act "covers the entire field of liability for injuries to seamen, it is paramount and exclusive." *Lindgren* v. *United States, supra,* at 47. In *Mahnich* v. *Southern S. S. Co., supra,* however, this Court held that a seaman may recover for injuries sustained from the ship's unseaworthiness notwithstanding his right to a remedy under the Jones Act for negligence. And in *Seas Shipping Co.* v. *Sieracki, supra,* the Court held that the same is true of longshoremen.[2] The logic

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[1] Catlett, The Development of the Doctrine of Stare Decisis and the Extent to Which it Should Be Applied. 21 Wash. L. Rev. 158, 162.

[2] Moreover, federal courts have borrowed state survival statutes to allow for the survival of claims based upon unseaworthiness for conscious pain and suffering prior to the seaman's death. *Holland* v. *Steag, Inc.,* 143 F. Supp. 203 (D. C. D. Mass.) cited with approval in *Kernan* v. *American Dredging Co., supra,* at 430, n. 4; accord: *McLaughlin* v. *Blidberg Rothchild Co.,* 167 F. Supp. 714 (D. C. S. D. N. Y.); cf. *Just* v. *Chambers,* 312 U. S. 383. I see no way to hold under *Lindgren* that state survival statutes may be applied to preserve actions for pain and suffering, yet state wrongful death actions may not be used to allow an action for wrongful death.

of Judge Learned Hand's comment on the effect of these decisions on the rationale of the *Lindgren* dicta is inescapable:

> "I find it hard to understand why the rationale of Lindgren v. United States . . . ought not to have forbidden recovery in either of these instances. If the Jones Act 'covers the entire field of liability for injuries to seamen' . . . and 'is paramount and exclusive,' why does it not supersede injuries arising from unseaworthiness which do not result in death, as well as those which do?" *Gill* v. *United States, supra,* at 57.

There is, however, an answer to Judge Hand's question. The Court in *Lindgren* was wrong in its sweeping assertion that the Jones Act covers the *entire* field of liability for injuries to seamen and is paramount and exclusive. Congress in passing the Jones Act meant to leave certain pre-existing remedies untouched. And Congress did not intend in enacting the Jones Act—a remedial statute—to eliminate the seaman's right to recovery for maintenance and cure or for unseaworthiness. See *The Osceola,* 189 U. S. 158, 175. The admiralty rule that the vessel and owner are liable to the seaman for "injury caused by unseaworthiness of the vessel or its appurtenant appliances and equipment, has been the settled law since this Court's ruling to that effect in *The Osceola,* [189 U. S. 158,] 175." *Mahnich* v. *Southern S. S. Co., supra,* at 99.

What Congress did intend in enacting the Jones Act was to provide an additional remedy denied in maritime law, as ruled in *The Osceola, supra,* "by way of indemnity beyond maintenance and cure, for the injury to a seaman caused by the mere *negligence* of a ship's officer or member of the crew." *Ibid.* (Emphasis added.)

In other words, prior to the Jones Act, "the maritime law afforded no remedy . . . for . . . injury to a seaman caused by . . . negligence." *Ibid.* The Jones Act supplied a maritime remedy for *negligence;* it pre-empted those purely state remedies related to negligence and it is paramount and exclusive only to that extent.[3] The Act does not supersede, as *Mahnich* holds, traditional maritime remedies for unseaworthiness.

Traditional maritime law not only recognized the right of a seaman to recover for injuries caused by unseaworthiness, *The Osceola, supra,* at 175; it also recognized a right of action to recover for the death of a seaman resulting from unseaworthiness of a vessel where the death occurs in the navigable waters of a State which provides a statutory remedy for wrongful death. This was recognized in the *Lindgren* opinion. 281 U. S., at 43. See also *Western Fuel Co.* v. *Garcia,* 257 U. S. 233, 242.

Simple logic compels the conclusion that if the Jones Act does not pre-empt a seaman's traditional remedy for injuries caused by unseaworthiness, it similarly does not pre-empt the right of action to recover for the death of a seaman resulting from unseaworthiness to the extent that such a remedy was recognized before the Jones Act in States providing a statutory remedy for wrongful death.

Legislative history as well as logic supports the conclusion that Congress by enacting the Jones Act did not intend to eliminate then-existing remedies for unseaworthiness.

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[3] Even if the analogy with FELA cases were followed exactly, *New York Central R. Co.* v. *Winfield, supra,* could require no more than pre-emption of *purely* state strict liability remedies. A wrongful death action based on unseaworthiness was a mixed state-federal remedy in which maritime courts borrowed a state wrongful death action which in turn was based upon a federal maritime standard of liability. Nothing in *Winfield* requires a finding that this type of remedy was pre-empted.

The same Congress which passed the Jones Act providing a remedy for injuries to a seaman resulting from negligence and a remedy for wrongful death caused by negligence where the death occurs in state waters, enacted the Death on the High Seas Act, 41 Stat. 537, 46 U. S. C. §§ 761–768 (1958 ed.). This statute gives an admiralty remedy for wrongful death of a seaman or other person occurring on the high seas beyond a marine league from the shore of any State. The Act expressly stipulates that "[t]he provisions of any State statute giving or regulating rights of action or remedies for death shall not be affected by this chapter." 41 Stat. 538, 46 U. S. C. § 767 (1958 ed.)

In *The Tungus* v. *Skovgaard, supra,* at 593, MR. JUSTICE STEWART for the Court said of this exception:

> "The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to leave 'unimpaired the rights under State statutes as to deaths on waters within the territorial jurisdiction of the States.' S. Rep. No. 216, 66th Cong., 1st Sess. 3; H. R. Rep. No. 674, 66th Cong., 2d Sess. 3. The record of the debate in the House of Representatives preceding passage of the bill reflects deep concern that the power of the States to create actions for wrongful death in no way be affected by enactment of the federal law. 59 Cong. Rec. 4482–4486."

From this expression of congressional purpose, the Court in *The Tungus* concluded that a suit in admiralty for death of a longshoreman resulting from unseaworthiness of a vessel may be maintained against the vessel's owner where the death occurs in the waters of a State which provides a statutory remedy for wrongful death.

It seems to me to strain credulity to impute to Congress the intent to eliminate state death remedies for unseaworthiness where the decedent is a seaman while

refusing to do so in cases involving nonseamen. Yet this is the result of the Court's following *Lindgren.*

Finally, even though the *Lindgren* dictum has been in existence for 34 years, no policy of *stare decisis* militates against overruling *Lindgren.* In refusing to follow *Lindgren* we would not create new duties or standards of liability; we would merely allow a new remedy. Shipowners are currently required to maintain a seaworthy ship; seamen and longshoremen currently recover for death on the high seas and injury suffered anywhere due to an unseaworthy vessel. The action of a shipowner in maintaining his vessel will not be affected by now allowing recovery for wrongful death in territorial water caused by unseaworthiness. It is thus difficult to find much if any reliance that would justify the continuation of a legal anomaly which would deny a humane and justifiable remedy.

Stare decisis does not mean blind adherence to irrational doctrine. The very point of *stare decisis* is to produce a sense of security in the working of the legal system by requiring the satisfaction of reasonable expectations. I should think that by allowing a remedy where one is needed, by eliminating differences not based on reason, while still leaving the underlying scheme of duties unchanged, this sense of security will not be weakened but strengthened. The policies behind *stare decisis* point toward ignoring *Lindgren,* not following it.

I cannot agree that Congress in enacting the Jones Act, designed "to provide liberal recovery for injured workers," intended to create the anomaly perpetuated by the Court's decision. I would reverse and free the lower federal courts to grant relief in these cases—relief which many of them have indicated is just and proper "in terms of general principles," *Fall* v. *Esso Standard Oil Co., supra,* at 417, and which they gladly would accord but for the unfortunate and unnecessary compulsion of *Lindgren.*

Since petitioner claims that Ohio law allows recovery for a wrongful death caused by unseaworthiness, nothing in either the majority or minority opinion in *The Tungus* v. *Skovgaard, supra,* would preclude recovery. Only the *Lindgren* dictum stands in the way. I would reject this dictum and reverse.

MR. JUSTICE HARLAN, dissenting.

I think that due regard for the "finality" rule governing the appellate jurisdiction of the courts of appeals requires that the judgment below be vacated and the case remanded to the Court of Appeals with instructions to dismiss the appeal because the decision of the District Court was not a "final" one, and hence not reviewable by the Court of Appeals at this stage of the litigation.

Petitioner sought to recover in this action upon two theories: negligence under the Jones Act and unseaworthiness under the general maritime law. The District Court dismissed the unseaworthiness claim in the complaint, and petitioner appealed. Although petitioner seemed to recognize that the order was not appealable,[1] the Court of Appeals, overruling respondent's motion to dismiss for lack of jurisdiction, affirmed on the merits and this Court granted certiorari over respondent's showing that the Court of Appeals should not have entertained the appeal. The Court substantially affirms the judgment of the Court of Appeals and the parties are remanded to a trial on the merits, but only after they have incurred needless delay and expense in consequence of the loose practices sanctioned by the Court of Appeals and in turn by this Court. This case thus presents a striking example of the vice inherent in a system which

[1] After the appeal was filed, petitioner unsuccessfully sought a writ of mandamus to compel the District Court to certify its order to the Court of Appeals under 28 U. S. C. § 1292 (b), *ante,* pp. 151–152.

permits piecemeal litigation of the issues in a lawsuit, a vice which Congress in 28 U. S. C. § 1291 intended to avoid by limiting appeals to the courts of appeals [2] only from "final decisions" of the district courts, with exceptions not here relevant.[3]

Manifestly the decision of the District Court reviewed by the Court of Appeals lacked the essential quality of finality; it involved but interstitial rulings in an action not yet tried. The justifications given by the Court for tolerating the lower court's departure from the requirements of § 1291 are, with all respect, unsatisfactory.

1. The Court relies on the discretionary right of a district court to certify an interlocutory order to the court of appeals under § 1292 (b) when the "order involves a controlling question of law," but the District Court in its discretion—and rightly it turns out—did not make such a certification in this case,[4] and the Court of Appeals,

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[2] The jurisdictional defect in this case arises only from the lack of finality of the District Court's order. In *United States* v. *General Motors Corp.*, 323 U. S. 373; *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U. S. 682; and *Land* v. *Dollar*, 330 U. S. 731, all cited in the majority opinion, *ante*, pp. 153–154, the District Court had entered a final judgment, but the Court of Appeals reversed and remanded the case for further proceedings. Thus the finality question before this Court was simply whether it should review a nonfinal order of the Court of Appeals, which of course the Court clearly has authority to do under 28 U. S. C. § 1254 (1) (1958 ed.).

[3] See 28 U. S. C. § 1292 (1958 ed.).

[4] The purpose of § 1292 (b) was to permit a district judge, in his discretion, to obtain immediate review of an order which might control the further conduct of the case and which normally involves an unsettled question of law. Cf. 28 U. S. C. § 1254 (3) (1958 ed.). In this case the District Court's ruling was controlled by *Lindgren* v. *United States*, 281 U. S. 38, and the validity of that ruling could only be tested by having certiorari issue from this Court. In that posture, I think the District Court was quite right in not wanting to delay the litigation on the chance that this Court would re-evaluate its decision in *Lindgren*.

equally correctly in my judgment, refused to order it to do so. The fact that Congress has provided some flexibility in the final judgment rule hardly lends support to the Court's attempt to obviate jurisdictional restrictions whenever a court of appeals erroneously entertains a nonappealable order and hardship may result if the substantive questions are not then decided here.[5]

2. *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, does not support a different result. As the Court in that case stated, § 1291 does not permit appeals from decisions "where they are but steps towards final judgment in which they will merge . . . [and are not] claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U. S., at 546. It is clear in this case that had petitioner proceeded to trial and won on her Jones Act claim, her asserted cause of action for unseaworthiness would have merged in the judgment. See *Baltimore S. S. Co.* v. *Phillips*, 274 U. S. 316. Conversely, her claim would have been preserved for appeal had she lost on her Jones Act claim. Surely the assertion that petitioner is entitled to submit her unseaworthiness theory to the jury is not collateral to rights asserted in her action, so as to entitle her to an appeal before trial.

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[5] Compare *Schlagenhauf* v. *Holder*, *ante*, p. 104, at 110. The presence of the brother and sisters, *ante*, p. 153, of the Court's opinion, cannot somehow serve to make the District Court order final. They were parties only to the mandamus proceeding, Court's opinion *ante*, pp. 151, 152, n. 7, their claims were not severable from petitioner's, *id.*, p. 153, and the merit of their claims likewise depended on a holding that *Lindgren* was overruled, see n. 4, *supra*. I can see no "injustice" resulting to the brother and sisters by delaying review of the order until after final judgment which is not also present with respect to petitioner.

3. Finally, the Court's suggestion that "it seems clear now that the case is before us that the eventual costs, as all the parties recognize, will certainly be less if we now pass on the questions presented here rather than send the case back with those issues undecided," *ante*, p. 153, furnishes no excuse for avoidance of the finality rule. Essentially such a position would justify review here of any case decided by a court of appeals whenever this Court, as it did in this instance, erroneously grants certiorari and permits counsel to brief and argue the case on the merits. That, I believe, is neither good law nor sound judicial administration.[6]

I would vacate the judgment of the Court of Appeals and remand the case to that court with directions to dismiss petitioner's appeal for lack of jurisdiction.

Memorandum of MR. JUSTICE STEWART.

While I agree with MR. JUSTICE HARLAN that this case is not properly here, the Court holds otherwise and decides the issues presented on their merits. As to those issues, I join the opinion of the Court.

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[6] Understandably counsel for the respondent, as he explained in oral argument, did not brief the finality point following the grant of certiorari; he assumed that the granting of the petition, despite his having raised the matter in his response thereto, indicated that the Court had no interest in the question.

Syllabus.

AMERICAN FEDERATION OF MUSICIANS OF THE UNITED STATES AND CANADA ET AL. *v.* WITTSTEIN ET AL.

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

No. 27. Argued November 16, 1964.—Decided December 7, 1964.

Under a weighted-voting system whereby delegates from each local of petitioner international union cast votes at its annual convention equal to the local's membership (with a local's total votes apportioned where delegates disagreed), a majority of the votes cast by less than one-half the delegates favored a dues increase. Respondent union members sued to nullify the increase, on the ground that weighted voting violated the requirement in § 101 (a)(3)(B) of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) that a dues increase be approved by "majority vote of the delegates voting at a regular convention." The District Court rendered summary judgments for respondents, and the Court of Appeals affirmed, holding that under that provision each delegate was entitled to but one vote regardless of the number of members he represented. *Held:* Section 101 (a)(3)(B) of the LMRDA permits a weighted-voting system under which delegates cast a number of votes equal to the membership of their local union. Pp. 175–183.

326 F. 2d 26, reversed and remanded.

Henry Kaiser argued the cause for petitioners. With him on the brief were *Eugene Gressman, George Kaufmann, David I. Ashe* and *Jerome H. Adler.*

Godfrey P. Schmidt argued the cause and filed a brief for respondents.

Briefs of *amici curiae,* urging reversal, were filed by *Solicitor General Cox* for the United States, and by *J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations.

MR. JUSTICE WHITE delivered the opinion of the Court.

The issue presented in these suits is whether § 101 (a) (3) of the Labor-Management Reporting and Disclosure Act of 1959 [1] providing that the dues of an international union "shall not be increased . . . except . . . by majority vote of the delegates voting at a regular convention" prohibits the vote of delegates at a national convention of the union, as authorized by its constitution, from being weighted and counted according to the number of members in the local that the delegate represents.

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[1] 73 Stat. 519, 522, 29 U. S. C. § 411 (a) (3) (1958 ed., Supp. V).

"(3) Dues, initiation fees, and assessments.—Except in the case of a federation of national or international labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on September 14, 1959 shall not be increased, and no general or special assessment shall be levied upon such members, except—

"(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

"(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constituent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: *Provided*, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization."

I.

The petitioner American Federation of Musicians (Federation) is an international labor organization comprising 675 locals in the United States and Canada. As with numerous other national and international labor organizations having many scattered locals of varying size, Federation's constitution and bylaws have long authorized alternative methods of ascertaining the vote of the delegates representing the locals at a union convention. Each local is entitled to one delegate for each 100 members or major fraction thereof, not to exceed three delegates from any one local. Federation's bylaws permit a voice vote of the delegates attending a convention in all cases, which is the method often used on routine noncontroversial matters. When amendments to the union constitution or bylaws are at issue, however, the delegates representing the locals, upon a roll call vote, may cast as many votes as there are members in the respective locals. A roll call vote is required upon the demand of 10 delegates or five locals. All amendments to the bylaws and constitution approved by a roll call vote are required under the constitution to be referred to a convention committee which may approve or veto the proposal.[2]

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[2] Article 5 of Federation's constitution provides:

"All Locals of this Federation of one hundred and fifty members or less shall be entitled to one delegate. All Locals shall be entitled to one delegate for each one hundred members or a major fraction thereof, not exceeding three delegates for any one Local, but each Local shall be entitled to one vote for each one hundred or major fraction thereof, but no Local shall cast more than ten votes, and the number each Local is entitled to shall be computed from the last report made on January 1st before the convention by the Local, according to the books of the Treasurer. On questions affecting a change in the laws, each Local may, upon roll call, cast as many votes as it has members,

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At petitioner's 1963 annual convention, a resolution increasing the per capita dues of all members, approximately 255,000, was submitted to the delegates. After the chairman ruled that two voice votes of the delegates were inconclusive, a delegate speaking on behalf of five locals requested a roll call vote in accordance with Federation's constitution. The rules governing a roll call vote were explained to the delegates. Delegates were to cast as many votes as there were members in the local that they represented. If the delegates from a given local were in disagreement, the total votes of that local were to be divided among the delegates. The roll call was taken and the recommendation carried by some 44,326 votes, with less than one-half of the delegates present voting in favor of the proposal.

Respondents, members of several locals whose delegates voted for or against the resolution at the convention, brought these suits against Federation and one of its locals to have the resolution declared null and void and its implementation enjoined. In the District Court, summary judgment in the consolidated actions was rendered for the respondent union members. 223 F. Supp. 27 (D. C. S. D. N. Y.). Finding that the material facts about the enactment of the dues resolution in regard to the issue under § 101 (a)(3)(B) were not in dispute, that court ruled that weighted voting did not comply with § 101 (a)(3)(B)'s requirement of approval by "majority vote of the delegates voting at a regular convention." A divided Court of Appeals affirmed. 326 F. 2d 26 (C. A. 2d Cir.). Although noting that weighted voting "is to all

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as per book of the Treasurer, A. F. of M. All laws so passed shall be referred to a convention committee consisting of the Executive Board, A. F. of M., and chairmen of all committees, who may sanction or veto same, their action to be final. Roll call shall be demandable and had under this Article on demand of ten delegates or five Locals."

appearances the most 'democratic' method, in the sense that each member is duly 'represented,' " it held that the plain language of § 101 (a)(3)(B) requires that each delegate be allowed but one vote regardless of the number of members he represents. The question being an important one of first impression under the LMRDA, we granted certiorari. 376 U. S. 942. We hold that § 101 (a)(3)(B) does not prohibit a weighted-voting system under which delegates cast a number of votes equal to the membership of the local union from which they are elected.

II.

Under § 101 (a)(3)(B) an international union may increase membership dues or levy an assessment by majority vote of the members voting in a membership referendum, by majority vote of the members of the executive board, effective, however, only to the next regular convention, or "by majority vote of the delegates voting at a . . . convention." The quoted language, it is said, authorizes only one system of voting: a head count of the delegates at a convention. Just as each member and each executive board member is entitled to one vote, so too each delegate may cast only his single vote. There cannot be a majority vote of the delegates voting, the argument proceeds, unless a delegate casts but one vote, no more or less, and the affirmative votes cast add up to a majority of the delegates voting. So far the argument is based solely upon what is said to be the literal meaning of the statutory language; there is no suggestion that § 101 (a)(3)(B) embodies an accepted or preferable system of representation by delegates or that the provision requires any set number of delegates at a convention or any particular relationship between the size of the local and the number of representatives at the convention.

We do not think this is the only fair import of the language in § 101 (a)(3)(B). The section requires a majority *vote* of the delegates voting. It does not state that a dues increase must be approved by a *majority of the delegates voting* at a convention. The respondents' construction renders the key word "vote" entirely superfluous, although that word describes what is to be counted to determine a majority. The provision on its face prescribes only by whom the vote must be cast—a delegate to a convention—and the proportion of votes needed for passage—a majority of the votes cast. The statute does require that those voting at a convention be delegates, but it says nothing about the number of votes each delegate may cast. Where the "vote" cast at a convention is weighted according to the number of people the delegate represents, that vote, we think, is a vote of a delegate. We believe that a majority vote so determined in favor of a dues increase is approval by majority vote of the delegates voting at a convention.

Whatever doubts may be left by sole and plenary reliance on plain meaning are fully resolved by consideration of the legislative history behind § 101 (a)(3)(B) and of other provisions of the LMRDA. This section had its genesis in Senator McClellan's proposals in S. 1137, which would have required a "general vote" on rules relating to the rate of dues and initiation fees and would have required that the vote of delegates at a convention "be numerically equivalent, or proportionate, to the number of the members of [each] constituent unit." [3] I Leg. Hist. 269, 278. Although S. 1137 was not reported out by the Senate Committee on Labor and

[3] S. 1137, 86th Cong., 1st Sess., I Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, 260, 269, 278 (1959) (hereafter Leg. Hist.).

Section 101 (5) of S. 1137 provided:

"FREEDOM FROM ARBITRARY FINANCIAL EXACTIONS.—Rules relating to the rate of dues and initiation fees, or the levying of any special

Public Welfare, Senator McClellan's requirement that the voting strength of convention delegates be proportionate to the size of their constituency is significant for the reason that it was the outgrowth of the extensive hearings held by the McClellan Committee [4] which uncovered substantial evidence of various forms of internal misgovernment and abuses in several labor organizations. The findings of this committee became the primary basis for the many bills that followed its investigations,[5] an

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or general assessment, may be adopted or amended only after due notice and by general vote."

Section 104 (2) of S. 1137 provided:

"VOTING AT CONVENTIONS.—All delegates elected or designated by the constituent units of an international labor organization . . . to represent such constituent unit at any meeting or convention held by such labor organization shall have a vote in all elections for officers and upon other matters brought before such meeting or convention for action or ratification by vote, which vote shall be numerically equivalent, or proportionate, to the number of the members of such constituent unit as disclosed by the roster of members . . . ."

[4] The Select Committee on Improper Activities in the Labor and Management Field.

[5] That the findings of the McClellan Committee were significant in the drafting of the LMRDA is well reflected in the Committee Reports.

"The committee reported bill is primarily designed to correct the abuses which have crept into labor and management and which have been the subject of investigation by the Committee on Improper Activities in the Labor and Management Field for the past several years. . . . The committee-reported bill is based on the legislation approved by the Senate last year and thus it too implements the remaining recommendations of the McClellan committee." S. Rep. No. 187, 86th Cong., 1st Sess., at 2, I Leg. Hist. 397, 398.

"The committee reported bill is primarily intended to correct the abuses which have crept into the labor and management field and which have been the subject of investigation by the Senate Committee on Improper Activities in the Labor and Management Field for the past several years." H. R. Rep. No. 741, 86th Cong., 1st Sess., at 1, I Leg. Hist. 759. See also 105 Cong. Rec. 15530, II Leg. Hist. 1566 (remarks of Congressman Griffin).

amalgam of which ultimately became the LMRDA. In light of the fact that then as now many large unions had provisions for weighted voting by delegates at a convention, it is very clear that weighted voting was not thought to be one of these abuses or forms of misgovernment.[6]

Senate bill No. 1555, the Kennedy-Ervin bill, was favorably reported out of the Senate Committee on Labor and Public Welfare without any Bill of Rights for union members, now Title I of the Act, of which the provision relating to dues is a part.[7] Senator McClellan soon introduced a comprehensive Bill of Rights provision as an amendment to S. 1555, which was adopted in the Senate by a vote of 47 to 46.[8] In respect to financial exactions, this amendment placed a flat limit on initiation fees and required for approval of a dues increase a majority vote of the members in the case of a local union and a "majority vote of the delegates present" at a general meeting in the case of a national or international union. It is not without significance that this language is susceptible

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[6] Leiserson, American Trade Union Democracy 129–132 (1959).

"Except in the few unions where locals are entitled to but one delegate with one vote, the number of votes in a convention is always greater than the number of delegates. Although proxy voting is generally prohibited (Longshoremen and Blacksmiths are exceptions), every convention delegate casts not only his own vote, but a share of the voting strength of the local union he represents as well. This voting strength varies with the size of the locals, and the total vote of a local union may be divided among its delegates or one of them may cast all its votes. The basis of representation and the methods of basing voting strength on size of local memberships differ among the unions . . . ." *Id.*, at 129–130.

See also United States Department of Labor, Bulletin No. 1239, Union Constitution Provisions: Election and Tenure of National and International Union Officers, at 15 (1958); National Industrial Conference Board, Handbook of Union Government, Structure and Procedures, Studies in Personnel Policy, No. 150, at 73 (1955).

[7] S. 1555, 86th Cong., 1st Sess., I Leg. Hist. 338.

[8] 105 Cong. Rec. 6475, II Leg. Hist. 1102.

of the same construction that is urged here in respect to § 101 (a)(3)(B), for it is quite clear that the author of this provision, Senator McClellan, did not intend to prohibit weighted voting. A few days later the Kuchel amendment, substituting another Bill of Rights provision, was adopted by a vote of 77 to 14.[9] This amendment eliminated some of the more stringent requirements of Senator McClellan's Bill of Rights, such as the limit on initiation fees, and dealt with voting procedures for approval of a dues increase by a local and an international union in more detail; in the case of a local, majority approval of the members was necessary, while in the case of an international, a "majority vote at a regular convention" was required. Under this language, which was said to be "taken almost verbatim from . . . the McClellan amendment," [10] it is very clear that no question of the permissibility of weighted voting could be raised. And no one expressed the thought that the McClellan proposal on voting was being altered in this or any other respect. S. 1555 passed the Senate with the Kuchel substitute as Title I.[11]

The changes in § 101 (a)(3)(B) in the House support the conclusion that this provision does not bar weighted voting. S. 1555, as passed by the Senate, became the focus of testimony before a Joint Subcommittee of the House Committee on Education and Labor.[12] The gist of the objections to § 101 (a)(3)(B) was that it failed explicitly to allow other methods of ensuring membership participation on proposals of an international or national union to increase dues, and it was too rigid in disallowing action

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[9] 105 Cong. Rec. 6693–6694, 6727, II Leg. Hist. 1220–1221, 1239.

[10] 105 Cong. Rec. 6719, II Leg. Hist. 1232.

[11] S. 1555, 86th Cong., 1st Sess., I Leg. Hist. 516.

[12] Hearings before a Joint Subcommittee of the Committee on Education and Labor, House of Representatives, 86th Cong., 1st Sess., on H. R. 3540, H. R. 3302, H. R. 4473, and H. R. 4474 and Related Bills Regarding Labor-Management Reform Legislation.

by an executive board of the international or national union.[13] The Committee responded by expanding the permissible methods of raising dues. As reported out in the Elliott bill, § 101 (a)(3)(B) allowed an international to increase dues by majority vote of the members, by majority vote of the members of an executive board, effective only until the next convention, and "by majority vote of the delegates voting at a regular convention." [14] The Committee version was incorporated in identical language in the Landrum-Griffin bill, which prevailed on the floor of the House.[15] In respect to his bill, Representative Griffin observed generally that the "bill of rights in our substitute is essentially the bill of rights in the form passed by the [Senate]. It guarantees to union members, subject to reasonable rules and regulations, . . . that their dues and initiation fees will not be increased arbitrarily." [16] The House Joint Conference Committee Report confirmed the view that the Senate and House versions of Title I contain "similar provisions." [17] Senator Goldwater, a member of the Joint Committee that considered S. 1555 and Landrum-Griffin, stated in his textual analysis of both bills that the House version of § 101 (a)(3)(B) was technically preferable and that the differences were in respect to the expanded methods of approval under the House bill and the applicability of the House bill only to dues increases rather than all changes.[18] And Senator Kuchel, the author of the Senate version of the dues proposal, and a conferee, stated that the Landrum-Griffin bill "adopted substantially the same

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[13] *Id.*, at 1517–1518.

[14] H. R. 8342, 86th Cong., 1st Sess., I Leg. Hist. 687, 697.

[15] H. R. 8400, 86th Cong., 1st Sess., 105 Cong. Rec. 15859–15860, II Leg. Hist. 1527, 1691–1692.

[16] 105 Cong. Rec. 15530, II Leg. Hist. 1566.

[17] H. R. Rep. No. 1147 on S. 1555, 86th Cong., 1st Sess., I Leg. Hist. 934–935.

[18] 105 Cong. Rec. 16487, II Leg. Hist. 1357.

bill of rights language" as he had earlier authored.[19] In light of the fact that the House changes were in the direction of affording unions more latitude for raising dues and the fact that no one, in the House or Senate, perceived that the House version would restrict voting at a convention to a head count of the delegates, we think it abundantly clear that § 101 (a)(3)(B) was intended to guarantee a member's "right to participate in deciding upon the rate of dues, initiation fees, and assessments," H. R. Rep. No. 741 on H. R. 8342, 86th Cong., 1st Sess., at 7, I Leg. Hist. 759, 765, but not to bar a well-known system of voting embodied in many union constitutions which well serves that end.

Other provisions of the LMRDA confirm this view. Section 101 (a)(3)(B) is a part of Title I, entitled the "Bill of Rights of Members of Labor Organizations." This Title guarantees to every member of a labor organization equal rights and privileges to vote, to attend meetings, and to participate in the deliberations and business of such meetings. Section 101 (a)(3)(B) forms a part of this framework by requiring participation by all members, either directly or through their elected representatives, on certain union matters thought to be of special importance. We find nothing to indicate that Congress thought this objective would be better fulfilled by allowing a delegate to cast one vote, regardless of the size of his constituency, than by permitting him to cast a vote equal to the number of members he represents. As a part of the Act's purpose of protecting and fostering participation by the rank and file in the affairs of the union, Title IV contains elaborate statutory safeguards for the election of union officers. But nothing in that title prohibits election of union officers by delegates voting at a convention in accordance with the number of members

[19] 105 Cong. Rec. 16760, II Leg. Hist. 1373.

they represent.[20] Respondents do not demonstrate any differences between weighted voting for officers of the union and weighted voting on changes in financial exactions that would support the asserted difference in voting procedures applicable to each. It is argued that delegates may not ascertain or follow the wishes of the members in respect to dues and assessments. But few issues are more likely to arouse active opposition and general membership participation than a proposal to increase dues. Further, this argument is too broad, for it questions the validity of a system of representative union government and has little to do with the manner in which the representative's vote is counted. Section 101 (a)(3)(B), as well as Title IV, authorizes a representative system of government and does not require a town meeting for action by an international or national union.[21] To that end Congress recognized the key role of elections in the process of union self-government and surrounded it with many safeguards to provide a fair election and to guarantee membership participation.

The pervading premise of both these titles is that there should be full and active participation by the rank and

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[20] See United States Department of Labor, Technical Assistance Aid No. 5, Electing Union Officers (rev. Sept. 1962).

[21] The Senate Committee Report accompanying S. 1555 stated in this regard:

"Under the National Labor Relations Act and the Railway Labor Act, a labor organization has vast responsibility for economic welfare of the individual members whom it represents. Union members have a vital interest, therefore, in the policies and conduct of union affairs. To the extent that union procedures are democratic they permit the individual to share in the formulation of union policy. This is not to say that in order to have democratically responsive unions, it is necessary to have each union member make decisions on detail as in a New England town meeting. What is required is the opportunity to influence policy and leadership by free and periodic elections." S. Rep. No. 187, 86th Cong., 1st Sess., at 6–7, I Leg. Hist. 397, 402–403.

file in the affairs of the union. We think our decision today that the vote of an elected delegate may reflect the size of his constituency is wholly consistent with that purpose.

Accordingly, the judgments below are reversed and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

THE CHIEF JUSTICE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of this case.

McLAUGHLIN ET AL. *v.* FLORIDA.

APPEAL FROM THE SUPREME COURT OF FLORIDA.

No. 11. Argued October 13–14, 1964.—Decided December 7, 1964.

A Florida criminal statute prohibits an unmarried interracial couple from habitually living in and occupying the same room in the nighttime. No other Florida statute penalizes precisely the same conduct when engaged in by members of the same race. *Held:* The Florida statute denies the equal protection of the laws guaranteed by the Fourteenth Amendment and is invalid. Pp. 184–196.

153 So. 2d 1, reversed.

William T. Coleman, Jr., and *Louis H. Pollak* argued the cause for appellants. With him on the briefs were *Jack Greenberg* and *James M. Nabrit III.*

James G. Mahorner, Assistant Attorney General of Florida, argued the cause for appellee. With him on the brief was *James W. Kynes,* Attorney General of Florida.

MR. JUSTICE WHITE delivered the opinion of the Court.

At issue in this case is the validity of a conviction under § 798.05 of the Florida statutes, providing that:

> "Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

Because the section applies only to a white person and a Negro who commit the specified acts and because no couple other than one made up of a white and a Negro is subject to conviction upon proof of the elements comprising the offense it proscribes, we hold § 798.05 invalid as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment.

The challenged statute is a part of chapter 798 entitled "Adultery and Fornication." [1] Section 798.01 forbids living in adultery and § 798.02 proscribes lewd cohabitation. Both sections are of general application, both require proof of intercourse to sustain a conviction, and both authorize imprisonment up to two years.[2] Section 798.03,

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[1] Fla. Stat. Ann. § 798.01—Living in open adultery:

"Whoever lives in an open state of adultery shall be punished by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding five hundred dollars. Where either of the parties living in an open state of adultery is married, both parties so living shall be deemed to be guilty of the offense provided for in this section."

Fla. Stat. Ann. § 798.02—Lewd and lascivious behavior:

"If any man and woman, not being married to each other, lewdly and lasciviously associate and cohabit together, or if any man or woman, married or unmarried, is guilty of open and gross lewdness and lascivious behavior, they shall be punished by imprisonment in the state prison not exceeding two years, or in the county jail not exceeding one year, or by fine not exceeding three hundred dollars."

Fla. Stat. Ann. § 798.03—Fornication:

"If any man commits fornication with a woman, each of them shall be punished by imprisonment not exceeding three months, or by fine not exceeding thirty dollars."

Fla. Stat. Ann. § 798.04—White persons and Negroes living in adultery:

"If any white person and negro, or mulatto, shall live in adultery or fornication with each other, each shall be punished by imprisonment not exceeding twelve months, or by fine not exceeding one thousand dollars."

Fla. Stat. Ann. § 798.05—Negro man and white woman or white man and Negro woman occupying same room:

"Any negro man and white woman, or any white man and negro woman, who are not married to each other, who shall habitually live in and occupy in the nighttime the same room shall each be punished by imprisonment not exceeding twelve months, or by fine not exceeding five hundred dollars."

[2] Section 798.02 proscribes two offenses: (1) open and gross lewdness and lascivious behavior by either a man or a woman; (2) lewd and lascivious association and cohabitation by a man and woman. The latter offense is identical to that proscribed by § 798.01, except

also of general application, proscribes fornication [3] and authorizes a three-month jail sentence. The fourth section of the chapter, 798.04, makes criminal a white person and a Negro's living together in adultery or fornication. A one-year prison sentence is authorized. The conduct it reaches appears to be the same as is proscribed under the first two sections of the chapter.[4] Section 798.05, the section at issue in this case, applies only to a white person and a Negro who habitually occupy the same room at nighttime. This offense, however, is distinguishable from the other sections of the chapter in that it is the only one which does not require proof of intercourse along with the other elements of the crime.[5]

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that § 798.01 contains the additional requirement that one of the participants be married to a third party. Conviction under either section requires a showing that the parties lived together and maintained sexual relations over a period of time as in the conjugal relation between husband and wife. *Braswell* v. *State,* 88 Fla. 183, 101 So. 232 (1924), *Lockhart* v. *State,* 79 Fla. 824, 85 So. 153 (1920) (both cases involving what is now § 798.01); *Wildman* v. *State,* 157 Fla. 334, 25 So. 2d 808 (1946), *Penton* v. *State,* 42 Fla. 560, 28 So. 774 (1900) (cases involving, respectively, § 798.02 and what is now that statute).

[3] Unlike all the other sections of chapter 798, § 798.03 does not relate only to habitual conduct. It proscribes single and occasional acts of fornication. See *Collins* v. *State,* 83 Fla. 458, 92 So. 681 (1922).

[4] We have not found any decisions construing § 798.04. Its operative language, "live in adultery or fornication," is substantially identical to the phrase "lives in an open state of adultery" in § 798.01, which has been construed to mean habitual conduct. That language sharply contrasts with the phrase "commits fornication" in § 798.03, which proscribes casual acts of fornication. Textual analysis therefore leads us to conclude that the Florida courts would give § 798.04 a similar construction to that accorded §§ 798.01 and 798.02. This conclusion that § 798.04 is duplicative of other provisions is consistent with the apparent lack of prosecutions under § 798.04.

[5] *Parramore* v. *State,* 81 Fla. 621, 88 So. 472 (1921). Compare note 2, *supra.*

Appellants were charged with a violation of § 798.05. The elements of the offense as described by the trial judge are the (1) habitual occupation of a room at night, (2) by a Negro and a white person (3) who are not married. The State presented evidence going to each factor, appellants' constitutional contentions were overruled and the jury returned a verdict of guilty. Solely on the authority of *Pace* v. *Alabama,* 106 U. S. 583, the Florida Supreme Court affirmed and sustained the validity of § 798.05 as against appellants' claims that the section denied them equal protection of the laws guaranteed by the Fourteenth Amendment. We noted probable jurisdiction, 377 U. S. 914. We deal with the single issue of equal protection and on this basis set aside these convictions.[6]

[6] Appellants present two other contentions which it is unnecessary for us to consider in view of our disposition of their principal claim. First, they challenge the constitutionality of Fla. Stat. Ann. § 741.11—Marriages between white and Negro persons prohibited:

"It is unlawful for any white male person residing or being in this state to intermarry with any negro female person; and it is in like manner unlawful for any white female person residing or being in this state to intermarry with any negro male person; and every marriage formed or solemnized in contravention of the provisions of this section shall be utterly null and void . . . ."

The basis for appellants' complaint regarding this statute is that in charging the jury with respect to appellants' defense of common-law marriage the trial judge stated, without objection by appellants, that because of § 741.11 it would have been unlawful for appellants to have entered into a common-law marriage in Florida. Appellants contend that this application of the marriage statute was a denial of due process and equal protection secured by the Fourteenth Amendment.

Appellants' final claim is that their convictions violated due process either because there was no proof of appellant McLaughlin's race or because the Florida definition of "Negro" is unconstitutionally vague. Fla. Stat. Ann. § 1.01 (6) provides: "The words 'negro,' 'colored,' 'colored persons,' 'mulatto' or 'persons of color,' when applied to persons, include every person having one-eighth or more of African or negro blood." At the trial one of the arresting officers was per-

I.

It is readily apparent that § 798.05 treats the interracial couple made up of a white person and a Negro differently than it does any other couple. No couple other than a Negro and a white person can be convicted under § 798.05 and no other section proscribes the precise conduct banned by § 798.05. Florida makes no claim to the contrary in this Court. However, all whites and Negroes who engage in the forbidden conduct are covered by the section and each member of the interracial couple is subject to the same penalty.

In this situation, *Pace* v. *Alabama, supra,* is relied upon as controlling authority. In our view, however, *Pace* represents a limited view of the Equal Protection Clause which has not withstood analysis in the subsequent decisions of this Court. In that case, the Court let stand a conviction under an Alabama statute forbidding adultery or fornication between a white person and a Negro and imposing a greater penalty than allowed under another Alabama statute of general application and proscribing the same conduct whatever the race of the participants. The opinion acknowledged that the purpose of the Equal Protection Clause "was to prevent hostile and discriminating State legislation against any person or class of persons" and that equality of protection under the laws implies that any person, "whatever his race . . . shall not be subjected, for the same offence, to any greater or different punishment." 106 U. S., at 584. But taking quite

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mitted, over objection, to state his conclusion as to the race of each appellant based on his observation of their physical appearance. Appellants claim that the statutory definition is circular in that it provides no independent means of determining the race of a defendant's ancestors and that testimony based on appearance is impermissible because not related to any objective standard. Florida argues that under Florida appellate procedure this claim was abandoned when the appellants failed to argue it in the brief they presented to the Florida Supreme Court.

literally its own words, "for the same *offence*" (emphasis supplied), the Court pointed out that Alabama had designated as a separate offense the commission by a white person and a Negro of the identical acts forbidden by the general provisions. There was, therefore, no impermissible discrimination because the difference in punishment was "directed against the offence designated" and because in the case of each offense all who committed it, white and Negro, were treated alike.[7] Under *Pace* the Alabama law regulating the conduct of both Negroes and whites satisfied the Equal Protection Clause since it applied equally to and among the members of the class which it reached without regard to the fact that the statute did not reach other types of couples performing the identical conduct and without any necessity to justify the difference in penalty established for the two offenses. Because each of the Alabama laws applied equally to those to whom it was applicable, the

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[7] "The defect in the argument of counsel consists in his assumption that any discrimination is made by the laws of Alabama in the punishment provided for the offence for which the plaintiff in error was indicted when committed by a person of the African race and when committed by a white person. The two sections of the code cited are entirely consistent. The one prescribes, generally, a punishment for an offence committed between persons of different sexes; the other prescribes a punishment for an offence which can only be committed where the two sexes are of different races. There is in neither section any discrimination against either race. Sect. 4184 equally includes the offence when the persons of the two sexes are both white and when they are both black. Sect. 4189 applies the same punishment to both offenders, the white and the black. Indeed, the offence against which this latter section is aimed cannot be committed without involving the persons of both races in the same punishment. Whatever discrimination is made in the punishment prescribed in the two sections is directed against the offence designated and not against the person of any particular color or race. The punishment of each offending person, whether white or black, is the same." 106 U. S., at 585.

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different treatment accorded interracial and intraracial couples was irrelevant.[8]

This narrow view of the Equal Protection Clause was soon swept away. While acknowledging the currency of the view that "if the law deals alike with all of a certain class" it is not obnoxious to the Equal Protection Clause and that "as a general proposition, this is undeniably true," the Court in *Gulf, C. & S. F. R. Co.* v. *Ellis,* 165 U. S. 150, 155, said that it was "equally true that such classification cannot be made arbitrarily. . . ." Classification "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis." *Ibid.* "[A]rbitrary selection can never be justified by calling it classification." *Id.,* at 159. This approach was confirmed in *Atchison, T. & S. F. R. Co.* v. *Matthews,* 174 U. S. 96, 104–105, and in numerous other cases.[9] See, *e. g., American Sugar Ref. Co.* v. *Louisiana,*

[8] Had the Court been presented with a statute that, for example, prohibited any Negro male from having carnal knowledge of a white female and penalized only the Negro, such a statute would unquestionably have been held to deny equal protection even though it applied equally to all to whom it applied. See *Strauder* v. *West Virginia,* 100 U. S. 303, 306–308; *Ho Ah Kow* v. *Nunan,* 12 Fed. Cas. 252 (No. 6546) (C. C. D. Cal. 1879) (Field, J.) ("Chinese Pigtail" case). Because of the manifest inadequacy of any approach requiring only equal application to the class defined in the statute, one may conclude that in *Pace* the Court actually ruled *sub silentio* that the different treatment meted out to interracial and intraracial couples was based on a reasonable legislative purpose. If the Court did reach that conclusion it failed to articulate it or to give its reasons, and for the reasons stated *infra* we reject the contention presented here that the criminal statute presently under review is grounded in a reasonable legislative policy.

[9] The *Pace* holding itself may have undergone some modification when the Court a few years later cited it for the proposition "that a different punishment for the same offence may be inflicted under particular circumstances, provided it is dealt out to all alike who are similarly situated." *Moore* v. *Missouri,* 159 U. S. 673, 678.

179 U. S. 89, 92; *Southern R. Co.* v. *Greene,* 216 U. S. 400, 417; *F. S. Royster Guano Co.* v. *Virginia,* 253 U. S. 412, 415; *Air-Way Elec. Appliance Corp.* v. *Day,* 266 U. S. 71, 85; *Louisville Gas & Elec. Co.* v. *Coleman,* 277 U. S. 32, 37–39; *Hartford Steam Boiler Inspection & Ins. Co.* v. *Harrison,* 301 U. S. 459, 461–463; *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535, 541–543; *Kotch* v. *Pilot Comm'rs,* 330 U. S. 552, 556–557; *Hernandez* v. *Texas,* 347 U. S. 475, 478; *Griffin* v. *Illinois,* 351 U. S. 12, 17–19 (opinion of BLACK, J., announcing judgment), 21–22 (Frankfurter, J., concurring); *Morey* v. *Doud,* 354 U. S. 457, 465–466; *Central R. Co.* v. *Pennsylvania,* 370 U. S. 607, 617–618; *Douglas* v. *California,* 372 U. S. 353, 356–357.

Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded. That question is what *Pace* ignored and what must be faced here.

Normally, the widest discretion is allowed the legislative judgment in determining whether to attack some, rather than all, of the manifestations of the evil aimed at; and normally that judgment is given the benefit of every conceivable circumstance which might suffice to characterize the classification as reasonable rather than arbitrary and invidious. See, *e. g., McGowan* v. *Maryland,* 366 U. S. 420, 425–426; *Two Guys from Harrison-Allentown, Inc.* v. *McGinley,* 366 U. S. 582, 591–592; *Allied Stores of Ohio, Inc.* v. *Bowers,* 358 U. S. 522, 528; *Railway Express Agency, Inc.* v. *New York,* 336 U. S. 106, 110; *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U. S. 61, 78–79. But we deal here with a classification based upon the race of the

participants, which must be viewed in light of the historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect," *Bolling* v. *Sharpe,* 347 U. S. 497, 499; and subject to the "most rigid scrutiny," *Korematsu* v. *United States,* 323 U. S. 214, 216; and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose, *Hirabayashi* v. *United States,* 320 U. S. 81, 100. Thus it is that racial classifications have been held invalid in a variety of contexts. See, *e. g., Virginia Board of Elections* v. *Hamm,* 379 U. S. 19 (designation of race in voting and property records); *Anderson* v. *Martin,* 375 U. S. 399 (designation of race on nomination papers and ballots); *Watson* v. *City of Memphis,* 373 U. S. 526 (segregation in public parks and playgrounds); *Brown* v. *Board of Education,* 349 U. S. 294 (segregation in public schools).

We deal here with a racial classification embodied in a criminal statute. In this context, where the power of the State weighs most heavily upon the individual or the group, we must be especially sensitive to the policies of the Equal Protection Clause which, as reflected in congressional enactments dating from 1870, were intended to secure "the full and equal benefit of all laws and proceedings for the security of persons and property" and to subject all persons "to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other." R. S. § 1977, 42 U. S. C. § 1981 (1958 ed.).

Our inquiry, therefore, is whether there clearly appears in the relevant materials some overriding statutory purpose requiring the proscription of the specified conduct when engaged in by a white person and a Negro, but not otherwise. Without such justification the racial classification contained in § 798.05 is reduced to an invid-

ious discrimination forbidden by the Equal Protection Clause.

The Florida Supreme Court, relying upon *Pace* v. *Alabama, supra,* found no legal discrimination at all and gave no consideration to statutory purpose. The State in its brief in this Court, however, says that the legislative purpose of § 798.05, like the other sections of chapter 798, was to prevent breaches of the basic concepts of sexual decency; [10] and we see no reason to quarrel with the State's characterization of this statute, dealing as it does with illicit extramarital and premarital promiscuity.

We find nothing in this suggested legislative purpose, however, which makes it essential to punish promiscuity of one racial group and not that of another. There is no suggestion that a white person and a Negro are any more likely habitually to occupy the same room together than the white or the Negro couple or to engage in illicit intercourse if they do. Sections 798.01–798.05 indicate no legislative conviction that promiscuity by the interracial couple presents any particular problems requiring separate or different treatment if the suggested over-all policy of the chapter is to be adequately served. Sections 798.01–798.03 deal with adultery, lewd cohabitation and fornica-

[10] "Section 798.05, Florida Statutes, under which the defendants were charged, simply prohibits habitual cohabiting of the same room by members of opposite races who are also members of opposite sexes. The terms of Section 798.05, supra, explicitly seek to avoid circumstances wherein there are high potentials of sexual engagement. . . . Section 798.02, Florida Statutes, which prohibits intraracial lewd cohabitation, has generally been interpreted as requiring the additional element of sexual occurrence as distinguished from the provisions of Section 798.05, supra, which only require a high potential of such occurrence. The legislative purpose in enacting both Sections 798.02 and 798.05, supra, is to prevent illegal sexual occurrences. . . . The purpose of the legislature in enacting both Sections 798.02 and 798.05, Florida Statutes, was to prevent such breaches of basic concepts of sexual decency whether committed by interracial or intraracial parties." Brief for Appellee, 55–56.

tion, in that order. All are of general application. Section 798.04 prohibits a white and a Negro from living in a state of adultery or fornication and imposes a lesser period of imprisonment than does either § 798.01 or § 798.02, each of which is applicable to all persons. Simple fornication by the interracial couple is covered only by the general provision of § 798.03. This is not, therefore, a case where the class defined in the law is that from which "the evil mainly is to be feared," *Patsone* v. *Pennsylvania,* 232 U. S. 138, 144; or where the "[e]vils in the same field may be of different dimensions and proportions, requiring different remedies," *Williamson* v. *Lee Optical Co.,* 348 U. S. 483, 489; or even one where the State has done as much as it can as fast as it can, *Buck* v. *Bell,* 274 U. S. 200, 208. That a general evil will be partially corrected may at times, and without more, serve to justify the limited application of a criminal law; but legislative discretion to employ the piecemeal approach stops short of permitting a State to narrow statutory coverage to focus on a racial group. Such classifications bear a far heavier burden of justification. "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo* v. *Hopkins* [118 U. S. 356]; *Gaines* v. *Canada,* 305 U. S. 337." *Skinner* v. *Oklahoma ex rel. Williamson,* 316 U. S. 535, 541.[11]

[11] In the *Skinner* case the Court invalidated on equal-protection grounds Oklahoma's law providing for the sterilization of multiple offenders but exempting offenses arising out of the prohibition laws, the revenue acts, embezzlement or political offenses. The Court said:

"Oklahoma makes no attempt to say that he who commits larceny by trespass or trick or fraud has biologically inheritable traits which he who commits embezzlement lacks. Oklahoma's line between

II.

Florida's remaining argument is related to its law against interracial marriage, Fla. Stat. Ann. § 741.11,[12] which, in the light of certain legislative history of the Fourteenth Amendment, is said to be immune from attack under the Equal Protection Clause. Its interracial cohabitation law, § 798.05, is likewise valid, it is argued, because it is ancillary to and serves the same purpose as the miscegenation law itself.

We reject this argument, without reaching the question of the validity of the State's prohibition against interracial marriage or the soundness of the arguments rooted in the history of the Amendment. For even if we posit the constitutionality of the ban against the marriage of a Negro and a white, it does not follow that the cohabitation law is not to be subjected to independent examination under the Fourteenth Amendment. "[A]ssuming, for purposes of argument only, that the basic prohibition is constitutional," in this case the law against interracial marriage, "it does not follow that there is no constitutional limit to the means which may be used to enforce it." *Oyama* v. *California,* 332 U. S. 633, 646–647. See

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larceny by fraud and embezzlement is determined, as we have noted, 'with reference to the time when the fraudulent intent to convert the property to the taker's own use' arises. *Riley* v. *State, supra,* 64 Okla. Cr. at p. 189, 78 P. 2d p. 715. We have not the slightest basis for inferring that that line has any significance in eugenics, nor that the inheritability of criminal traits follows the neat legal distinctions which the law has marked between those two offenses. In terms of fines and imprisonment, the crimes of larceny and embezzlement rate the same under the Oklahoma code. Only when it comes to sterilization are the pains and penalties of the law different. The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn." 316 U. S., at 541–542.

[12] See note 6, *supra.* See also Fla. Const., Art. 16, § 24.

also *Buchanan* v. *Warley,* 245 U. S. 60, 81. Section 798.05 must therefore itself pass muster under the Fourteenth Amendment; and for reasons quite similar to those already given, we think it fails the test.

There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification, as we have said, and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy. See the cases cited, *supra,* p. 192. Those provisions of chapter 798 which are neutral as to race express a general and strong state policy against promiscuous conduct, whether engaged in by those who are married, those who may marry or those who may not. These provisions, if enforced, would reach illicit relations of any kind and in this way protect the integrity of the marriage laws of the State, including what is claimed to be a valid ban on interracial marriage. These same provisions, moreover, punish premarital sexual relations as severely or more severely in some instances than do those provisions which focus on the interracial couple. Florida has offered no argument that the State's policy against interracial marriage cannot be as adequately served by the general, neutral, and existing ban on illicit behavior as by a provision such as § 798.05 which singles out the promiscuous interracial couple for special statutory treatment. In short, it has not been shown that § 798.05 is a necessary adjunct to the State's ban on interracial marriage. We accordingly invalidate § 798.05 without expressing any views about the State's prohibition of interracial marriage, and reverse these convictions.

Reversed.

MR. JUSTICE HARLAN, concurring.

I join the Court's opinion with the following comments.

I agree with the Court that the cohabitation statute has not been shown to be necessary to the integrity of the antimarriage law, assumed *arguendo* to be valid, and that necessity, not mere reasonable relationship, is the proper test, see *ante,* pp. 195–196. *NAACP* v. *Alabama,* 377 U. S. 288, 307–308; *Saia* v. *New York,* 334 U. S. 558, 562; *Martin* v. *Struthers,* 319 U. S. 141, 147; *Thornhill* v. *Alabama,* 310 U. S. 88, 96; *Schneider* v. *State,* 308 U. S. 147, 161, 162, 164; see *McGowan* v. *Maryland,* 366 U. S. 420, 466–467 (Frankfurter, J., concurring).

The fact that these cases arose under the principles of the First Amendment does not make them inapplicable here. Principles of free speech are carried to the States only through the Fourteenth Amendment. The necessity test which developed to protect free speech against state infringement should be equally applicable in a case involving state racial discrimination—prohibition of which lies at the very heart of the Fourteenth Amendment. Nor does the fact that these cases all involved what the Court deemed to be a constitutionally excessive exercise of legislative power relating to a single state policy, whereas this case involves two legislative policies—prevention of extramarital relations and prevention of miscegenation—effectuated by separate statutes, serve to vitiate the soundness of the Court's conclusion that the validity of the State's antimarriage law need not be decided in this case. If the legitimacy of the cohabitation statute is considered to depend upon its being ancillary to the antimarriage statute, the former must be deemed "unnecessary" under the principle established by the cited cases in light of the nondiscriminatory extramarital relations statutes. If, however, the interracial cohabitation statute is considered to rest upon a discrete

state interest, existing independently of the antimarriage law, it falls of its own weight.

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS joins, concurring.

I concur in the judgment and agree with most of what is said in the Court's opinion. But the Court implies that a criminal law of the kind here involved might be constitutionally valid if a State could show "some overriding statutory purpose." This is an implication in which I cannot join, because I cannot conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense. These appellants were convicted, fined, and imprisoned under a statute which made their conduct criminal only because they were of different races. So far as this statute goes, their conduct would not have been illegal had they both been white, or both Negroes. There might be limited room under the Equal Protection Clause for a civil law requiring the keeping of racially segregated public records for statistical or other valid public purposes. Cf. *Tancil* v. *Woolls, ante,* at 19. But we deal here with a criminal law which imposes criminal punishment. And I think it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend upon the race of the actor. Discrimination of that kind is invidious *per se.**

*Since I think this criminal law is clearly invalid under the Equal Protection Clause of the Fourteenth Amendment, I do not consider the impact of the Due Process Clause of that Amendment, nor of the Thirteenth and Fifteenth Amendments.

Per Curiam.

RAILWAY LABOR EXECUTIVES' ASSOCIATION ET AL. *v.* UNITED STATES ET AL.

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

No. 130. Decided December 7, 1964.

District Court's judgment dismissing appellant railway employees' complaint to set aside in part Interstate Commerce Commission railroad merger orders for failure to protect employees' interests under certain provisions of a collective bargaining agreement vacated insofar as that judgment relates to those provisions, with instructions to remand case to ICC for clarification of orders.

226 F. Supp. 521, vacated and remanded.

Clarence M. Mulholland, Edward J. Hickey, Jr., James L. Highsaw, Jr., William G. Mahoney and *William H. King* for appellants.

Solicitor General Cox, Assistant Attorney General Orrick, Philip B. Heymann, Robert B. Hummel and *Elliott Moyer* for the United States; *Robert W. Ginnane* and *Leonard S. Goodman* for Interstate Commerce Commission; and *Hugh B. Cox, W. Graham Claytor, Jr.,* and *Richard S. Arnold* for Southern Railway Co. et al., appellees.

PER CURIAM.

This appeal is from a judgment of a three-judge District Court, 226 F. Supp. 521, dismissing appellants' complaint to set aside orders of the Interstate Commerce Commission, 317 I. C. C. 557, 729, relating to the Southern Railway Company's acquisition of control through stock ownership of the Central of Georgia Railway Company. Appellants, representing railway employees, object that under the Commission's orders, the employees are not protected as provided by §§ 4, 5,

and 9 of the Washington Job Protection Agreement. We agree with the suggestion of the Solicitor General that this case should be remanded to the Interstate Commerce Commission for clarification of its orders insofar as they relate to the agreement. For this reason, the motion of the Interstate Commerce Commission to affirm the judgment of the District Court is denied. The motion of intervenor-appellees Southern Railway Company and Central of Georgia Railway Company to defer consideration of the jurisdictional statement is denied. Appellants' motion to limit the appeal to questions related to §§ 4, 5, and 9 of the Washington Job Protection Agreement is granted. The judgment of the District Court is vacated insofar as it relates to §§ 4, 5, and 9 of the Washington Agreement, and this case is remanded to that court with instructions to remand it to the Interstate Commerce Commission with instructions to amend its reports and orders as necessary to deal with appellants' request that §§ 4, 5, and 9 be included as protective conditions, specifically indicating why each of these provisions is either omitted or included. See *United States* v. *Chicago, M., St. P. & Pac. R. Co.*, 294 U. S. 499, 511.

Vacated and remanded.

MOITY *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 337. Decided December 7, 1964.

245 La. 546, 159 So. 2d 149, reversed.

Bentley G. Byrnes for appellant.

Jack P. F. Gremillion, Attorney General of Louisiana, and *M. E. Culligan,* Assistant Attorney General, for appellee.

PER CURIAM.

The judgment is reversed. *Garrison* v. *Louisiana, ante,* p. 64.

MUTTER *v.* WISCONSIN.

APPEAL FROM THE SUPREME COURT OF WISCONSIN.

No. 495. Decided December 7, 1964.

Appeal dismissed for want of a substantial federal question.
Reported below: 23 Wis. 2d 407, 127 N. W. 2d 15.

Roger C. Minahan for appellant.

George Thompson, Attorney General of Wisconsin, and *Roy G. Tulane* and *Robert D. Martinson,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

CROSS ET AL. *v.* BRUNING ET AL.

APPEAL FROM THE SUPREME COURT OF CALIFORNIA.

No. 436, Misc. Decided December 7, 1964.

Appeal dismissed and certiorari denied.

PER CURIAM.

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

THE CHIEF JUSTICE took no part in the consideration or decision of this case.

Syllabus.

FIBREBOARD PAPER PRODUCTS CORP. *v.* NATIONAL LABOR RELATIONS BOARD ET AL.

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

No. 14. Argued October 19, 1964.—Decided December 14, 1964.

Respondent union, the bargaining representative for a unit of petitioner's maintenance employees, gave timely notice of its desire to modify the existing collective bargaining agreement. Four days before the expiration of the contract, petitioner informed the union that it had determined that substantial savings could be effected by contracting out the maintenance work, and that since it had made a definite decision to do so, negotiation of a new agreement would be pointless. On the contract expiration date, the employment of employees represented by the union was terminated and an independent contractor was engaged to do the maintenance work. The union filed unfair labor practice charges against the employer, alleging violations of §§ 8 (a) (1), 8 (a) (3) and 8 (a) (5) of the National Labor Relations Act. The National Labor Relations Board (NLRB) found that, while petitioner's motive was economic rather than antiunion, petitioner's failure to negotiate with the union concerning its decision to contract out the maintenance work violated § 8 (a) (5) of the Act, which requires bargaining with respect to "wages, hours, and other terms and conditions of employment." The NLRB ordered reinstatement of the maintenance employees with back pay, and the Court of Appeals granted the NLRB's petition for enforcement. *Held:*

1. The type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8 (d) of the Act. Pp. 209–215.

2. The NLRB did not exceed its remedial powers in ordering petitioner to reinstate its maintenance employees with back pay and to bargain with the union. Pp. 215–217.

116 U. S. App. D. C. 198, 322 F. 2d 411, affirmed.

Marion B. Plant argued the cause for petitioner. With him on the briefs was *Gerard D. Reilly.*

Solicitor General Cox argued the cause for respondent National Labor Relations Board. With him on the brief were *Arnold Ordman, Dominick L. Manoli* and *Norton J. Come.*

David E. Feller argued the cause for respondents United Steelworkers of America et al. With him on the brief were *Elliot Bredhoff, Jerry D. Anker, Michael H. Gottesman* and *Jay Darwin.*

Briefs of *amici curiae,* urging reversal, were filed by *Eugene Adams Keeney* and *James W. Hunt* for the Chamber of Commerce of the United States; *Lambert H. Miller* for the National Association of Manufacturers of the United States; and *John B. Olverson* for the Electronic Industries Association.

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

This case involves the obligation of an employer and the representative of his employees under §§ 8 (a)(5), 8 (d) and 9 (a) of the National Labor Relations Act to "confer in good faith with respect to wages, hours, and other terms and conditions of employment." [1] The primary issue is whether the "contracting out" of work being

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[1] The relevant provisions of the National Labor Relations Act, as amended, are:

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

. . . . . .

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a). . . .

. . . . . .

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms

performed by employees in the bargaining unit is a statutory subject of collective bargaining under those sections.

Petitioner, Fibreboard Paper Products Corporation (the Company), has a manufacturing plant in Emeryville, California. Since 1937 the East Bay Union Machinists, Local 1304, United Steelworkers of America, AFL–CIO (the Union) has been the exclusive bargaining representative for a unit of the Company's maintenance employees. In September 1958, the Union and the Company entered the latest of a series of collective bargaining agreements which was to expire on July 31, 1959. The agreement provided for automatic renewal for another year unless one of the contracting parties gave 60 days' notice of a desire to modify or terminate the contract. On May 26, 1959, the Union gave timely notice of its desire to modify the contract and sought to arrange a bargaining session with Company representatives. On June 2, the Company acknowledged receipt of the Union's notice and stated: "We will contact you at a later date regarding a meeting for this purpose." As required by the contract, the Union sent a list of proposed modifications on June 15. Efforts by the Union to schedule a bargaining session met with no success until July 27,

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and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession . . . .

. . . . . .

"SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ."

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four days before the expiration of the contract, when the Company notified the Union of its desire to meet.

The Company, concerned with the high cost of its maintenance operation, had undertaken a study of the possibility of effecting cost savings by engaging an independent contractor to do the maintenance work. At the July 27 meeting, the Company informed the Union that it had determined that substantial savings could be effected by contracting out the work upon expiration of its collective bargaining agreements with the various labor organizations representing its maintenance employees. The Company delivered to the Union representatives a letter which stated in pertinent part:

> "For some time we have been seriously considering the question of letting out our Emeryville maintenance work to an independent contractor, and have now reached a definite decision to do so effective August 1, 1959.
>
> "In these circumstances, we are sure you will realize that negotiation of a new contract would be pointless. However, if you have any questions, we will be glad to discuss them with you."

After some discussion of the Company's right to enter a contract with a third party to do the work then being performed by employees in the bargaining unit, the meeting concluded with the understanding that the parties would meet again on July 30.

By July 30, the Company had selected Fluor Maintenance, Inc., to do the maintenance work. Fluor had assured the Company that maintenance costs could be curtailed by reducing the work force, decreasing fringe benefits and overtime payments, and by preplanning and scheduling the services to be performed. The contract provided that Fluor would:

> "furnish all labor, supervision and office help required for the performance of maintenance work . . . at

> the Emeryville plant of Owner as Owner shall from time to time assign to Contractor during the period of this contract; and shall also furnish such tools, supplies and equipment in connection therewith as Owner shall order from Contractor, it being understood however that Owner shall ordinarily do its own purchasing of tools, supplies and equipment."

The contract further provided that the Company would pay Fluor the costs of the operation plus a fixed fee of $2,250 per month.

At the July 30 meeting, the Company's representative, in explaining the decision to contract out the maintenance work, remarked that during bargaining negotiations in previous years the Company had endeavored to point out through the use of charts and statistical information "just how expensive and costly our maintenance work was and how it was creating quite a terrific burden upon the Emeryville plant." He further stated that unions representing other Company employees "had joined hands with management in an effort to bring about an economical and efficient operation," but "we had not been able to attain that in our discussions with this particular Local." The Company also distributed a letter stating that "since we will have no employees in the bargaining unit covered by our present Agreement, negotiation of a new or renewed Agreement would appear to us to be pointless." On July 31, the employment of the maintenance employees represented by the Union was terminated and Fluor employees took over. That evening the Union established a picket line at the Company's plant.

The Union filed unfair labor practice charges against the Company, alleging violations of §§ 8 (a)(1), 8 (a)(3) and 8 (a)(5). After hearings were held upon a complaint issued by the National Labor Relations Board's Regional Director, the Trial Examiner filed an Inter-

mediate Report recommending dismissal of the complaint. The Board accepted the recommendation and dismissed the complaint. 130 N. L. R. B. 1558.

Petitions for reconsideration, filed by the General Counsel and the Union, were granted. Upon reconsideration, the Board adhered to the Trial Examiner's finding that the Company's motive in contracting out its maintenance work was economic rather than antiunion but found nonetheless that the Company's "failure to negotiate with . . . [the Union] concerning its decision to subcontract its maintenance work constituted a violation of Section 8 (a)(5) of the Act." [2] This ruling was based upon the doctrine established in *Town & Country Mfg. Co.*, 136 N. L. R. B. 1022, 1027, enforcement granted, 316 F. 2d 846 (C. A. 5th Cir. 1963), that contracting out work, "albeit for economic reasons, is a matter within the statutory phrase 'other terms and conditions of employment' and is a mandatory subject of collective bargaining within the meaning of Section 8 (a)(5) of the Act."

The Board ordered the Company to reinstitute the maintenance operation previously performed by the employees represented by the Union, to reinstate the employees to their former or substantially equivalent positions with back pay computed from the date of the Board's supplemental decision, and to fulfill its statutory obligation to bargain.

On appeal, the Court of Appeals for the District of Columbia Circuit granted the Board's petition for enforcement. 116 U. S. App. D. C. 198, 322 F. 2d 411. Because of the importance of the issues and because of an alleged

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[2] The Board did not disturb its original holding that the Company had not violated § 8 (a)(1) or § 8 (a)(3), or its holding that the Company had satisfied its obligation to bargain about termination pay.

conflict among the courts of appeals,[3] we granted certiorari limited to a consideration of the following questions:

> "1. Was Petitioner required by the National Labor Relations Act to bargain with a union representing some of its employees about whether to let to an independent contractor for legitimate business reasons the performance of certain operations in which those employees had been engaged?
>
> "3. Was the Board, in a case involving only a refusal to bargain, empowered to order the resumption of operations which had been discontinued for legitimate business reasons and reinstatement with back pay of the individuals formerly employed therein?"

We agree with the Court of Appeals that, on the facts of this case, the "contracting out" of the work previously performed by members of an existing bargaining unit is a subject about which the National Labor Relations Act requires employers and the representatives of their employees to bargain collectively. We also agree with the Court of Appeals that the Board did not exceed its remedial powers in directing the Company to resume its maintenance operations, reinstate the employees with back pay, and bargain with the Union.

I.

Section 8 (a)(5) of the National Labor Relations Act provides that it shall be an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in § 8 (d) as

> "the performance of the mutual obligation of the employer and the representative of the employees

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[3] *Labor Board* v. *Adams Dairy, Inc.*, 322 F. 2d 553 (C. A. 8th Cir. 1963), *post*, p. 644.

> to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

"Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment . . . .' The duty is limited to those subjects, and within that area neither party is legally obligated to yield. *Labor Board* v. *American Ins. Co.*, 343 U. S. 395. As to other matters, however, each party is free to bargain or not to bargain . . . ." *Labor Board* v. *Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342, 349. Because of the limited grant of certiorari, we are concerned here only with whether the subject upon which the employer allegedly refused to bargain—contracting out of plant maintenance work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform—is covered by the phrase "terms and conditions of employment" within the meaning of § 8 (d).

The subject matter of the present dispute is well within the literal meaning of the phrase "terms and conditions of employment." See *Order of Railroad Telegraphers* v. *Chicago & N. W. R. Co.*, 362 U. S. 330. A stipulation with respect to the contracting out of work performed by members of the bargaining unit might appropriately be called a "condition of employment." The words even more plainly cover termination of employment which, as the facts of this case indicate, necessarily results from the contracting out of work performed by members of the established bargaining unit.

The inclusion of "contracting out" within the statutory scope of collective bargaining also seems well designed to effectuate the purposes of the National Labor Relations

Act. One of the primary purposes of the Act is to promote the peaceful settlement of industrial disputes by subjecting labor-management controversies to the mediatory influence of negotiation.[4] The Act was framed with an awareness that refusals to confer and negotiate had been one of the most prolific causes of industrial strife. *Labor Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42–43. To hold, as the Board has done, that contracting out is a mandatory subject of collective bargaining would promote the fundamental purpose of the Act by bringing a problem of vital concern to labor and management within the framework established by Congress as most conducive to industrial peace.

The conclusion that "contracting out" is a statutory subject of collective bargaining is further reinforced by industrial practices in this country. While not determinative, it is appropriate to look to industrial bargaining practices in appraising the propriety of including a particular subject within the scope of mandatory bargaining.[5] *Labor Board* v. *American Nat. Ins. Co.*, 343 U. S. 395, 408. Industrial experience is not only reflective of the interests of labor and management in the subject matter but is also indicative of the amenability of such subjects to the collective bargaining process. Experience illustrates that contracting out in one form or another has been brought, widely and successfully, within the collective bargaining framework.[6] Provisions relating to contracting out exist in numerous collective bargaining

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[4] See declaration of policy set forth in §§ 1 and 101 of the Labor-Management Relations Act, 1947, 61 Stat. 136, 29 U. S. C. §§ 141, 151 (1958 ed.).

[5] See Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389, 405–406 (1950).

[6] See Lunden, Subcontracting Clauses in Major Contracts, Pts. 1, 2, 84 Monthly Lab. Rev. 579, 715 (1961).

agreements,[7] and "[c]ontracting out work is the basis of many grievances; and that type of claim is grist in the mills of the arbitrators." *United Steelworkers* v. *Warrior & Gulf Nav. Co.*, 363 U. S. 574, 584.

The situation here is not unlike that presented in *Local 24, Teamsters Union* v. *Oliver*, 358 U. S. 283, where we held that conditions imposed upon contracting out work to prevent possible curtailment of jobs and the undermining of conditions of employment for members of the bargaining unit constituted a statutory subject of collective bargaining. The issue in that case was whether state antitrust laws could be applied to a provision of a collective bargaining agreement which fixed the minimum rental to be paid by the employer motor carrier who leased vehicles to be driven by their owners rather than the carrier's employees. We held that the agreement was upon a subject matter as to which federal law directed the parties to bargain and hence that state antitrust laws could not be applied to prevent the effectuation of the agreement. We pointed out that the agreement was a

> "direct frontal attack upon a problem thought to threaten the maintenance of the basic wage structure established by the collective bargaining contract. The inadequacy of a rental which means that the owner makes up his excess costs from his driver's wages not only clearly bears a close relation to labor's efforts to improve working conditions but is in fact of vital concern to the carrier's employed drivers; an inadequate rental might mean the progressive cur-

[7] A Department of Labor study analyzed 1,687 collective bargaining agreements, which applied to approximately 7,500,000 workers (about one-half of the estimated work force covered by collective bargaining agreements). Among the agreements studied, approximately one-fourth (378) contained some form of a limitation on subcontracting. Lunden, *supra*, at 581.

> tailment of jobs through withdrawal of more and more carrier-owned vehicles from service." *Id.*, at 294.

Thus, we concluded that such a matter is a subject of mandatory bargaining under § 8 (d). *Id.*, at 294–295. The only difference between that case and the one at hand is that the work of the employees in the bargaining unit was let out piecemeal in *Oliver*, whereas here the work of the entire unit has been contracted out. In reaching the conclusion that the subject matter in *Oliver* was a mandatory subject of collective bargaining, we cited with approval *Timken Roller Bearing Co.*, 70 N. L. R. B. 500, 518, *enforcement denied on other grounds*, 161 F. 2d 949 (C. A. 6th Cir. 1947), where the Board in a situation factually similar to the present case held that §§ 8 (a)(5) and 9 (a) required the employer to bargain about contracting out work then being performed by members of the bargaining unit.

The facts of the present case illustrate the propriety of submitting the dispute to collective negotiation. The Company's decision to contract out the maintenance work did not alter the Company's basic operation. The maintenance work still had to be performed in the plant. No capital investment was contemplated; the Company merely replaced existing employees with those of an independent contractor to do the same work under similar conditions of employment. Therefore, to require the employer to bargain about the matter would not significantly abridge his freedom to manage the business.

The Company was concerned with the high cost of its maintenance operation. It was induced to contract out the work by assurances from independent contractors that economies could be derived by reducing the work force, decreasing fringe benefits, and eliminating overtime payments. These have long been regarded as matters

peculiarly suitable for resolution within the collective bargaining framework, and industrial experience demonstrates that collective negotiation has been highly successful in achieving peaceful accommodation of the conflicting interests. Yet, it is contended that when an employer can effect cost savings in these respects by contracting the work out, there is no need to attempt to achieve similar economies through negotiation with existing employees or to provide them with an opportunity to negotiate a mutually acceptable alternative. The short answer is that, although it is not possible to say whether a satisfactory solution could be reached, national labor policy is founded upon the congressional determination that the chances are good enough to warrant subjecting such issues to the process of collective negotiation.

The appropriateness of the collective bargaining process for resolving such issues was apparently recognized by the Company. In explaining its decision to contract out the maintenance work, the Company pointed out that in the same plant other unions "had joined hands with management in an effort to bring about an economical and efficient operation," but "we had not been able to attain that in our discussions with this particular Local." Accordingly, based on past bargaining experience with this union, the Company unilaterally contracted out the work. While "the Act does not encourage a party to engage in fruitless marathon discussions at the expense of frank statement and support of his position," *Labor Board* v. *American Nat. Ins. Co.*, 343 U. S. 395, 404, it at least demands that the issue be submitted to the mediatory influence of collective negotiations. As the Court of Appeals pointed out, "[i]t is not necessary that it be likely or probable that the union will yield or supply a feasible solution but rather that the union be afforded an opportunity to meet management's legitimate complaints that its maintenance was unduly costly."

We are thus not expanding the scope of mandatory bargaining to hold, as we do now, that the type of "contracting out" involved in this case—the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment—is a statutory subject of collective bargaining under § 8 (d). Our decision need not and does not encompass other forms of "contracting out" or "subcontracting" which arise daily in our complex economy.[8]

II.

The only question remaining is whether, upon a finding that the Company had refused to bargain about a matter which is a statutory subject of collective bargaining, the Board was empowered to order the resumption of maintenance operations and reinstatement with back pay. We believe that it was so empowered.

Section 10 (c) provides that the Board, upon a finding that an unfair labor practice has been committed,

> "shall issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . ." [9]

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[8] As the Solicitor General points out, the terms "contracting out" and "subcontracting" have no precise meaning. They are used to describe a variety of business arrangements altogether different from that involved in this case. For a discussion of the various types of "contracting out" or "subcontracting" arrangements, see Brief for Respondent, pp. 13–17; Brief for Electronic Industries Association as *amicus curiae,* pp. 5–10.

[9] Section 10 (c) provides in pertinent part: "If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person

That section "charges the Board with the task of devising remedies to effectuate the policies of the Act." *Labor Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346. The Board's power is a broad discretionary one, subject to limited judicial review. *Ibid.* "[T]he relation of remedy to policy is peculiarly a matter for administrative competence . . . ." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 194. "In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience." *Labor Board* v. *Seven-Up Bottling Co.*, 344 U. S. 344, 346. The Board's order will not be disturbed "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Elec. & Power Co.* v. *Labor Board*, 319 U. S. 533, 540. Such a showing has not been made in this case.

There has been no showing that the Board's order restoring the *status quo ante* to insure meaningful bargaining is not well designed to promote the policies of the Act. Nor is there evidence which would justify disturbing the Board's conclusion that the order would not impose an undue or unfair burden on the Company.[10]

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an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . . . No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ."

[10] The Board stated: "We do not believe that requirement [restoring the *status quo ante*] imposes an undue or unfair burden on Respondent. The record shows that the maintenance operation is still being performed in much the same manner as it was prior to the subcontracting arrangement. Respondent has a continuing need for the services of maintenance employees; and Respondent's subcontract is terminable at any time upon 60 days' notice." 138 N. L. R. B., at 555, n. 19.

It is argued, nonetheless, that the award exceeds the Board's powers under § 10 (c) in that it infringes the provision that "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. . . ." The legislative history of that provision indicates that it was designed to preclude the Board from reinstating an individual who had been discharged because of misconduct.[11] There is no indication, however, that it was designed to curtail the Board's power in fashioning remedies when the loss of employment stems directly from an unfair labor practice as in the case at hand.

The judgment of the Court of Appeals is

Affirmed.

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

MR. JUSTICE STEWART, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE HARLAN join, concurring.

Viewed broadly, the question before us stirs large issues. The Court purports to limit its decision to "the

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[11] The House Report states that the provision was "intended to put an end to the belief, now widely held and certainly justified by the Board's decisions, that engaging in union activities carries with it a license to loaf, wander about the plants, refuse to work, waste time, break rules, and engage in incivilities and other disorders and misconduct." H. R. Rep. No. 245, 80th Cong., 1st Sess., 42 (1947). The Conference Report notes that under § 10 (c) "employees who are discharged or suspended for interfering with other employees at work, whether or not in order to transact union business, or for engaging in activities, whether or not union activities, contrary to shop rules, or for Communist activities, or for other cause [interfering with war production] . . . will not be entitled to reinstatement." H. R. Conf. Rep. No. 510, 80th Cong., 1st Sess., 55 (1947).

facts of this case." But the Court's opinion radiates implications of such disturbing breadth that I am persuaded to file this separate statement of my own views.

Section 8 (a)(5) of the National Labor Relations Act, as amended, makes it an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." Collective bargaining is defined in § 8 (d) as:

> "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

The question posed is whether the particular decision sought to be made unilaterally by the employer in this case is a subject of mandatory collective bargaining within the statutory phrase "terms and conditions of employment." That is all the Court decides.[1] The Court most assuredly does not decide that every managerial decision which necessarily terminates an individual's employment is subject to the duty to bargain. Nor does the Court decide that subcontracting decisions are as a general matter subject to that duty. The Court holds no more than that this employer's decision to subcontract this work, involving "the replacement of employees in the existing bargaining unit with those of an independent contractor to do the same work under similar conditions of employment," is subject to the duty to bargain collectively. Within the narrow limitations implicit in the specific facts of this case, I agree with the Court's decision.

Fibreboard had performed its maintenance work at its Emeryville manufacturing plant through its own em-

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[1] Except for the quite separate remedy issue discussed in Part II of the Court's opinion.

ployees, who were represented by a local of the United Steelworkers. Estimating that some $225,000 could be saved annually by dispensing with internal maintenance, the company contracted out this work, informing the union that there would be no point in negotiating a new contract since the employees in the bargaining unit had been replaced by employees of the independent contractor, Fluor. Maintenance work continued to be performed within the plant, with the work ultimately supervised by the company's officials and "functioning as an integral part" of the company. Fluor was paid the cost of operations plus $2,250 monthly. The savings in costs anticipated from the arrangement derived largely from the elimination of fringe benefits, adjustments in work scheduling, enforcement of stricter work quotas, and close supervision of the new personnel. Under the cost-plus arrangement, Fibreboard remained responsible for whatever maintenance costs were actually incurred. On these facts, I would agree that the employer had a duty to bargain collectively concerning the replacement of his internal maintenance staff by employees of the independent contractor.

The basic question is whether the employer failed to "confer in good faith with respect to . . . terms and conditions of employment" in unilaterally deciding to subcontract this work. This question goes to the scope of the employer's duty in the absence of a collective bargaining agreement.[2] It is true, as the Court's opinion

[2] There was a time when one might have taken the view that the National Labor Relations Act gave the Board and the courts no power to determine the subjects about which the parties must bargain—a view expressed by Senator Walsh when he said that public concern ends at the bargaining room door. 79 Cong. Rec. 7659 (1935). See Cox and Dunlop, Regulation of Collective Bargaining by the National Labor Relations Board, 63 Harv. L. Rev. 389. But too much law has been built upon a contrary assumption for this view any longer to prevail, and I question neither the power of the Court to decide this issue nor the propriety of its doing so.

points out, that industrial experience may be useful in determining the proper scope of the duty to bargain. See *Labor Board* v. *American Nat. Ins. Co.*, 343 U. S. 395, 408. But data showing that many labor contracts refer to subcontracting or that subcontracting grievances are frequently referred to arbitrators under collective bargaining agreements, while not wholly irrelevant, do not have much real bearing, for such data may indicate no more than that the parties have often considered it mutually advantageous to bargain over these issues on a permissive basis. In any event, the ultimate question is the scope of the duty to bargain defined by the statutory language.

It is important to note that the words of the statute are words of limitation. The National Labor Relations Act does not say that the employer and employees are bound to confer upon any subject which interests either of them; the specification of wages, hours, and other terms and conditions of employment defines a limited category of issues subject to compulsory bargaining. The limiting purpose of the statute's language is made clear by the legislative history of the present Act. As originally passed, the Wagner Act contained no definition of the duty to bargain collectively.[3] In the 1947 revision of the Act, the House bill contained a detailed but limited list of subjects of the duty to bargain, excluding all others.[4] In conference the present language was substituted for the House's detailed specification. While the language thus incorporated in the 1947 legislation as

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[3] However, it did recognize that the party designated by a majority of employees in a bargaining unit shall be their exclusive representative "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." § 9 (a).

[4] H. R. 3020, 80th Cong., 1st Sess., § 2 (11) (B) (vi) (1947), in I Legislative History of the Labor Management Relations Act, 1947, at 166–167 (1948). (Hereinafter LMRA.)

enacted is not so stringent as that contained in the House bill, it nonetheless adopts the same basic approach in seeking to define a limited class of bargainable issues.[5]

The phrase "conditions of employment" is no doubt susceptible of diverse interpretations. At the extreme, the phrase could be construed to apply to any subject which is insisted upon as a prerequisite for continued employment. Such an interpretation, which would in effect place the compulsion of the Board behind any and all bargaining demands, would be contrary to the intent of Congress, as reflected in this legislative history. Yet there are passages in the Court's opinion today which suggest just such an expansive interpretation, for the Court's opinion seems to imply that any issue which may reasonably divide an employer and his employees must be the subject of compulsory collective bargaining.[6]

Only a narrower concept of "conditions of employment" will serve the statutory purpose of delineating a limited category of issues which are subject to the duty to bargain collectively. Seeking to effect this purpose, at least seven circuits have interpreted the statutory language to exclude various kinds of management decisions from the

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[5] The conference report accompanying the bill said that although this section "did not prescribe a purely objective test of what constituted collective bargaining, as did the House bill, [it] had to a very substantial extent the same effect . . . ." I LMRA 538. Though this statement refers to the entire section, it is clear from the context that the focus of attention was upon the procedures of collective bargaining rather than its scope.

[6] The opinion of the Court seems to assume that the only alternative to compulsory collective bargaining is unremitting economic warfare. But to exclude subjects from the ambit of compulsory collective bargaining does not preclude the parties from seeking negotiations about them on a permissive basis. And there are limitations upon the use of economic force to compel concession upon subjects which are only permissively bargainable. *Labor Board* v. *Wooster Div. of Borg-Warner Corp.*, 356 U. S. 342.

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scope of the duty to bargain.[7] In common parlance, the conditions of a person's employment are most obviously the various physical dimensions of his working environment. What one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment. There are other less tangible but no less important characteristics of a person's employment which might also be deemed "conditions"—most prominently the characteristic involved in this case, the security of one's employment. On one view of the matter, it can be argued that the question whether there is to be a job is not a condition of employment; the question is not one of imposing conditions on employment, but the more fundamental question whether there is to be employment at all. However, it is clear that the Board and the courts have on numerous occasions recognized that union demands for provisions limiting an employer's power to discharge employees are mandatorily bargainable. Thus, freedom from discriminatory discharge,[8] seniority rights,[9] the imposition of a compulsory retirement age,[10] have been recognized as subjects upon which an employer must bargain, although all of these concern the very existence of the employment itself.

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[7] *Labor Board* v. *Adams Dairy*, 322 F. 2d 553 (C. A. 8th Cir. 1963); *Labor Board* v. *New England Web*, 309 F. 2d 696 (C. A. 1st Cir. 1962); *Labor Board* v. *Rapid Bindery*, 293 F. 2d 170 (C. A. 2d Cir. 1961); *Jays Foods* v. *Labor Board*, 292 F. 2d 317 (C. A. 7th Cir. 1961); *Labor Board* v. *Lassing*, 284 F. 2d 781 (C. A. 6th Cir. 1960); *Mount Hope Finishing Co.* v. *Labor Board*, 211 F. 2d 365 (C. A. 4th Cir. 1954); *Labor Board* v. *Houston Chronicle*, 211 F. 2d 848 (C. A. 5th Cir. 1954).

[8] *Labor Board* v. *Bachelder*, 120 F. 2d 574 (C. A. 7th Cir. 1941). See also *National Licorice Co.* v. *Labor Board*, 309 U. S. 350.

[9] *Labor Board* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004 (C. A. 3d Cir. 1941).

[10] *Inland Steel Co.* v. *Labor Board*, 170 F. 2d 247 (C. A. 7th Cir. 1948).

While employment security has thus properly been recognized in various circumstances as a condition of employment, it surely does not follow that every decision which may affect job security is a subject of compulsory collective bargaining. Many decisions made by management affect the job security of employees. Decisions concerning the volume and kind of advertising expenditures, product design, the manner of financing, and sales, all may bear upon the security of the workers' jobs. Yet it is hardly conceivable that such decisions so involve "conditions of employment" that they must be negotiated with the employees' bargaining representative.

In many of these areas the impact of a particular management decision upon job security may be extremely indirect and uncertain, and this alone may be sufficient reason to conclude that such decisions are not "with respect to . . . conditions of employment." Yet there are other areas where decisions by management may quite clearly imperil job security, or indeed terminate employment entirely. An enterprise may decide to invest in labor-saving machinery. Another may resolve to liquidate its assets and go out of business. Nothing the Court holds today should be understood as imposing a duty to bargain collectively regarding such managerial decisions, which lie at the core of entrepreneurial control. Decisions concerning the commitment of investment capital and the basic scope of the enterprise are not in themselves primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment. If, as I think clear, the purpose of § 8 (d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from that area.

Applying these concepts to the case at hand, I do not believe that an employer's subcontracting practices are, as a general matter, in themselves conditions of employment. Upon any definition of the statutory terms short of the most expansive, such practices are not conditions—tangible or intangible—of any person's employment.[11] The question remains whether this particular kind of subcontracting decision comes within the employer's duty to bargain. On the facts of this case, I join the Court's judgment, because all that is involved is the substitution of one group of workers for another to perform the same task in the same plant under the ultimate control of the same employer. The question whether the employer may discharge one group of workers and substitute another for them is closely analogous to many other situations within the traditional framework of collective bargaining. Compulsory retirement, layoffs according to seniority, assignment of work among potentially eligible groups within the plant—all involve similar questions of discharge and work assignment, and all have been recognized as subjects of compulsory collective bargaining.[12]

Analytically, this case is not far from that which would be presented if the employer had merely discharged all its employees and replaced them with other workers willing to work on the same job in the same plant without the various fringe benefits so costly to the company. While such a situation might well be considered a § 8 (a)(3) violation upon a finding that the employer discriminated against the discharged employees because of

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[11] At least four circuits have held that subcontracting decisions are not subject to the duty to bargain. *Labor Board* v. *Adams Dairy*, 322 F. 2d 553 (C. A. 8th Cir. 1963); *Jays Foods* v. *Labor Board*, 292 F. 2d 317 (C. A. 7th Cir. 1961); *Labor Board* v. *Lassing*, 284 F. 2d 781 (C. A. 6th Cir. 1960); *Labor Board* v. *Houston Chronicle*, 211 F. 2d 848 (C. A. 5th Cir. 1954).

[12] See notes 7, 8, and 9, *supra*.

their union affiliation, it would be equally possible to regard the employer's action as a unilateral act frustrating negotiation on the underlying questions of work scheduling and remuneration, and so an evasion of its duty to bargain on these questions, which are concededly subject to compulsory collective bargaining.[13] Similarly, had the employer in this case chosen to bargain with the union about the proposed subcontract, negotiations would have inevitably turned to the underlying questions of cost, which prompted the subcontracting. Insofar as the employer frustrated collective bargaining with respect to these concededly bargaining issues by its unilateral act of subcontracting this work, it can properly be found to have violated its statutory duty under § 8 (a)(5).

This kind of subcontracting falls short of such larger entrepreneurial questions as what shall be produced, how capital shall be invested in fixed assets, or what the basic scope of the enterprise shall be. In my view, the Court's decision in this case has nothing to do with whether any aspects of those larger issues could under any circumstances be considered subjects of compulsory collective bargaining under the present law.

I am fully aware that in this era of automation and onrushing technological change, no problems in the domestic economy are of greater concern than those involving job security and employment stability. Because of the potentially cruel impact upon the lives and fortunes of the working men and women of the Nation, these problems have understandably engaged the solicitous attention of government, of responsible private business, and particularly of organized labor. It is possible that in meeting these problems Congress may eventually decide to give organized labor or government a far heavier hand

[13] *Labor Board* v. *United States Air Conditioning Corp.*, 302 F. 2d 280 (C. A. 1st Cir. 1962); *Labor Board* v. *Tak Trak, Inc.*, 293 F. 2d 270 (C. A. 9th Cir. 1961). Cf. *Labor Board* v. *Katz*, 369 U. S. 736.

in controlling what until now have been considered the prerogatives of private business management. That path would mark a sharp departure from the traditional principles of a free enterprise economy. Whether we should follow it is, within constitutional limitations, for Congress to choose. But it is a path which Congress certainly did not choose when it enacted the Taft-Hartley Act.

FARMER *v.* ARABIAN AMERICAN OIL CO.

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

No. 32. Argued November 9–10, 1964.—
Decided December 14, 1964.*

A doctor formerly employed by an oil company to work in Saudi Arabia sued for breach of his employment contract. The jury failed to agree and the District Judge granted the company's motion for a directed verdict. Costs of more than $6,600 were taxed against the doctor, including transportation expenses of witnesses from Arabia and daily transcripts requested by company counsel. The Court of Appeals reversed, on the ground that a verdict should not have been directed, and remanded for a new trial. On remand the case was dismissed because of the doctor's inability to post a $6,000 bond as security for costs. The Court of Appeals again reversed, and indicated that the costs already taxed were exorbitant. At a second trial the jury found for the company. The clerk taxed costs at almost $12,000 for the two trials, which the second District Judge reduced by over 90%, eliminating the expenses of the overseas witnesses and the cost of the daily transcripts. The Court of Appeals upheld the costs for the second trial, but reversed as to costs for the first trial, although reducing the amount, holding that the second judge failed to give proper deference to the first judge's taxation of costs. *Held:*

1. The 100-mile subpoena provision in Rule 45 (e) of the Federal Rules of Civil Procedure does not completely bar a district court from taxing as costs expenses of transporting witnesses more than 100 miles, for Rule 54 (d) does leave the district court discretion to tax such expenses. Pp. 231–232.

2. It was not error for the District Judge at the end of the second trial when judgment was finally entered to determine costs for both trials, the first judgment and taxation of costs having been upset by the reversal of the trial judgment. Pp. 232–233.

3. The District Judge's discretion was appropriately exercised in his taxation of costs for both trials. Pp. 233–236.

324 F. 2d 359, reversed.

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*Together with No. 33, *Arabian American Oil Co.* v. *Farmer,* also on certiorari to the same court.

Kalman I. Nulman argued the cause for petitioner in No. 32 and respondent in No. 33. With him on the briefs was *William V. Homans.*

Chester Bordeau argued the cause for respondent in No. 32 and petitioner in No. 33. With him on the briefs were *Lowell Wadmond, William L. Owen* and *Thomas F. Barry.*

Mr. Justice Black delivered the opinion of the Court.

The questions presented in this case relate to the power and discretion of a United States district court to tax as costs against the loser in a civil lawsuit expenses incurred by the winner in carrying on the litigation.

Howard Farmer, a physician from Texas specializing in ophthalmology, started this litigation against the Arabian American Oil Company in a New York state court, claiming $4,000 damages[1] for breach of an employment contract. The complaint alleged that in April 1955 the company entered into an agreement to employ Farmer as an ophthalmologist in Saudi Arabia at an annual salary of $16,000 plus a $4,000 living allowance per year, so long as the company continued its oil-well operations there, and that although he began work and properly performed his duties, the company wrongfully discharged him in March 1956. On the company's motion the case was removed to federal court because of diversity. The company admitted that it had employed Farmer but defended on the grounds that the discharge was not wrongful both because he had been employed at will rather than for a definite term, and because he had been discharged for good cause. At the trial Farmer attempted to show that the company discharged him because he had

[1] By two successive amendments made several years later, the complaint was amended to claim, first, $59,683, and finally, $160,000.

found that a number of Americans employed by the company in Arabia had contracted trachoma, a much dreaded tropical eye disease which may lead to blindness, and that although urged by the company's medical staff to falsify or suppress his findings, he had refused to do so. The company's evidence tended to disprove this charge and to show that Farmer had been discharged because he had operated on a young Arabian boy's eye, without first having received and examined a urinalysis and blood test report. This the company alleged to be in violation of a written company rule and standard surgical practice. Such tests had in fact been completed before Dr. Farmer performed the operation, but whether he had known of the tests or their results, and whether there actually had been a company rule requiring that he have the test results were in sharp dispute.

The company, in order to refute Farmer's charge, brought three witnesses from Saudi Arabia to New York to testify in support of its version of the dispute. The jury failed to agree, after which District Judge Palmieri granted the company's motion for a directed verdict, 176 F. Supp. 45, and approved the clerk's taxation of costs against Farmer in the amount of $6,601.08, which included among other things transportation expenses for the witnesses from Arabia and costs of daily stenographic transcripts of the trial record furnished to the company's lawyers at their request. Holding that a verdict should not have been directed, the Court of Appeals reversed and remanded the case for a new trial, thereby upsetting the judgment and the taxation of costs. 277 F. 2d 46.

On remand to the District Court the company obtained an order directing Farmer to put up security for costs in the sum of $6,000. Because Farmer was unable to post so large a bond, Judge MacMahon dismissed the case. The Court of Appeals reversed in an opinion that strongly

indicated its belief that the costs already taxed were exorbitant and that to require Farmer to give the bond would "for all practical purposes" deny him his day in court. 285 F. 2d 720. On a second trial, this time before District Judge Weinfeld, the jury found for the company and no appeal was taken. The clerk then taxed $11,900.12 against Farmer as the aggregate cost of both trials, but on review Judge Weinfeld found these costs "staggering" for so uncomplicated a case and reduced them to $831.60. In making this reduction, Judge Weinfeld lowered the cost bill approved by Judge Palmieri in the first trial from $6,601.08 to $496.05. He did this chiefly by eliminating the transportation expenses of the witnesses from Arabia and the costs of supplying the company's counsel with overnight transcripts of the daily trial proceedings. Judge Weinfeld also refused to require Farmer to reimburse the company for its similar expenses in the second trial. 31 F. R. D. 191. Sitting *en banc*, the Court of Appeals, by a vote of 5–4, affirmed Judge Weinfeld's cost taxation for the second trial, but held that he had failed to give proper deference to Judge Palmieri's taxation of costs for the first trial and so reversed that part of his order. The Court of Appeals itself, however, directed that Judge Palmieri's cost allowance be reduced by $2,064 for transportation of two of the witnesses from Arabia, who had "occupied otherwise empty space in company planes on regularly scheduled flights to and from Saudi Arabia, so that as to them there was no actual travel expense incurred by the company and none should have been allowed." 324 F. 2d 359, 364.

Farmer petitioned for certiorari to review the Court of Appeals' refusal to affirm Judge Weinfeld's taxation of costs. The company sought certiorari to review those parts of the Court of Appeals' judgment refusing to allow all costs taxed by Judge Palmieri on the first trial and

refusing to allow transportation costs incurred in transporting its witnesses from Arabia for the second trial. We granted both petitions, 376 U. S. 942. For reasons to be stated, which are not wholly the grounds relied on by Farmer, we agree with him that Judge Weinfeld's order should have been upheld in its entirety.

I.

We deal first with Farmer's contention that the District Court was wholly without power to tax costs against him to reimburse the company for expenses incurred in bringing the witnesses from Arabia to this country. His argument runs this way. It has long been the law in this country, as now set out in Rule 45 (e) of the Federal Rules of Civil Procedure,[2] that, with exceptions not here relevant, subpoenas requiring the attendance of witnesses at a trial cannot be served outside the judicial district more than 100 miles from the place of trial. Many decisions of district courts and courts of appeals have held that since witnesses cannot be compelled under this rule to travel more than 100 miles, a party who persuades them to do so by paying their transportation expenses cannot have those expenses taxed as costs against his adversary.[3] This was the view of three of the dissenting judges below. 324 F. 2d 359, 365. The majority, however, while recognizing that the great bulk of judicial authority supports the 100-mile rule, neverthe-

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[2] Rule 45 (e) provides in part that:

"A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the district, or at any place without the district that is within 100 miles of the place of the hearing or trial specified in the subpoena . . . ."

[3] See cases cited in the opinion of the court below, 324 F. 2d, at 362, and the dissent, 324 F. 2d, at 366, as well as cases collected in 28 U. S. C. A. § 1821, n. 4, and 28 Fed. Code Ann. § 1821.

less held that district courts do have discretionary power to tax such costs under 28 U. S. C. § 1920 (3) (1958 ed.), which provides that "[a] judge or clerk . . . may tax as costs . . . [f]ees and disbursements for . . . witnesses . . . ." The majority also thought the prior 100-mile rule had been undercut by the 1949 congressional amendment to 28 U. S. C. § 1821 (1958 ed.), which provides that "witnesses who are required to travel . . . to and from the continental United States, shall be entitled to the actual expenses of travel . . . ."

We cannot accept either the extreme position of the company that the old 100-mile rule has no vitality for any purpose or Farmer's argument that a federal district court can never under any circumstances tax as costs expenses for transporting witnesses more than 100 miles. In this case, however, where taxation of such expenses is being denied, we need not set out the specific circumstances under which such costs can be taxed nor mark precisely the limits of a district court's power to tax them. It is sufficient here to point to Federal Rule of Civil Procedure 54 (d), which provides that "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." While this Rule could be far more definite as to what "costs shall be allowed," the words "unless the court otherwise directs" quite plainly vest some power in the court to allow some "costs." We therefore hold that Judge Weinfeld was correct in treating this case as an appeal to his discretion.

II.

The Court of Appeals held, and the company argues here, that, even if Judge Weinfeld did have discretion, it was nevertheless error for him to undertake "an independent determination *de novo* of the costs allowed at

a prior trial." 324 F. 2d, at 364. We cannot agree. Since Judge Palmieri's judgment and his taxation of costs were both upset by the Court of Appeals' reversal of the first trial judgment, it became the duty of the clerk to tax costs for both trials only when judgment was finally entered for the company. The fact that the clerk accepted Judge Palmieri's former cost taxation put no duty on Judge Weinfeld to accept the same figures. On review of the clerk's assessment, it was Judge Weinfeld's responsibility to decide the cost question himself, and so far as an exercise of discretion was called for, it was then *his* discretion and not Judge Palmieri's that had to control. True, any judge in a like situation would almost surely hope to agree with his brother judge's prior opinion, but we cannot accept the idea that he is compelled to do so. Judge Weinfeld was aware of intervening circumstances of which Judge Palmieri could not have known, as for example the Court of Appeals' two opinions following the first trial, one of which mentioned cost questions. And Judge Weinfeld in lowering the prior assessment reached a result not greatly different from that of the Court of Appeals, which itself reduced Judge Palmieri's cost allowance more than $2,000.

III.

Finally, we think that Judge Weinfeld's taxation of costs as to both trials was an appropriate exercise of his discretion and should have been allowed to stand. The two disputed expenses that are most important in principle and largest in amount are (a) approximately $3,000 for stenographers' fees in supplying company counsel with daily transcripts of the trial, and (b) approximately $7,000 for expenses incurred in transporting witnesses from and back to Arabia.

(a) In denying the allowance for daily transcripts, Judge Weinfeld pointed out that while these might have

added to the convenience of counsel for the company, and perhaps even have made the task of the trial judges easier, the transcripts were by no means indispensable. The judge's conclusion was based on his personal knowledge that this was not a complicated or extended trial where lawyers were required to submit briefs and proposed findings. As to the company's argument that the transcript costs were justified because the jury read them, Judge Weinfeld correctly pointed out that the same result could have been accomplished without this expense by following the common practice of calling on the stenographer to read from his notes. We think Judge Weinfeld's refusal to make Farmer pay for these overnight transcripts, which were ordered by the company's counsel, was proper and should not have been disturbed by the Court of Appeals.

(b) Judge Weinfeld "in the exercise of discretion" refused to tax the actual transportation expenses of the witnesses from Arabia, limiting those costs to the per diem fees fixed by law and to expenses for travel for a distance not to exceed 100 miles to and from the courthouse. He undoubtedly was influenced to some extent by the long-standing 100-mile rule. That rule, we think, is a proper and necessary consideration in exercising discretion in this field. The century-and-a-half-old special statutory provision [4] relating to service of subpoenas more than 100 miles from the courthouse is designed not only to protect witnesses from the harassment of long, tiresome trips but also, in line with our national policy, to minimize the costs of litigation, which policy is strongly emphasized in the Federal Rules of Civil Procedure.[5] Here the company

[4] 1 Stat. 88 (1789); 1 Stat. 335 (1793).

[5] See, *e. g.*, Rule 1 of the Federal Rules of Civil Procedure which provides that all the Rules "shall be construed to secure the just, speedy, and *inexpensive* determination of every action." (Emphasis supplied.)

on its own, without prior notice to the court, brought its foreign witnesses to court at its own expense. With reference to this, Judge Weinfeld said:

> "Upon an appropriate motion, the means of obtaining the testimony of the witness would have rested with the Court which, in its discretion, could have imposed conditions with respect to which party initially was to bear the expense and provided for its ultimate taxation in favor of the prevailing party." 31 F. R. D. 191, 195.

Having failed to bring this problem to the court's attention in any manner, the company went ahead and piled up what Judge Weinfeld quite understandably referred to as this "huge bill of costs." We think that under the circumstances, Judge Weinfeld could not be charged with any improper exercise of the discretion vested in him by Rule 54 (d). We do not read that Rule as giving district judges unrestrained discretion to tax costs to reimburse a winning litigant for every expense he has seen fit to incur in the conduct of his case. Items proposed by winning parties as costs should always be given careful scrutiny. Any other practice would be too great a movement in the direction of some systems of jurisprudence that are willing, if not indeed anxious, to allow litigation costs so high as to discourage litigants from bringing lawsuits, no matter how meritorious they might in good faith believe their claims to be. Therefore, the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute. Such a restrained administration of the Rule is in harmony with our national policy of reducing insofar as possible the burdensome cost of litigation. We therefore hold that Judge Weinfeld's order assessing only appropriate expenses should have been

affirmed by the Court of Appeals. That court's judgment is accordingly reversed and the judgment of the District Court is affirmed. *It is so ordered.*

MR. JUSTICE GOLDBERG, concurring in the result.

I agree with the Court that Judge Weinfeld did not abuse his discretion in limiting the costs for transcripts in both trials. The issues, as Judge Weinfeld properly found, were not extraordinarily complicated nor were the trials of great length, and Judge Weinfeld's decision that much of this expense was not really necessary seems to me entirely correct, let alone not so erroneous as to constitute an abuse of discretion. I likewise agree with the Court that it was Judge Weinfeld's responsibility to decide the cost question and that he was not compelled to agree with Judge Palmieri's prior opinion which was set aside by the Court of Appeals' reversal of the first trial judgment. Also, if I believed that Judge Weinfeld had discretion to tax costs for travel beyond the "100-mile limit," I would agree that he did not abuse his discretion in reducing the travel allowances of the defendant's witnesses to the equivalent of mileage for 100 miles.

But I do not agree that the 100-mile limit is a matter for even the narrow discretion which the Court would allow the lower federal courts to exercise. I would not depart from the strong precedents and long-continued custom that the 100-mile rule is a limitation to be uniformly observed and not to be departed from in taxing costs.

Judges Smith, Clark, and Hays, dissenting in the Court of Appeals on this point, have stated reasons which to me are both persuasive and compelling. Judge Smith succinctly summarized the rationale of the dissenters in stating that the decision of the majority of the Court of Appeals

> "not only breaks with the overwhelming weight of authority, and creates a different rule for costs in

> civil cases from that in admiralty, but also, as the majority indeed appears to admit, abandons the traditional scheme of costs in American courts to turn in the direction of the English practice of making the unsuccessful litigant pay his opponent's litigation expense as well as his own. It has not been accident that the American litigant must bear his own cost of counsel and other trial expense save for minimal court costs, but a deliberate choice to ensure that access to the courts be not effectively denied those of moderate means." 324 F. 2d 359, 365.

No undue burden is imposed upon a litigant by the American rule, for depositions may be taken of witnesses who live outside the district where a case is pending. If the litigant feels that the personal appearance in court of such a witness is necessary, it is reasonable that he bear the cost involved.

That a discretionary application of the 100-mile rule violates other sound policy is shown by this very case. Two able and experienced District Court Judges applying discretion came to opposite results in the application of the rule; a learned Court of Appeals divided 5 to 4 on this issue. I fear that, in place of the certainty and uniformity of treatment of this important cost item, which has heretofore prevailed throughout the federal system, the opinion of the Court will spawn considerable litigation seeking review of the discretion which the Court now holds is vested in the lower courts. This type of litigation in itself is both time consuming and expensive to the parties and will further add to the burdens of litigation, which even under the traditional 100-mile rule were heavy. Moreover, it will unduly prolong litigation, for appeals over costs may be decided well after a final judgment has been entered.

The fact is that the defendant, in all probability, would not have seriously raised this issue, in light of the uniform

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authority against its position, were it not for the enactment of the proviso added in 1949 to 28 U. S. C. § 1821 (1958 ed.). But, as the dissenting judges demonstrated, this proviso has nothing to do with "the eventual recovery of . . . fees as costs by the prevailing party." 324 F. 2d, at 367. It was enacted at the request of the Attorney General to obtain authority to pay the travel expenses of witnesses at the lowest first-class rate so that their attendance could be obtained without financial sacrifice on their part. S. Rep. No. 187, 81st Cong., 1st Sess. Furthermore, it is doubtful whether this statute applies to foreign travel at all since it seems on its face to be limited to travel between the Territories and possessions of the United States and between the continental United States and its Territories and possessions. Finally, since the word "required" is used in the statute, and since the statute's proponent was the Attorney General, it is susceptible of the interpretation that, even if deemed applicable to witnesses coming from abroad, it is limited to those witnesses who are subject to subpoena in the two situations provided in 28 U. S. C. § 1783 (1958 ed.).[1]

Moreover, Federal Rule of Civil Procedure 54 (d) lends no support to this Court's conclusion. That Rule provides that "Except when express provision therefor is made either in a statute of the United States or in these

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[1] 28 U. S. C. § 1783 (a) (1958 ed.) provides:

"(a) A court of the United States may subpoena, for appearance before it, a citizen or resident of the United States who:

"(1) Has been personally notified in a foreign country to appear before a court thereof to testify pursuant to letters rogatory issued by such court of the United States, and who has failed to appear or has failed to answer any question which he would be required to answer were he being examined before such court of the United States; or

"(2) is beyond the jurisdiction of the United States and whose testimony in a criminal proceeding is desired by the Attorney General."

rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." In light of the uniform application of the 100-mile limitation both before and after the adoption of 54 (d), known to those charged with framing and amending the Rules, its reference to "costs" can only be interpreted as referring to those traditional court costs, such as the cost of providing transcripts or travel costs limited by the 100-mile rule, normally awarded to a winning litigant.[2]

For these reasons, I would adhere to the traditional formulation of the rule as set forth by the Ninth Circuit that the "mileage allowable should be that which was traveled *within* the district, *or* actual mileage traveled in and out of the district up to 100 miles, whichever is the greater." *Kemart Corp.* v. *Printing Arts Research Laboratories, Inc.*, 232 F. 2d 897, 904.

Even the narrow decision of the Court today, in the words of Judge Clark, dissenting in this case, "represents an approach to the English system, never accepted by us because of our conviction that it 'favored the wealthy and unduly penalized the losing party.' " 324 F. 2d, at 370.

Judge Learned Hand once properly observed: "After now some dozen years of experience I must say that as a litigant I should dread a law suit beyond almost anything else short of sickness and death." [3]

I would not intensify that dread.

MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, dissenting.

The only possible justification for bringing this case here was to settle the question of whether the 100-mile

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[2] Authorities on the rules such as Professor Moore approve the 100-mile rule and do not intimate that it departs in any way from the letter or spirit of Rule 54 (d). 6 Moore, Federal Practice, 1362–1363.

[3] Address of Learned Hand, 3 Association of the Bar of the City of New York, Lectures on Legal Topics, 105 (1926).

subpoena rule deprives a district court of power to tax as costs the traveling expenses of witnesses reasonably brought by the prevailing litigant from places beyond that distance. The Court, however, declines to make any precise holding on this question. The scope of the discretion of a district judge acting within his powers, which is the foundation of today's decision, is in my opinion a matter which should be left with the courts of appeals. I would affirm the judgment below for the reasons stated in the opinion of Chief Judge Lumbard for the majority of the Court of Appeals, 324 F. 2d 359.

HEART OF ATLANTA MOTEL, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 515. Argued October 5, 1964.—Decided December 14, 1964.

Appellant, the owner of a large motel in Atlanta, Georgia, which restricts its clientele to white persons, three-fourths of whom are transient interstate travelers, sued for declaratory relief and to enjoin enforcement of the Civil Rights Act of 1964, contending that the prohibition of racial discrimination in places of public accommodation affecting commerce exceeded Congress' powers under the Commerce Clause and violated other parts of the Constitution. A three-judge District Court upheld the constitutionality of Title II, §§ 201 (a), (b)(1) and (c)(1), the provisions attacked, and on appellees' counterclaim permanently enjoined appellant from refusing to accommodate Negro guests for racial reasons. *Held:*

1. Title II of the Civil Rights Act of 1964 is a valid exercise of Congress' power under the Commerce Clause as applied to a place of public accommodation serving interstate travelers. *Civil Rights Cases,* 109 U. S. 3, distinguished. Pp. 249–262.

(a) The interstate movement of persons is "commerce" which concerns more than one State. Pp. 255–256.

(b) The protection of interstate commerce is within the regulatory power of Congress under the Commerce Clause whether or not the transportation of persons between States is "commercial." P. 256.

(c) Congress' action in removing the disruptive effect which it found racial discrimination has on interstate travel is not invalidated because Congress was also legislating against what it considered to be moral wrongs. P. 257.

(d) Congress had power to enact appropriate legislation with regard to a place of public accommodation such as appellant's motel even if it is assumed to be of a purely "local" character, as Congress' power over interstate commerce extends to the regulation of local incidents thereof which might have a substantial and harmful effect upon that commerce. P. 258.

(2) The prohibition in Title II of racial discrimination in public accommodations affecting commerce does not violate the Fifth

Amendment as being a deprivation of property or liberty without due process of law. Pp. 258–261.

(3) Such prohibition does not violate the Thirteenth Amendment as being "involuntary servitude." P. 261.

231 F. Supp. 393, affirmed.

Moreton Rolleston, Jr., argued the cause and filed a brief for appellant.

Solicitor General Cox argued the cause for the United States et al. With him on the brief were *Assistant Attorney General Marshall, Philip B. Heymann* and *Harold H. Greene.*

Briefs of *amici curiae,* urging reversal, were filed by *James W. Kynes,* Attorney General of Florida, and *Fred M. Burns* and *Joseph C. Jacobs,* Assistant Attorneys General, for the State of Florida; and *Robert Y. Button,* Attorney General of Virginia, and *Frederick T. Gray,* Special Assistant Attorney General, for the Commonwealth of Virginia.

Briefs of *amici curiae,* urging affirmance, were filed by *Thomas C. Lynch,* Attorney General of California, *Charles E. Corker* and *Dan Kaufmann,* Assistant Attorneys General, and *Charles B. McKesson* and *Jerold L. Perry,* Deputy Attorneys General, for the State of California; *Edward W. Brooke,* Attorney General of Massachusetts, for the Commonwealth of Massachusetts; and *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Shirley Adelson Siegel,* Assistant Attorney General, for the State of New York.

Mr. Justice Clark delivered the opinion of the Court.

This is a declaratory judgment action, 28 U. S. C. § 2201 and § 2202 (1958 ed.), attacking the constitutionality of Title II of the Civil Rights Act of 1964, 78 Stat.

241, 243.[1] In addition to declaratory relief the complaint sought an injunction restraining the enforcement of the Act and damages against appellees based on allegedly resulting injury in the event compliance was required. Appellees counterclaimed for enforcement under § 206 (a) of the Act and asked for a three-judge district court under § 206 (b). A three-judge court, empaneled under § 206 (b) as well as 28 U. S. C. § 2282 (1958 ed.), sustained the validity of the Act and issued a permanent injunction on appellees' counterclaim restraining appellant from continuing to violate the Act which remains in effect on order of MR. JUSTICE BLACK, 85 S. Ct. 1. We affirm the judgment.

1. *The Factual Background and Contentions of the Parties.*

The case comes here on admissions and stipulated facts. Appellant owns and operates the Heart of Atlanta Motel which has 216 rooms available to transient guests. The motel is located on Courtland Street, two blocks from downtown Peachtree Street. It is readily accessible to interstate highways 75 and 85 and state highways 23 and 41. Appellant solicits patronage from outside the State of Georgia through various national advertising media, including magazines of national circulation; it maintains over 50 billboards and highway signs within the State, soliciting patronage for the motel; it accepts convention trade from outside Georgia and approximately 75% of its registered guests are from out of State. Prior to passage of the Act the motel had followed a practice of refusing to rent rooms to Negroes, and it alleged that it intended to continue to do so. In an effort to perpetuate that policy this suit was filed.

The appellant contends that Congress in passing this Act exceeded its power to regulate commerce under Art. I,

[1] See Appendix.

§ 8, cl. 3, of the Constitution of the United States; that the Act violates the Fifth Amendment because appellant is deprived of the right to choose its customers and operate its business as it wishes, resulting in a taking of its liberty and property without due process of law and a taking of its property without just compensation; and, finally, that by requiring appellant to rent available rooms to Negroes against its will, Congress is subjecting it to involuntary servitude in contravention of the Thirteenth Amendment.

The appellees counter that the unavailability to Negroes of adequate accommodations interferes significantly with interstate travel, and that Congress, under the Commerce Clause, has power to remove such obstructions and restraints; that the Fifth Amendment does not forbid reasonable regulation and that consequential damage does not constitute a "taking" within the meaning of that amendment; that the Thirteenth Amendment claim fails because it is entirely frivolous to say that an amendment directed to the abolition of human bondage and the removal of widespread disabilities associated with slavery places discrimination in public accommodations beyond the reach of both federal and state law.

At the trial the appellant offered no evidence, submitting the case on the pleadings, admissions and stipulation of facts; however, appellees proved the refusal of the motel to accept Negro transients after the passage of the Act. The District Court sustained the constitutionality of the sections of the Act under attack (§§ 201 (a), (b) (1) and (c) (1)) and issued a permanent injunction on the counterclaim of the appellees. It restrained the appellant from "[r]efusing to accept Negroes as guests in the motel by reason of their race or color" and from "[m]aking any distinction whatever upon the basis of race or color in the availability of the goods, services, facilities,

privileges, advantages or accommodations offered or made available to the guests of the motel, or to the general public, within or upon any of the premises of the Heart of Atlanta Motel, Inc."

2. *The History of the Act.*

Congress first evidenced its interest in civil rights legislation in the Civil Rights or Enforcement Act of April 9, 1866.[2] There followed four Acts,[3] with a fifth, the Civil Rights Act of March 1, 1875,[4] culminating the series. In 1883 this Court struck down the public accommodations sections of the 1875 Act in the *Civil Rights Cases,* 109 U. S. 3. No major legislation in this field had been enacted by Congress for 82 years when the Civil Rights Act of 1957 [5] became law. It was followed by the Civil Rights Act of 1960.[6] Three years later, on June 19, 1963, the late President Kennedy called for civil rights legislation in a message to Congress to which he attached a proposed bill. Its stated purpose was

> "to promote the general welfare by eliminating discrimination based on race, color, religion, or national origin in . . . public accommodations through the exercise by Congress of the powers conferred upon it . . . to enforce the provisions of the fourteenth and fifteenth amendments, to regulate commerce among the several States, and to make laws necessary and proper to execute the powers conferred upon it by the Constitution." H. R. Doc. No. 124, 88th Cong., 1st Sess., at 14.

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[2] 14 Stat. 27.

[3] Slave Kidnaping Act, 14 Stat. 50; Peonage Abolition Act of March 2, 1867, 14 Stat. 546; Act of May 31, 1870, 16 Stat. 140; Anti-Lynching Act of April 20, 1871, 17 Stat. 13.

[4] 18 Stat. 335.

[5] 71 Stat. 634.

[6] 74 Stat. 86.

Bills were introduced in each House of the Congress, embodying the President's suggestion, one in the Senate being S. 1732 [7] and one in the House, H. R. 7152. However, it was not until July 2, 1964, upon the recommendation of President Johnson, that the Civil Rights Act of 1964, here under attack, was finally passed.

After extended hearings each of these bills was favorably reported to its respective house, H. R. 7152 on November 20, 1963, H. R. Rep. No. 914, 88th Cong., 1st Sess., and S. 1732 on February 10, 1964, S. Rep. No. 872, 88th Cong., 2d Sess. Although each bill originally incorporated extensive findings of fact these were eliminated from the bills as they were reported. The House passed its bill in January 1964 and sent it to the Senate. Through a bipartisan coalition of Senators Humphrey and Dirksen, together with other Senators, a substitute was worked out in informal conferences. This substitute was adopted by the Senate and sent to the House where it was adopted without change. This expedited procedure prevented the usual report on the substitute bill in the Senate as well as a Conference Committee report ordinarily filed in such matters. Our only frame of reference as to the legislative history of the Act is, therefore, the hearings, reports and debates on the respective bills in each house.

The Act as finally adopted was most comprehensive, undertaking to prevent through peaceful and voluntary settlement discrimination in voting, as well as in places of accommodation and public facilities, federally secured programs and in employment. Since Title II is the only portion under attack here, we confine our consideration to those public accommodation provisions.

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[7] S. 1732 dealt solely with public accommodations. A second Senate bill, S. 1731, contained the entire administration proposal. The Senate Judiciary Committee conducted the hearings on S. 1731 while the Committee on Commerce considered S. 1732.

3. *Title II of the Act.*

This Title is divided into seven sections beginning with § 201 (a) which provides that:

> "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

There are listed in § 201 (b) four classes of business establishments, each of which "serves the public" and "is a place of public accommodation" within the meaning of § 201 (a) "if its operations affect commerce, or if discrimination or segregation by it is supported by State action." The covered establishments are:

> "(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> "(2) any restaurant, cafeteria . . . [not here involved];
>
> "(3) any motion picture house . . . [not here involved];
>
> "(4) any establishment . . . which is physically located within the premises of any establishment otherwise covered by this subsection, or . . . within the premises of which is physically located any such covered establishment . . . [not here involved]."

Section 201 (c) defines the phrase "affect commerce" as applied to the above establishments. It first declares that "any inn, hotel, motel, or other establishment which provides lodging to transient guests" affects commerce *per se*. Restaurants, cafeterias, etc., in class two affect

commerce only if they serve or offer to serve interstate travelers or if a substantial portion of the food which they serve or products which they sell have "moved in commerce." Motion picture houses and other places listed in class three affect commerce if they customarily present films, performances, etc., "which move in commerce." And the establishments listed in class four affect commerce if they are within, or include within their own premises, an establishment "the operations of which affect commerce." Private clubs are excepted under certain conditions. See § 201 (e).

Section 201 (d) declares that "discrimination or segregation" is supported by state action when carried on under color of any law, statute, ordinance, regulation or any custom or usage required or enforced by officials of the State or any of its subdivisions.

In addition, § 202 affirmatively declares that all persons "shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof."

Finally, § 203 prohibits the withholding or denial, etc., of any right or privilege secured by § 201 and § 202 or the intimidation, threatening or coercion of any person with the purpose of interfering with any such right or the punishing, etc., of any person for exercising or attempting to exercise any such right.

The remaining sections of the Title are remedial ones for violations of any of the previous sections. Remedies are limited to civil actions for preventive relief. The Attorney General may bring suit where he has "reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to

the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described . . . ." § 206 (a).

A person aggrieved may bring suit, in which the Attorney General may be permitted to intervene. Thirty days' written notice before filing any such action must be given to the appropriate authorities of a State or subdivision the law of which prohibits the act complained of and which has established an authority which may grant relief therefrom. § 204 (c). In States where such condition does not exist the court after a case is filed may refer it to the Community Relations Service which is established under Title X of the Act. § 204 (d). This Title establishes such service in the Department of Commerce, provides for a Director to be appointed by the President with the advice and consent of the Senate and grants it certain powers, including the power to hold hearings, with reference to matters coming to its attention by reference from the court or between communities and persons involved in disputes arising under the Act.

4. *Application of Title II to Heart of Atlanta Motel.*

It is admitted that the operation of the motel brings it within the provisions of § 201 (a) of the Act and that appellant refused to provide lodging for transient Negroes because of their race or color and that it intends to continue that policy unless restrained.

The sole question posed is, therefore, the constitutionality of the Civil Rights Act of 1964 as applied to these facts. The legislative history of the Act indicates that Congress based the Act on § 5 and the Equal Protection Clause of the Fourteenth Amendment as well as its power to regulate interstate commerce under Art. I, § 8, cl. 3, of the Constitution.

The Senate Commerce Committee made it quite clear that the fundamental object of Title II was to vindicate "the deprivation of personal dignity that surely accompanies denials of equal access to public establishments." At the same time, however, it noted that such an objective has been and could be readily achieved "by congressional action based on the commerce power of the Constitution." S. Rep. No. 872, *supra,* at 16–17. Our study of the legislative record, made in the light of prior cases, has brought us to the conclusion that Congress possessed ample power in this regard, and we have therefore not considered the other grounds relied upon. This is not to say that the remaining authority upon which it acted was not adequate, a question upon which we do not pass, but merely that since the commerce power is sufficient for our decision here we have considered it alone. Nor is § 201 (d) or § 202, having to do with state action, involved here and we do not pass upon either of those sections.

5. *The Civil Rights Cases, 109 U. S. 3 (1883), and their Application.*

In light of our ground for decision, it might be well at the outset to discuss the *Civil Rights Cases, supra,* which declared provisions of the Civil Rights Act of 1875 unconstitutional. 18 Stat. 335, 336. We think that decision inapposite, and without precedential value in determining the constitutionality of the present Act. Unlike Title II of the present legislation, the 1875 Act broadly proscribed discrimination in "inns, public conveyances on land or water, theaters, and other places of public amusement," without limiting the categories of affected businesses to those impinging upon interstate commerce. In contrast, the applicability of Title II is carefully limited to enterprises having a direct and substantial relation to the interstate flow of goods and peo-

ple, except where state action is involved. Further, the fact that certain kinds of businesses may not in 1875 have been sufficiently involved in interstate commerce to warrant bringing them within the ambit of the commerce power is not necessarily dispositive of the same question today. Our populace had not reached its present mobility, nor were facilities, goods and services circulating as readily in interstate commerce as they are today. Although the principles which we apply today are those first formulated by Chief Justice Marshall in *Gibbons* v. *Ogden,* 9 Wheat. 1 (1824), the conditions of transportation and commerce have changed dramatically, and we must apply those principles to the present state of commerce. The sheer increase in volume of interstate traffic alone would give discriminatory practices which inhibit travel a far larger impact upon the Nation's commerce than such practices had on the economy of another day. Finally, there is language in the *Civil Rights Cases* which indicates that the Court did not fully consider whether the 1875 Act could be sustained as an exercise of the commerce power. Though the Court observed that "no one will contend that the power to pass it was contained in the Constitution before the adoption of the last three amendments [Thirteenth, Fourteenth, and Fifteenth]," the Court went on specifically to note that the Act was not "conceived" in terms of the commerce power and expressly pointed out:

> "Of course, these remarks [as to lack of congressional power] do not apply to those cases in which Congress is clothed with direct and plenary powers of legislation over the whole subject, accompanied with an express or implied denial of such power to the States, as in the regulation of commerce with foreign nations, among the several States, and with the Indian tribes . . . . In these cases Congress has

> power to pass laws for regulating the subjects specified in every detail, and the conduct and transactions of individuals in respect thereof." At 18.

Since the commerce power was not relied on by the Government and was without support in the record it is understandable that the Court narrowed its inquiry and excluded the Commerce Clause as a possible source of power. In any event, it is clear that such a limitation renders the opinion devoid of authority for the proposition that the Commerce Clause gives no power to Congress to regulate discriminatory practices now found substantially to affect interstate commerce. We, therefore, conclude that the *Civil Rights Cases* have no relevance to the basis of decision here where the Act explicitly relies upon the commerce power, and where the record is filled with testimony of obstructions and restraints resulting from the discriminations found to be existing. We now pass to that phase of the case.

6. *The Basis of Congressional Action.*

While the Act as adopted carried no congressional findings the record of its passage through each house is replete with evidence of the burdens that discrimination by race or color places upon interstate commerce. See Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess.; S. Rep. No. 872, *supra*; Hearings before Senate Committee on the Judiciary on S. 1731, 88th Cong., 1st Sess.; Hearings before House Subcommittee No. 5 of the Committee on the Judiciary on miscellaneous proposals regarding Civil Rights, 88th Cong., 1st Sess., ser. 4; H. R. Rep. No. 914, *supra.* This testimony included the fact that our people have become increasingly mobile with millions of people of all races traveling from State to State; that Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great dis-

tances to secure the same; that often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight, S. Rep. No. 872, *supra,* at 14–22; and that these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook which was itself "dramatic testimony to the difficulties" Negroes encounter in travel. Senate Commerce Committee Hearings, *supra,* at 692–694. These exclusionary practices were found to be nationwide, the Under Secretary of Commerce testifying that there is "no question that this discrimination in the North still exists to a large degree" and in the West and Midwest as well. *Id.,* at 735, 744. This testimony indicated a qualitative as well as quantitative effect on interstate travel by Negroes. The former was the obvious impairment of the Negro traveler's pleasure and convenience that resulted when he continually was uncertain of finding lodging. As for the latter, there was evidence that this uncertainty stemming from racial discrimination had the effect of discouraging travel on the part of a substantial portion of the Negro community. *Id.,* at 744. This was the conclusion not only of the Under Secretary of Commerce but also of the Administrator of the Federal Aviation Agency who wrote the Chairman of the Senate Commerce Committee that it was his "belief that air commerce is adversely affected by the denial to a substantial segment of the traveling public of adequate and desegregated public accommodations." *Id.,* at 12–13. We shall not burden this opinion with further details since the voluminous testimony presents overwhelming evidence that discrimination by hotels and motels impedes interstate travel.

7. *The Power of Congress Over Interstate Travel.*

The power of Congress to deal with these obstructions depends on the meaning of the Commerce Clause. Its meaning was first enunciated 140 years ago by the great

Chief Justice John Marshall in *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824), in these words:

> "The subject to be regulated is commerce; and . . . to ascertain the extent of the power, it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities . . . but it is something more: it is intercourse . . . between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. [At 189–190.]
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> . . . . . .
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> "To what commerce does this power extend? The constitution informs us, to commerce 'with foreign nations, and among the several States, and with the Indian tribes.'
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> "It has, we believe, been universally admitted, that these words comprehend every species of commercial intercourse . . . . No sort of trade can be carried on . . . to which this power does not extend. [At 193–194.]
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> . . . . . .
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> "The subject to which the power is next applied, is to commerce 'among the several States.' The word 'among' means intermingled . . . .
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> . . . . . .
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> ". . . [I]t may very properly be restricted to that commerce which concerns more States than one. . . . The genius and character of the whole government seem to be, that its action is to be applied to all the . . . internal concerns [of the Nation] which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not neces-

> sary to interfere, for the purpose of executing some of the general powers of the government. [At 194–195.]
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> . . . . . .
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> "We are now arrived at the inquiry—What is this power?
>
> "It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. . . . If, as has always been understood, the sovereignty of Congress . . . is plenary as to those objects [specified in the Constitution], the power over commerce . . . is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments. [At 196–197.]"

In short, the determinative test of the exercise of power by the Congress under the Commerce Clause is simply whether the activity sought to be regulated is "commerce which concerns more States than one" and has a real and substantial relation to the national interest. Let us now turn to this facet of the problem.

That the "intercourse" of which the Chief Justice spoke included the movement of persons through more

States than one was settled as early as 1849, in the *Passenger Cases,* 7 How. 283, where Mr. Justice McLean stated: "That the transportation of passengers is a part of commerce is not now an open question." At 401. Again in 1913 Mr. Justice McKenna, speaking for the Court, said: "Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property." *Hoke* v. *United States,* 227 U. S. 308, 320. And only four years later in 1917 in *Caminetti* v. *United States,* 242 U. S. 470, Mr. Justice Day held for the Court:

> "The transportation of passengers in interstate commerce, it has long been settled, is within the regulatory power of Congress, under the commerce clause of the Constitution, and the authority of Congress to keep the channels of interstate commerce free from immoral and injurious uses has been frequently sustained, and is no longer open to question." At 491.

Nor does it make any difference whether the transportation is commercial in character. *Id.,* at 484–486. In *Morgan* v. *Virginia,* 328 U. S. 373 (1946), Mr. Justice Reed observed as to the modern movement of persons among the States:

> "The recent changes in transportation brought about by the coming of automobiles [do] not seem of great significance in the problem. People of all races travel today more extensively than in 1878 when this Court first passed upon state regulation of racial segregation in commerce. [It but] emphasizes the soundness of this Court's early conclusion in *Hall* v. *DeCuir,* 95 U. S. 485." At 383.

The same interest in protecting interstate commerce which led Congress to deal with segregation in interstate

carriers and the white-slave traffic has prompted it to extend the exercise of its power to gambling, *Lottery Case,* 188 U. S. 321 (1903); to criminal enterprises, *Brooks* v. *United States,* 267 U. S. 432 (1925); to deceptive practices in the sale of products, *Federal Trade Comm'n* v. *Mandel Bros., Inc.,* 359 U. S. 385 (1959); to fraudulent security transactions, *Securities & Exchange Comm'n* v. *Ralston Purina Co.,* 346 U. S. 119 (1953); to misbranding of drugs, *Weeks* v. *United States,* 245 U. S. 618 (1918); to wages and hours, *United States* v. *Darby,* 312 U. S. 100 (1941); to members of labor unions, *Labor Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1 (1937); to crop control, *Wickard* v. *Filburn,* 317 U. S. 111 (1942); to discrimination against shippers, *United States* v. *Baltimore & Ohio R. Co.,* 333 U. S. 169 (1948); to the protection of small business from injurious price cutting, *Moore* v. *Mead's Fine Bread Co.,* 348 U. S. 115 (1954); to resale price maintenance, *Hudson Distributors, Inc.* v. *Eli Lilly & Co.,* 377 U. S. 386 (1964), *Schwegmann* v. *Calvert Distillers Corp.,* 341 U. S. 384 (1951); to professional football, *Radovich* v. *National Football League,* 352 U. S. 445 (1957); and to racial discrimination by owners and managers of terminal restaurants, *Boynton* v. *Virginia,* 364 U. S. 454 (1960).

That Congress was legislating against moral wrongs in many of these areas rendered its enactments no less valid. In framing Title II of this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.

It is said that the operation of the motel here is of a purely local character. But, assuming this to be true, "[i]f it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U. S. 460, 464 (1949). See *Labor Board* v. *Jones & Laughlin Steel Corp., supra.* As Chief Justice Stone put it in *United States* v. *Darby, supra:*

> "The power of Congress over interstate commerce is not confined to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce. See *McCulloch* v. *Maryland,* 4 Wheat. 316, 421." At 118.

Thus the power of Congress to promote interstate commerce also includes the power to regulate the local incidents thereof, including local activities in both the States of origin and destination, which might have a substantial and harmful effect upon that commerce. One need only examine the evidence which we have discussed above to see that Congress may—as it has—prohibit racial discrimination by motels serving travelers, however "local" their operations may appear.

Nor does the Act deprive appellant of liberty or property under the Fifth Amendment. The commerce power invoked here by the Congress is a specific and plenary one authorized by the Constitution itself. The only questions are: (1) whether Congress had a rational basis for finding that racial discrimination by motels affected commerce, and (2) if it had such a basis, whether the means it selected to eliminate that evil are reasonable and appro-

priate. If they are, appellant has no "right" to select its guests as it sees fit, free from governmental regulation.

There is nothing novel about such legislation. Thirty-two States [8] now have it on their books either by statute or executive order and many cities provide such regulation. Some of these Acts go back fourscore years. It has been repeatedly held by this Court that such laws

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[8] The following statutes indicate States which have enacted public accommodation laws:

Alaska Stat., §§ 11.60.230 to 11.60.240 (1962); Cal. Civil Code, §§ 51 to 54 (1954); Colo. Rev. Stat. Ann., §§ 25–1–1 to 25–2–5 (1953); Conn. Gen. Stat. Ann., § 53–35 (1963 Supp.); Del. Code Ann., Tit. 6, c. 45 (1963); Idaho Code Ann., §§ 18–7301 to 18–7303 (1963 Supp.); Ill. Ann. Stat. (Smith-Hurd ed.), c. 38, §§ 13–1 to 13–4 (1964), c. 43, § 133 (1944); Ind. Ann. Stat. (Burns ed.), §§ 10–901 to 10–914 (1956, and 1963 Supp.); Iowa Code Ann., §§ 735.1 and 735.2 (1950); Kan. Gen. Stat. Ann., § 21–2424 (1961 Supp.); Me. Rev. Stat. Ann., c. 137, § 50 (1954); Md. Ann. Code, Art. 49B, § 11 (1964); Mass. Ann. Laws, c. 140, §§ 5 and 8 (1957), c. 272, §§ 92A and 98 (1963 Supp.); Mich. Stat. Ann., §§ 28.343 and 28.344 (1962); Minn. Stat. Ann., § 327.09 (1947); Mont. Rev. Codes Ann., § 64–211 (1962); Neb. Rev. Stat., §§ 20–101 and 20–102 (1962); N. H. Rev. Stat. Ann., §§ 354:1, 354:2, 354:4 and 354:5 (1955, and 1963 Supp.); N. J. Stat. Ann., §§ 10:1–2 to 10:1–7 (1960), §§ 18:25–1 to 18:25–6 (1964 Supp.); N. M. Stat. Ann., §§ 49–8–1 to 49–8–7 (1963 Supp.); N. Y. Civil Rights Law (McKinney ed.), Art. 4, §§ 40 and 41 (1948, and 1964 Supp.), Exec. Law, Art. 15, §§ 290 to 301 (1951, and 1964 Supp.), Penal Law, Art. 46, §§ 513 to 515 (1944); N. D. Cent. Code, § 12–22–30 (1963 Supp.); Ohio Rev. Code Ann. (Page's ed.), §§ 2901.35 and 2901.36 (1954); Ore. Rev. Stat., §§ 30.670, 30.675 and 30.680 (1963); Pa. Stat. Ann., Tit. 18, § 4654 (1963); R. I. Gen. Laws Ann., §§ 11–24–1 to 11–24–6 (1956); S. Dak. Sess. Laws, c. 58 (1963); Vt. Stat. Ann., Tit. 13, §§ 1451 and 1452 (1958); Wash. Rev. Code, §§ 49.60.010 to 49.60.170, and § 9.91.010; Wis. Stat. Ann., § 942.04 (1958); Wyo. Stat. Ann., §§ 6–83.1 and 6–83.2 (1963 Supp.).

In 1963 the Governor of Kentucky issued an executive order requiring all governmental agencies involved in the supervision or licensing of businesses to take all lawful action necessary to prevent racial discrimination.

do not violate the Due Process Clause of the Fourteenth Amendment. Perhaps the first such holding was in the *Civil Rights Cases* themselves, where Mr. Justice Bradley for the Court inferentially found that innkeepers, "by the laws of all the States, so far as we are aware, are bound, to the extent of their facilities, to furnish proper accommodation to all unobjectionable persons who in good faith apply for them." At 25.

As we have pointed out, 32 States now have such provisions and no case has been cited to us where the attack on a state statute has been successful, either in federal or state courts. Indeed, in some cases the Due Process and Equal Protection Clause objections have been specifically discarded in this Court. *Bob-Lo Excursion Co.* v. *Michigan,* 333 U. S. 28, 34, n. 12 (1948). As a result the constitutionality of such state statutes stands unquestioned. "The authority of the Federal Government over interstate commerce does not differ," it was held in *United States* v. *Rock Royal Co-op., Inc.,* 307 U. S. 533 (1939), "in extent or character from that retained by the states over intrastate commerce." At 569–570. See also *Bowles* v. *Willingham,* 321 U. S. 503 (1944).

It is doubtful if in the long run appellant will suffer economic loss as a result of the Act. Experience is to the contrary where discrimination is completely obliterated as to all public accommodations. But whether this be true or not is of no consequence since this Court has specifically held that the fact that a "member of the class which is regulated may suffer economic losses not shared by others . . . has never been a barrier" to such legislation. *Bowles* v. *Willingham, supra,* at 518. Likewise in a long line of cases this Court has rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty. See *District of Columbia* v. *John R. Thompson Co.,* 346 U. S.

100 (1953), and cases there cited, where we concluded that Congress had delegated law-making power to the District of Columbia "as broad as the police power of a state" which included the power to adopt "a law prohibiting discriminations against Negroes by the owners and managers of restaurants in the District of Columbia." At 110. Neither do we find any merit in the claim that the Act is a taking of property without just compensation. The cases are to the contrary. See *Legal Tender Cases,* 12 Wall. 457, 551 (1870); *Omnia Commercial Co.* v. *United States,* 261 U. S. 502 (1923); *United States* v. *Central Eureka Mining Co.,* 357 U. S. 155 (1958).

We find no merit in the remainder of appellant's contentions, including that of "involuntary servitude." As we have seen, 32 States prohibit racial discrimination in public accommodations. These laws but codify the common-law innkeeper rule which long predated the Thirteenth Amendment. It is difficult to believe that the Amendment was intended to abrogate this principle. Indeed, the opinion of the Court in the *Civil Rights Cases* is to the contrary as we have seen, it having noted with approval the laws of "all the States" prohibiting discrimination. We could not say that the requirements of the Act in this regard are in any way "akin to African slavery." *Butler* v. *Perry,* 240 U. S. 328, 332 (1916).

We, therefore, conclude that the action of the Congress in the adoption of the Act as applied here to a motel which concededly serves interstate travelers is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years. It may be argued that Congress could have pursued other methods to eliminate the obstructions it found in interstate commerce caused by racial discrimination. But this is a matter of policy that rests entirely with the Congress not with the courts. How obstructions in commerce

may be removed—what means are to be employed—is within the sound and exclusive discretion of the Congress. It is subject only to one caveat—that the means chosen by it must be reasonably adapted to the end permitted by the Constitution. We cannot say that its choice here was not so adapted. The Constitution requires no more.

Affirmed.

APPENDIX TO OPINION OF THE COURT.

"TITLE II—INJUNCTIVE RELIEF AGAINST DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION

"SEC. 201. (a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

> "(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;
>
> "(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

"(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

"(4) any establishment (A) (i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

"(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b), it customarily presents films, performances, athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b), it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Columbia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

"(d) Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried

on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

"(e) The provisions of this title shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b).

"SEC. 202. All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof.

"SEC. 203. No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.

"SEC. 204. (a) Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section 203, a civil action for preventive relief, including an application for a permanent or temporary injunction, restraining order, or other order, may be instituted by the person aggrieved and, upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case

is of general public importance. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the civil action without the payment of fees, costs, or security.

"(b) In any action commenced pursuant to this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, and the United States shall be liable for costs the same as a private person.

"(c) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has a State or local law prohibiting such act or practice and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no civil action may be brought under subsection (a) before the expiration of thirty days after written notice of such alleged act or practice has been given to the appropriate State or local authority by registered mail or in person, provided that the court may stay proceedings in such civil action pending the termination of State or local enforcement proceedings.

"(d) In the case of an alleged act or practice prohibited by this title which occurs in a State, or political subdivision of a State, which has no State or local law prohibiting such act or practice, a civil action may be brought under subsection (a): *Provided,* That the court may refer the matter to the Community Relations Service established by title X of this Act for as long as the court believes there is a reasonable possibility of obtaining voluntary compliance, but for not more than sixty days: *Provided further,* That upon expiration of such sixty-day period, the court may extend such period for an addi-

tional period, not to exceed a cumulative total of one hundred and twenty days, if it believes there then exists a reasonable possibility of securing voluntary compliance.

"SEC. 205. The Service is authorized to make a full investigation of any complaint referred to it by the court under section 204 (d) and may hold such hearings with respect thereto as may be necessary. The Service shall conduct any hearings with respect to any such complaint in executive session, and shall not release any testimony given therein except by agreement of all parties involved in the complaint with the permission of the court, and the Service shall endeavor to bring about a voluntary settlement between the parties.

"SEC. 206. (a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this title, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such preventive relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described.

"(b) In any such proceeding the Attorney General may file with the clerk of such court a request that a court of three judges be convened to hear and determine the case. Such request by the Attorney General shall be accompanied by a certificate that, in his opinion, the case is of general public importance. A copy of the certificate

and request for a three-judge court shall be immediately furnished by such clerk to the chief judge of the circuit (or in his absence, the presiding circuit judge of the circuit) in which the case is pending. Upon receipt of the copy of such request it shall be the duty of the chief judge of the circuit or the presiding circuit judge, as the case may be, to designate immediately three judges in such circuit, of whom at least one shall be a circuit judge and another of whom shall be a district judge of the court in which the proceeding was instituted, to hear and determine such case, and it shall be the duty of the judges so designated to assign the case for hearing at the earliest practicable date, to participate in the hearing and determination thereof, and to cause the case to be in every way expedited. An appeal from the final judgment of such court will lie to the Supreme Court.

"In the event the Attorney General fails to file such a request in any such proceeding, it shall be the duty of the chief judge of the district (or in his absence, the acting chief judge) in which the case is pending immediately to designate a judge in such district to hear and determine the case. In the event that no judge in the district is available to hear and determine the case, the chief judge of the district, or the acting chief judge, as the case may be, shall certify this fact to the chief judge of the circuit (or in his absence, the acting chief judge) who shall then designate a district or circuit judge of the circuit to hear and determine the case.

"It shall be the duty of the judge designated pursuant to this section to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited.

"SEC. 207. (a) The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this title and shall exercise the same without regard

to whether the aggrieved party shall have exhausted any administrative or other remedies that may be provided by law.

"(b) The remedies provided in this title shall be the exclusive means of enforcing the rights based on this title, but nothing in this title shall preclude any individual or any State or local agency from asserting any right based on any other Federal or State law not inconsistent with this title, including any statute or ordinance requiring nondiscrimination in public establishments or accommodations, or from pursuing any remedy, civil or criminal, which may be available for the vindication or enforcement of such right."

MR. JUSTICE BLACK, concurring.*

In the first of these two cases the Heart of Atlanta Motel, a large motel in downtown Atlanta, Georgia, appeals from an order of a three-judge United States District Court for the Northern District of Georgia enjoining it from continuing to violate Title II of the Civil Rights Act of 1964[1] by refusing to accept Negroes as lodgers solely because of their race. In the second case the Acting Attorney General of the United States and a United States Attorney appeal from a judgment of a three-judge United States District Court for the Northern District of Alabama holding that Title II cannot constitutionally be applied to Ollie's Barbecue, a restaurant in Birmingham, Alabama, which serves few if any interstate travelers but which buys a substantial quantity of food which has moved in interstate commerce. It is undisputed that both establishments had and intended to continue a policy against serving Negroes. Both claimed that Con-

*[This opinion applies also to No. 543, *Katzenbach* v. *McClung*, *post*, p. 294.]

[1] 78 Stat. 243–246, 42 U. S. C. §§ 2000a—2000a–6 (1964 ed.).

gress had exceeded its constitutional powers in attempting to compel them to use their privately owned businesses to serve customers whom they did not want to serve.

The most immediately relevant parts of Title II of the Act, which, if valid, subject this motel and this restaurant to its requirements are set out below.[2] The language of that Title shows that Congress in passing it intended to exercise—at least in part—power granted in the Constitu-

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[2] Section 201 of the Act, 78 Stat. 243, 42 U. S. C. § 2000a (1964 ed.), provides in part:

"(a) All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

"(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

. . . . . .

"(c) The operations of an establishment affect commerce within the meaning of this title if (1) it is one of the establishments described in paragraph (1) of subsection (b); (2) in the case of an establishment described in paragraph (2) of subsection (b), it serves or offers to serve interstate travelers or a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce . . . . For purposes of this section, 'commerce' means travel, trade, traffic, commerce, transportation, or communication among the several States . . . ."

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tion by Art. I, § 8, "To regulate Commerce . . . among the several States . . . ." Thus § 201 (b) of Title II by its terms is limited in application to a motel or restaurant of which the "operations affect [interstate] commerce, or if discrimination or segregation by it is supported by State action." [3] The "State action" provision need not concern us here since there is no contention that Georgia or Alabama has at this time given any support whatever to these establishments' racially discriminatory practices. The basic constitutional question decided by the courts below and which this Court must now decide is whether Congress exceeded its powers to regulate interstate commerce and pass all laws necessary and proper to such regulation in subjecting either this motel or this restaurant to Title II's commands that applicants for food and lodging be served without regard to their color. And if the regulation is otherwise within the congressional commerce power, the motel and the restaurant proprietors further contend that it would be a denial of due process under the Fifth Amendment to compel them to serve Negroes against their will.[4] I agree that all these constitutional contentions must be rejected.

I.

It requires no novel or strained interpretation of the Commerce Clause to sustain Title II as applied in either

[3] This last definitional clause of § 201 (b) together with § 202 shows a congressional purpose also to rely in part on § 1 of the Fourteenth Amendment, which forbids any State to deny due process or equal protection of the laws. There is no contention in these cases that Congress relied on the fifth section of the Fourteenth Amendment granting it "power to enforce, by appropriate legislation, the provisions of" the Amendment.

[4] The motel also argues that the law violates the Thirteenth Amendment's prohibition of slavery or involuntary servitude and takes private property for public use without just compensation, in violation of the Fifth Amendment.

of these cases. At least since *Gibbons* v. *Ogden,* 9 Wheat. 1, decided in 1824 in an opinion by Chief Justice John Marshall, it has been uniformly accepted that the power of Congress to regulate commerce among the States is plenary, "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." 9 Wheat., at 196. Nor is "Commerce" as used in the Commerce Clause to be limited to a narrow, technical concept. It includes not only, as Congress has enumerated in the Act, "travel, trade, traffic, commerce, transportation, or communication," but also all other unitary transactions and activities that take place in more States than one. That some parts or segments of such unitary transactions may take place only in one State cannot, of course, take from Congress its plenary power to regulate them in the national interest.[5] The facilities and instrumentalities used to carry on this commerce, such as railroads, truck lines, ships, rivers, and even highways are also subject to congressional regulation, so far as is necessary to keep interstate traffic upon fair and equal terms. *The Daniel Ball,* 10 Wall. 557.

Furthermore, it has long been held that the Necessary and Proper Clause, Art. I, § 8, cl. 18, adds to the commerce power of Congress the power to regulate local instrumentalities operating within a single State if their activities burden the flow of commerce among the States. Thus in the *Shreveport Case, Houston, E. & W. T. R. Co.* v. *United States,* 234 U. S. 342, 353–354, this Court recognized that Congress could not fully carry out its responsibility to protect interstate commerce were its constitutional power to regulate that commerce to be strictly limited to prescribing the rules for controlling the things

[5] Compare *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, 546–547; *Board of Trade* v. *Olsen,* 262 U. S. 1, 33–36; *Swift & Co.* v. *United States,* 196 U. S. 375, 398–399.

actually moving in such commerce or the contracts, transactions, and other activities, immediately concerning them. Regulation of purely intrastate railroad rates is primarily a local problem for state rather than national control. But the *Shreveport Case* sustained the power of Congress under the Commerce Clause and the Necessary and Proper Clause to control purely intrastate rates, even though reasonable, where the effect of such rates was found to impose a discrimination injurious to interstate commerce. This holding that Congress had power under these clauses, not merely to enact laws governing interstate activities and transactions, but also to regulate even purely local activities and transactions where necessary to foster and protect interstate commerce, was amply supported by Mr. Justice (later Mr. Chief Justice) Hughes' reliance upon many prior holdings of this Court extending back to *Gibbons* v. *Ogden, supra.*[6] And since the *Shreveport Case* this Court has steadfastly followed, and indeed has emphasized time and time again, that Congress has ample power to protect interstate commerce from activities adversely and injuriously affecting it, which but for this adverse effect on interstate commerce would be beyond the power of Congress to regulate.[7]

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[6] "The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, *which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government.*" *Gibbons* v. *Ogden, supra,* 9 Wheat., at 195. (Emphasis supplied.)

[7] See, *e. g., Labor Board* v. *Reliance Fuel Oil Corp.,* 371 U. S. 224; *Lorain Journal Co.* v. *United States,* 342 U. S. 143; *United States* v. *Women's Sportswear Manufacturers Assn.,* 336 U. S. 460; *United States* v. *Sullivan,* 332 U. S. 689; *Wickard* v. *Filburn,* 317 U. S. 111; *United States* v. *Wrightwood Dairy Co.,* 315 U. S. 110; *United States* v. *Darby,* 312 U. S. 100; *Labor Board* v. *Jones & Laughlin Steel*

Congress in § 201 declared that the racially discriminatory "operations" of a motel of more than five rooms for rent or hire do adversely affect interstate commerce if it "provides lodging to transient guests . . ." and that a restaurant's "operations" affect such commerce if (1) "it serves or offers to serve interstate travelers" or (2) "a substantial portion of the food which it serves . . . has moved in [interstate] commerce." Congress thus described the nature and extent of operations which it wished to regulate, excluding some establishments from the Act either for reasons of policy or because it believed its powers to regulate and protect interstate commerce did not extend so far. There can be no doubt that the operations of both the motel and the restaurant here fall squarely within the measure Congress chose to adopt in the Act and deemed adequate to show a constitutionally prohibitable adverse effect on commerce. The choice of policy is of course within the exclusive power of Congress; but whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court. I agree that as applied to this motel and this restaurant the Act is a valid exercise of congressional power, in the case of the motel because the record amply demonstrates that its practice of discrimination tended directly to interfere with interstate travel, and in the case of the restaurant because Congress had ample basis for concluding that a widespread practice of racial discrimination by restaurants buying as substantial a quantity of goods shipped from other States as this restaurant buys could distort or impede interstate trade.

Corp., 301 U. S. 1; *Kentucky Whip & Collar Co.* v. *Illinois Central R. Co.*, 299 U. S. 334. See also *Southern R. Co.* v. *United States*, 222 U. S. 20.

The Heart of Atlanta Motel is a large 216-room establishment strategically located in relation to Atlanta and interstate travelers. It advertises extensively by signs along interstate highways and in various advertising media. As a result of these circumstances approximately 75% of the motel guests are transient interstate travelers. It is thus an important facility for use by interstate travelers who travel on highways, since travelers in their own cars must find lodging places to make their journeys comfortably and safely.

The restaurant is located in a residential and industrial section of Birmingham, 11 blocks from the nearest interstate highway. Almost all, if not all, its patrons are local people rather than transients. It has seats for about 200 customers and annual gross sales of about $350,000. Most of its sales are of barbecued meat sandwiches and pies. Consequently, the main commodity it purchases is meat, of which during the 12 months before the District Court hearing it bought $69,683 worth (representing 46% of its total expenditures for supplies), which had been shipped into Alabama from outside the State. Plainly, 46% of the goods it sells is a "substantial" portion and amount. Congress concluded that restaurants which purchase a substantial quantity of goods from other States might well burden and disrupt the flow of interstate commerce if allowed to practice racial discrimination, because of the stifling and distorting effect that such discrimination on a wide scale might well have on the sale of goods shipped across state lines. Certainly this belief would not be irrational even had there not been a large body of evidence before the Congress to show the probability of this adverse effect.[8]

[8] See, *e. g.*, Hearings Before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., Part 1, Ser. 26, pp. 18–19 (Attorney General Kennedy), 623–630 (Secretary of Labor Wirtz); Part 2, Ser. 26, pp. 695–700 (Under Secretary of Commerce Roosevelt).

The foregoing facts are more than enough, in my judgment, to show that Congress acting within its discretion and judgment has power under the Commerce Clause and the Necessary and Proper Clause to bar racial discrimination in the Heart of Atlanta Motel and Ollie's Barbecue. I recognize that every remote, possible, speculative effect on commerce should not be accepted as an adequate constitutional ground to uproot and throw into the discard all our traditional distinctions between what is purely local, and therefore controlled by state laws, and what affects the national interest and is therefore subject to control by federal laws. I recognize too that some isolated and remote lunchroom which sells only to local people and buys almost all its supplies in the locality may possibly be beyond the reach of the power of Congress to regulate commerce, just as such an establishment is not covered by the present Act. But in deciding the constitutional power of Congress in cases like the two before us we do not consider the effect on interstate commerce of only one isolated, individual, local event, without regard to the fact that this single local event when added to many others of a similar nature may impose a burden on interstate commerce by reducing its volume or distorting its flow. *Labor Board* v. *Reliance Fuel Oil Corp.*, 371 U. S. 224; *Wickard* v. *Filburn*, 317 U. S. 111, 127–128; *United States* v. *Darby*, 312 U. S. 100, 123; *Labor Board* v. *Fainblatt*, 306 U. S. 601, 608–609; cf. *Hotel Employees Local No. 255* v. *Leedom*, 358 U. S. 99. There are approximately 20,000,000 Negroes in our country.[9] Many of them are able to, and do, travel among the States in automobiles. Certainly it would seriously discourage such travel by them if, as evidence before the Congress indicated has been true in the past,[10] they should in the

[9] Bureau of the Census, 1964 Statistical Abstract of the United States, 25 (18,872,000 Negroes by 1960 census).

[10] See, *e. g.*, S. Rep. No. 872, 88th Cong., 2d Sess., 15–18.

future continue to be unable to find a decent place along their way in which to lodge or eat. Cf. *Boynton* v. *Virginia,* 364 U. S. 454. And the flow of interstate commerce may be impeded or distorted substantially if local sellers of interstate food are permitted to exclude all Negro consumers. Measuring, as this Court has so often held is required, by the aggregate effect of a great number of such acts of discrimination, I am of the opinion that Congress has constitutional power under the Commerce and Necessary and Proper Clauses to protect interstate commerce from the injuries bound to befall it from these discriminatory practices.

Long ago this Court, again speaking through Mr. Chief Justice Marshall, said:

> "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." *M'Culloch* v. *Maryland,* 4 Wheat. 316, 421.

By this standard Congress acted within its power here. In view of the Commerce Clause it is not possible to deny that the aim of protecting interstate commerce from undue burdens is a legitimate end. In view of the Thirteenth, Fourteenth and Fifteenth Amendments, it is not possible to deny that the aim of protecting Negroes from discrimination is also a legitimate end.[11] The means

[11] We have specifically upheld the power of Congress to use the commerce power to end racial discrimination. *Boynton* v. *Virginia,* 364 U. S. 454; *Henderson* v. *United States,* 339 U. S. 816; *Mitchell* v. *United States,* 313 U. S. 80; cf. *Bailey* v. *Patterson,* 369 U. S. 31; *Morgan* v. *Virginia,* 328 U. S. 373. Compare cases in which the commerce power has been used to advance other ends not entirely commercial: *e. g., United States* v. *Darby,* 312 U. S. 100 (Fair Labor Standards Act); *United States* v. *Miller,* 307 U. S. 174 (National Firearms Act); *Gooch* v. *United States,* 297 U. S. 124 (Federal Kid-

adopted to achieve these ends are also appropriate, plainly adopted to achieve them and not prohibited by the Constitution but consistent with both its letter and spirit.

II.

The restaurant and motel proprietors argue also, however, that Congress violated the Due Process Clause of the Fifth Amendment by requiring that they serve Negroes if they serve others. This argument comes down to this: that the broad power of Congress to enact laws deemed necessary and proper to regulate and protect interstate commerce is practically nullified by the negative constitutional commands that no person shall be deprived of "life, liberty, or property, without due process of law" and that private property shall not be "taken" for public use without just compensation. In the past this Court has consistently held that regulation of the use of property by the Federal Government or by the States does not violate either the Fifth or the Fourteenth Amendment. See, *e. g., Ferguson* v. *Skrupa,* 372 U. S. 726; *District of Columbia* v. *John R. Thompson Co.,* 346 U. S. 100; *Village of Euclid* v. *Ambler Realty Co.,* 272 U. S. 365; *Nebbia* v. *New York,* 291 U. S. 502. A regulation such as that found in Title II does not even come close to being a "taking" in the constitutional sense. Cf. *United States* v. *Central Eureka Mining Co.,* 357 U. S. 155. And a more or less vague clause like the requirement for due process, originally meaning "according to

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naping Act); *Brooks* v. *United States,* 267 U. S. 432 (National Motor Vehicle Theft Act); *United States* v. *Simpson,* 252 U. S. 465 (Act forbidding shipment of liquor into a "dry" State); *Caminetti* v. *United States,* 242 U. S. 470 (White-Slave Traffic [Mann] Act); *Hoke* v. *United States,* 227 U. S. 308 (White-Slave Traffic [Mann] Act); *Hipolite Egg Co.* v. *United States,* 220 U. S. 45 (Pure Food and Drugs Act); *Lottery Case,* 188 U. S. 321 (Act forbidding interstate shipment of lottery tickets).

the law of the land" would be a highly inappropriate provision on which to rely to invalidate a "law of the land" enacted by Congress under a clearly granted power like that to regulate interstate commerce. Moreover, it would be highly ironical to use the guarantee of due process—a guarantee which plays so important a part in the Fourteenth Amendment, an amendment adopted with the predominant aim of protecting Negroes from discrimination—in order to strip Congress of power to protect Negroes from discrimination.[12]

III.

For the foregoing reasons I concur in holding that the anti-racial-discrimination provisions of Title II of the Civil Rights Act of 1964 are valid as applied to this motel and this restaurant. I should add that nothing in the *Civil Rights Cases,* 109 U. S. 3, which invalidated the Civil Rights Act of 1875,[13] gives the slightest support to the argument that Congress is without power under the Commerce Clause to enact the present legislation, since in the *Civil Rights Cases* this Court expressly left undecided the validity of such antidiscrimination legislation if rested on the Commerce Clause. See 109 U. S., at 18–19; see also *Butts* v. *Merchants & Miners Transp. Co.,* 230 U. S. 126, 132. Nor does any view expressed in my dissenting opinion in *Bell* v. *Maryland,* 378 U. S. 226, 318, in which MR. JUSTICE HARLAN and MR. JUSTICE WHITE joined, affect this conclusion in the slightest, for that opinion stated only that the Fourteenth Amendment in and of itself, without implementation by a law passed by Congress, does not bar racial discrimination in privately owned places of business in the absence of state action. The opinion did not discuss the power of Congress under

[12] The motel's argument that Title II violates the Thirteenth Amendment is so insubstantial that it requires no further discussion.

[13] 18 Stat. 335.

the Commerce and Necessary and Proper Clauses or under section 5 of the Fourteenth Amendment to pass a law forbidding such discrimination. See 378 U. S., at 318, 326, 342–343 and n. 44. Because the Civil Rights Act of 1964 as applied here is wholly valid under the Commerce Clause and the Necessary and Proper Clause, there is no need to consider whether this Act is also constitutionally supportable under section 5 of the Fourteenth Amendment which grants Congress "power to enforce, by appropriate legislation, the provisions of this article."

MR. JUSTICE DOUGLAS, concurring.*

I.

Though I join the Court's opinions, I am somewhat reluctant here, as I was in *Edwards* v. *California,* 314 U. S. 160, 177, to rest solely on the Commerce Clause. My reluctance is not due to any conviction that Congress lacks power to regulate commerce in the interests of human rights. It is rather my belief that the right of people to be free of state action that discriminates against them because of race, like the "right of persons to move freely from State to State" (*Edwards* v. *California, supra,* at 177), "occupies a more protected position in our constitutional system than does the movement of cattle, fruit, steel and coal across state lines." *Ibid.* Moreover, when we come to the problem of abatement in *Hamm* v. *City of Rock Hill, post,* p. 306, decided this day, the result reached by the Court is for me much more obvious as a protective measure under the Fourteenth Amendment than under the Commerce Clause. For the former deals with the constitutional status of the individual not with the impact on commerce of local activities or vice versa.

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*[This opinion applies also to No. 543, *Katzenbach* v. *McClung, post,* p. 294.]

Hence I would prefer to rest on the assertion of legislative power contained in § 5 of the Fourteenth Amendment which states: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article"—a power which the Court concedes was exercised at least in part in this Act.

A decision based on the Fourteenth Amendment would have a more settling effect, making unnecessary litigation over whether a particular restaurant or inn is within the commerce definitions of the Act or whether a particular customer is an interstate traveler. Under my construction, the Act would apply to all customers in all the enumerated places of public accommodation. And that construction would put an end to all obstructionist strategies and finally close one door on a bitter chapter in American history.

My opinion last Term in *Bell* v. *Maryland,* 378 U. S. 226, 242, makes clear my position that the right to be free of discriminatory treatment (based on race) in places of public accommodation—whether intrastate or interstate—is a right guaranteed against state action by the Fourteenth Amendment and that state enforcement of the kind of trespass laws which Maryland had in that case was state action within the meaning of the Amendment.

II.

I think the Court is correct in concluding that the Act is not founded on the Commerce Clause to the exclusion of the Enforcement Clause of the Fourteenth Amendment.

In determining the reach of an exertion of legislative power, it is customary to read various granted powers together. See *Veazie Bank* v. *Fenno,* 8 Wall. 533, 548–549; *Edye* v. *Robertson,* 112 U. S. 580, 595–596; *United States* v. *Gettysburg Electric R. Co.,* 160 U. S. 668, 683. As stated in *McCulloch* v. *Maryland,* 4 Wheat. 316, 421:

> "We admit, as all must admit, that the powers of the government are limited, and that its limits are

> not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."

The "means" used in the present Act are in my view "appropriate" and "plainly adapted" to the end of enforcing Fourteenth Amendment rights [1] as well as protecting interstate commerce.

Section 201 (a) declares in Fourteenth Amendment language the right of equal access:

> "All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

The rights protected are clearly within the purview of our decisions under the Equal Protection Clause of the Fourteenth Amendment.[2]

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[1] For a synopsis of the legislative history see the Appendix to this opinion.

[2] See *Peterson* v. *City of Greenville,* 373 U. S. 244 (discrimination in restaurant); *Lombard* v. *Louisiana,* 373 U. S. 267 (discrimination in restaurant); *Burton* v. *Wilmington Parking Authority,* 365 U. S. 715 (discrimination in restaurant); *Watson* v. *City of Memphis,* 373 U. S. 526 (discrimination in city park); *Brown* v. *Board of Education,* 347 U. S. 483 (discrimination in public school system); *Nixon* v. *Herndon,* 273 U. S. 536 (discrimination in voting).

"State action"—the key to Fourteenth Amendment guarantees—is defined by § 201 (d) as follows:

> "Discrimination or segregation by an establishment is supported by State action within the meaning of this title if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or *enforced by officials of the State* or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof." (Italics added.)

That definition is within our decision of *Shelley* v. *Kraemer,* 334 U. S. 1, for the "discrimination" in the present cases is "enforced by officials of the State," *i. e.,* by the state judiciary under the trespass laws.[3] As we wrote in *Shelley* v. *Kraemer, supra,* 19:

> "We have no doubt that there has been state action in the full and complete sense of the phrase. The undisputed facts disclose that petitioners were willing purchasers of properties upon which they desired to establish homes. The owners of the properties were willing sellers; and contracts of sale were accordingly consummated. It is clear that but for the active intervention of the state courts, supported by the full panoply of state power, petitioners would have been free to occupy the properties in question without restraint.
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> "These are not cases, as has been suggested, in which the States have merely abstained from action, leaving private individuals free to impose such discriminations as they see fit. Rather, these are cases in which the States have made available to such indi-

[3] The Georgia trespass law is found in Ga. Code Ann., § 26–3005 (1963 Supp.), and that of Alabama in Ala. Code, Tit. 14, § 426 (1958 Recomp.).

viduals the full coercive power of government to deny to petitioners, on the grounds of race or color, the enjoyment of property rights in premises which petitioners are willing and financially able to acquire and which the grantors are willing to sell. The difference between judicial enforcement and nonenforcement of the restrictive covenants is the difference to petitioners between being denied rights of property available to other members of the community and being accorded full enjoyment of those rights on an equal footing."

Section 202 declares the right of all persons to be free from certain kinds of state action at *any* public establishment—not just at the previously enumerated places of public accommodation:

> "All persons shall be entitled to be free, at any establishment or place, from discrimination or segregation of any kind on the ground of race, color, religion, or national origin, if such discrimination or segregation is or purports to be required by any law, statute, ordinance, regulation, rule, or order of a State or any agency or political subdivision thereof."

Thus the essence of many of the guarantees embodied in the Act are those contained in the Fourteenth Amendment.

The Commerce Clause, to be sure, enters into some of the definitions of "place of public accommodation" in §§ 201 (b) and (c). Thus a "restaurant" is included, § 201 (b)(2), "if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce." § 201 (c)(2). But any "motel" is included "which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the pro-

prietor of such establishment as his residence." §§ 201 (b)(1) and (c)(1). Providing lodging "to transient guests" is not strictly Commerce Clause talk, for the phrase aptly describes any guest—local or interstate.

Thus some of the definitions of "place of public accommodation" in § 201 (b) are in Commerce Clause language and some are not. Indeed § 201 (b) is explicitly bifurcated. An establishment "which serves the public is a place of public accommodation," says § 201 (b), under either of two conditions: *first*, "if its operations affect commerce," or *second*, "if discrimination or segregation by it is supported by State action."

The House Report emphasizes these dual bases on which the Act rests (H. R. Rep. No. 914, 88th Cong., 1st Sess., p. 20)—a situation which a minority recognized was being attempted and which it opposed. *Id.*, pp. 98–101.

The Senate Committee laid emphasis on the Commerce Clause. S. Rep. No. 872, 88th Cong., 2d Sess., pp. 12–13. The use of the Commerce Clause to surmount what was thought to be the obstacle of the *Civil Rights Cases*, 109 U. S. 3, is mentioned. *Ibid.* And the economic aspects of the problems of discrimination are heavily accented. *Id.*, p. 17 *et seq.* But it is clear that the objectives of the Fourteenth Amendment were by no means ignored. As stated in the Senate Report:

> "Does the owner of private property devoted to use as a public establishment enjoy a property right to refuse to deal with any member of the public because of that member's race, religion, or national origin? As noted previously, the English common law answered this question in the negative. It reasoned that one who employed his private property for purposes of commercial gain by offering goods or services to the public must stick to his bargain. It is to be remembered that the right of the private

property owner to serve or sell to whom he pleased was never claimed when laws were enacted prohibiting the private property owner from dealing with persons of a particular race. Nor were such laws ever struck down as an infringement upon this supposed right of the property owner.

"But there are stronger and more persuasive reasons for not allowing concepts of private property to defeat public accommodations legislation. The institution of private property exists for the purpose of enhancing the individual freedom and liberty of human beings. This institution assures that the individual need not be at the mercy of others, including government, in order to earn a livelihood and prosper from his individual efforts. Private property provides the individual with something of value that will serve him well in obtaining what he desires or requires in his daily life.

"Is this time honored means to freedom and liberty now to be twisted so as to defeat individual freedom and liberty? Certainly denial of a right to discriminate or segregate by race or religion would not weaken the attributes of private property that make it an effective means of obtaining individual freedom. In fact, in order to assure that the institution of private property serves the end of individual freedom and liberty it has been restricted in many instances. The most striking example of this is the abolition of slavery. Slaves were treated as items of private property, yet surely no man dedicated to the cause of individual freedom could contend that individual freedom and liberty suffered by emancipation of the slaves.

"There is not any question that ordinary zoning laws place far greater restrictions upon the rights of private property owners than would public accom-

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modations legislation. Zoning laws tell the owner of private property to what type of business his property may be devoted, what structures he may erect upon that property, and even whether he may devote his private property to any business purpose whatsoever. Such laws and regulations restricting private property are necessary so that human beings may develop their communities in a reasonable and peaceful manner. Surely the presence of such restrictions does not detract from the role of private property in securing individual liberty and freedom.

"Nor can it be reasonably argued that racial or religious discrimination is a vital factor in the ability of private property to constitute an effective vehicle for assuring personal freedom. The pledge of this Nation is to secure freedom for every individual; that pledge will be furthered by elimination of such practices." *Id.*, pp. 22–23.

Thus while I agree with the Court that Congress in fashioning the present Act used the Commerce Clause to regulate racial segregation, it also used (and properly so) some of its power under § 5 of the Fourteenth Amendment.

I repeat what I said earlier, that our decision should be based on the Fourteenth Amendment, thereby putting an end to all obstructionist strategies and allowing every person—whatever his race, creed, or color—to patronize all places of public accommodation without discrimination whether he travels interstate or intrastate.

APPENDIX TO OPINION OF MR. JUSTICE DOUGLAS, CONCURRING.

(1) *The Administration Bill* (as introduced in the House by Congressman Celler, it was H. R. 7152).

Unlike the Act as it finally became law, this bill (a) contained findings (pp. 10–13) which described discrimina-

tion in places of public accommodation and in findings (h) and (i) connected this discrimination to state action and invoked Fourteenth Amendment powers to deal with the problem; and (b) in setting forth the public establishments which were covered, it used only commerce-type language and did not contain anything like the present § 201 (d) and its link to § 201 (b)—the "or" clause in § 201 (b). Nor did the bill contain the present § 202.

In the hearings before the House Judiciary Subcommittee the Attorney General stated clearly and repeatedly that while the bill relied "primarily" on the Commerce Clause, it was also intended to rest on the Fourteenth Amendment. See Hearings before Subcommittee No. 5, House Judiciary Committee, 88th Cong., 1st Sess., 1375–1376, 1388, 1396, 1410, 1417–1419.

(2) *The Subcommittee Bill* (as reported to the full House Judiciary Committee).

The Attorney General testified against portions of this bill. He reiterated that the administration bill rested on the Fourteenth Amendment as well as on the Commerce Clause: see Hearings, House Judiciary Committee on H. R. 7152, as amended by Subcommittee No. 5, 88th Cong., 1st Sess., 2693, 2700, 2764. But this bill added for the first time a provision similar to the present § 201 (d)—only much broader. See *id.*, at 2656, first full paragraph. (Apparently this addition was in response to the urgings of those who wanted to broaden the bill and who failed to comprehend that the administration bill already rested, despite its commerce language, on the Fourteenth Amendment.) The Attorney General feared that the new provision went too far. Further, the new provision, unlike the present § 201 (d) but like the present § 202, did not limit coverage to those establishments specifically defined as places of public accommodation; rather it referred to all businesses operating under state

"authorization, permission, or license." See *id.*, at 2656. The Attorney General objected to this: Congress ought not to invoke the Fourteenth Amendment generally but rather ought to specify the establishments that would be covered. See *id.*, at 2656, 2675–2676, 2726. This the administration bill had done by covering only those establishments which had certain commercial characteristics.

Subsequently the Attorney General indicated that he would accept a portion of the Subcommittee additions that ultimately became §§ 201 (d) and 202; but he made it clear that he did not understand that these additions removed the Fourteenth Amendment foundation which the administration had placed under its bill. He did not understand that these additions confined the Fourteenth Amendment foundation of the bill to the additions alone; the commerce language sections were still supported in the alternative by the Fourteenth Amendment. See especially *id.*, at 2764; compare p. 2727 with p. 2698. The Subcommittee said that it made these additions in order to insure that the Fourteenth Amendment was relied on. See *id.*, at 2763; also Subcommittee Hearings, *supra*, 1413–1421. And the Attorney General repeated at p. 2764 that he would agree to whatever language was necessary to make it clear that the bill relied on the Fourteenth Amendment as well as the Commerce Clause.

Therefore it seems clear that a dual motive was behind the addition of what ultimately became §§ 201 (d) and 202: (1) to expand the coverage of the Act; (2) to make it clear that Congress was invoking its powers under the Fourteenth Amendment.

(3) *The Committee Bill* (as reported to the House).

This bill contains the present §§ 201 (d) and 202, except that "state action" is given an even broader definition in § 201 (d) as then written than it has in the present § 201 (d).

The House Report has the following statement: "*Section 201 (d)* delineates the circumstances under which discrimination or segregation by an establishment is supported by State action within the meaning of title II." H. R. Rep. No. 914, 88th Cong., 1st Sess., 21. On p. 117 of the Report Representative Cramer says: "The 14th amendment approach to public accommodations [in the committee bill as contrasted with the administration bill] is not limited to the narrower definition of 'establishment' under the interstate commerce approach and covers broad State 'custom or usage' or where discrimination is 'fostered or encouraged' by State action (sec. 201 (d))." By implication the committee has merely broadened the coverage of the administration's bill by adding the explicit state action language; it has not thereby removed the Fourteenth Amendment foundation from the commerce language coverage.

Congressman Celler introduced into the Congressional Record a series of memoranda on the constitutionality of the various titles of the bill; at pp. 1524–1526* the Fourteenth Amendment is discussed; at p. 1526 it is suggested that the Thirteenth Amendment is to be regarded as "additional authority" for the legislation.

At p. 1917 Congressman Willis introduces an amendment to strike out "transient guests" and to replace these words with "interstate travelers." As reported, says Congressman Willis, the bill boldly undertakes to regulate intrastate commerce, at least to this extent. *Ibid.* The purpose of the amendment is simply to relate "this bill to the powers of Congress." *Ibid.* Congressman Celler, the floor manager of the bill, will not accept the amendment, which introduces an element of uncertainty into the scope of the bill's coverage. At p. 1924 Congressman

*All citations are to Vol. 110, Congressional Record.

Lindsay makes remarks indicating that it is his understanding that the commerce language portions of § 201 rest only on the Commerce Clause, while the Fourteenth Amendment is invoked to support only § 201 (d).

But at p. 1926 Congressman MacGregor, a member of the Judiciary Subcommittee, states, in response to Congressman Willis' challenge to the constitutionality of the "transient guests" coverage, that: "When the gentleman from Louisiana seeks in subparagraph (1) on page 43 [§ 201 (b)(1)] to tightly circumscribe the number of inns, hotels, and motels to be covered under this legislation he does violence to the 1883 Supreme Court decision where it defines the authority of the Congress under the 14th amendment. . . . Mr. Chairman, in light of the 1883 Supreme Court decision cited by the gentleman from Louisiana, and in light of a score of subsequent decisions, it is precisely the legislative authority granted in the 14th amendment that we seek here to exercise."

At pp. 1962–1968 there is the discussion surrounding the passage of the Goodell amendment striking the word "encouraged" from § 201 (d)(2) of the bill as reported. Likewise in these pages there is the discussion concerning the Willis amendment to the Goodell amendment: this amendment eliminated the word "fostered." After the adoption of these amendments the custom or usage had to be "required or enforced" by the State—not merely "fostered or encouraged" in order to constitute "state action" within the meaning of the Act.

At p. 1964 Congressman Smith of Virginia offered an amendment as a substitute to the Goodell amendment that would have eliminated the "custom or usage" language altogether. Congressman Celler said in defense of the bill as reported: "[C]ustom or usage is not constituted merely by a practice in a neighborhood or by popular attitude in a particular community. It consists of a practice which, though not embodied in law, receives notice and sanction to the extent that it is enforced by

the officialdom of the State or locality" (pp. 1964–1965). The Smith Amendment was rejected by the House (p. 1967).

It would seem that the action on this Smith substitute and the statement by Congressman Celler mean that a State's enforcement of the custom of segregation in places of public accommodation by the use of its trespass laws is a violation of § 201 (d)(2).

(4) *The House Bill.*

The House bill was placed directly on the Senate calendar and did not go to committee. The Dirksen-Mansfield substitute adopted by the Senate made only one change in §§ 201 and 202: it changed "a" to "the" in § 201 (d)(3). Senator Dirksen nowhere made any explicit references to the constitutional bases of Title II. Thus it is fair to assume that the Senate's understanding on this question was no different from the House's view. The Senate substitute was adopted without change by the House on July 2, 1964, and signed by the President on the same day.

MR. JUSTICE GOLDBERG, concurring.*

I join in the opinions and judgments of the Court, since I agree "that the action of the Congress in the adoption of the Act as applied here . . . is within the power granted it by the Commerce Clause of the Constitution, as interpreted by this Court for 140 years," *ante,* at 261.

The primary purpose of the Civil Rights Act of 1964, however, as the Court recognizes, and as I would underscore, is the vindication of human dignity and not mere economics. The Senate Commerce Committee made this quite clear:

> "The primary purpose of . . . [the Civil Rights Act], then, is to solve this problem, the deprivation of personal dignity that surely accompanies denials

*[This opinion applies also to No. 543, *Katzenbach* v. *McClung, post,* p. 294.]

> of equal access to public establishments. Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility, courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues." S. Rep. No. 872, 88th Cong., 2d Sess., 16.

Moreover, that this is the primary purpose of the Act is emphasized by the fact that while § 201 (c) speaks only in terms of establishments which "affect commerce," it is clear that Congress based this section not only on its power under the Commerce Clause but also on § 5 of the Fourteenth Amendment.[1] The cases cited in the Court's opinions are conclusive that Congress could exercise its

[1] Hearings in Congress as well as statements by administration spokesmen show that the original bill, presented by the administration, was so based even though it contained no clause which resembled § 201 (d)—the so-called "state action" provision—or which even mentioned "state action." See, *e. g.*, Hearings before Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., 23, 27–28, 57, 74, 230, 247–248, 250, 252–253, 256, 259; Hearings before Senate Judiciary Committee on S. 1731, 88th Cong., 1st Sess., 151, 152, 186; Hearings before Subcommittee No. 5 of the House Committee on the Judiciary on H. R. 7152, 88th Cong., 1st Sess., 1396, 1410; Hearings before House Judiciary Committee on H. R. 7152, as amended by Subcommittee No. 5, 88th Cong., 1st Sess., 2693, 2699–2700; S. Rep. No. 872, 88th Cong., 2d Sess., 2. The later additions of "state action" language to § 201 (a) and § 201 (d) did not remove the dual Commerce Clause-Fourteenth Amendment support from the rest of the bill, for those who added this clause did not intend thereby to bifurcate its constitutional basis. This language and § 201 (d) were added, first, in order to make certain that the Act would cover all or almost all of the situations as to which this Court might hold that § 1 of the Fourteenth Amendment applied. Senator Hart stated that not to do so would "embarrass Congress

powers under the Commerce Clause to accomplish this purpose. As §§ 201 (b) and (c) are undoubtedly a valid exercise of the Commerce Clause power for the reasons stated in the opinions of the Court, the Court considers that it is unnecessary to consider whether it is additionally supportable by Congress' exertion of its power under § 5 of the Fourteenth Amendment.

In my concurring opinion in *Bell* v. *Maryland,* 378 U. S. 226, 317, however, I expressed my conviction that § 1 of the Fourteenth Amendment guarantees to all Americans the constitutional right "to be treated as equal members of the community with respect to public accommodations," and that "Congress [has] authority under § 5 of the Fourteenth Amendment, or under the Commerce Clause, Art. I, § 8, to implement the rights protected by § 1 of the Fourteenth Amendment. In the give-and-take of the legislative process, Congress can fashion a law drawing the guidelines necessary and appropriate to facilitate practical administration and to distinguish between genuinely public and private accommodations." The challenged Act is just such a law and, in my view, Congress clearly had authority under both § 5 of the Fourteenth Amendment and the Commerce Clause to enact the Civil Rights Act of 1964.

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because . . . the reach of the administration bill would be less inclusive than that Court-established right." Hearings before Senate Commerce Committee, *supra,* at 256. See also *id.,* at 259–262. Second, the sponsors of § 201 (d) were trying to make even clearer the Fourteenth Amendment basis of Title II. See, *e. g.,* Hearings before Subcommittee No. 5 of the House Committee, *supra,* at 1413–1418; Hearings before the Senate Commerce Committee, *supra,* at 259–262. There is no indication that they thought the inclusion of § 201 (d) would remove the Fourteenth Amendment foundation of the rest of the title. Third, the history of the bill after provisions similar to § 201 (d) were added contains references to the dual foundation of all Title II provisions before us. See Hearings before Subcommittee No. 5 of the House Committee, *supra,* at 1396, 1410; Hearings before House Judiciary Committee, *supra,* at 2693, 2699–2700; 110 Cong. Rec. 1925–1928.

KATZENBACH, ACTING ATTORNEY GENERAL, ET AL. *v.* McCLUNG ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA.

No. 543. Argued October 5, 1964.—Decided December 14, 1964.

Appellees, whose restaurant in Birmingham, Alabama, caters to local white customers with take-out service for Negroes, serving food a substantial portion of which has moved in interstate commerce, sued to enjoin appellants from enforcing against their restaurant and others Title II of the Civil Rights Act of 1964 which they claimed was unconstitutional. A three-judge District Court granted an injunction, holding that there was no demonstrable connection between food purchased in interstate commerce and sold in a restaurant and Congress' conclusion that discrimination in the restaurant would affect commerce so as to warrant regulation of local activities to protect interstate commerce. *Held:*

1. Since interference with governmental action has occurred and the constitutionality of Title II is before the Court in a companion case, the Court reaches the merits of this case by considering the complaint as an application for declaratory judgment, instead of denying relief for want of equity jurisdiction as it would ordinarily do on the ground that appellees should have waited to pursue the statutory procedures for adjudication of their rights. Pp. 295–296.

2. Congress acted within its power to protect and foster commerce in extending coverage of Title II to restaurants serving food a substantial portion of which has moved in interstate commerce, since it had ample basis to conclude that racial discrimination by such restaurants burdened interstate trade. Pp. 300–305.

233 F. Supp. 815, reversed.

Solicitor General Cox argued the cause for appellants. With him on the brief were *Assistant Attorney General Marshall, Ralph S. Spritzer, Philip B. Heymann, Harold H. Greene* and *Gerald P. Choppin.*

Robert McDavid Smith argued the cause for appellees. With him on the briefs was *William G. Somerville.*

Jack Greenberg, Constance Baker Motley, James M. Nabrit III and *Charles L. Black, Jr.,* filed a brief for the NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae,* urging reversal.

T. W. Bruton, Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, filed a brief for the State of North Carolina, as *amicus curiae,* urging affirmance.

MR. JUSTICE CLARK delivered the opinion of the Court.

This case was argued with No. 515, *Heart of Atlanta Motel* v. *United States,* decided this date, *ante,* p. 241, in which we upheld the constitutional validity of Title II of the Civil Rights Act of 1964 against an attack by hotels, motels, and like establishments. This complaint for injunctive relief against appellants attacks the constitutionality of the Act as applied to a restaurant. The case was heard by a three-judge United States District Court and an injunction was issued restraining appellants from enforcing the Act against the restaurant. 233 F. Supp. 815. On direct appeal, 28 U. S. C. §§ 1252, 1253 (1958 ed.), we noted probable jurisdiction. 379 U. S. 802. We now reverse the judgment.

1. *The Motion to Dismiss.*

The appellants moved in the District Court to dismiss the complaint for want of equity jurisdiction and that claim is pressed here. The grounds are that the Act authorizes only preventive relief; that there has been no threat of enforcement against the appellees and that they have alleged no irreparable injury. It is true that ordinarily equity will not interfere in such cases. However, we may and do consider this complaint as an application for a declaratory judgment under 28 U. S. C. §§ 2201 and 2202 (1958 ed.). In this case, of course, direct appeal to this Court would still lie under 28 U. S. C. § 1252 (1958

ed.). But even though Rule 57 of the Federal Rules of Civil Procedure permits declaratory relief although another adequate remedy exists, it should not be granted where a special statutory proceeding has been provided. See Notes on Rule 57 of Advisory Committee on Rules, 28 U. S. C. App. 5178 (1958 ed.). Title II provides for such a statutory proceeding for the determination of rights and duties arising thereunder, §§ 204–207, and courts should, therefore, ordinarily refrain from exercising their jurisdiction in such cases.

The present case, however, is in a unique position. The interference with governmental action has occurred and the constitutional question is before us in the companion case of *Heart of Atlanta Motel* as well as in this case. It is important that a decision on the constitutionality of the Act as applied in these cases be announced as quickly as possible. For these reasons, we have concluded, with the above caveat, that the denial of discretionary declaratory relief is not required here.

2. *The Facts.*

Ollie's Barbecue is a family-owned restaurant in Birmingham, Alabama, specializing in barbecued meats and homemade pies, with a seating capacity of 220 customers. It is located on a state highway 11 blocks from an interstate one and a somewhat greater distance from railroad and bus stations. The restaurant caters to a family and white-collar trade with a take-out service for Negroes. It employs 36 persons, two-thirds of whom are Negroes.

In the 12 months preceding the passage of the Act, the restaurant purchased locally approximately $150,000 worth of food, $69,683 or 46% of which was meat that it bought from a local supplier who had procured it from outside the State. The District Court expressly found that a substantial portion of the food served in the restau-

rant had moved in interstate commerce. The restaurant has refused to serve Negroes in its dining accommodations since its original opening in 1927, and since July 2, 1964, it has been operating in violation of the Act. The court below concluded that if it were required to serve Negroes it would lose a substantial amount of business.

On the merits, the District Court held that the Act could not be applied under the Fourteenth Amendment because it was conceded that the State of Alabama was not involved in the refusal of the restaurant to serve Negroes. It was also admitted that the Thirteenth Amendment was authority neither for validating nor for invalidating the Act. As to the Commerce Clause, the court found that it was "an express grant of power to Congress to regulate interstate commerce, which consists of the movement of persons, goods or information from one state to another"; and it found that the clause was also a grant of power "to regulate intrastate activities, but only to the extent that action on its part is necessary or appropriate to the effective execution of its expressly granted power to regulate interstate commerce." There must be, it said, a close and substantial relation between local activities and interstate commerce which requires control of the former in the protection of the latter. The court concluded, however, that the Congress, rather than finding facts sufficient to meet this rule, had legislated a conclusive presumption that a restaurant affects interstate commerce if it serves or offers to serve interstate travelers or if a substantial portion of the food which it serves has moved in commerce. This, the court held, it could not do because there was no demonstrable connection between food purchased in interstate commerce and sold in a restaurant and the conclusion of Congress that discrimination in the restaurant would affect that commerce.

The basic holding in *Heart of Atlanta Motel,* answers many of the contentions made by the appellees.[1] There we outlined the overall purpose and operational plan of Title II and found it a valid exercise of the power to regulate interstate commerce insofar as it requires hotels and motels to serve transients without regard to their race or color. In this case we consider its application to restaurants which serve food a substantial portion of which has moved in commerce.

3. *The Act As Applied.*

Section 201 (a) of Title II commands that all persons shall be entitled to the full and equal enjoyment of the goods and services of any place of public accommodation without discrimination or segregation on the ground of race, color, religion, or national origin; and § 201 (b) defines establishments as places of public accommodation if their operations affect commerce or segregation by them is supported by state action. Sections 201 (b)(2) and (c) place any "restaurant . . . principally engaged in selling food for consumption on the premises" under the Act "if . . . it serves or offers to serve interstate travelers or a substantial portion of the food which it serves . . . has moved in commerce."

Ollie's Barbecue admits that it is covered by these provisions of the Act. The Government makes no contention that the discrimination at the restaurant was supported by the State of Alabama. There is no claim that interstate travelers frequented the restaurant. The sole question, therefore, narrows down to whether Title II, as applied to a restaurant annually receiving about $70,000 worth of food which has moved in commerce, is a valid exercise of the power of Congress. The Govern-

[1] That decision disposes of the challenges that the appellees base on the Fifth, Ninth, Tenth, and Thirteenth Amendments, and on the *Civil Rights Cases,* 109 U. S. 3 (1883).

ment has contended that Congress had ample basis upon which to find that racial discrimination at restaurants which receive from out of state a substantial portion of the food served does, in fact, impose commercial burdens of national magnitude upon interstate commerce. The appellees' major argument is directed to this premise. They urge that no such basis existed. It is to that question that we now turn.

4. *The Congressional Hearings.*

As we noted in *Heart of Atlanta Motel* both Houses of Congress conducted prolonged hearings on the Act. And, as we said there, while no formal findings were made, which of course are not necessary, it is well that we make mention of the testimony at these hearings the better to understand the problem before Congress and determine whether the Act is a reasonable and appropriate means toward its solution. The record is replete with testimony of the burdens placed on interstate commerce by racial discrimination in restaurants. A comparison of per capita spending by Negroes in restaurants, theaters, and like establishments indicated less spending, after discounting income differences, in areas where discrimination is widely practiced. This condition, which was especially aggravated in the South, was attributed in the testimony of the Under Secretary of Commerce to racial segregation. See Hearings before the Senate Committee on Commerce on S. 1732, 88th Cong., 1st Sess., 695. This diminutive spending springing from a refusal to serve Negroes and their total loss as customers has, regardless of the absence of direct evidence, a close connection to interstate commerce. The fewer customers a restaurant enjoys the less food it sells and consequently the less it buys. S. Rep. No. 872, 88th Cong., 2d Sess., at 19; Senate Commerce Committee Hearings, at 207. In addition, the Attorney General testified that this type of discrimination imposed "an artificial restriction on the market" and interfered

with the flow of merchandise. *Id.*, at 18–19; also, on this point, see testimony of Senator Magnuson, 110 Cong. Rec. 7402–7403. In addition, there were many references to discriminatory situations causing wide unrest and having a depressant effect on general business conditions in the respective communities. See, *e. g.*, Senate Commerce Committee Hearings, at 623–630, 695–700, 1384–1385.

Moreover there was an impressive array of testimony that discrimination in restaurants had a direct and highly restrictive effect upon interstate travel by Negroes. This resulted, it was said, because discriminatory practices prevent Negroes from buying prepared food served on the premises while on a trip, except in isolated and unkempt restaurants and under most unsatisfactory and often unpleasant conditions. This obviously discourages travel and obstructs interstate commerce for one can hardly travel without eating. Likewise, it was said, that discrimination deterred professional, as well as skilled, people from moving into areas where such practices occurred and thereby caused industry to be reluctant to establish there. S. Rep. No. 872, *supra,* at 18–19.

We believe that this testimony afforded ample basis for the conclusion that established restaurants in such areas sold less interstate goods because of the discrimination, that interstate travel was obstructed directly by it, that business in general suffered and that many new businesses refrained from establishing there as a result of it. Hence the District Court was in error in concluding that there was no connection between discrimination and the movement of interstate commerce. The court's conclusion that such a connection is outside "common experience" flies in the face of stubborn fact.

It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant when

compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in *Wickard* v. *Filburn,* 317 U. S. 111 (1942):

> "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." At 127–128.

We noted in *Heart of Atlanta Motel* that a number of witnesses attested to the fact that racial discrimination was not merely a state or regional problem but was one of nationwide scope. Against this background, we must conclude that while the focus of the legislation was on the individual restaurant's relation to interstate commerce, Congress appropriately considered the importance of that connection with the knowledge that the discrimination was but "representative of many others throughout the country, the total incidence of which if left unchecked may well become far-reaching in its harm to commerce." *Polish Alliance* v. *Labor Board,* 322 U. S. 643, 648 (1944).

With this situation spreading as the record shows, Congress was not required to await the total dislocation of commerce. As was said in *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197 (1938):

> "But it cannot be maintained that the exertion of federal power must await the disruption of that commerce. Congress was entitled to provide reasonable preventive measures and that was the object of the National Labor Relations Act." At 222.

5. *The Power of Congress to Regulate Local Activities.*

Article I, § 8, cl. 3, confers upon Congress the power "[t]o regulate Commerce . . . among the several States" and Clause 18 of the same Article grants it the power

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"[t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers . . . ." This grant, as we have pointed out in *Heart of Atlanta Motel* "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce." *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110, 119 (1942). Much is said about a restaurant business being local but "even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce . . . ." *Wickard* v. *Filburn, supra,* at 125. The activities that are beyond the reach of Congress are "those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government." *Gibbons* v. *Ogden,* 9 Wheat. 1, 195 (1824). This rule is as good today as it was when Chief Justice Marshall laid it down almost a century and a half ago.

This Court has held time and again that this power extends to activities of retail establishments, including restaurants, which directly or indirectly burden or obstruct interstate commerce. We have detailed the cases in *Heart of Atlanta Motel,* and will not repeat them here.

Nor are the cases holding that interstate commerce ends when goods come to rest in the State of destination apposite here. That line of cases has been applied with reference to state taxation or regulation but not in the field of federal regulation.

The appellees contend that Congress has arbitrarily created a conclusive presumption that all restaurants

meeting the criteria set out in the Act "affect commerce." Stated another way, they object to the omission of a provision for a case-by-case determination—judicial or administrative—that racial discrimination in a particular restaurant affects commerce.

But Congress' action in framing this Act was not unprecedented. In *United States* v. *Darby,* 312 U. S. 100 (1941), this Court held constitutional the Fair Labor Standards Act of 1938.[2] There Congress determined that the payment of substandard wages to employees engaged in the production of goods for commerce, while not itself commerce, so inhibited it as to be subject to federal regulation. The appellees in that case argued, as do the appellees here, that the Act was invalid because it included no provision for an independent inquiry regarding the effect on commerce of substandard wages in a particular business. (Brief for appellees, pp. 76–77, *United States* v. *Darby,* 312 U. S. 100.) But the Court rejected the argument, observing that:

> "[S]ometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power." At 120–121.

Here, as there, Congress has determined for itself that refusals of service to Negroes have imposed burdens both upon the interstate flow of food and upon the movement of products generally. Of course, the mere fact that Congress has said when particular activity shall be deemed to affect commerce does not preclude further examination by this Court. But where we find that the legislators, in

[2] 52 Stat. 1060, 29 U. S. C. § 201 *et seq.* (1958 ed.).

light of the facts and testimony before them, have a rational basis for finding a chosen regulatory scheme necessary to the protection of commerce, our investigation is at an end. The only remaining question—one answered in the affirmative by the court below—is whether the particular restaurant either serves or offers to serve interstate travelers or serves food a substantial portion of which has moved in interstate commerce.

The appellees urge that Congress, in passing the Fair Labor Standards Act and the National Labor Relations Act,[3] made specific findings which were embodied in those statutes. Here, of course, Congress has included no formal findings. But their absence is not fatal to the validity of the statute, see *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152 (1938), for the evidence presented at the hearings fully indicated the nature and effect of the burdens on commerce which Congress meant to alleviate.

Confronted as we are with the facts laid before Congress, we must conclude that it had a rational basis for finding that racial discrimination in restaurants had a direct and adverse effect on the free flow of interstate commerce. Insofar as the sections of the Act here relevant are concerned, §§ 201 (b)(2) and (c), Congress prohibited discrimination only in those establishments having a close tie to interstate commerce, *i. e.*, those, like the McClungs', serving food that has come from out of the State. We think in so doing that Congress acted well within its power to protect and foster commerce in extending the coverage of Title II only to those restaurants offering to serve interstate travelers or serving food, a substantial portion of which has moved in interstate commerce.

The absence of direct evidence connecting discriminatory restaurant service with the flow of interstate food,

[3] 49 Stat. 449, as amended, 29 U. S. C. § 151 *et seq.* (1958 ed.).

a factor on which the appellees place much reliance, is not, given the evidence as to the effect of such practices on other aspects of commerce, a crucial matter.

The power of Congress in this field is broad and sweeping; where it keeps within its sphere and violates no express constitutional limitation it has been the rule of this Court, going back almost to the founding days of the Republic, not to interfere. The Civil Rights Act of 1964, as here applied, we find to be plainly appropriate in the resolution of what the Congress found to be a national commercial problem of the first magnitude. We find it in no violation of any express limitations of the Constitution and we therefore declare it valid.

The judgment is therefore

Reversed.

[For concurring opinion of MR. JUSTICE BLACK, see *ante*, p. 268.]

[For concurring opinion of MR. JUSTICE DOUGLAS, see *ante*, p. 279.]

[For concurring opinion of MR. JUSTICE GOLDBERG, see *ante*, p. 291.]

HAMM *v.* CITY OF ROCK HILL.

CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA.

No. 2. Argued October 12, 1964.—Decided December 14, 1964.*

The petitioners, who are Negroes, were convicted for violations of state trespass statutes for participating in "sit-ins" at lunch counters of retail stores. It was conceded that the lunch-counter operations would probably come within the coverage of the Civil Rights Act of 1964, which was passed subsequent to the convictions and the affirmances thereof in the state courts. *Held:*

1. The Act creates federal statutory rights which under the Supremacy Clause must prevail over any conflicting state laws. Pp. 310–312.

2. These convictions, being on direct review at the time the Act made the conduct no longer unlawful, must abate. Pp. 312–317.

(a) Had these been federal convictions they would have abated, Congress presumably having intended to avoid punishment no longer furthering a legislative purpose, and the general federal saving statute being inapplicable to a statute like this which substitutes a right for what was previously criminal. Pp. 312–314.

(b) Though these were state convictions their abatement is likewise required not only under the Supremacy Clause and because the pending convictions are contrary to the legislative purpose of the Act but also because abatement is a necessary part of every statute which repeals criminal legislation. Pp. 314–317.

241 S. C. 420, 128 S. E. 2d 907; 236 Ark. 596, 367 S. W. 2d 750, judgments vacated and charges ordered dismissed.

Jack Greenberg argued the cause for petitioner in No. 2. *Constance Baker Motley* argued the cause for petitioners in No. 5. With them on the brief were *James M. Nabrit III, Charles L. Black, Jr., Matthew J. Perry, Lincoln C. Jenkins, Donald James Sampson, Willie T. Smith, Jr., Harold B. Anderson, Wiley A. Branton, William T. Coleman, Jr.,* and *Marvin E. Frankel.*

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*Together with No. 5, *Lupper et al.* v. *Arkansas*, on certiorari to the Supreme Court of Arkansas.

Daniel R. McLeod, Attorney General of South Carolina, argued the cause for respondent in No. 2. With him on the brief was *Everett N. Brandon,* Assistant Attorney General of South Carolina.

Jack L. Lessenberry, Chief Assistant Attorney General of Arkansas, argued the cause for respondent in No. 5. With him on the brief was *Bruce Bennett,* Attorney General of Arkansas.

MR. JUSTICE CLARK delivered the opinion of the Court.

These are "sit-in" cases that came here from the highest courts of South Carolina and Arkansas, respectively. Each of those courts affirmed convictions based upon state trespass statutes against petitioners, who are Negroes, for participating in "sit-in" demonstrations in the luncheon facilities of retail stores in their respective States. We granted certiorari in each of the cases, 377 U. S. 988, 989, and consolidated them for argument. The petitioners asserted both in the state courts and here the denial of rights, privileges, and immunities secured by the Fourteenth Amendment; in addition, they claim here that the Civil Rights Act of 1964, 78 Stat. 241, passed subsequent to their convictions and the affirmances thereof in the state courts, abated these actions.

1. *The Facts.*

In No. 2, *Hamm* v. *Rock Hill,* the petitioner, and a companion who is now deceased, entered McCrory's variety store at Rock Hill, South Carolina. After making purchases in other parts of the store, they proceeded to the lunch counter and sought service. It was refused. The manager asked the petitioner and his associate to leave and when they refused he called the police. They were prosecuted and convicted under § 16–388 of the S. C. Code of Laws, making it an offense for anyone to enter a place of business after having been warned not to do so

or to refuse to leave immediately after having entered therein. Petitioner's companion died subsequently. The conviction of petitioner was affirmed by both the Court of General Sessions and the Supreme Court of South Carolina, 241 S. C. 420, 128 S. E. 2d 907 (1962).

Lupper v. *Arkansas,* No. 5, involves a group of Negroes who entered the department store of Gus Blass Company in Little Rock. The group went to the mezzanine tearoom of the store at the busy luncheon hour, seated themselves and requested service which was refused. Within a few minutes the group, including petitioners, was advised that Blass reserved the right to refuse service to anyone and was not prepared to serve them at that time. Upon being requested to leave, the petitioners refused. The police officers who were summoned located petitioners on the first floor of the store and arrested them. The officers' testimony that petitioners admitted the whole affair was denied. The prosecutions in the Little Rock Municipal Court resulted in convictions of petitioners based upon § 41–1433, Ark. Stat. Ann. (1964 Repl. Vol.), which prohibits a person from remaining on the premises of a business establishment after having been requested to leave by the owner or manager thereof. On appeal to the Pulaski Circuit Court, a trial *de novo* resulted in verdicts of guilty and the Arkansas Supreme Court affirmed, 236 Ark. 596, 367 S. W. 2d 750 (1963), *sub nom. Briggs* v. *State.*

We hold that the convictions must be vacated and the prosecutions dismissed. The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still-pending convictions are abated by its passage.

2. *Application of Title II of the Civil Rights Act of 1964 to the Facts Here.*

We treat these cases as involving places of public accommodation covered by the Civil Rights Act of 1964. Under that statute, a place of public accommodation is defined to include one which serves or offers to serve interstate travelers. Applying the rules of §§ 201 (b) (2), (c)[1] we find that each of them offers to serve interstate travelers. In *Hamm* it is not denied that the lunch counter was in a McCrory's 5-and-10-cent store, a large variety store at Rock Hill belonging to a national chain, which offers to sell thousands of items to the public; that it invites all members of the public into its premises to do business and offers to serve all persons, except at its lunch counter which is restricted to white persons only. There is no contention here that it does not come within the Act. Likewise in *Lupper* the lunch counter area, called a tearoom, is located within and operated by the Gus Blass Company's department store at Little Rock. It is a large department store dealing extensively in interstate commerce. It appears from the record that it also offered to serve all persons coming into its store but limited its lunch counter service to white persons. On argument it was frankly admitted that the

[1] Section 201:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . .

. . . . . .

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment . . .

. . . . . .

"(c) The operations of an establishment affect commerce within the meaning of this title if . . . it serves or offers to serve interstate travelers . . . ."

lunch counter operation "probably would" come under the Act. Finally, neither respondent asks for a remand to determine the facts as to coverage of the respective lunch counters.[2] In the light of such a record and the legislative history indicating that Congress intended to cover retail store lunch counters, see 110 Cong. Rec. 1519–1520, we hold that the Act covers both the McCrory and the Blass lunch counter operations.

3. *The Provisions of the Act.*

Under the Civil Rights Act, petitioners' conduct could not be the subject of trespass prosecutions, federal or state, if it had occurred after the enactment of the statute.

Title II includes several sections, some of which are relevant here, that create federal statutory rights.[3] The first is § 201 (a) declaring that "[a]ll persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation," which as we have found includes the establishments here involved. Next, § 203 provides:

> "No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or

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[2] In *Lupper* the State's brief says, "a remand of these cases would not reap any . . . benefits." At 13.

[3] Some of us believe that the substantive rights granted by the Act here, *i. e.*, freedom from discrimination in places of public accommodation are also included in the guarantees of the Fourteenth Amendment, see concurring opinions in *Bell* v. *Maryland,* 378 U. S. 226; others take the position that the Amendment creates no such substantive rights, see dissenting opinion in *Bell* v. *Maryland, supra.* No such question is involved here, and we do not pass upon it in any manner. We deal only with the statutory rights created in the Act.

> privilege secured by section 201 or 202, or (c) *punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202.*" (Emphasis supplied.)

On its face, this language prohibits prosecution of any person for seeking service in a covered establishment, because of his race or color. It has been argued, however, that victims of discrimination must make use of the exclusive statutory mechanisms for the redress of grievances, and not resort to extralegal means. Although we agree that the law generally condemns self-help, the language of § 203 (c) supports a conclusion that nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising or attempting to exercise a "right or privilege" secured by its earlier provisions. The availability of the Act as a defense against punishment is not limited solely to those who pursue the statutory remedies. The legislative history specifically notes that the Act would be a defense to criminal trespass, breach of the peace and similar prosecutions. Senator Humphrey, floor manager of the bill in the Senate, said in explaining the bill:

> "This plainly means that a defendant in a criminal trespass, breach of the peace, or other similar case can assert the rights created by 201 and 202 and that State courts must entertain defenses grounded upon these provisions. . . ." 110 Cong. Rec. 9767.

In effect the Act prohibits the application of state laws in a way that would deprive any person of the rights granted under the Act. The Supremacy Clause, Art. VI, cl. 2, requires this result where "there is a clear collision" between state and federal law, *Kesler* v. *Department of Safety,* 369 U. S. 153, 172 (1962), or a conflict between

federal law and the application of an otherwise valid state enactment, *Hill* v. *Florida,* 325 U. S. 538 (1945). There can be no question that this was the intended result here in light of § 203 (c). The present convictions and the command of the Civil Rights Act of 1964 are clearly in direct conflict. The only remaining question is the effect of the Act on judgments rendered, but not finalized, before its passage.

4. *Effect of the Act upon the Prosecutions.*

Last Term, in *Bell* v. *Maryland,* 378 U. S. 226, we noted the existence of a body of federal and state law to the effect that convictions on direct review at the time the conduct in question is rendered no longer unlawful by statute, must abate. We consider first the effect the Civil Rights Act would have on petitioners' convictions if they had been federal convictions, and then the import of the fact that these are state and not federal convictions. We think it is clear that the convictions, if federal, would abate.

The doctrine found its earliest expression in Chief Justice Marshall's opinion in *United States* v. *Schooner Peggy,* 1 Cranch 103, 110 (1801):

> "But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . [the law] ought always to receive a construction conforming to its manifest import . . . . In such a case the court must decide according to existing laws, and if it

> be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside."

Although the decision in that case arguably rested on the premise that appeals in admiralty were trials *de novo,* and that prize litigation applied the law of the time of trial, see *Yeaton* v. *United States,* 5 Cranch 281, 283 (1809); *Maryland* v. *Baltimore & O. R. Co.,* 3 How. 534, 552 (1845); *United States* v. *Tynen,* 11 Wall. 88, 95 (1871); *United States* v. *Reisinger,* 128 U. S. 398, 401 (1888); *United States* v. *Chambers,* 291 U. S. 217, 222–223 (1934); *Massey* v. *United States,* 291 U. S. 608 (1934), the later cases applied the rule in quite different contexts, see *United States* v. *Tynen, supra; United States* v. *Reisinger, supra.* The reason for the rule was stated by Chief Justice Hughes, in *United States* v. *Chambers:* "Prosecution for crimes is but an application or enforcement of the law, and if the prosecution continues the law must continue to vivify it." 291 U. S. 217, at 226. Although *Chambers* specifically left open the question of the effect of its rule on cases where final judgment was rendered prior to ratification of the Twenty-first Amendment, and petition for certiorari sought thereafter, such an extension of the rule was taken for granted in the *per curiam* decision in *Massey* v. *United States, supra,* handed down shortly after *Chambers.*

It is apparent that the rule exemplified by *Chambers* does not depend on the imputation of a specific intention to Congress in any particular statute. None of the cases cited drew on any reference to the problem in the legislative history or the language of the statute. Rather, the principle takes the more general form of imputing to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive. This general principle, expressed in the rule, is to be read wher-

ever applicable as part of the background against which Congress acts. Thus, we deem it irrelevant that Congress made no allusion to the problem in enacting the Civil Rights Act.

Nor do we believe that the provisions of the federal saving statute, 61 Stat. 635, 1 U. S. C. § 109 (1958 ed.), would nullify abatement of a federal conviction. In *Chambers*, a case where the cause for punishment was removed by a repeal of the constitutional basis for the punitive statute, the Court was quite certain as to this. See 291 U. S., at 224 and n. 2, involving the identical statute. The federal saving statute was originally enacted in 1871, 16 Stat. 432. It was meant to obviate mere technical abatement such as that illustrated by the application of the rule in *Tynen* decided in 1871. There a substitution of a new statute with a greater schedule of penalties was held to abate the previous prosecution. In contrast, the Civil Rights Act works no such technical abatement. It substitutes a right for a crime. So drastic a change is well beyond the narrow language of amendment and repeal. It is clear, therefore, that if the convictions were under a federal statute they would be abated.

We believe the fact that the convictions were under state statutes is in these cases a distinction without a difference.[4] We cannot believe the Congress, in enacting such a far-reaching and comprehensive scheme, intended the Act to operate less effectively than the run-of-

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[4] In *Bell* v. *Maryland*, *supra*, we dealt with the problem arising when a state enactment intervened prior to the finalizing of state criminal trespass convictions. Because we were dealing with the effect of a state statute on a state conviction prior to the Act's passage we felt that the state courts should be allowed to pass on the question. Here, we have an intervening federal statute and in attempting to judge its effect on a state conviction we are faced with a federal not a state question. Because of this distinction we do not feel that remand is required or desirable.

the-mill repealer. Since the provisions of the Act would abate all federal prosecutions it follows that the same rule must prevail under the Supremacy Clause which requires that a contrary state practice or state statute must give way. Here the Act intervened before either of the judgments under attack was finalized. Just as in federal cases abatement must follow in these state prosecutions. Rather than a retroactive intrusion into state criminal law this is but the application of a long-standing federal rule, namely, that since the Civil Rights Act substitutes a right for a crime any state statute, or its application, to the contrary must by virtue of the Supremacy Clause give way under the normal abatement rule covering pending convictions arising out of a pre-enactment activity. The great purpose of the civil rights legislation was to obliterate the effect of a distressing chapter of our history. This demands no less than the application of a normal rule of statutory construction to strike down pending convictions inconsistent with the purposes of the Act.

Far from finding a bar to the application of the rule where a state statute is involved, we find that our construction of the effect of the Civil Rights Act is more than statutory. It is required by the Supremacy Clause of the Constitution. See *Kesler* v. *Department of Safety,* 369 U. S. 153, 172 (1962); *Hill* v. *Florida,* 325 U. S. 538 (1945). Future state prosecutions under the Act being unconstitutional and there being no saving clause in the Act itself, convictions for pre-enactment violations would be equally unconstitutional and abatement necessarily follows.

Nor do we find persuasive reasons for imputing to the Congress an intent to insulate such prosecutions. As we have said, Congress, as well as the two Presidents who recommended the legislation, clearly intended to eradicate an unhappy chapter in our history. The peaceful conduct for which petitioners were prosecuted was on behalf

of a principle since embodied in the law of the land. The convictions were based on the theory that the rights of a property owner had been violated. However, the supposed right to discriminate on the basis of race, at least in covered establishments, was nullified by the statute. Under such circumstances the actionable nature of the acts in question must be viewed in the light of the statute and its legislative purpose.

We find yet another reason for applying the *Chambers* rule of construction. In our view Congress clearly had the power to extend immunity to pending prosecutions. Some might say that to permit these convictions to stand would have no effect on interstate commerce which we have held justified the adoption of the Act. But even if this be true, the principle of abatement is so firmly imbedded in our jurisprudence as to be a necessary and proper part of every statute working a repealer of criminal legislation. Where Congress sets out to regulate a situation within its power, the Constitution affords it a wide choice of remedies. This being true, the only question remaining is whether Congress exercised its power in the Act to abate the prosecutions here. If we held that it did not we would then have to pass on the constitutional question of whether the Fourteenth Amendment, without the benefit of the Civil Rights Act, operates of its own force to bar criminal trespass convictions, where, as here, they are used to enforce a pattern of racial discrimination. As we have noted, some of the Justices joining this opinion believe that the Fourteenth Amendment does so operate; others are of the contrary opinion. Since this point is not free from doubt, and since as we have found Congress has ample power to extend the statute to pending convictions we avoid that question by favoring an interpretation of the statute which renders a constitutional decision unnecessary.

In short, now that Congress has exercised its constitutional power in enacting the Civil Rights Act of 1964 and declared that the public policy of our country is to prohibit discrimination in public accommodations as therein defined, there is no public interest to be served in the further prosecution of the petitioners. And in accordance with the long-established rule of our cases they must be abated and the judgment in each is therefore vacated and the charges are ordered dismissed.

It is so ordered.

MR. JUSTICE DOUGLAS, whom MR. JUSTICE GOLDBERG joins, concurring.

Some of my Brethren raise constitutional doubts about the power of Congress to nullify the convictions of sit-in demonstrators for violation of state trespass laws prior to the passage of the Civil Rights Act of 1964. My Brother HARLAN observes that it is difficult to see, in the absence of any evidence in the legislative record of the Act, how "giving effect to *past* state trespass convictions would result in placing any burden on *present* interstate commerce," *post,* p. 325. I merely note here that, in joining the opinion of the Court, I am faced with no such difficulty. That is because, as my Brother GOLDBERG and I said in our respective concurring opinions in *Heart of Atlanta Motel, Inc.* v. *United States, ante,* pp. 291, 279, Congress has, in passing this Act, not merely sought to remove burdens from interstate commerce; it has also sought to protect and enforce the Fourteenth Amendment right to be free of discriminatory treatment, based on race, in places of public accommodation. It is certainly not difficult to see how Congress could appropriately conclude that all state interference with the exercise of this right should come to a halt on the passage of the Act, that the States should not be permitted to insist on punishing one whose only "crime" was assertion of a consti-

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tutional right, albeit prior to the enactment of the present legislation, and that this Court should not put its imprimatur on such state prosecutions, whenever they arose.

MR. JUSTICE BLACK, dissenting.

The Civil Rights Act of 1964, validly, I think,[1] made it unlawful for certain restaurants thereafter to refuse to serve food to colored people because of their color. The Court now interprets the Act as a command making it unlawful for the States to prosecute and convict "sit-in" demonstrators who had violated valid state trespass laws prior to passage of the federal Act. The idea that Congress has power to accomplish such a result has no precedent, so far as I know, in the nearly 200 years that Congress has been in existence.

The record shows that the two petitioners in *Lupper*, No. 5, were part of a group of persons who went to a department store tearoom, seated themselves at tables and at the counter as part of a "sit-in" demonstration, and refused to leave when asked to do so. The Court says that this conduct "could not be the subject of trespass prosecutions, federal or state, if it had occurred after the enactment of the statute." I do not understand from what the Court says that it interprets those provisions of the Civil Rights Act which give a right to be served without discrimination in an establishment which the Act covers [2] as also authorizing persons who are unlawfully refused service a "right" to take the law into their own hands by sitting down and occupying the premises for as long as they choose to stay. I think one of the chief purposes of the 1964 Civil Rights Act was to take such dis-

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[1] See my concurring opinion in *Heart of Atlanta Motel, Inc.* v. *United States, ante,* p. 268.

[2] Sections 201–203, 78 Stat. 243–244, 42 U. S. C. §§ 2000a—2000a–2 (1964 ed.).

putes out of the streets and restaurants and into the courts, which Congress has granted power to provide an adequate and orderly judicial remedy.

Even assuming, however, that the Civil Rights Act was intended to let people who enter restaurants take the law into their own hands by forcibly remaining when service is refused them, this would be no basis for holding that Congress also meant to compel States to abate convictions like these for lawless conduct occurring before the Act was passed. See *Bell* v. *Maryland,* 378 U. S. 226, 318 (dissenting opinion). The judge-made "common law rule" of construction on which the Court relies has been applied heretofore only where there was a repeal of one statute by another—not, as my Brother HARLAN points out, where as here a later law passed by Congress places certain restrictions on the operation of the still valid law of a State. But even if the old common-law rule of construction taken alone would otherwise have abated these convictions, Congress nearly a century ago passed a "saving" statute, 1 U. S. C. § 109 (1958 ed.), to keep courts from imputing to it an intent to abate cases retroactively, unless such an intent was expressly stated in the law it passed. That statute says:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. . . ."

The purpose of this statute is plain on its face—it was to prevent courts from imputing to Congress an intent which Congress never entertained. This was broad, remedial legislation, see *Great Northern R. Co.* v. *United*

States, 208 U. S. 452; *United States* v. *Reisinger,* 128 U. S. 398; *United States* v. *Ulrici,* 3 Dillon 532, 28 Fed. Cas. 328 (No. 16,594) (C. C. E. D. Mo.) (opinion of Mr. Justice Miller on circuit), and by any fair reading it is broad enough to wipe out any and every application of the common-law rule which it was designed to do away with, unless judge-made rules of construction have some sort of superiority over congressionally enacted statutes.[3] In *United States* v. *Chambers,* 291 U. S. 217, and *Massey* v. *United States,* 291 U. S. 608, the only cases which the Court cites as authority for disregarding the federal saving statute, this Court made clear that the saving statute was not involved in any way since the abatement there was by force of the Twenty-first Amendment, and of course an amendment to the Constitution supersedes an Act of Congress. See 291 U. S., at 223–224. By today's discovery of a "long-established rule of our cases," the Court has now put back on Congress the burden of spelling out expressly, statute by statute, in laws passed hereafter that it does not want to upset convictions for past crimes, a burden which Congress renounced nearly 100 years ago and which it did not know it had when it passed the 1964 Act.

Furthermore, I have grave doubt about the power of Congress acting under the Commerce Clause and the Necessary and Proper Clause to take the unprecedented step of abating these past state convictions. Yet the

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[3] The Court says that:

"The federal saving statute was originally enacted in 1871, 16 Stat. 432. It was meant to obviate mere technical abatement such as that illustrated by the application of the rule in *Tynen* decided in 1871. There a substitution of a new statute with a greater schedule of penalties was held to abate the previous prosecution." *Ante,* p. 314.

There is no support for this statement in the language of the statute, in its legislative history, or in subsequent decisions under it.

Court judicially declares that "there is no public interest to be served" in upholding the convictions of these trespassers, a conclusion of policy which I had thought was only for legislative bodies to decide. See *Ferguson* v. *Skrupa,* 372 U. S. 726.

In the early days of this country this Court did not so lightly intrude upon the criminal laws of a State. In *Cohens* v. *Virginia,* 6 Wheat. 264, 443, decided in 1821, Chief Justice John Marshall speaking for the Court said:

> "To interfere with the penal laws of a State, where they are not levelled against the legitimate powers of the Union, but have for their sole object the internal government of the country, is a very serious measure, which Congress cannot be supposed to adopt lightly, or inconsiderately. The motives for it must be serious and weighty. It would be taken deliberately, and the intention would be clearly and unequivocally expressed.
>
> "An act, such as that under consideration, ought not, we think, to be so construed as to imply this intention, unless its provisions were such as to render the construction inevitable."

Nothing in the language or history of the 1964 Act makes the Court's reading into it of a purpose to interfere with state laws "inevitable" or even supportable, nor in any way justifies the Court's offhand assertion that it is carrying out the "legislative purpose." For I do not find one paragraph, one sentence, one clause, or one word in the 1964 Act on which the most strained efforts of the most fertile imagination could support such a conclusion. And in what is perhaps the most extensive and careful legislative history ever compiled, dealing with one of the most thoroughly discussed and debated bills ever passed by Congress, a history including millions and millions of words written on tens of thousands of pages contained in

volumes weighing well over half a hundred pounds, in which every conceivable aspect and application of the 1964 Act were discussed *ad infinitum*, not even once did a single sponsor, proponent or opponent of the Act intimate a hope or express a fear that the Act was intended to have the effect which the Court gives it today.

MR. JUSTICE HARLAN, dissenting.

The Court holds that these state trespass convictions, occurring before the passage of the Civil Rights Act of 1964, must be set aside by virtue of the federal doctrine of criminal abatement. This remarkable conclusion finds no support in reason or authority.

The common-law rule of abatement is basically a canon of construction conceived by the courts as a yardstick for determining whether a legislature, which has enacted a statute making conduct noncriminal which was proscribed by an earlier criminal statute, also intended to put an end to nonfinal convictions under the former legislation. In effect, the doctrine of abatement establishes a presumption that such was the purpose of the legislature in the absence of a demonstrated contrary intent, as evidenced, for example, in the case of congressional enactments by the federal saving statute,[1] see *United States*

[1] 1 U. S. C. § 109 (1958 ed.):

"The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any

v. *Reisinger,* 128 U. S. 398. As was said in *United States* v. *Tynen,* 11 Wall. 88, 95:

> "By the repeal of the 13th section of the act of 1813 all criminal proceedings taken under it fell. There can be no legal conviction, nor any valid judgment pronounced upon conviction, unless the law creating the offence be at the time in existence. By the repeal the legislative will is expressed that no further proceedings be had under the act repealed."

The doctrine has its origins in the English common law, see, *e. g., Rex* v. *Cator,* 4 Burr. 2026, 98 Eng. Rep. 56; *King* v. *Davis,* 1 Leach Crown Cases 306 (3d ed.), 168 Eng. Rep. 238, and has been embraced in American state and federal jurisprudence.

The abatement doctrine serves a useful and appropriate purpose in a framework of the legislation of a *single* political sovereignty. The doctrine strikes a jarring note, however, when it is applied so as to affect the legislation of a *different* sovereignty, as the federal doctrine is now used to abate these state convictions. Our federal system tolerates wide differences between state and federal legislative policies,[2] and the presumption of retroactive excul-

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proper action or prosecution for the enforcement of such penalty, forfeiture, or liability."

I accept the Court's conclusion that this section has no application here, but only because there has been no repeal or amendment of an existing *federal* statute.

[2] Arkansas, for example, has a saving clause, Ark. Stat. Ann. §§ 1–103, 1–104, similar to 1 U. S. C. § 109, which expresses a state policy to save the conviction of Lupper. See *Mack* v. *Connor,* 220 Ga. 450, 139 S. E. 2d 286 (1964). Cf. *Bell* v. *Maryland,* 378 U. S. 226, conviction affirmed on remand, 236 Md. 356, 204 A. 2d 54; rehearing granted and argument deferred "awaiting the outcome of similar issues now pending before the United States Supreme Court," quite obviously referring to these cases.

pation that readily attaches to a federal criminal statute which unreservedly repeals earlier federal legislation cannot, in my opinion, be automatically thought to embrace exoneration from earlier wrongdoing under a state statute.[3]

I know of no case which suggests that the doctrine of abatement can be applied to affect the existing legislation of another jurisdiction. Until today the doctrine has always been applied only with respect to legislation of the *same* sovereignty, *e. g., Rex* v. *Cator, supra; King* v. *Davis, supra; United States* v. *Tynen, supra; Yeaton* v. *United States,* 5 Cranch 281. And all of the cases relied on by the Court are of that character.

The Supremacy Clause cannot serve as a vehicle for extending the federal doctrine of abatement beyond proper bounds. That provision of the Constitution would come into play only if it appeared from the Civil Rights Act itself or from its legislative history and setting that Congress' purpose was to displace past as well as prospective applications of state laws touching upon the matters with which the federal statute is concerned. For me, this would have to be made to appear in unmistakable terms, for such a purpose would represent an exercise of federal legislative power wholly unprecedented in our history.

I entirely agree with my Brother BLACK's poignant observations on this score; there is not a scintilla of evidence which remotely suggests that Congress had any such revolutionary course in mind. Section 1104 of the Civil Rights Act indeed provides that nothing in the statute is to be "construed as invalidating any provision of State law unless . . . inconsistent with any of the pur-

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[3] See *Cohens* v. *Virginia,* 6 Wheat. 264, 443, quoted in my Brother BLACK's opinion, *ante,* p. 321.

poses of this Act, or any provision thereof." Whether or not state trespass laws as applied to "racial trespasses" occurring *after* the effective date of the Civil Rights Act are to be deemed inconsistent with the provisions of § 203 (c) of the Act,[4] a question which I find unnecessary to decide at this juncture, there is certainly no such plain inconsistency between § 203 (c) and state trespass laws as applied in those situations arising *before* the passage of the Civil Rights Act as would justify this Court's attributing to Congress a purpose to pre-empt state law in such instances.

Moreover, the contrary conclusion would confront us with constitutional questions of the gravest import, for the legislative record is barren of any evidence showing that giving effect to *past* state trespass convictions would result in placing any burden on *present* interstate commerce.[5] Such evidence, at the very least, would be a prerequisite to the validity of any purported exercise of the Commerce power in this regard. See *Heart of Atlanta Motel, Inc.* v. *United States, ante,* p. 241; *Katzenbach* v. *McClung, ante,* p. 294. There is, indeed, nothing to indicate that Congress even adverted to such a question.

Finally, the Court's decision cannot be justified under the rule of avoidance of constitutional questions, see Court's opinion, *ante,* p. 316. That rule does not reach to the extent of enabling this Court to fabricate nonconstitutional grounds of decision out of whole cloth.

> "'A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also grave doubts upon that score.' *United States* v. *Jin Fuey Moy, supra* [241 U. S. 394, 401]. But avoidance of a difficulty will not

[4] Quoted in the Court's opinion, *ante,* pp. 310–311.

[5] No attempt is made by the Court to justify the retroactive application of the Civil Rights Act under the Fourteenth Amendment.

be pressed to the point of disingenuous evasion." *Moore Ice Cream Co.* v. *Rose,* 289 U. S. 373, 379 (Cardozo, J.).[6]

Concluding that these trespass convictions are not abated, I would affirm the judgments in both of these cases for the reasons given by MR. JUSTICE BLACK in his dissenting opinion in *Bell* v. *Maryland,* 378 U. S. 226, 318, in which I joined.

MR. JUSTICE STEWART, dissenting.

The chief difference between these cases and *Bell* v. *Maryland,* 378 U. S. 226, is that here federal rather than state legislation has intervened while the convictions were under review. As I understand the Court's opinion, it first asserts that, if these had been federal convictions, the passage of the Civil Rights Act would have abated them under principles of federal decisional law. It then proceeds to apply those asserted principles to these state convictions through the Supremacy Clause of the Constitution. If I thought that Congress had provided that such nonfinal state convictions are to be abated, I would find no constitutional difficulty in joining the Court's disposition of these cases under the Supremacy Clause. But Congress was silent on the subject, and I am unable to subscribe to the Court's reasoning.

In *Bell* v. *Maryland,* we said that a State's abatement policy was for the State to determine. Arkansas and South Carolina might hold that this supervening federal legislation provides a compelling reason to abate these proceedings, but I can find nothing in the legislation or in the Constitution which requires these States to do so.

We found in *Bell* that the law of Maryland was "open and arguable" on the issue of abatement. The law of

[6] See also *International Association of Machinists* v. *Street,* 367 U. S. 740, 797 (Frankfurter, J., dissenting).

Arkansas and South Carolina is no clearer. Like Maryland, Arkansas has a saving statute similar to the federal counterpart. And like Maryland, South Carolina apparently has a policy favoring abatement when state criminal statutes are repealed while prosecutions are pending. See *State* v. *Spencer,* 177 S. C. 346, 181 S. E. 217.

For the reasons stated in the Court's opinion in *Bell* v. *Maryland,* I would vacate the judgments and remand the cases to the state courts for reconsideration in the light of the supervening federal legislation.

MR. JUSTICE WHITE, dissenting.

Absent the Civil Rights Act there was, in my view, no constitutional infirmity in the state court convictions. *Bell* v. *Maryland,* 378 U. S. 226, 318 (dissenting opinion of MR. JUSTICE BLACK). And if Congress had the power to abate these convictions I am confident it had no intent of exercising it by passing the new law. There is nothing but silence to indicate that Congress meant to void outstanding judgments of state courts. I would not, for several reasons, read so much into nothing as the Court attempts to do.

It is wrong to impute to the silence of Congress an unusual and unprecedented step which at the very least poses constitutional problems of some import. By the time the Act was passed, *Bell* v. *Maryland, supra,* had forcefully raised the whole question of the status of previous convictions after a change in the law. I cannot believe, with that case on the books, remitting the matter to the state courts as it did, Congress would have left unstated its intention to erase all state court trespass judgments then on appeal in the courts. Moreover, the common-law presumption of abatement was reversed by 1 U. S. C. § 109 (1958 ed.), which stands as the most relevant indicator of congressional intention in situations like this. Congressional silence in these circumstances

seems to me to point to the conclusion exactly opposite to that reached by the Court.

Finally, had Congress intended to ratify massive disobedience to the law, so often attended by violence, I feel sure it would have said so in unmistakable language. The truth is that it is only judicial rhetoric to blame this result upon Congress. Given a discernable congressional decision, I would be happy to follow it, as it is our task to do, absent constitutional limitations. But without it we have another case. Whether persons or groups should engage in nonviolent disobedience to laws with which they disagree perhaps defies any categorical answer for the guidance of every individual in every circumstance. But whether a court should give it wholesale sanction is a wholly different question which calls for only one answer.

KING, EXECUTRIX, ET AL. *v.* UNITED STATES.

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

No. 16. Argued October 19, 1964.—Decided December 14, 1964.

A company which held certain federal contracts filed a petition for reorganization under Chapter XI of the Bankruptcy Act. The Government announced that it would terminate the contracts for default, relet them and hold the company liable for any excess costs. The company's president was appointed by the referee as distributing agent. A plan of arrangement submitted by the company did not list the Government as a creditor, although the contracts were noted on a schedule as executory. The plan was confirmed after a hearing at which the referee was advised by the company attorney that $94,000 was available to pay any federal claim. The Government filed its claim for more than $26,000 within the time directed by the court, but prior thereto the distributing agent had paid out by checks countersigned by the referee all but about $6,000 of approximately $160,000 deposited with him, including substantial payments to himself as a company creditor. The agent's final report was ultimately approved by the court and he and his surety were discharged. Litigation established that the Government's claim was timely filed and the United States brought this suit against the distributing agent (on whose death petitioner executrix was substituted as a defendant) and the surety under 31 U. S. C. § 192 for payment of its claim. The District Court dismissed the case on the theory that a distributing agent is not within § 192 as an "executor, administrator, or assignee or other person," because he is not a personal representative of the debtor, but is an arm of the bankruptcy court. The Court of Appeals reversed. *Held:*

1. Both 31 U. S. C. § 191, which establishes priority for any debt owed by an insolvent debtor to the United States, and § 192, which assures that such debt will be paid, are part of a single statutory plan. *Bramwell* v. *U. S. Fidelity Co.*, 269 U. S. 483, followed. Pp. 334–336.

2. That distributing agents may be acting primarily for the court rather than for the debtor does not categorically exclude them from the coverage of § 192. Pp. 337–338.

3. Here the distributing agent as the debtor company's president must have been aware of the Government's claim; presumably actively helped formulate the plan of arrangement referring to the federal contracts; was apparently present when the company's counsel represented that funds were available to pay the claim; and was a major distributee under the plan. Accordingly, the agent possessed sufficient control over the assets in his possession to give rise to a responsibility under § 192, which he did not discharge, for seeing that the federal priority claim was paid. Pp. 338–340.

322 F. 2d 317, affirmed.

David S. Bate argued the cause for petitioners. With him on the brief was *Paul T. Murphy.*

Alan S. Rosenthal argued the cause for the United States. With him on the brief were *Solicitor General Cox, Assistant Attorney General Douglas, Hadley W. Libbey* and *Frederick B. Abramson.*

Mr. Justice Harlan delivered the opinion of the Court.

This is an action brought by the United States against the executrix of George King,[1] a deceased distributing agent for a debtor in a Chapter XI proceeding, and against his surety. The Government alleged that King was personally liable under R. S. § 3467, 31 U. S. C. § 192 (1958 ed.), because he satisfied claims of nonpriority creditors with knowledge of an outstanding government priority claim, in consequence of which the Government could not be paid in full.

The facts of the case were stipulated and are essentially as follows. On October 1, 1946, Seeley Tube &

[1] King died testate after commencement of the suit and his executrix was substituted as a party defendant by court order. An action by the United States against a fiduciary under R. S. § 3467, 31 U. S. C. § 192 (1958 ed.), survives against his estate. See *United States* v. *Dewey,* 39 F. 251.

Box Company, Inc., a New Jersey corporation, filed a petition for reorganization under Chapter XI of the Bankruptcy Act, 30 Stat. 563, as amended, 52 Stat. 905. Soon thereafter, the United States notified Seeley that it intended to terminate, because of Seeley's default, two federal contracts between Seeley and the Picatinny Arsenal, an installation of the War Department of the United States; the Government further signified its purpose to relet the contracts and to hold Seeley liable for any excess costs. On March 17, 1947, the referee appointed King, who was Seeley's president, as distributing agent and accepted his surety bond for $10,000. On March 21, 1947, after a hearing, a plan of arrangement submitted by Seeley was confirmed; the Government was not listed as a creditor in Seeley's petition, but the Picatinny contracts were noted in an annexed schedule as executory. The plan called for Seeley, the debtor corporation, to deposit with the distributing agent $160,193.68 to be distributed pursuant to orders of the court by checks signed by the distributing agent and countersigned by the referee. The plan contained no written provision for payment of the Government's as yet unliquidated and unfiled claim.

At the hearing, the following colloquy took place between the referee and Mr. Freeman, counsel for Seeley:

> "The Referee. Is there a claim of the Picatinny Arsenal?
>
> "Mr. Freeman. The Picatinny Arsenal may have some claim.
>
> "The Referee. Have we put up enough money to meet it?
>
> "Mr. Freeman. No.
>
> "The Referee. Is there a problem there?
>
> "Mr. Freeman. We do not owe them any money, and we want to bring them in. I want to state to your Honor further that the debtor company will

deposit any sum of money that is represented by any claim that the Picatinny Arsenal may file in these proceedings within a time that your Honor directs them to file it.

"The Referee. Have you any notion of what they might claim?

"Mr. Freeman. We think they may claim $20,000.

"The Referee. Have you $20,000 available?

"Mr. Freeman. We have $94,000 available to pay them if necessary, and we represent to your Honor that there will be at all times $20,000 or more available to dispose of that claim, in cash . . . ."

The record shows that King was present in the courtroom on the day of the hearing.

Thereafter the court entered an order directing the Government to file its claim on or before May 9, 1947. On May 9 the Government duly filed its preliminary contingent proof of claim in the amount of $26,818.82, later amended to $34,125.03, alleging a priority under § 64 of the Bankruptcy Act, 11 U. S. C. § 104 (1958 ed.), and R. S. § 3466, 31 U. S. C. § 191 (1958 ed.). However, in the seven weeks between the hearing and the filing of this claim, King, as distributing agent, had paid out by checks duly countersigned by the referee, all but $6,085.01 of the $160,193.68 deposited with him; $42,829.76 was paid to King himself as a creditor of the company.[2] A long litigation then commenced on the issue of whether the Government had timely filed its claim, with an ultimate determination being made in January 1955, in favor of the Government by the Court of Appeals for the Third Circuit. The court stated, "The disclosure by the debtor at the referee's hearing on confirmation of the plan that

[2] This fact was not stipulated, but appears in King's final petition and report, which was attached as Exhibit A to the Government's complaint. See Brief for Respondent, p. 7, n. 4.

the Government had become a creditor was . . . in performance of its duty under the Act and amounted to an informal amendment of the list of creditors included in the debtor's schedules." *In re Seeley Tube & Box Co.*, 219 F. 2d 389, 391, cert. denied, 350 U. S. 821.

After King had distributed the $6,085.01 which still remained in his hands ($3,620.39 had gone to the United States) he filed his final report and account. On August 2, 1956, the Bankruptcy Court approved them and discharged King and his surety.[3]

On July 3, 1958, the United States commenced this suit against King[4] for $25,831.08, the balance outstanding on the claim as finally determined, and against the surety for $10,000. The Government's contention was that King incurred personal liability under § 192 for the unpaid amount by paying the claims of the debtor's nonpriority creditors and thereby so depleting the debtor's assets that the Government's § 191 priority claim could not be paid in full. Section 192 provides:

> "Every executor, administrator, or assignee, or other person, who pays, in whole or in part, any debt due by the person or estate for whom or for which he acts before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate to the extent of such payments for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

The District Court dismissed the complaint on the theory that a distributing agent is not included within § 192 as an "executor, administrator, or assignee, or other person"

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[3] It was alleged in the Government's complaint in this action that it received no notice of these events, but this allegation was denied in the answer and is not mentioned in the stipulated facts.

[4] See note 1, *supra*.

because he, unlike those fiduciaries mentioned specifically in the statute, is not a personal representative of the debtor but an arm and a representative of the bankruptcy court. 208 F. Supp. 697. The decision was reversed on appeal, 322 F. 2d 317, and, because of a conflict among the circuits on the proper interpretation of § 192,[5] we granted certiorari, 375 U. S. 983.

I.

Section 191,[6] which establishes government priorities on any debts owed by an insolvent debtor to the United States, and § 192, which gives assurance that such debts will be paid, are part of a single statutory structure. The precursor of § 191 first appeared in 1789 in an act establishing customs duties (1 Stat. 29, 42). Section 21, relating to collection on bonds for the payment of duties, provided: "[A]nd in all cases of insolvency, or where any estate in the hands of executors or administrators shall be insufficient to pay all the debts due from the deceased, the debt due to the United States on any such bonds shall be first satisfied." In 1792 the Government's priority was extended to voluntary assignments for the benefit of

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[5] Compare *United States* v. *Stephens*, 208 F. 2d 105 (C. A. 5th Cir. 1953), with *United States* v. *Crocker*, 313 F. 2d 946 (C. A. 9th Cir. 1963) and the decision of the court below in the present case.

[6] Section 191 provides:

"Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

creditors and to attachments of the property of "absconding, concealed or absent" debtors as well as to cases in which "an act of legal bankruptcy shall have been committed," § 18, 1 Stat. 263. Prior to passage of the Act of 1797, "An internal revenue had been established, and extensive transactions had taken place; in the course of which, many persons had necessarily become indebted to the United States." *United States* v. *Fisher,* 2 Cranch 358, 392. By the Act of 1797, the section was extended to cases involving "any revenue officer, or other person hereafter becoming indebted to the United States, by bond or otherwise." 1 Stat. 515. See *Price* v. *United States,* 269 U. S. 492, 501. Then, in 1799, Congress took the step which concerns us here by adding the provision now embodied in § 192, establishing personal liability for those who frustrated the Government's priority:

> ". . . and in all cases of insolvency, or where any estate in the hands of the executors, administrators or assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States, on any such bond or bonds, shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate from whom, or for which, they are acting, previous to the debt or debts due to the United States from such person or estate being first duly satisfied and paid, shall become answerable in their own person and estate, for the debt or debts so due to the United States, or so much thereof as may remain due and unpaid . . . ." 1 Stat. 676.

Later, in the same section, the proviso extending the statute to voluntary assignments and absconding debtors is also included.

Division of the provisions into separate sections in the Revised Statutes "did not work any change in the purpose or meaning." *Price* v. *United States,* 269 U. S. 492, 501. Thus, it is evident that §§ 191 and 192 must be interpreted *in pari materia.* The Court so stated in *United States* v. *Butterworth-Judson Corp.,* 269 U. S. 504, 513, and so interpreted them in *Bramwell* v. *United States Fidelity & Guaranty Co.,* 269 U. S. 483, where it said:

> "The specification in § 3466 [§ 191] of the ways insolvency may be manifested is aided by the designation in § 3467 [§ 192] of the persons made answerable for failure to pay the United States first from the inadequate estates of deceased debtors or from the insolvent estates of living debtors. The persons held are 'every executor, administrator, or assignee, or *other person.*' The generality of the language is significant. Taken together, these sections mean that a debt due the United States is required first to be satisfied when the possession and control of the estate of the insolvent is given to any person charged with the duty of applying it to the payment of the debts of the insolvent, as the rights and priorities of creditors may be made to appear." 269 U. S., at 490.

II.

Petitioners, in oral argument, conceded the Government's priority claim under § 191. Their contention, relying on *United States* v. *Stephens,* 208 F. 2d 105, is that distributing agents as a class are nonetheless excluded from the category of fiduciaries covered by § 192 because they are agents of the court rather than personal representatives of the debtor, and the words "or other person" are "limited to those who stand as personal representatives [of the debtor] not only by the application of the principle of *ejusdem generis* but by the language qualify-

ing 'person' as one 'who pays in whole or in part any debt *due by the person or estate for whom or for which he acts.*'" *Id.*, at 108.

Petitioners' emphasis on a distinction between a personal representative and an agent of the court is misplaced in the context of §§ 191 and 192. The purpose of § 192, as recognized in *Bramwell,* is to make those into whose hands control and possession of the debtor's assets are placed, responsible for seeing that the Government's priority is paid. Whether or not King falls within the category of fiduciaries on whom such responsibility should be placed depends, not on the title of his position or the mode of his appointment, but, in practical terms, upon the degree of control he is in a position to assert over the allocation among creditors of the debtor's assets in his possession. That appointment as an officer of the court does not decisively inhibit operation of § 192 is shown by the express inclusion within the scope of the statute of court-appointed administrators.[7] And *Bramwell* showed that others besides personal representatives of the debtor may be included in § 192, for in that case this Court indicated that § 192 would apply to a state official charged with the function of liquidating a bank's assets, although the official was clearly not acting as the personal representative of the bank. Petitioners would distinguish *Bramwell* in that the state official had a large measure of control, whereas King did not,[8] but this, on the one hand, does not vitiate the point that one need not be a personal representative to come within the coverage of § 192, and, on the other, emphasizes that it is the element of control over the assets which is decisive.

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[7] A trustee in bankruptcy, an officer of the court, has been included as an "other person," *United States* v. *Kaplan,* 74 F. 2d 664.

[8] See *United States* v. *King,* 322 F. 2d 317, at 322.

We agree with Judge Browning, writing in *United States* v. *Crocker,* 313 F. 2d 946, 949, that "the debts paid by a liquidating receiver [and, we add, distributing agent], like those paid by an executor, administrator, or assignee for the benefit of creditors, are primary obligations of the debtor; the phrase 'for whom, or for which he acts' should be read as a general acknowledgment of this fact rather than as imposing a restriction upon the reach of Section 192 inconsistent with the overall purpose of this section and Section 191." We reject, therefore, the proposition that because distributing agents in Chapter XI proceedings act primarily for the court rather than for the debtor they are categorically excluded from the coverage of § 192.

III.

It remains to inquire whether King, by acting as an arm of the court under court instruction and approval lacked the degree of control necessary to make § 192 operative as to him. Petitioners argue that distributing agents exercise no discretion in the discharge of their duties, but perform only the ministerial function of paying out the deposited funds in conformity with the court's orders. Indeed, it is contended that inclusion of distributing agents within the coverage of § 192 would have placed King on the horns of a dilemma, in that he must either have incurred personal liability to the Government or risked being held in contempt by the Bankruptcy Court. But this assumes that the plan of arrangement, once submitted to the court, was immutable. In fact, if King had objected at the confirmation hearing to paying out the deposited funds to nonpriority creditors before the Government's claim was surely provided for, there can be little doubt that he would have obtained satisfaction.[9]

[9] See generally 8 Collier on Bankruptcy, ¶ 5.33 (14th ed. 1963).

Even after confirmation it is most unlikely that such an objection would have been ignored. Had it been, responsibility for the frustration of the Government's claim would have devolved completely upon the court, and we would be faced with a very different case.

We are not prepared to articulate any general rule defining the responsibility of distributing agents to make and press such objections. We hold only that King, on the facts of this case, did have such a responsibility.[10] As president of the debtor corporation he must have been aware of the Government's potential claim; most likely he took an active role in the formulation of the plan of arrangement which appended a reference to the Picatinny contracts. He had been appointed distributing agent before the day of the confirmation hearing, and was present in court on that day. In all likelihood, he was present at the time when the possibility of the government claim arose and Mr. Freeman, the company's counsel, made the representation that $94,000 was available to meet it. Finally, he himself was one of the major distributees in the distribution plan. In these circumstances we think King was possessed of a sufficient degree of control over the allocation among creditors of the assets in his possession to give rise to responsibility under § 192 for seeing that the government priority was paid, a responsibility which King, so far as the record reveals, made no effort to discharge. This is not to say that King acted dishonestly in any way or that he positively intended to thwart the Government's claim. He may well have relied either on the representation that $94,000 was available, or, as president of the corporation with full knowledge of its finances, on whatever underlying facts led Mr. Freeman to make that representation. But § 192

[10] Cf. *Field* v. *United States*, 9 Pet. 182 (1835).

required more of King than an honest belief that the Government would be paid. It imposed upon him a duty to see that this was done.

Affirmed.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS share the views of the Court of Appeals for the Fifth Circuit, *United States* v. *Stephens,* 208 F. 2d 105, as to the construction of the statute, and would therefore reverse the judgment below.

MR. JUSTICE WHITE, concurring.

In the typical Chapter XI case initiated by the debtor under § 322 it is the debtor that remains in possession and that has prepared and filed the petition and schedules and that proposes the arrangement. It is only after the arrangement has been approved by the creditors that a distributing agent is appointed and charged with the distribution to specified recipients of the deposit required by the Act. The agent, *qua* agent, has no reason or duty to know or to learn of unscheduled debts, priority or otherwise, and lacking such knowledge from some other source such as his prior or current position with the debtor I would think he would be beyond the reach of 31 U. S. C. § 192 (1958 ed.) if a government priority claim is unscheduled and unpaid.*

*Even if a distributing agent does learn of the government claims it may be that he should not be held liable under § 192, if such knowledge is not obtained until after confirmation. As the claim was neither scheduled nor filed prior to confirmation the Government would not be entitled to share in the deposit and a disbursement from the deposit to the United States would probably subject the distributing agent to liability to creditors entitled to share in the composition. *In re J. B. Pollak Co.,* 86 F. 2d 99. Only if the confirmation were set aside prior to distribution of the deposit, which normally occurs immediately, could provision be made to pay the government claim. In this respect it should be noted that the Court's observation that

But the agent does have the task of distributing the deposit and the deposit is required to include a sufficient sum to pay all priority claims (with some exceptions), even those which are scheduled as disputed and unliquidated. Bankruptcy Act, § 337 (2), 11 U. S. C. § 737 (2) (1958 ed.); 8 Collier on Bankruptcy, ¶ 5.33 [2], at 696 (14th ed. 1963). His responsibility under Chapter XI and under 31 U. S. C. §§ 191 and 192 extends far enough to impose the obligation to ascertain that the deposit he is handling is ample to pay the claims specified in the statute and is disbursed as required by law. And as to scheduled claims, liquidated or not, disputed or undisputed, the distributing agent is furnished with sufficient knowledge to fasten upon him the responsibility of not paying out the deposit so as to defeat the priority of the Government under § 191, at least without a court determination that he should do so.

There remains, however, a difficulty in this case. Although the papers filed with the petition revealed the debtor had certain contracts with the Government, the schedules did not list the United States as a creditor. However, the Government later terminated the contracts and at the confirmation hearing the existence of a claim of the United States was made known. The referee himself brought up the question of providing for payment of the Government's claim and was told, as I read the testimony, that the deposit did not include any sum to defray any part of this claim but that the debtor would have ample sums available to satisfy the claim and would make any deposit for this purpose which it was directed to

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even if King had waited to object "to paying out the deposited funds to nonpriority creditors before the Government's claim was surely provided for" until after confirmation "it is most unlikely that such an objection would have been ignored," *ante*, pp. 338, 339, while perhaps true on the particular facts of this case, is greatly oversimplified if meant to apply to the distributing agent's position generally.

make. The debtor's attorney, however, made it clear that the debtor was disputing the claim of the United States. In effect, the situation at that point was as though a disputed and unliquidated claim had been scheduled. *In re Seeley Tube & Box Co.*, 219 F. 2d 389, cert. denied, 350 U. S. 821. An arrangement may not be confirmed if a deposit does not include an amount to take care of all scheduled priority claims including those which are unliquidated. 8 Collier on Bankruptcy, ¶ 5.32 [8]. If the referee, as he apparently did here, confirmed the arrangement without having in hand a deposit to pay the debt to the Government if proved and allowed, it could well be argued that a distributing agent should not be required to have remonstrated with the referee or to bear the burden of the referee's unauthorized act, for the distributing agent's "control and possession" are limited to the deposit.

We need not pursue this phase of the matter further, however, since other facts justify holding the distributing agent accountable in this particular case. As the Court points out, the agent was an officer of the debtor, was undoubtedly familiar with its affairs and took no exception to the attorney's statement that there would be ample funds to pay the government claim. This petitioner was not an uninformed distributing agent doing only what he was told to do but was both a distributing agent and an officer of the debtor, with ample notice of the Government's claim and of the referee's expectation that when proved and allowed it would be paid. In paying out the deposit without provision for the claim of the United States he acted at his own risk and became personally liable under § 192 when the Government's claim became liquidated.

ALL STATES FREIGHT, INC., ET AL. *v.* NEW YORK, NEW HAVEN & HARTFORD RAILROAD CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

No. 22. Argued October 21, 1964.—Decided December 14, 1964.

Section 1 (6) of the Interstate Commerce Act, which requires carriers to establish "just and reasonable classifications of property for transportation, with reference to which rates" are or may be prescribed, applies to the setting of class rates (rates for various classes or categories of property) but not to all-commodity rates, although all-commodity rates are subject to Interstate Commerce Commission control under other provisions of the Act. Pp. 343–355.

221 F. Supp. 370, affirmed.

Homer S. Carpenter argued the cause for appellants. With him on the brief was *John S. Fessenden.*

Edward A. Kaier and *Eugene E. Hunt* argued the cause for appellees. With them on the brief were *Margaret P. Allen* and *John A. Daily.*

Robert W. Ginnane argued the cause for the United States and the Interstate Commerce Commission, urging reversal. With him on the brief were *Solicitor General Cox, Assistant Attorney General Orrick, Frank Goodman, Lionel Kestenbaum* and *Fritz R. Kahn.*

MR. JUSTICE STEWART delivered the opinion of the Court.

This is an appeal from the judgment of a three-judge district court setting aside an order of the Interstate Commerce Commission which had disallowed certain freight rates filed by the New York, New Haven & Hartford Railroad Company (hereafter "the New Haven") and other rail carriers. The issue presented is whether

§ 1 (6) of the Interstate Commerce Act, as amended, which requires carriers "to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed," [1] is applicable to so-called all-commodity freight rates. The Commission, with three members dissenting, held that § 1 (6) does apply to such rates, and that the section was violated by the rate schedules here in question. 315 I. C. C. 419. The District Court held that § 1 (6) requires "the maintenance in being of class rates" but does not prohibit "competitively compelled departures from classifications, within the established maxima, absent some other violation of the Act than the mere departure from the classification." 221 F. Supp. 370, 374. We agree with the District Court and affirm the judgment before us.

A general word as to the basic distinction between class rates and commodity rates may be appropriate before proceeding to the specifics of the present case. Class

[1] "It is made the duty of all common carriers subject to the provisions of this chapter to establish, observe, and enforce just and reasonable classifications of property for transportation, with reference to which rates, tariffs, regulations, or practices are or may be made or prescribed, and just and reasonable regulations and practices affecting classifications, rates, or tariffs, the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the facilities for transportation, the carrying of personal, sample, and excess baggage, and all other matters relating to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this chapter which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this chapter upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful." 49 U. S. C. § 1 (6) (1958 ed.).

rates were at the foundation of the railroad rate structure at the time of the enactment of the Interstate Commerce Act in 1887. Such rates are applied to traffic through two separate tariffs. One tariff, the "classification," assigns each of the many thousand commodities carried by rail to one of presently some 30 categories or classes, based upon the commodity's particular characteristics.[2] A companion tariff specifies the rate at which each class of freight will be carried. By contrast, commodity rates, which were also in existence at the time of the original passage of the Interstate Commerce Act, are rates made specifically applicable for the carriage of a particular commodity or group of commodities from one designated point to another. The original function of commodity rates, which are generally lower than class rates, was to encourage the movement of bulk commodities, such as coal and grain. With the onset and rapid growth of

[2] The characteristics of a commodity which are generally considered in determining the classification to which it should be assigned are:

1. Shipping weight per cubic foot.
2. Liability to damage.
3. Liability to damage other commodities with which it is transported.
4. Perishability.
5. Liability to spontaneous combustion or explosion.
6. Susceptibility to theft.
7. Value per pound in comparison with other articles.
8. Ease or difficulty in loading or unloading.
9. Stowability.
10. Excessive weight.
11. Excessive length.
12. Care or attention necessary in loading and transporting.
13. Trade conditions.
14. Value of service.
15. Competition with other commodities transported. *Motor Carrier Rates in New England,* 47 M. C. C. 657, 660–661; *Class Rate Investigation, 1939,* 262 I. C. C. 447, 508; *Investigation and Suspension Docket No. 76,* 25 I. C. C. 442, 472–473.

intermodal competition, the railroads increasingly turned to commodity rates in an effort to prevent diversion of traffic to other modes of transportation. Since 1932, numerous all-commodity or all-freight rail rates have been established between various points throughout the country. Typically, such rates have not literally applied to all commodities, but to a broad number, and they have often applied only to mixed carload shipments. Today only a small fraction of rail carload tonnage moves on class rates; by far the major portion moves on commodity rates of some kind.

In the summer of 1958 the rail carriers competing with the New Haven established a trailer-on-flatcar service. Under this system truck-trailers loaded with various commodities are brought to the railroad's loading ramp for carriage on freight cars to destination for delivery to the consignee at the railroad's unloading ramp. This type of service was instituted in an effort to meet motor carrier competition. *Eastern Central Motor Carriers Assn.* v. *Baltimore & O. R. Co.*, 314 I. C. C. 5. The New Haven had physical clearance problems and equipment shortages which prevented its participation in this type of freight transportation, and during the first two months that the trailer-on-flatcar rates were in effect on competing railroads, the New Haven lost the equivalent of more than 350 cars of traffic from Boston to St. Louis, and suffered substantial further losses of traffic westward from other New England points.

In order to compete with the trailer-on-flatcar rates, and in an effort to cope with a significant imbalance between eastbound and westbound traffic over its lines,[3] the New Haven filed with the Commission the all-com-

[3] Every day the New Haven was dispatching approximately 150 empty boxcars to Chicago and St. Louis, with an annual carrying capacity of 3,000,000 tons.

modity rates which have become the subject of the present litigation. These rates applied to traffic between specified New England points and Chicago and St. Louis. Restricted to boxcar freight moving westward, in straight or mixed carloads, the rates were graduated according to minimum weight per car. They did not apply to certain designated kinds of traffic.[4]

The Commission initially suspended the rates, but allowed them to become effective on July 6, 1959, and they have remained in effect since that date. Various motor carrier associations and some of their individual members protested the rates, but in February 1961, Division 2 of the Commission filed a report approving them. 313 I. C. C. 275. On reconsideration later that year, the full Commission held by a divided vote that the rates violated § 1 (6) of the Act. 315 I. C. C. 419.[5] The District Court set aside the Commission's order and enjoined its enforcement, holding that the order rested on an erroneous interpretation of § 1 (6) of the Act. The intervening protestants brought this appeal here, and we noted probable jurisdiction. 376 U. S. 961.[6]

[4] The rates did not apply to import, export, or ex-water traffic. In addition, certain commodities were excluded, such as livestock, explosives, scientific equipment, and easily damaged goods.

[5] The Commission's report also spoke of the rates as "constituting a destructive competitive practice in contravention of the national transportation policy," but in a brief filed here the Commission has pointed out that this statement was "merely an adjunct to the Commission's ruling that the rates violated Section 1 (6)," and that this conclusion "cannot be sustained as an independent basis for disallowing the rates, in the absence of additional findings."

[6] The Commission and the United States did not appeal. Instead, the Commission reopened the case for further hearings, since it entertained doubt as to the adequacy of its findings. Those further hearings have been postponed pending resolution of this appeal. The Commission has filed a brief on the merits, however, agreeing, as do all the parties, that the § 1 (6) issue is necessarily presented by this appeal. We agree, and further agree with the Commission that there

It is clear that § 1 (6) gives the Commission power to require that carriers maintain just and reasonable classifications in conjunction with the setting of class rates. The question here posed is whether that section applies to commodity rates as well, and specifically whether it applies to all-commodity rates. No doubt the language of the statute, "just and reasonable classifications of property" and "just and reasonable regulations and practices affecting classifications" is susceptible of a construction which would embrace the rates in issue here. The rates do not apply to a single, uniquely identifiable article but to a large group of commodities, which could be described as a classification of property. But the fact that the terms of the statute can be interpreted broadly enough to encompass these rates without doing violence to the English language does not settle the problem. It remains to inquire whether the legislative history warrants or the statutory structure supports such a broad interpretation.

At the time of the enactment of the Interstate Commerce Act the vast preponderance of rail freight traffic moved on class rates. These classes as well as the rates applicable to them varied greatly among different railroads and different sections of the country. When the Interstate Commerce Act was formulated, consideration was given to empowering the Commission to prescribe classifications, but it was finally concluded that the provisions of the bill which required publication of rates and classifications, together with the provisions regulating unreasonable rates, would ultimately prove adequate to achieve the desired uniformity of classifications.[7] Beginning with its First Annual Report, however, the Commis-

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is nothing in the District Court's judgment or in our disposition of this appeal to prevent further Commission proceedings with respect to these rates.

[7] S. Rep. No. 46, 49th Cong., 1st Sess., 188.

sion expressed its concern with the continuing lack of uniformity in freight classifications,[8] and seven years later recommended that it be empowered to make a uniform classification.[9] In 1906 the Hepburn Act gave the Commission power for the first time to prescribe maximum reasonable rates,[10] but transportation charges could still be increased by changes in the classification of any commodity.

The Commission had succeeded in exercising power over classifications in proceedings under §§ 1, 2, and 3 of the Act, and in many cases had declared classifications of particular commodities to be unreasonable.[11] However, the power of the Commission to halt manipulation of the classification rate system had been thrown into serious doubt by a case decided in 1905.[12]

It was against this background that § 1 (6) was enacted in 1910 as part of the Mann-Elkins Act, which also gave the Commission power to find classifications unreasonable and to prescribe reasonable classifications for the future.[13] The immediate genesis of these provisions seems to have been a special message to Congress by President Taft recommending ". . . that the commission shall be fully empowered, beyond any question, to pass upon the classifications of commodities for purposes of

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[8] 1 I. C. C. Ann. Rep. 30–32 (1887).

[9] 8 I. C. C. Ann. Rep. 38–39. See also 5 I. C. C. Ann. Rep. 33.

[10] 34 Stat. 589, 49 U. S. C. § 15 (1) (1958 ed.).

[11] *James Pyle & Sons* v. *East Tennessee, Virginia & Georgia R. Co.*, 1 I. C. C. 465 (1888); *Thurber* v. *New York Central & H. R. Co.*, 3 I. C. C. 473 (1890); see *National Hay Assn.* v. *Lake Shore & M. S. R. Co.*, 9 I. C. C. 264 (1902).

[12] *Interstate Commerce Commission* v. *Lake Shore & M. S. R. Co.*, 134 F. 942, aff'd by an equally divided Court, 202 U. S. 613. In this case the court struck down a Commission order commanding the reclassification of hay and straw to a lower-rated class.

[13] 36 Stat. 546, 551, 552, 49 U. S. C. §§ 1 (6), 15 (1), 15 (7) (1958 ed.).

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fixing rates, in like manner as it may now do with respect to the maximum rate applicable to any transportation." [14]

During the course of the debate on the proposed bill in the House of Representatives, Congressman Russell, a member of the Committee on Interstate and Foreign Commerce, said

> "[T]he shipper can be extorted from; he can be made to pay an unjust rate just as well through classification as he can through the fixing of a rate. The carriers can put an article in one classification, subject to a given rate, and if the Interstate Commerce Commission sees fit to declare that rate unreasonable, and reduce it, declaring what shall be a reasonable rate to take its place, the carrying corporation can obtain the same benefit and put the shipper under the same disadvantages by simply changing the classification of the article." [15]

Chairman Mann stated that "classification of freight is just as important as rates, because by moving a particular article from one class to another you affect the rates." [16] He added that "in the course of time undoubtedly the power of the commission to have control of classifications will lead to greater uniformity and possibly to complete uniformity of classifications." [17] The Senate Report alluded only to the doubt which had been recently cast upon the Commission's power to deal with classifications.[18]

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[14] H. R. Rep. No. 923, 61st Cong., 2d Sess., 3.

[15] 45 Cong. Rec. 5142.

[16] 45 Cong. Rec. 4578.

[17] *Ibid.*

[18] The Senate Report stated:

"Some doubt has been raised as to whether, under the provisions of section 15 of the existing act, the commission is empowered to review *classifications* of freight as well as rates, and to make orders dealing with improper classifications. (Judson on Interstate Commerce, Ed. of 1908, secs. 209, 210.) By section 9 of the bill, this

This legislative history makes it apparent that the object of § 1 (6) was to give the Commission clear power to deal with the twin problems which had arisen in the administration of class rates—the possibility of their manipulation to avoid maximum rate regulation and their lack of uniformity. Those problems never affected commodity rates, because those rates were competitively compelled reductions from whatever class rates would otherwise be applicable, and because standardization of commodity rates would have been completely inconsistent with their basic function of accommodating specific particularized competitive conditions. The legislative history thus fully supports the conclusion that the reach of § 1 (6) of the Act was confined to class rates.

This conclusion is amply confirmed by the pattern of the Commission's decisions since § 1 (6) was enacted. The course of those decisions makes clear that the Commission has given full consideration to the question of whether § 1 (6) applies to all-commodity rates, and has squarely decided that the section is inapplicable. All-commodity rates first came under scrutiny of the Commission more than 25 years ago. In 1937 and 1938, the Commission approved all-commodity rates on four different occasions without the slightest suggestion that the rates were subject to the provisions of § 1 (6). The principal concern of the Commission's inquiry in these cases was to ascertain whether the rates were prejudicial to any person, locality, or description of traffic.[19] In a similar

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doubt is removed and the power is expressly vested in the commission." S. Rep. No. 355, 61st Cong., 2d Sess., 8 (1910). The authority primarily relied on by the Judson treatise was the *Lake Shore* case, note 12, *supra.*

[19] *Freight from Boston to East Hartford,* 223 I. C. C. 421 (Div. 4, 1937); *Commodities between Chicago, Ill., and Twin Cities,* 226 I. C. C. 356 (Div. 3, 1938); *All Freight between Boston & Maine Railroad Points,* 226 I. C. C. 387 (Div. 4, 1938); *All Freight from Chicago and St. Louis to Birmingham,* 226 I. C. C. 455 (Div. 3, 1938).

case decided in 1939, Commissioner Alldredge filed a dissent expressing the view that § 1 (6) *did* apply to all-commodity rates, and that the rates in question violated that section by lumping into a single category articles which had traditionally been assigned to different categories under the customary classification criteria.[20] With Commissioner Alldredge's dissent putting in issue the applicability of § 1 (6), it is clear that the Commission consciously rejected his position. Two years later, however, the view taken by Commissioner Alldredge prevailed in a two-to-one order by Division 3, which struck down all-commodity rates as violative of § 1 (6).[21] With the decisions thus in conflict, the problem received consideration by the full Commission a year later in *All Freight to Pacific Coast,* 248 I. C. C. 73. There the Commission squarely held that § 1 (6) does not apply to all-commodity rates. Its report stated:

> "Respondents now maintain a full line of class rates governed by the western classification from and to all of the points involved in this proceeding, as required by section 1 (6) of the Interstate Commerce Act. They also maintain hundreds of lower rates as exceptions to the classification, including commodity rates, that are not subject to the classification ratings nor to rules as to mixing of commodities in carloads. . . .
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> . . . . .

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[20] *All Freight between Harlem River, N. Y., and Boston,* 234 I. C. C. 673 (Div. 3, 1939). See also Commissioner Alldredge's dissents in the following cases: *All Freight from Chicago and St. Louis to Santa Rosa, N. Mex.,* 243 I. C. C. 517 (Div. 2, 1941); *All Freight between Los Angeles and Albuquerque,* 28 M. C. C. 161 (Div. 3, 1941).

[21] *All Freight from Eastern Ports to the South,* 245 I. C. C. 207 (Div. 3, 1941). See also the decision under § 216 (b) of the Interstate Commerce Act by Commissioners Alldredge and Johnson in *All Freight from Chicago and St. Louis to El Paso, Tex.,* 28 M. C. C. 727 (Div. 2, 1941).

> "Class rates normally reflect the maximum of reasonableness on goods falling within the various classes of traffic. Commodity rates are established, and necessary or desirable exceptions to the classification are made, when circumstances and conditions suggest that the class basis is too high for application on the traffic. We have approved this basis of rate making, and have never required commodity rates to conform to the ratings of the classification." 248 I. C. C., at 86–87.

In a separate concurrence, Commissioner Eastman said:

> "As is well known, the classifications of freight which the railroads publish are for the purpose of governing the application of their class rates. The latter are used when no rate has been published applying specifically to the movement in question, such specific rates being called commodity rates. The railroads carry, of course, a vast multitude of separate and distinct commodities, and the class rates are a convenient device for avoiding the publication of a like multitude of separate and distinct rates. . . ." 248 I. C. C., at 88.

Thereafter, the Commission rejected other challenges to all-commodity rates based on § 1 (6) upon the authority of the *Pacific Freight* decision,[22] and the two-to-one decision based on § 1 (6) which Division 3 had previously rendered was recalled and decided upon another ground.[23] In the years that followed, the *Pacific Freight* case was regarded as controlling, and all-commodity rate cases

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[22] *All Freight from Butte, Mont., to Spokane, Wash.*, 251 I. C. C. 291 (Div. 2, 1942); *All Freight Rates to Points in Southern Territory*, 253 I. C. C. 623 (1942).

[23] *All Freight from Eastern Ports to the South*, 251 I. C. C. 361 (1942).

were decided without reference to the provisions of § 1 (6).[24] Finally, it is significant that in approving the trailer-on-flatcar service instituted by the New Haven's rail competitors in 1958, the Commission did not discern any problem created by § 1 (6).[25]

Thus both the legislative history and the course of the Commission's decisions clearly impel the conclusion that § 1 (6) does not apply to all-commodity rates. In reaching this conclusion, we hardly need add that, as the Act is structured, these rates are subject to full policing by the Commission under other provisions. If a commodity rate is too high, the Commission may reduce it.[26] If a commodity rate unjustly discriminates against a shipper, the Commission may order the discrimination removed.[27] If a commodity rate results in an undue preference in favor of or an unreasonable prejudice against any person, locality, or description of traffic, the Commission may require that appropriate adjustments be made.[28] If a commodity rate is unreasonably low, the Commission may order that it be increased.[29]

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[24] See *All Freight, Straight Carloads, to and from the South*, 258 I. C. C. 579 (Div. 2, 1944); *All-Commodity Rates between Calif. and Ore., Wash.*, 293 I. C. C. 327 (Div. 3, 1954).

[25] *Eastern Central Motor Carriers Assn.* v. *Baltimore & O. R. Co.*, 314 I. C. C. 5, 48–49. The trailer-on-flatcar rates, unlike the all-commodity rates involved in the present case, are subject to a mixing rule requiring that the lading consist of at least two commodities, no one of which shall exceed 60% of the total volume of the lading. But the New Haven points out that this mixing rule is satisfied whenever two straight trailerloads, each containing a different commodity, are tendered at the same loading platform under a single bill of lading, even though they may be consigned by different shippers and destined for different consignees.

[26] 49 U. S. C. §§ 1 (5) and 15 (1) (1958 ed.).

[27] 49 U. S. C. §§ 2 and 15 (1) (1958 ed.).

[28] 49 U. S. C. §§ 3 (1) and 15 (1) (1958 ed.).

[29] 49 U. S. C. §§ 1 (5), 15a (2), 15a (3), and 15 (1) (1958 ed.).

The District Court's opinion contains, by way of dicta, considerable discussion concerning the continuing validity of the concept of value of service as a factor in the setting of railroad freight rates, and that subject was also discussed in the briefs and oral arguments in this Court. But the extent to which value of service may continue as a valid element in assessing the lawfulness of rates under the sections of the Act applicable to commodity rates is a question we need not and do not decide. We decide only that the District Court was correct in holding that the issues in this case "should never have been framed under § 1 (6)."

Affirmed.

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

In my view, the record in this case is inadequate to support the action taken by the Commission and I would vacate the judgment below and remand to the Commission for further proceedings. I dissent, however, from the Court's categorical ruling which in any and all circumstances bars the application of § 1 (6) to any set of rates which bears a commodity rate label.

Section 1 (6) imposes upon carriers the "duty . . . to establish, observe, and enforce just and reasonable classifications of property for transportation." The Court seems to accept the act of excluding commodity rates from this broad imperative as well within the mainstream of Commission functions. I have great difficulty coming to any different answer concerning the Commission's task with respect to §1 (6) now that the Commission has changed its mind, or modified its views, and believes it best serves transportation policy and the goal of just and reasonable rates to subject at least some commodity rates to scrutiny under § 1 (6).

It is no answer to say that Congress intended § 1 (6) to regulate only class rates, for the Commission at this point obviously thinks some commodity rates are in fact class rates, particularly a rate which, as in this case, applies to an enormous range of traffic but at the same time excludes many specific commodities and groups thereof.

Nor will it do to say that if the past decisions of the Commission are to be changed, the job should be left to Congress. This is an erroneous view. If there is a task for Congress, it is the one the Court has itself performed. The dissenting commissioners, with whom the Court essentially agrees, felt constrained to acknowledge that further erosion of the principles of classification might well be in the province of Congress but defended their views as vigorous and wise transportation policy within the realm of proper administrative action. Their difference with the majority of the Commission was over policy, and it is precisely this area which it seems to me the Court invades. Our task on review is a far more limited one. With all due respect, I dissent.

PIANO & MUSICAL INSTRUMENT WORKERS UNION, LOCAL NO. 2549, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL–CIO *v.* W. W. KIMBALL CO.

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

No. 535. Decided December 14, 1964.

Certiorari granted and judgment reversed.
Reported below: 333 F. 2d 761.

Bernard M. Mamet for petitioner.

Thomas R. Mulroy for respondent.

PER CURIAM.

The petition for a writ of certiorari is granted and the judgment is reversed. *Steelworkers* v. *American Manufacturing Co.*, 363 U. S. 564, and *Wiley & Sons, Inc.* v. *Livingston*, 376 U. S. 543.

GREEN *v.* BOMAR, WARDEN.

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

No. 87, Misc. Decided December 14, 1964.

Certiorari granted, judgment vacated and case remanded.
Reported below: 329 F. 2d 796.

Petitioner *pro se.*

George F. McCanless, Attorney General of Tennessee, and *Henry C. Foutch,* Assistant Attorney General, for respondent.

PER CURIAM.

The motion for leave to proceed *in forma pauperis* and the petition for a writ of certiorari are granted. The judgment is vacated and the case is remanded to the United States District Court for the Middle District of Tennessee for a hearing in light of *Townsend* v. *Sain,* 372 U. S. 293.

Per Curiam.

PARSONS, TOWN CLERK OF THE TOWN OF HUBBARDTON, ET AL. *v.* BUCKLEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT.

No. 624.—Decided January 12, 1965.*

Parties' stipulation seeking modification of the remedial portion of District Court judgment holding Vermont constitutional provisions concerning legislative apportionment invalid under Fourteenth Amendment approved by this Court; the judgment modified to conform to the stipulation; and the judgment as so modified affirmed. Pp. 359–364.

234 F. Supp. 191, modified and affirmed.

George D. Webster for appellants in No. 624. *Charles E. Gibson, Jr.,* Attorney General of Vermont, and *Chester S. Ketcham,* Deputy Attorney General, for appellants in No. 625.

Joseph A. McNamara for appellees.

PER CURIAM.

The District Court on August 3, 1964, entered a judgment holding invalid under the Fourteenth Amendment to the United States Constitution, §§ 13 and 18 of Chapter II of the Constitution of Vermont relating to apportionment of the General Assembly of the State of Vermont. 234 F. Supp. 191. Paragraph (3) of the judgment of the District Court is as follows:

> "(3) Therefore, subject to the provisions hereinafter appearing, the injunction that plaintiffs have requested restraining the officers of the State and those of the counties, towns and cities charged with

*Together with No. 625, *Hoff, Governor of Vermont, et al.* v. *Buckley et al.,* also on appeal from the same court.

the conduct of the elections of members of the General Assembly from proceeding with elections pursuant to the present method of apportionment is granted; and the defendants Philip H. Hoff, Governor of Vermont, Howard E. Armstrong, Secretary of State, the Town Clerks of the Towns of Vermont, and the County Clerks of the Counties of Vermont, and their respective successors in office, are perpetually enjoined from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont pursuant to said method, and said defendants are further enjoined from certifying or in any other manner declaring that the results of such nominations or elections are valid or that the General Assembly of the State of Vermont which, if constitutionally elected, would be convened on January 6, 1965, is properly or legally constituted, unless by some other authorized lawful and constitutional method Senators and Representatives are nominated and elected to the Senate and House of Representatives of the State of Vermont pursuant to a reapportionment or redistricting of the Senate and a reapportionment or redistricting of the House of Representatives to be effected promptly, such reapportionment or redistricting of the Senate and reapportionment or redistricting of the House of Representatives having been done in such manner as to achieve substantially equal weighting of the votes of all voters in the choice of members of the General Assembly as guaranteed by the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is, however, permissible for the September 1964 primary elections for nominees

> for the offices of Senators and Representatives and for the general elections to be held on November 3, 1964 to be conducted as presently scheduled to be conducted, and if, in the meantime, no members shall have been chosen by a constitutionally valid method, the members of the General Assembly chosen as heretofore may convene on January 6, 1965, provided that legislation shall be limited to the devising of a constitutional method of reapportionment and redistricting, and that the terms of said members shall expire on March 31, 1965." 234 F. Supp., at 200.

Appellants appealed to this Court from Paragraph (3) of the judgment of the District Court. On December 14, 1964, we noted probable jurisdiction of both appeals, stayed that portion of the judgment which is the subject of these appeals, and set these cases for oral argument on January 18, 1965. 379 U. S. 942.

All of the parties to and intervenors in these cases have now moved that this Court modify the District Court's judgment to conform to a Stipulation signed by them and affirm the judgment of the District Court as so modified.

The parties stipulate that Paragraph (3) of the judgment be deleted and in lieu thereof the order include the following:

> "Therefore, subject to the provisions hereinafter appearing, the injunction that plaintiffs have requested restraining the officers of the State and those of the counties, towns and cities charged with the conduct of the elections of members of the General Assembly from proceeding with elections pursuant to the present method of apportionment is granted;

and the defendants Philip H. Hoff, Governor of Vermont, Howard E. Armstrong, Secretary of State, the Town Clerks of the Towns of Vermont, and the County Clerks of the Counties of Vermont, and their respective successors in office, are perpetually enjoined from doing any act or taking any steps in furtherance of nominating or holding elections of senators or representatives to the Senate or House of Representatives of the State of Vermont pursuant to said method, and said defendants are further enjoined from certifying or in any other manner declaring that the results of such nominations or elections are valid or that the General Assembly of the State of Vermont which, if constitutionally elected, would be convened on January 6, 1965, is properly or legally constituted, unless by some other authorized lawful and constitutional method Senators and Representatives are nominated and elected to the Senate and House of Representatives of the State of Vermont pursuant to a reapportionment or redistricting of the House of Representatives to be effected promptly, such reapportionment or redistricting of the Senate and reapportionment or redistricting of the House of Representatives having been done in such manner as to achieve substantial equality in the choice of members of the General Assembly as guaranteed by the equal protection clause of the Fourteenth Amendment of the United States Constitution. It is, however, permissible for the September 1964 primary elections for nominees for the offices of Senators and Representatives and for the general elections to be held on November 3, 1964 to be conducted as presently scheduled to be conducted, and if, in the meantime, no members shall have been chosen by a constitutionally valid method, the members of the

General Assembly chosen as heretofore may convene on January 6, 1965, provided that:

"(a) A reapportionment bill or bills be introduced in at least one House of the General Assembly by February 1, 1965.

"(b) Should the General Assembly desire to submit the matter of reapportionment to a constitutional convention, legislation shall be enacted on or before March 1, 1965 to provide for the convening of a constitutional convention on or before June 1, 1965.

"(c) Should legislation be enacted setting up a constitutional convention, said convention shall finish its deliberations by September 1, 1965.

"(d) If the matter of reapportionment is not referred to a constitutional convention, reapportionment legislation shall be enacted so as to comply with the mandate of the Court on or before July 1, 1965.

"(e) The General Assembly shall be empowered to enact all legislation as usual for the operation of state, town and county governments between January 6, 1965 and July 1, 1965.

"(f) If reapportionment legislation is not enacted by July 1, 1965, and if a constitutional convention shall fail to reapportion the General Assembly by September 1, 1965, the Court shall reapportion the General Assembly so as to comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

"(g) In any event, a reapportioned General Assembly shall have been elected and ready to serve by the first Wednesday after the first Monday in January, 1966.

"(h) The terms of office of the members to the 1965 General Assembly shall expire on July 1, 1965, except that their offices may continue if called into

special session by the Governor of the State of Vermont to act upon a State emergency not pertaining to reapportionment."

The cases are removed from the argument list, the Stipulation is approved, and, in accordance therewith, the judgment of the District Court is modified by vacating Paragraph (3) and substituting in lieu thereof the quoted language of the Stipulation. As so modified, the judgment of the District Court dated August 3, 1964, is affirmed. The judgment of this Court shall issue forthwith.

Memorandum of MR. JUSTICE HARLAN.

I would approve the Stipulation submitted by the parties except for subparagraph (f). That provision envisages a reapportionment of the Vermont Legislature by the District Court itself if an apportionment of that body, satisfying the requirements of *Reynolds* v. *Sims,* 377 U. S. 533, is not accomplished by the other means, and within the timetable, set forth in the Stipulation.[1] The prospect of the federal courts engaging in such a political undertaking is for me a spectacle not easy to contemplate. Whether such a course may be an inevitable ultimate consequence of *Reynolds* v. *Sims* is a matter which should be determined only after the fullest and most deliberate consideration on the part of this Court. Cf. *Brown* v. *Board of Education,* 347 U. S. 483, 495–496, and 349 U. S. 294. I do not believe that any of the summary dispositions made in reapportionment cases following *Reynolds* v. *Sims,* see, *e. g., Williams* v. *Moss,* 378 U. S. 558, forecloses or obviates the need for such a

[1] "(f) If reapportionment legislation is not enacted by July 1, 1965, and if a constitutional convention shall fail to reapportion the General Assembly by September 1, 1965, the Court shall reapportion the General Assembly so as to comply with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution."

consideration of this far-reaching question.[2] The parties to a particular litigation should not be permitted by stipulation to thrust a federal court into this foreign activity.

Except in the foregoing respects, I join in the Court's disposition of the matter.

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[2] The District Court in its order of August 3, 1964, declined to pass on this question. Paragraph (4) of the order read:

"(4) No action is taken now upon the alternative request of plaintiffs that this court order that elections of Senators and Representatives be on a state-wide basis; and jurisdiction is retained for the entry of such further orders as may be necessary and proper hereafter." 234 F. Supp. 191, 201.

744-008 O-65-30

CALIFORNIA ET AL. *v.* LO-VACA GATHERING CO. ET AL.

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

No. 46. Argued November 17–18, 1964.—Decided January 18, 1965.*

An interstate pipeline company which supplies natural gas at the California border entered into contracts to buy gas in Texas for delivery to its pipeline system. Although the gas was to be commingled with other purchases the contracts provided for "restricted use" of the gas for internal company use, either intrastate or, if interstate, not for resale. It was conceded that some of the gas input would be resold outside of Texas. The Federal Power Commission asserted jurisdiction over these sales as sales in interstate commerce for resale under § 1 (b) of the Natural Gas Act. The Court of Appeals reversed. *Held:*

1. The actuality of the interstate transportation and resale of a substantial portion of the gas invokes federal jurisdiction over the transactions, the form of the contracts notwithstanding. Pp. 369–370.

2. The jurisdictional boundaries of the Federal Power Commission may be established by adjudication rather than by rule-making. P. 371.

323 F. 2d 190, reversed.

Richard E. Tuttle argued the cause for petitioners in No. 46. With him on the briefs were *J. Calvin Simpson* and *John T. Murphy.*

John Ormasa argued the cause for petitioners in No. 47. With him on the brief was *Milford Springer.*

Richard A. Solomon argued the cause for petitioner in No. 57. With him on the brief were *Solicitor General*

*Together with No. 47, *Southern California Gas Co. et al.* v. *Lo-Vaca Gathering Co. et al.*, and No. 57, *Federal Power Commission* v. *Lo-Vaca Gathering Co. et al.*, also on certiorari to the same court.

Cox, Ralph S. Spritzer, Frank I. Goodman, Howard E. Wahrenbrock, Robert L. Russell and *Peter H. Schiff.*

Sherman S. Poland argued the cause for respondents. With him on the brief were *Bradford Ross, C. Frank Reifsnyder* and *Hugh Q. Buck.*

Harry L. Albrecht filed a brief for the Independent Natural Gas Association of America, as *amicus curiae*, urging affirmance.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

El Paso Natural Gas Co. is an interstate natural gas pipeline company that delivers gas at the Arizona-California border to three California distribution companies. The present controversy concerns gas to be purchased by it in Texas from Lo-Vaca Gathering Co. and Houston Pipe Line Co. Under Lo-Vaca's contract gas produced in Texas is to be delivered to a subsidiary of El Paso's at a Texas point for delivery into its pipeline. The contract contains the following two clauses:

> "All of the gas to be purchased by El Paso from Gatherer [Lo-Vaca] under this agreement shall be used by El Paso solely as fuel in El Paso's compressors, treating plants, boilers, camps and other facilities located outside of the State of Texas. It is understood, however, that said gas will be commingled with other gas being transported in El Paso's pipe line system."
>
> "It is the intent and understanding of the parties hereto that the sale of natural gas hereof is not subject to the jurisdiction of the Federal Power Commission because this sale is not for resale."

This "restricted use" agreement provides for a separate metering of the contract volumes prior to their delivery into El Paso's system. El Paso will meter the gas used

for fuel purposes in its New Mexico and Arizona facilities to make certain this amount invariably exceeds the volumes of gas taken from Lo-Vaca under this agreement.

El Paso and Houston made a similar contract containing a similar "restricted use" provision by which El Paso covenants that this Houston gas will be consumed by El Paso solely as fuel in its Texas operations or in another Texas plant. This contract, like the other one, also provides for metering the volume of gas delivered in Texas; and it includes a covenant by El Paso that the Texas uses will at all times exceed the amounts supplied by Houston.

In spite of these "restricted use" covenants it is conceded that the gas sold by Lo-Vaca and Houston to El Paso will flow in a commingled stream with gas from other sources and that at least a portion of the gas will in fact be resold out of Texas.

The Federal Power Commission asserted jurisdiction over these sales as sales in interstate commerce "for resale," as that term is used in § 1 (b) of the Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717 (1958 ed.).[1] 26 F. P. C. 606, rehearing denied, *id.*, at 840. The Court of

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[1] Section 1 (b) of the Act provides:

"The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas."

Section 2 (7) of the Act reads as follows:

"When used in this Act, unless the context otherwise requires—

. . . . . .

"(7) 'Interstate commerce' means commerce between any point in a State and any point outside thereof, or between points within the same State but through any place outside thereof, but only insofar as such commerce takes place within the United States."

Appeals reversed, one judge dissenting. 323 F. 2d 190. The case is here on a writ of certiorari. 377 U. S. 951.

We said in *Connecticut Co.* v. *Federal Power Comm'n,* 324 U. S. 515, 529, "Federal jurisdiction was to follow the flow of electric energy, an engineering and scientific, rather than a legalistic or governmental, test." And that is the test we have followed under both the Federal Power Act and the Natural Gas Act, except as Congress itself has substituted a so-called legal standard for the technological one. *Id.,* at 530–531. In *Interstate Natural Gas Co.* v. *Federal Power Comm'n,* 331 U. S. 682, 687, we considered the anatomy of the pipeline system to discover the channel of the constant flow; again in *Federal Power Comm'n* v. *East Ohio Gas Co.,* 338 U. S. 464, 467; and most recently in *Federal Power Comm'n* v. *Southern Cal. Edison Co.,* 376 U. S. 205, 209, n. 5. The result of our decisions is to make the sale of gas which crosses a state line at any stage of its movement from wellhead to ultimate consumption "in interstate commerce" within the meaning of the Act.

Attempts have been made by one convention or another to convert a local transaction into one of interstate commerce (*Sprout* v. *South Bend,* 277 U. S. 163; *Superior Oil Co.* v. *Mississippi,* 280 U. S. 390) or to make a segment of interstate commerce appear to be only intrastate (*Baltimore & Ohio R. Co.* v. *Settle,* 260 U. S. 166). But those attempts have failed. Similarly, we conclude that when it comes to the question what gas is for "resale" the present contracts should not be able to change the jurisdictional result.

The fact that a substantial part of the gas will be resold, in our view, invokes federal jurisdiction at the outset over the entire transaction. Were suppliers of gas and pipeline companies free to allocate by contract gas from a particular source to a particular use, havoc would be raised with the federal regulatory scheme, as it was con-

strued and applied in *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672. A pipeline would then be able to discriminate in favor of its "nonjurisdictional" customers. Moreover, a pipeline company by a contract clause could immunize a particular supplier from the reach of federal regulation [2] as defined by *Phillips Petroleum Co.* v. *Wisconsin, supra.* There would be created in those and in other ways an "attractive gap" in the federal regulatory scheme (*Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.,* 365 U. S. 1, 28) which the producing States might have little incentive to close, since the gap would often involve either lower costs to intrastate customers or else merely higher pipeline costs which ultimately would be reflected in rates paid by consumers in other States. Whether cases could be conjured up where in spite of original commingling there might be a separate so-called nonjurisdictional transaction [3] of a precise amount of gas not-for-resale [4] within the meaning of the Act is a question we need not reach.

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[2] The Commission's Report, Statistics of Natural Gas Companies—1962, shows that the 40 major natural gas pipeline companies consumed more than $85,000,000 worth of gas in operating their facilities (principally compressor stations), p. xviii. This represents almost 4% of the total gas-purchase-costs of those companies. The Commission therefore points out in its brief that pipeline companies, merely by using "restricted use" controls, could without changing their actual operations create a substantial unregulated market for the benefit of particular producers.

[3] Our reference in *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.,* 365 U. S. 1, 4, to "direct" sales of gas to industrial users as nonjurisdictional sales is not dispositive of the present issue. For the Commission had refused a certificate for transportation of the gas because from the standpoint of conservation it considered the end use as boiler fuel to be inferior. Whether the Commission had authority to assert jurisdiction over the so-called "direct" sale because it was "for resale" as a result of its commingling with other gas was not in issue.

[4] Cf. *United States* v. *Public Utilities Comm'n,* 345 U. S. 295, 317–318; *City of Hastings* v. *Federal Power Comm'n,* 221 F. 2d 31.

Finally it is said that the Commission should draw the appropriate lines between "jurisdictional" and "nonjurisdictional" sales through the use of its rule-making power. But we cannot say that the adjudicatory process is not an appropriate method for drawing the line case-by-case (*United States* v. *Public Utilities Comm'n,* 345 U. S. 295) as in a host of other administrative determinations. The Commission has acted responsibly in this situation and its decision must be upheld.

Reversed.

MR. JUSTICE WHITE took no part in the consideration or decision of these cases.

MR. JUSTICE HARLAN, dissenting.

Today's decision furnishes a too-ready answer to an intricate problem of administrative regulation. It reflects the sort of decision that is to be expected when the Court is willing to make a bare choice between two unrefined points of view as to regulatory method, without first being informed by the regulating agency concerned as to its evaluation of the competing factors—something that is indispensable to achieving a well-balanced solution of a problem such as this. The respective positions of the parties here each possesses the capacity to frustrate the scope of natural gas regulation ordained by the Congress. The Commission's molecular theory, accepted by the Court with undefined reservations, results in expanding the regulatory scheme by sweeping within the Commission's authority gas that has not been supplied or used for interstate resale ("nonjurisdictional" gas). The respondents' contract-allocation position, on the other hand, might serve to contract the legitimate scope of regulation by interfering with the ability of the Commission to deal with gas restricted under a supply contract to

"not-for-sale," but which has been actually used by the pipeline-purchaser for interstate resale ("jurisdictional" gas).

Whether or not there is a middle ground that would more closely fulfill the purposes of the Natural Gas Act than either of the proposals now before us is something that this Court is not competent to assess without expert guidance from the Commission, and we have been given none. Lacking this, I am unwilling to accept at this juncture the position of either party to this litigation. I think the Court should decline to pass upon these cases until the Commission has first illumined the regulatory problems involved through an appropriate exercise of its rule-making powers.[1]

The complexity and elusiveness of the matters with which we are asked to deal are best exposed from the vantage point of this Court by considering some of the questions to which allocation contracts in varying contexts give rise.

The Commission has, at least until this case, accepted the proposition that a single supplier to a pipeline may allocate by contract between the amount of gas used for jurisdictional purposes and the amount used nonjurisdictionally. For example, in *City of Hastings* v. *Federal Power Comm'n,* 221 F. 2d 31, a pipeline company sold gas to the city through one pipeline under two contracts, one covering the gas to be resold by the city, and the other gas to be used by the city in its own plants. Although the gas was mingled in the common pipeline, the allocation was approved, and the latter gas was, without more, considered not subject to Commission regulation. A similar situation was presented in *United States* v. *Public Utilities Comm'n of California,* 345 U. S. 295, where a power company sold electricity to the Navy for

[1] See Elman, Comment, Rulemaking Procedures in the FTC's Enforcement of the Merger Law, 78 Harv. L. Rev. 385 (1964).

use in its power plants and also for resale to dependent families. The absence of any allocation was fatal in that case, but the Court recognized that a different question would be presented if there had been two separate transactions. 345 U. S., at 316–318.

The result does not change when two or more suppliers are involved, provided that the allocation of nonjurisdictional gas is prorated among all of the suppliers. For example, if a pipeline company consumed 30% of its total volume of gas in its own plants, and sold 10% of the total volume in the State of production, each supplier could allocate 40% of its gas supply to nonjurisdictional use. Such was essentially the case in *North Dakota* v. *Federal Power Comm'n,* 247 F. 2d 173, where the allocation was upheld with Commission approval. If these cases are accepted by the Court, two corollaries follow: since gas is a fungible commodity, the mingling of gas does not alone render ineffective for purposes of Commission jurisdiction the allocation contracts, although the molecular identification of the nonjurisdictional gas is destroyed; and the fact that the prices paid for nonjurisdictional gas [2] may affect the rate base for the jurisdictional gas, is also not a critical factor at this stage.[3]

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[2] See Court's opinion, *ante,* p. 370. In fact, the price charged by Lo-Vaca for its nonjurisdictional gas is exactly the same as the price established for its concededly jurisdictional sale, and the Houston sale is for a price lower than either of the Lo-Vaca sales.

[3] Both Lo-Vaca and El Paso are constructing pipelines to connect with the El Paso system at its Coquat station, and both must obtain Commission certification under § 7 of the Natural Gas Act in order to construct such pipelines. The Commission could take many of the factors presented in this case into account when ruling on the applications, see *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.,* 365 U. S. 1. The Commission could also take into account the reasonableness of the prices charged for nonjurisdictional gas should El Paso apply for a rate increase on its jurisdictional sales.

The issue now before the Court arises only when some suppliers are allocating part or all of their gas to nonjurisdictional use, but others are not. This issue could arise commonly in two contexts: if existing suppliers were allocating pro rata, and new suppliers were added which did not allocate, the addition of the new suppliers might be thought not to destroy the validity of the existing allocation contracts since the new suppliers might be satisfying an increase in the demand for jurisdictional gas.[4] The converse situation is presented in this case, where the new suppliers are attempting to allocate, and existing suppliers are not. One possible test in such cases might be to determine the source of the demand for the gas supplied to El Paso by Houston and Lo-Vaca. To modify the argument used by respondents, if a separate pipeline were constructed from the Coquat station (at which the gas enters the El Paso system) to the point along El Paso's system where the outflow will increase, would the sale be jurisdictional or not? If in fact El Paso has formerly been using the same amount of gas in its compressors that it intends to use in the future, then the purpose of the Lo-Vaca allocation will be merely to release for interstate sale—to satisfy the interstate demand—gas from other suppliers which formerly was used for nonjurisdictional purposes.

The record before us does not answer the question put. There is some indication that El Paso intends to construct new compressor plants, and may have to use more nonjurisdictional gas at its existing plants to handle the added gas received from Lo-Vaca under the unrestricted contract. Such a use would satisfy a nonjurisdictional de-

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[4] See *Amerada Petroleum Corp.* v. *Federal Power Comm'n,* 334 F. 2d 404 (C. A. 8th Cir. 1964), cert. pending, No. 585, this Term, where the suppliers in the *North Dakota* case, *supra,* had been allocating, and the pipeline then added new suppliers which did not allocate. The Court of Appeals upheld the allocation contracts.

mand. However, there is also evidence that in fact El Paso's consumption for nonjurisdictional purposes will remain constant, and that Lo-Vaca's supplies will be used to satisfy an increased demand from interstate consumers. The fact that Lo-Vaca gas purportedly replaces the compressor gas supplies formerly furnished by other suppliers, thus releasing that gas for interstate resale, should not defeat Commission jurisdiction under this analysis.

Another possible standard which suggests itself would be to determine the probable percentages of gas from each supplier which will be used for nonjurisdictional purposes, and only permit each supplier to allocate by contract to nonjurisdictional use his pro rata share of the total estimated nonjurisdictional gas. For example, if we suppose a pipeline running from the Gulf coast of Texas through New Mexico into California, as does the El Paso system, then each supplier should determine what percentage of the total volume of gas flowing west from the point of its input will be ultimately used for a nonjurisdictional purpose. It would then be mathematically probable that his gas would be used for nonjurisdictional purposes in the same percentage, and he could allocate that amount by contract, subject to change should new supplies be added to the system.[5]

I recognize, of course, that there may be pitfalls in both of these possible methods, and that there may be other formulae that are preferable to either. I have ventured

[5] Corrections would have to be made, of course, where gas is withdrawn for intrastate consumption from a trunk line before the gas is mingled with the interstate system. Such gas would all be attributed to the suppliers feeding the trunk line, and this gas would not be used in computing the total percentages. Cf. *Peoples Natural Gas Co.* v. *Public Service Comm'n of Pennsylvania*, 270 U. S. 550. This method of allocation would only operate with natural gas, which flows in one direction only; different considerations would be applicable were we dealing with electric power, which can flow in both directions along a system.

them only as support for my belief that the Commission's molecular theory, which in the name of protecting the Commission's jurisdiction in reality involves a judicial expansion of its authority, should not be accepted until the Commission, after due exploration in a rule-making proceeding, is able to satisfy this Court that no other feasible method—more particularly no modification of the respondents' contract-allocation theory—exists that would better fit the boundaries of the Commission's jurisdiction as fixed by Congress.

It is undoubtedly true that normally an administrative agency may decide for itself whether to proceed in a given field of its regulatory functions through the promulgation of general rules [6] or by the process of case-by-case adjudication.[7] This Commission from the outset has usually proceeded, with the Court's approval,[8] in developing its procedures by the adjudicatory process. Nevertheless, there are good reasons why the rule-making power appears to be the more promising avenue of approach in this instance. *First,* the adjudicatory process has not yielded any satisfactory basic principle to serve as a point of departure for judicial assessment of cases of this kind, or indeed for a consistent administrative approach; [9] even in this litigation the Commission's position is far from clear as to what room, if any, there may be for restrictive allocation contracts. *Second,* the gas industry is entitled to know the fundamental ground rules by which it should

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[6] See *United States* v. *Storer Broadcasting Co.,* 351 U. S. 192. See generally 1 Davis, Administrative Law Treatise, § 5.01 (1958).

[7] See *Securities & Exchange Comm'n* v. *Chenery Corp.,* 332 U. S. 194.

[8] See, *e. g., United States* v. *Public Utilities Comm'n of California, supra,* at 318, n. 28.

[9] See *Lo-Vaca Gathering Co.,* 26 F. P. C. 606, 615:

"To the extent that *North Dakota* may be inconsistent with the action we take here, we believe it was erroneously decided." Compare, *supra,* p. 373.

conduct itself in this regard with some degree of predictability, as witness the situation of these respondents whose good faith in the transactions giving rise to this litigation has not been impugned in any way. *Third,* that unlike the line of cases in which agency jurisdiction is conceded,[10] here the Commission should not be permitted to adopt a theory which expands its jurisdiction beyond statutory limits [11] without full hearings and the formulation of a rule interpreting its jurisdiction in this area which conforms to the jurisdictional limits of § 1 (b) of the Natural Gas Act. *Fourth,* because these matters are fraught with technical "perplexities, both geological and economic," *Railroad Comm'n of Texas* v. *Rowan & Nichols Oil Co.,* 311 U. S. 570, 574, the informed expertise of the Commission is a necessary adjunct to satisfactory judicial resolution of particular cases. "Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different." *Securities & Exchange Comm'n* v. *Chenery Corp.,* 318 U. S. 80, 92. The courts have a right to the informed judgment of the Commission before acting further in this presently opaque area.

I would vacate the judgment of the Court of Appeals and remand the case to the Commission for further proceedings after the promulgation of interpretive rules to cover this, and like cases.[12]

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[10] As for example, in rate-making proceedings.

[11] Natural Gas Act, § 1 (b), quoted in the Court's opinion, *ante,* p. 368, n. 1.

[12] See *Addison* v. *Holly Hill Fruit Prods., Inc.,* 322 U. S. 607, 619.

UNITED STATES *v.* FIRST NATIONAL CITY BANK.

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

No. 59. Argued November 16, 1964.—Decided January 18, 1965.

The Commissioner of Internal Revenue, having made jeopardy assessments of some $19,000,000 against a Uruguayan corporation, served with notices of levy and of federal tax lien respondent bank in New York, in whose Montevideo branch the corporation maintained a deposit. Concurrently, petitioner brought a foreclosure action in Federal District Court against the corporation, respondent, and others, pending determination of which an injunction was sought against transfer by respondent of any property or rights held for the corporation's account. Respondent, but not the corporation, was personally served. The District Court granted a temporary injunction under 26 U. S. C. § 7402 (a), which gives district courts power to grant injunctions "necessary or appropriate for the enforcement of the internal revenue laws"; and the Court of Appeals reversed. *Held:* The District Court has jurisdiction to preserve the *status quo* and prevent further dissipation of assets by issuing its temporary injunction "freezing" the corporation's account in respondent's foreign branch pending personal service on the corporation. Pp. 381–385.

(a) Rules 4 (e) and (f) of the Federal Rules of Civil Procedure provide for service in accordance with a state statute of a noninhabitant or person not found in the State. P. 381.

(b) Under § 302 (a) of the New York Civil Practice Law and Rules, which became effective after the temporary injunction was issued, out-of-state personal service may be made as provided in § 313 on a nondomiciliary transacting business within the State, a remedy which New York law makes applicable to further proceedings, such as are involved here, in an action pending on the effective date of the statute. Pp. 382–383.

(c) Issuance of the injunction under 26 U. S. C. § 7402 (a) was a proper exercise of the equity power of the District Court, particularly as it was acting in the public interest. P. 383.

(d) Respondent's foreign branch was not a "separate entity" without the reach of the District Court's *in personam* order. P. 384.

(e) The District Court reserved power to enter a protective order upon a showing, though none has been made, that the "freezing" of the foreign branch account would violate foreign law or subject respondent to the risk of double liability, and that court is open to any representations which the Executive Branch might make that such "freezing" would embarrass this country's foreign relations. P. 384.

325 F. 2d 1020, reversed.

Assistant Attorney General Oberdorfer argued the cause for the United States. With him on the briefs were *Solicitor General Cox* and *Harold C. Wilkenfeld.*

Henry Harfield argued the cause for respondent. With him on the brief were *William Harvey Reeves* and *John E. Hoffman, Jr.*

Roy C. Haberkern, Jr., and *Edward J. Ross* filed a brief for the Chase Manhattan Bank et al., as *amici curiae,* urging affirmance.

Theodore Tannenwald and *A. Chauncey Newlin* filed a memorandum for Omar, S. A.

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

This case presents a collateral phase of litigation involving jeopardy assessments of some $19,000,000 made by the Commissioner of Internal Revenue against Omar, S. A., a Uruguayan corporation. The assessments charged that income had been realized within the United States on which a tax was due. On the same day respondent was served with notice of levy and notice of the federal tax lien. At the same time petitioner commenced an action in the New York District Court naming Omar, as well as respondent and others, as defendants. Personal jurisdiction over respondent was acquired; but as of the date of argument of the case here, Omar had not yet been served. That action requested, *inter alia,* foreclosure of

the tax lien upon all of Omar's property, including sums held for the account or credit of Omar in foreign branch offices of respondent.[1] It also requested that, pending determination of the action, respondent be enjoined from transferring any property or rights to property held for the account of Omar; and affidavits filed with the complaint averred that Omar was removing its assets from the United States.

The District Court, on the basis of the affidavits, issued a temporary injunction enjoining respondent from transferring any property or rights to property of Omar now held by it or by any branch offices within or without the United States, indicating it would modify the order should compliance be shown to violate foreign law. 210 F. Supp. 773. The Court of Appeals reversed by a divided vote both by a panel of three, 321 F. 2d 14, and *en banc,* 325 F. 2d 1020. The case is here on a writ of certiorari. 377 U. S. 951.

Title 26 U. S. C. § 7402 (a) gives the District Court power to grant injunctions "necessary or appropriate for the enforcement of the internal revenue laws." Since it has personal jurisdiction over respondent, has it power to grant the interim relief requested? We are advised that respondent's only debt to Omar is payable at respondent's branch in Montevideo. It is said that the United States, the creditor, can assert against respondent in New York only those rights that Omar, the debtor, has against respondent in New York and that under New York law a depositor in a foreign branch has an action against the head office only where there has been a demand and wrongful refusal at the foreign branch. *Sokoloff* v. *National City Bank,* 239 N. Y. 158, 145 N. E. 917, 250

[1] These branches are not separate corporations but parts of respondent's single, federally chartered corporation. See 12 U. S. C. §§ 601–604; *First National City Bank* v. *Internal Revenue Service,* 271 F. 2d 616.

N. Y. 69, 164 N. E. 745. The point is emphasized by the argument that any obligation of respondent to Omar is due only in Montevideo—an obligation apparently dischargeable in Uruguayan currency, not in dollars. Therefore, the argument runs, there is no claim of the debtor (Omar) in New York which the creditor can reach.

We need not consider at this juncture all the refinements of that reasoning. For the narrow issue for us is whether the creditor (the United States) may by injunction *pendente lite* protect whatever rights the debtor (Omar) may have against respondent who is before the court on personal service. If it were clear that the debtor (Omar) were beyond reach of the District Court so far as personal service is concerned, we would have quite a different case—one on which we intimate no opinion. But under § 302 (a) of the New York Civil Practice Law and Rules, 7B McKinney's Consol. Laws Ann., § 302, personal jurisdiction may be exercised over a "non-domiciliary" who "transacts any business within the state" as to a cause of action arising out of such transaction, in which event out-of-state personal service may be made as provided in § 313.[2] The Federal Rules of Civil Procedure by Rule 4 (e) and Rule 4 (f) allow a party not an inhabitant of the State or found therein to be served with a summons in a federal court in the manner and under the circumstances prescribed by a state statute.[3] See *United States* v. *Montreal Trust Co.*, 35 F. R. D. 216.

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[2] There is also of course the possibility that Omar might enter a general appearance as it apparently did in the Tax Court when it filed its petition of May 20, 1963, for a redetermination of the deficiencies on the basis of which the present jeopardy assessments were made.

[3] Rule 4 (e), effective July 1, 1963, reads in relevant part:

"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

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To be sure, this cause of action arose, the complaint was filed, and the temporary injunction was issued before the New York statute became effective. The New York Court of Appeals has, however, indicated that where the suit is instituted *after* the effective date of the statute, the statute will normally apply to transactions occurring *before* the effective date. *Simonson* v. *International Bank,* 14 N. Y. 2d 281, 290, 200 N. E. 2d 427, 432. That court has further indicated that where, as in the instant case, the suit based on the prior transaction was *pending* on the effective date of the statute, "the new act shall—except where it 'would not be feasible or would work injustice'—apply 'to all *further* proceedings' in such actions . . . ." [4] *Ibid.* It seems obvious that a future attempt by the Government to serve process on Omar would be considered a "further proceeding" in the instant litigation. Accordingly, we judge the temporary injunction, which has only a prospective application, as of now and in light of the present remedy which § 302 (a)

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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."

Rule 4 (f), also effective July 1, 1963, reads in relevant part:

"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."

[4] The Court of Appeals reached these conclusions on the basis of Civil Practice Law and Rules, § 10003, 7B McKinney's Consol. Laws Ann., § 10003: "This act shall apply to all actions hereafter commenced. This act shall also apply to all further proceedings in pending actions, except to the extent that the court determines that application in a particular pending action would not be feasible or would work injustice, in which event the former procedure applies. Proceedings pursuant to law in an action taken prior to the time this act takes effect shall not be rendered ineffectual or impaired by this act."

affords.[5] And our review of the injunction as an exercise of the equity power granted by 26 U. S. C. § 7402 (a) must be in light of the public interest involved: "Courts of equity may, and frequently do, go much farther both to give and withhold relief in furtherance of the public interest than they are accustomed to go when only private interests are involved." *Virginian R. Co.* v. *Federation,* 300 U. S. 515, 552. And see *United States* v. *Morgan,* 307 U. S. 183, 194; *Hecht Co.* v. *Bowles,* 321 U. S. 321, 330.

If personal jurisdiction over Omar is acquired, the creditor (the United States) will be able to collect from respondent what the debtor (Omar) could collect. The opportunity to make that collection should not be lost *in limine* merely because the debtor (Omar) has not

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[5] That the Government has not yet attempted to obtain personal jurisdiction over Omar is not significant in light of the fact that until now the Government's primary contention has been that the District Court's personal jurisdiction over the respondent bank was by itself an adequate basis for the issuance of the temporary injunction. As the Government said in its petition for rehearing before the Court of Appeals: "The jurisdictional basis, then, for the injunction issued by the District Court was personal jurisdiction over the Bank. Certainly, at this stage of the proceeding, it is inconsequential whether the District Court has jurisdiction over a *res* or over the taxpayer." The Government went on to say that if this contention was rejected, then it wished to argue that the tax lien had attached to Omar's deposits and that these deposits "constitute rights to property which were within the jurisdiction of the District Court." Finally the Government stated: "It is only in the event that the Court concludes that the lien does not attach to such deposits that personal jurisdiction over Omar becomes relevant. In such event the Government should be afforded an opportunity to obtain personal jurisdiction over Omar and the injunction should stand pending such efforts." Even before this Court the Government argues alternatively that "the District Court had authority to enter the temporary injunction to preserve funds over which it had jurisdiction *quasi in rem,*" a contention upon which, as noted previously, we do not pass.

made the agreed-upon demand on respondent at the time and place and in the manner provided in their contract.

Whether the Montevideo branch is a "separate entity," as the Court of Appeals thought, is not germane to the present narrow issue. It is not a separate entity in the sense that it is insulated from respondent's managerial prerogatives. Respondent has actual, practical control over its branches; it is organized under a federal statute, 12 U. S. C. § 24, which authorizes it "To sue and be sued, complain and defend, in any court of law and equity, as fully as natural persons"—as one entity, not branch by branch. The branch bank's affairs are, therefore, as much within the reach of the *in personam* order entered by the District Court as are those of the home office. Once personal jurisdiction of a party is obtained, the District Court has authority to order it to "freeze" property under its control, whether the property be within or without the United States. See *New Jersey* v. *New York City,* 283 U. S. 473, 482.

That is not to say that a federal court in this country should treat all the affairs of a branch bank the same as it would those of the home office. For overseas transactions are often caught in a web of extraterritorial activities and foreign law beyond the ken of our federal courts or their competence. We have, however, no such involvement here, for there is no showing that the mere "freezing" of the Montevideo accounts, pending service on Omar, would violate foreign law, cf. *Societe Internationale* v. *Rogers,* 357 U. S. 197, 211, or place respondent under any risk of double liability. Cf. *Western Union Co.* v. *Pennsylvania,* 368 U. S. 71. The District Court reserved power to enter any protective order of that character. 210 F. Supp. 773, 775. And if, as is argued in dissent, the litigation might in time be embarrassing to United States diplomacy, the District Court remains open

to the Executive Branch, which, it must be remembered, is the moving party in the present proceeding.

The temporary injunction issued by the District Court seems to us to be eminently appropriate to prevent further dissipation of assets. See *United States* v. *Morris & Essex R. Co.*, 135 F. 2d 711, 713–714. If such relief were beyond the authority of the District Court, foreign taxpayers facing jeopardy assessments might either transfer assets abroad or dissipate those in foreign accounts under control of American institutions before personal service on the foreign taxpayer could be made. Such a scheme was underfoot here, the affidavits aver. Unlike *De Beers Mines* v. *United States*, 325 U. S. 212, there is here property which would be "the subject of the provisions of any final decree in the cause." *Id.*, 220. We conclude that this temporary injunction is "a reasonable measure to preserve the status quo" (*Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, 290) pending service of process on Omar and an adjudication of the merits.

Reversed.

MR. JUSTICE HARLAN, with whom MR. JUSTICE GOLDBERG joins, dissenting.

The Court's opinion reflects an expansive view of the jurisdiction of a federal court to tie up foreign owned and situated property with which I cannot agree.

The Internal Revenue Service first focused on Omar, S. A., a Uruguayan corporation, in 1959 when Omar filed a return seeking a $10,000 credit from a regulated investment company. Investigation of this relatively small refund claim revealed the possibility that in fact Omar owed a very substantial amount in taxes to the Government. Omar maintained accounts with several New York securities brokers, and purchase and sale orders

communicated from abroad had resulted in the realization of large profits. The lawyer acting for Omar contended that these transactions gave rise to no tax liability because Omar was not a personal holding company. In a meeting with the investigating agent in May 1962, the lawyer warned that if the Service persisted in its attempt to tax Omar as a personal holding company, "Omar would quite likely liquidate its holdings in the United States, and send the money out of the country." [1]

The Service did persist. On October 31, 1962, it issued jeopardy assessments against Omar totaling $19,300,000, and on the same day filed a complaint in the District Court for the Southern District of New York naming as defendants Omar, the brokerage houses with which Omar had dealt, and several banks including the First National City Bank (hereinafter Citibank) which is the respondent here. By this time Omar had in large part succeeded in liquidating its securities and transferring the funds out of the country. Some of the funds were apparently transferred to Citibank's branch in Montevideo, Uruguay, and were on deposit there on the day the complaint was filed. As part of the relief sought, the Government asked the District Court to "freeze" this account (we are not informed as to its size) until such time as personal jurisdiction could be obtained over Omar. Citibank contested the authority of the court to make such an order on the ground that the account had its situs in Montevideo and was therefore beyond the jurisdiction of the court. Personal jurisdiction over Omar had not been obtained at the time the complaint was filed, and has not been obtained in the two years since. Omar is thus not a party to the present litigation. Personal jurisdiction over Citibank was obtained by service upon its home office at 55 Wall Street, New York City.

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[1] Affidavit of William R. T. Gottlieb, one of the investigating agents.

The issue presented by the case is: Did the Federal District Court have jurisdiction to freeze the account in Montevideo by enjoining Citibank from transferring any property or rights to property held therein for Omar? The Government argues that jurisdiction could stem from either of two sources: jurisdiction *quasi in rem* over the debt owing from Citibank's Montevideo branch to Omar; or personal jurisdiction over Citibank, which is capable of controlling the debt even though its *situs* may be outside the court's jurisdiction. Despite its enigmatic and unsupported statement that "there is here property which would be 'the subject of the provisions of any final decree in the cause,' " *ante,* p. 385, the Court does not decide the *quasi in rem* issue on which the District Court relied. The opinion rests entirely on the personal jurisdiction theory. Both theories are, in my view, demonstrably insufficient.

I.

PERSONAL JURISDICTION.

The Court upholds the freeze order on the basis that the District Court, pending acquisition of personal jurisdiction over Omar, had authority to enjoin Citibank (over which it did have personal jurisdiction) from allowing its Montevideo branch to transfer the funds to Omar.

There can be no doubt that the enforcement powers available to the District Court were adequate to accomplish that much of the end in view. Citibank was before the court. It had sufficient control over the Montevideo branch to require compliance with the freeze order, and if it did not exercise that control, the sanctions of contempt could be inflicted on officers and property of Citibank within the New York district.[2] But "jurisdiction" is not

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[2] Cf. *Penn* v. *Lord Baltimore,* 1 Ves. sen. 444, 454 (Ch. 1750) (1st Am. ed. 1831); *Deschenes* v. *Tallman,* 248 N. Y. 33, 161 N. E. 321.

synonymous with naked power. It is a combination of power and policy. Judge Learned Hand made this point in *Amey* v. *Colebrook Guaranty Sav. Bank,* 92 F. 2d 62, a case containing some of the same elements as the case before us. In reversing so much of an interlocutory decree of a federal judge sitting in Vermont as provided for the cutting of timber in Maine, Judge Hand said:

> "The word, 'jurisdiction,' is in this connection somewhat equivocal; in one sense the judge had it; the bank had personally appeared and was subject to his orders, as far as any corporation can be; he might sequester its property in Vermont, if he could find any, or he might proceed against its officers as for a contempt. But although he thus had the power to prevent the defendant from asserting its rights in Maine, it might still be improper for him to do so. Courts do not always exert themselves to the full, or direct parties to do all that they can effectively compel, and such forbearance is sometimes called lack of 'jurisdiction.' What reserves a court shall make, when dealing with real property beyond its territory, is not altogether plain; as to some things, it will act freely when it has before it those who hold the legal interests." 92 F. 2d, at 63.

The real problem with this phase of the case is therefore this: Granting that the District Court had the naked power to control the Montevideo account by bringing to bear coercive action on Citibank, *ought* the court to have exercised it? Or to put the question in the statutory terms,[3] was the court's order "appropriate" for the enforcement of the internal revenue laws?

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[3] Internal Revenue Code of 1954, § 7402 (a), provides:

"*To Issue Orders, Processes, and Judgments.*—The district courts of the United States at the instance of the United States shall have such jurisdiction to make and issue in civil actions, writs and

1. *Need for Personal Jurisdiction Over Omar.*

We should first consider the question in its starkest form. Assuming that there is no *quasi in rem* jurisdiction over the property (see Part IV, *infra,* p. 404) and no reasonable likelihood of obtaining personal jurisdiction over Omar, why should the court not use its naked power, to the extent that it could be brought to bear on others situated as was Citibank, to tie up Omar's property all over the world for the avowed purpose of coercing Omar into paying its taxes?

Use of judicial equity powers to coerce a party over whom the court has no jurisdiction or likelihood of obtaining jurisdiction is unheard of. The statute authorizing courts to render such decrees as may be "necessary or appropriate for the enforcement of the internal revenue laws" clearly intends that courts use only their *traditional* equity powers to that end.[4] It should not be interpreted as an authorization to employ radically new and extremely far-reaching forms of coercive action in a more free-wheeling approach to international than to domestic cases.[5] Neither the Government nor the Court argues for such an extraordinary judicial use of power. Suffice it to say that if the contrary position were taken, serious constitutional problems would arise.

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orders of injunction, and of *ne exeat republica,* orders appointing receivers, and such other orders and processes, and to render such judgments and decrees as may be necessary or appropriate for the enforcement of the internal revenue laws. The remedies hereby provided are in addition to and not exclusive of any and all other remedies of the United States in such courts or otherwise to enforce such laws."

[4] Compare *De Beers Consol. Mines, Ltd.* v. *United States,* 325 U. S. 212; *Appalachian Coals, Inc.* v. *United States,* 288 U. S. 344, 377.

[5] Compare *Banco Nacional de Cuba* v. *Sabbatino,* 376 U. S. 398.

2. *Improbability of Obtaining Personal Jurisdiction Over Omar as of the Time the Injunction Was Issued.*

It is basic to traditional notions of equity that to justify the issuance of a protective temporary injunction there must exist a substantial probability that jurisdiction, judgment, and enforcement will be obtained with respect to the person sought to be affected.[6] The Court does not and could not contest this proposition, and virtually concedes that at the time the injunction was issued, the Government had insufficient probability of obtaining personal jurisdiction over Omar to justify the issuance of the freeze order. Section 302 (a) of the New York Civil Practice Law and Rules, upon which the Court alone relies, did not become effective until 10 months later.[7]

No other theory is offered by the Court which could justify the freeze order as of the time at which it was issued.[8]

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[6] *Hall Signal Co.* v. *General R. Signal Co.*, 153 F. 907; *A. H. Bull Steamship Co.* v. *National Marine Engineers' Beneficial Assn.*, 250 F. 2d 332, 337.

[7] It became effective on September 1, 1963. The freeze order was issued on October 31, 1962. Section 302 provides:

"(a) *Acts which are the basis of jurisdiction.* A court may exercise personal jurisdiction over any non-domiciliary, or his executor or administrator, as to a cause of action arising from any of the acts enumerated in this section, in the same manner as if he were a domiciliary of the state, if, in person or through an agent, he:

"1. transacts any business within the state; or

"2. commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

"3. owns, uses or possesses any real property situated within the state.

"(b) *Effect of appearance.* Where personal jurisdiction is based solely upon this section, an appearance does not confer such jurisdiction with respect to causes of action not arising from an act enumerated in this section."

[8] The lame suggestion is made by the Government that Omar would voluntarily make a general appearance to defend the suit. In light of the fact that Omar had quite evidently purposefully with-

3. *Evaluating the Injunction "as of now."*

The only course left open to the Court on its theory of the case is to judge the injunction "as of now." Indeed the New York Court of Appeals ruled in *Simonson* v. *International Bank,* 14 N. Y. 2d 281, 200 N. E. 2d 427, that § 302 (a) does not retroactively validate actions in pending cases taken before its enactment, and may be applied to further proceedings in pending cases only if it is equitable to do so.[9] Thus even on the glib assumption that New York courts would interpret § 302 (a) to give personal jurisdiction over one who merely traded long

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drawn most of its property from the jurisdiction, including the property here in question, an appearance voluntarily putting this very property in jeopardy would have been most surprising. The Government makes the further argument that Omar might have attempted to make a limited appearance to contest the title to some other property over which the District Court had clear *quasi in rem* jurisdiction (an account with Lehman Bros. in New York has been attached); and since the limited appearance might not be recognized, but instead treated as a general appearance, personal jurisdiction would be obtained. (There is a split of authority as to whether limited appearances are permitted. See *United States* v. *Balanovski,* 236 F. 2d 298 (C. A. 2d Cir.), cert. denied, 352 U. S. 968, and cases cited therein. See also Developments in the Law: State-Court Jurisdiction, 73 Harv. L. Rev. 909, 953 (1960).) Whether or not a rule against limited appearances should prevail in our federal courts, it is clear that no argument for having such a rule could extend so far as to authorize a court, by reason of its having *quasi in rem* jurisdiction over one piece of property, to use whatever naked power is at its command to freeze all property wherever located, which could conceivably be affected by a personal judgment.

[9] *Simonson* involved a suit brought in 1960 in New York against an Arizona bank. The trial court held that there was no personal jurisdiction over the defendant under existing statutes. By the time the plaintiff's appeal on this issue reached the Court of Appeals, § 302 had become effective and appellant tried to rely on it. The court held that § 302 did not retroactively apply to validate the service that had been made upon the Arizona bank, and affirmed the dismissal of the complaint.

distance for his own account on the New York exchanges,[10] the Court must nonetheless show, as a matter of both state and federal law, that there is equity in continuing the existence of the freeze order. There are two inescapable reasons why such a showing is impossible.

(a) The so-called "temporary" freeze order has now been in effect for over two years. During this time no form of jurisdiction over Omar has been obtained. It may be argued that it is this appellate review which has been the cause of delay. *But Omar is not party to this review.* The contesting parties are the Government and Citibank. Nothing pertaining to these proceedings precluded or excused the Government from obtaining personal jurisdiction over Omar and proceeding with the case if it was otherwise able to do so. As far as Omar is concerned, its property has been taken from its control by a court having jurisdiction neither over the corporation nor over the property (see Part IV, *infra,* p. 404), prior to any judgment of liability being entered against it, and during a time when the Uruguayan peso has fallen over 60%.[11] The Government had its chance to reach Omar's property before it was removed from the country. Indeed, it was warned (*supra,* p. 386), and made no legal move until several months later. It made no effort to obtain personal jurisdiction over Omar within a reasonable time after the "temporary" injunction was issued; or after § 302 (a) was enacted; or after the date at which it supposedly altered the theory on which it chose to argue

[10] See *Simonson* v. *International Bank,* 14 N. Y. 2d 281, 288, 200 N. E. 2d 427, 431; *Purdy Co.* v. *Argentina,* 333 F. 2d 95, cert. denied, 379 U. S. 962 (decided under the Illinois statute on which § 302 was patterned). Compare *Grobark* v. *Addo Machine Co.,* 16 Ill. 2d 426, 158 N. E. 2d 73; *Insull* v. *New York World-Telegram Corp.,* 273 F. 2d 166; *National Gas Appliance Corp.* v. *AB Electrolux,* 270 F. 2d 472.

[11] Foreign Exchange Rates, N. Y. Times, Oct. 31, 1962, p. 47, col. 5; N. Y. Times, Jan. 11, 1965, p. 37, col. 4.

its case. The Court expresses the opinion that this latter event, obviously irrelevant to the equities of Omar and Citibank, somehow explains and excuses the Government's failure to have acquired personal jurisdiction over Omar. This is surely untenable. The petition for rehearing was filed on July 10, 1963, following the initial Court of Appeals' opinion and prior to the opinion of the court *en banc*. Over 18 months have elapsed since that time. Were this in itself not conclusive, the Government stated unequivocally and as its very first ground for rehearing:

> "The United States, which in this action seeks *inter alia* a judgment *in personam* against Omar, is taking necessary steps to effectuate personal jurisdiction over Omar."

In the face of this statement there is no way that the Court can excuse or avoid the fact that the Government, by reason of either neglect or inability, has failed to acquire jurisdiction over Omar in the ample time which has been available to it. Yet the Court inexplicably finds equity in continuing the freeze order.[12] Omar, as a foreign corporation which allegedly withdrew its assets to avoid taxation by this country, naturally does not present a sympathetic aspect to this Court, but that is no justification for perpetuating a "temporary" order which, without any jurisdictional basis, has tied up Omar's

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[12] The Court's very assertion that the Government changed its theory is belied by the statement, prominently featured in the petition for rehearing, that "The Government contended in the brief heretofore filed in this Court that there is every likelihood that personal jurisdiction over Omar can be effectuated . . . ." Of course, the Government argued alternative theories below just as it has done here. The statements quoted by the Court (gleaned from a footnote) indicate only that the Government (rightly, I think) regarded the personal jurisdiction argument as its weaker point.

property for over two years.[13] Alleged tax dodgers, as much as those charged with crime, are entitled to due process treatment. And the hand of equity should be stayed long before it reaches constitutional limits.

(b) Whether the situation is examined as of the time the order originally issued or as of now, the Government has to show that the funds to be frozen may be subject to ultimate execution. If the property cannot be subjected to government levy, there is obviously no equity in freezing it. That is the situation presented here. The *quasi in rem* statute does not permit the court to attach the property directly (see Part IV, *infra,* p. 404), and no view is expressed by the Court as to how or whether this difficulty could be avoided.

The Government argues that this obstacle can be skirted in the following fashion. Personal jurisdiction under § 302 can be obtained over Omar by mailing a

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[13] The Government's delay in obtaining personal jurisdiction is particularly significant because of the unknowns and imponderables with which the case in its present posture is saturated. Thus, we have no firm indication of what Uruguayan law is with respect to any aspect of this action, no indication of the effect freeze orders would have on this country's banking interests, and Omar, the foreign taxpayer whose interests are most at stake, is not before the Court. Can it be doubted that a decision upon the propriety of the novel use of judicial power here involved could be much better made if the issue were presented in a context with some of the unknowns removed? Had the Government not delayed but, instead, proceeded (if possible) to acquire personal jurisdiction over Omar, and then judgment and execution (if possible) against the Montevideo account, the case could come before us with most of this opaqueness removed. Omar could have presented the issue of the validity of the freeze order as a defense to an ultimate levy upon the account; the issue would not be moot at that stage because there would have been no earlier time at which Omar could have attacked the order without running the risk of being subjected to the personal jurisdiction of the court, and, as a matter of sound judicial principle, the Government should not be permitted to levy successfully upon the account when its ability to do so stems from an improper freeze order.

letter to Uruguay pursuant to New York's substituted service statute.[14] Judgment can then be obtained together with an order to Omar to transfer the funds in the Montevideo account to the Government. When Omar refuses to comply voluntarily—it has no officers in New York who could be punished for contempt—a court officer appointed under Rule 70 of the Federal Rules of Civil Procedure could be sent to Montevideo to make demand upon the Citibank branch in the name of the United States.[15] If the branch refuses payment, it will breach its contract to pay on demand. An action for breach of the contract could then be brought by the depositor against Citibank in New York (see n. 27, *infra*). Once that obligation accrues in New York, the Government can garnish it to satisfy the personal judgment. Of course, if the court could directly order Citibank in New York to pay the debt, the obligation would be payable "within the district" (see Part IV, *infra,* p. 404), in which case the *quasi in rem* statute would serve without necessitating elaborate personal jurisdiction theories.

The reasons why this procedural cake-walking should not commend itself are manifest. Foreign courts in cus-

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[14] Section 313 of New York Civil Practice Law and Rules provides:

"A person domiciled in the state or subject to the jurisdiction of the courts of the state under section 301 or 302, or his executor or administrator, may be served with the summons without the state, in the same manner as service is made within the state, by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the state, territory, possession or country in which service is made or by any duly qualified attorney, solicitor, barrister, or equivalent in such jurisdiction."

[15] Rule 70 provides in relevant part:

"If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party."

tomary international practice (which Uruguay presumably follows) do not enforce foreign tax judgments.[16] Therefore Uruguay would undoubtedly not consider valid a demand made by the court-appointed officer for the property within Uruguayan borders. If the refusal to pay the court officer is proper under the Uruguayan law which governs the contract, there can be no breach which would give rise to a cause of action in New York, *Zimmermann* v. *Sutherland,* 274 U. S. 253.

Furthermore the prospect is more than startling that a district court, aware that a foreign country would not enforce its judgment, would nonetheless dispatch a court officer to the foreign jurisdiction to accomplish that end by self-help.[17]

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[16] *United States* v. *Harden,* [1963] Can. Sup. Ct. 366, 41 D. L. R. 2d 721; *Government of India* v. *Taylor,* [1955] A. C. 491 (H. L.); *Peter Buchanan Ld. & Macharg* v. *McVey,* [1955] A. C. 516 (Eire Sup. Ct.). For enforcement of tax claims between States see *Moore* v. *Mitchell,* 30 F. 2d 600, aff'd on other grounds, 281 U. S. 18; *Colorado* v. *Harbeck,* 232 N. Y. 71, 133 N. E. 357. Contra: *Oklahoma* v. *Rodgers,* 238 Mo. App. 1115, 193 S. W. 2d 919. Tax treaties may be used to change the general international understanding. See Owens, United States Income Tax Treaties: Their Role in Relieving Double Taxation, 17 Rutgers L. Rev. 428, 449–451 (1963). We have no tax treaty with Uruguay, Treaties in Force, 205 (Dept. of State 1964).

[17] Nations, generally chary of having foreign officials enter their borders even for purposes of serving process, are even more unlikely to look with favor upon a foreign official entering in an attempt to enforce a tax judgment. See Smit, International Aspects of Federal Civil Procedure, 61 Col. L. Rev. 1031, 1040 (1961); Harvard Research in International Law, Draft Convention on Judicial Assistance, 33 Am. J. Int'l L., Spec. Supp. II, 43–65 (1939); Jones, International Judicial Assistance: Procedural Chaos and a Program for Reform, 62 Yale L. J. 515, 534–537 (1953); Longley, Serving Process, Subpoenas and Other Documents in Foreign Territory, A. B. A. Section of Int'l and Comp. Law 34 (1959).

The Court derives support for such a bizarre procedure from the fact that "the District Court remains open to the Executive Branch" (*ante,* pp. 384–385). But certainly the Court cannot justify a pro-

II.

THE DE BEERS AND DECKERT CASES.

It is surprising that the Court has been content to so cursorily lay aside *De Beers Consolidated Mines, Ltd.* v. *United States,* 325 U. S. 212, for upon examination that case will be found to be indistinguishable from the present case and should control this litigation on the personal jurisdiction issue.

The United States brought a Sherman antitrust action against De Beers and other African-based diamond companies alleging monopolization and conspiracy in restraint of trade. All were allegedly doing business within the United States. With the complaint the Government requested a preliminary injunction freezing all property in the United States belonging to the defendants. As stated in the opinion, the reasons given in support of the motion were:

> " 'The injury to the United States of America from the withdrawal of said deposits, diamonds or other property would be irreparable because sequestration of said property is the only means of enforcing this Court's orders or decree against said foreign corporate defendants. The principal business of said defendants is carried on in foreign countries and they could quickly withdraw their assets from the United States and so prevent enforcement of any order or decree which this Court may render.'
>
> "Amongst other supporting papers was an affidavit by counsel for the United States which stated that 'the investigation which he has made shows the

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cedure at odds with proper international practice simply because the Executive has not expressed a contrary wish.

I doubt very much whether before today's decision even our own State Department would have found it easy to lend its aid, by way of issuing a passport or otherwise, to such a novel international adventure.

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> foreign corporate defendants named herein have endeavored to avoid subjecting themselves to the jurisdiction of the courts of the United States by making their sales abroad only and requiring customers to pay in advance for all purchases.'" 325 U. S., at 215–216.

Under the Sherman Act district courts had power "to prevent and restrain violations of this act" (26 Stat. 209, 15 U. S. C. § 4 (1958 ed.)), and, under the "all-writs" section of the Judicial Code, to "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law" (now 28 U. S. C. § 1651 (1958 ed.)). The Court construed these grants of authority as limited to traditional equitable powers. It then demonstrated the remoteness of any levy by the Government against the property of the defendants, and because of the remoteness vacated the freeze order. It should be noted that unlike the present case the property sought to be frozen was within the borders of the United States, and, that without a hold on it, an order to the defendants to stop their alleged monopolistic practices would have been as little likely to meet with voluntary compliance as an order to Omar to pay $19,300,000.

The Government would distinguish *De Beers* on the ground that under the Sherman Act the trial court could award only injunctive relief, whereas in the present case the judgment, were the Government successful, would be a money award. However, the *De Beers* Court recognized that levy against the property could ultimately be had as a means of enforcing the injunctive order. Clearly the Court's point in emphasizing the scope of the order which could issue in the first instance was that the possibility of an ultimate levy was too remote in practical terms to justify freezing the property from the outset of the litigation. Remoteness is the determinative point,

whatever its cause, and in terms of remoteness the case before us argues even stronger than *De Beers* against the issuance of what amounts to an interim sequestration order. The principles of *De Beers* should govern this litigation.[18]

The Government puts forth *Deckert* v. *Independence Shares Corp.*, 311 U. S. 282, instead of *De Beers* as the case most analogous to the present one. In *Deckert* a bill in equity was brought against an insolvent and allegedly fraudulent securities vendor and against a third party who held assets of the vendor. By way of interlocutory relief the plaintiffs asked that the assets in the hands of the third party be frozen, and this Court sustained the request. Distinguishing features are many. *Deckert* involved no international problems. The court had personal jurisdiction over all parties concerned. There was no question of power to enforce a judgment against the frozen funds. The only contingency on which enforcement depended was whether the plaintiff would win the suit; thus, there was virtually no problem of remoteness. And unlike the present case (see *infra*, pp. 404–409), the frozen funds could have been attached directly by a suit *quasi in rem* in a state court.[19]

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[18] The Court places reliance on *New Jersey* v. *New York City*, 283 U. S. 473, an inapposite case in which the Court enjoined New York City from taking its garbage out to sea and dumping it off the New Jersey coast. No international problem was involved, nor any question of personal jurisdiction, enforcement, or rights of third parties. The garbage left our territorial jurisdiction on a circular route calculated to return it in an offensive manner. The Court had clear jurisdiction to prevent it from beginning that journey.

[19] This last feature was heavily relied upon in *United States* v. *Morris & Essex R. Co.*, 135 F. 2d 711, a tax case in which the tax-lien statute could have been used directly.

Prior to the recent amendments of the Federal Rules of Civil Procedure (see Rule 4 (e)), a federal district court could not obtain *quasi in rem* jurisdiction over a debt owed to an absent defendant. *Big Vein Coal Co.* v. *Read*, 229 U. S. 31.

III.

THE OVERALL BALANCE OF EQUITIES AND CONSIDERATIONS AFFECTING JURISDICTION.[20]

Certainly the Court's remark that it must act in light of the "public interest" cannot mean that because the Government is a party here, the Court may ignore its duty to consider the balance of equities. It is, therefore, well to consider just what overall benefits will accrue in the public interest as a result of today's decision.

Except in the context of the comparatively rare case in which the Government has the element of surprise on its side, it must be recognized that the utility of the extra-territorial freeze order as a tax-collecting weapon is minimal. Under the tax regulation adopted during this action the Government declares that it would use the freeze-order power to reach only funds which were transferred out of this country in order to hinder or delay the collection of taxes and which were in banks having an American office.[21] In other words, the regulation would

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[20] Those policy considerations which enter into a jurisdictional determination once it is decided that naked power exists are those which would apply in the generality of cases raising the jurisdictional question. Those considerations which are peculiar to this case relate to the question whether, in this instance, jurisdiction, once established, should be exercised.

[21] The regulation provides:

26 CFR § 301.6332–1 (as amended by T. D. 6746, 29 Fed. Reg. 9792) *Surrender of property subject to levy.*

"(a) *Requirement*—(1) *In general.* Any person in possession of (or obligated with respect to) property or rights to property subject to levy upon which a levy has been made shall, upon demand of the district director, surrender such property or rights (or discharge such obligation) to the district director, except such part of the property or right as is, at the time of such demand, subject to an attachment or execution under any judicial process.

"(2) *Property held by banks.* Notwithstanding subparagraph (1) of this paragraph, if a levy has been made upon property or rights

snare only those taxpayers smart and unscrupulous enough to withdraw their funds from the United States, but stupid and uninformed enough, even after this decision, to put the transferred funds in a bank having a United States office. In order to provide the Government with this toy pistol, the Court flexes its muscles in a manner never before imagined.

If the overall benefits of this exercise of power are minimal, the detriments are substantial.

(a) It would expose Citibank, an innocent stakeholder, to exactly the kind of administrative hazards which New York's "separate entity" theory is designed to obviate.

(b) It would subject Citibank to the possibility of double liability if Uruguay did not recognize the United

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to property subject to levy which a bank engaged in the banking business in the United States or a possession of the United States is in possession of (or obligated with respect to), the Commissioner shall not enforce the levy with respect to any deposits held in an office of the bank outside the United States or a possession of the United States, unless the notice of levy specifies that the district director intends to reach such deposits. The notice of levy shall not specify that the district director intends to reach such deposits unless the district director believes—

"(i) That the taxpayer is within the jurisdiction of a United States court at the time the levy is made and that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office of the bank outside the United States or a possession of the United States; or

"(ii) That the taxpayer is not within the jurisdiction of a United States court at the time the levy is made, that the bank is in possession of (or obligated with respect to) deposits of the taxpayer in an office outside the United States or a possession of the United States, and that such deposits consist, in whole or in part, of funds transferred from the United States or a possession of the United States in order to hinder or delay the collection of a tax imposed by the Code.

"For purposes of this subparagraph, the term 'possession of the United States' includes Guam, the Midway Islands, the Panama Canal Zone, the Commonwealth of Puerto Rico, American Samoa, the Virgin Islands, and Wake Island."

States' judgment, and multiple liability if Uruguay permitted actions for slander of credit. The District Court's offer to modify the freeze order if Citibank shows that it conflicts with Uruguayan law is some hedge against the first of these dangers, but operating at its best it places the heavy burden on Citibank, blameless in this situation, of discovering Uruguayan law. In practical operation the Uruguayan law may well be unclear to the point that Citibank can only be sure of its obligation to Omar if it is sued for payment and the matter is litigated. If Omar is loath to sue for one reason or another (it may fear that its demand for the money and the bank's refusal to pay it will cause the obligation to become payable in New York), it may be impossible for Citibank to establish Uruguayan law before it is too late. If the Government manages to levy on the account, and only afterwards is it established that the bank was liable to Omar, Citibank would be left to sue the United States for recoupment, an eventuality for which no provision has been made and which the Government stated at the oral argument of this case that it would oppose.

(c) Citibank alleges that its foreign banking business will be hurt because foreign depositors will be discouraged from using United States banks for fear that their funds can be reached by United States courts. There is no sure way to gauge the seriousness of this possibility, but since Citibank is an innocent stakeholder here, doubt should be resolved in its favor.

(d) The Uruguay Code of Civil Procedure provides, in rough translation:

> Art. 511. Judgments rendered in foreign states shall have in the Republic [Uruguay] the effect prescribed by applicable treaties.
>
> Art. 512. If there are not treaties with the nation in which they are rendered, they shall have the same

> effect which by the laws of that nation, it would give to the decrees rendered in the Republic.
>
> Art. 513. If the judgment proceeds from a nation in which by its jurisprudence, it would not give effect to the decrees of the Tribunals of the Republic, they [*sic*] shall have no force here.[22]

When Omar sues Citibank in Montevideo for its account, Citibank will plead the United States decree as a defense, and the Court speculates that Uruguay will give it effect (*ante,* pp. 384–385). In light of Uruguay's reciprocity principle the Court's decision implicitly signifies that our courts would recognize a similar order by a Uruguayan court.[23] Operating under a tax regulation similar to that adopted by the Government, a Uruguayan court with jurisdiction over the Montevideo branch of Citibank could freeze accounts in New York.[24] I am extremely reluctant to uphold such a power. The freeze orders of the type in question here issue prior to any court judgment, indeed before any significant proceedings at all. A nation asked to recognize such a freeze order will have virtually nothing to go on but the bare request. The propriety of the decree does not even rest on the reliability of the foreign court, as is the usual case in judgment recognition problems,[25] but on the reliability of the foreign taxing authorities, something a domestic court has no way of judging.

The Court should not lose sight of the fact that our modern notions of substituted service and personal juris-

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[22] Código de Procedimiento Civil (Couture, 1952). There have been no amendments, Index to Latin American Legislation, Library of Congress.

[23] See Ehrenzweig, Conflict of Laws, §§ 45, 46 (1962); *Hilton* v. *Guyot,* 159 U. S. 113.

[24] The regulation makes no distinction between parent and branch offices.

[25] Reese, The Status in This Country of Judgments Rendered Abroad, 50 Col. L. Rev. 783 (1950).

diction were developed within a framework of States whose various processes are governed by the Due Process Clause and whose judgments must be given full faith and credit by the other States within the federal structure. Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field, both as a basis for asserting federal judicial power with respect to property in foreign countries and for permitting property in this country to be tied up by foreign courts.

IV.

QUASI IN REM JURISDICTION.

There remains for consideration the *quasi in rem* issue which the Government argues but which the Court chooses not to decide. Whether the District Court had *quasi in rem* jurisdiction turns on whether Omar had property or rights to property within the Southern District of New York to which a federal lien could attach.[26]

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[26] 28 U. S. C. § 1655 (1958 ed.) provides:

"§ 1655. *Lien enforcement; absent defendants.*

"In an action in a district court to enforce any lien upon or claim to, or to remove any incumbrance or lien or cloud upon the title to, real or personal property within the district, where any defendant cannot be served within the State, or does not voluntarily appear, the court may order the absent defendant to appear or plead by a day certain.

"Such order shall be served on the absent defendant personally if practicable, wherever found, and also upon the person or persons in possession or charge of such property, if any. Where personal service is not practicable, the order shall be published as the court may direct, not less than once a week for six consecutive weeks.

"If an absent defendant does not appear or plead within the time allowed, the court may proceed as if the absent defendant had been served with process within the State, but any adjudication shall, as regards the absent defendant without appearance, affect only the property which is the subject of the action. When a part of the

Under New York law, Omar had only a conditional right to payment in New York in the event that a demand made upon the Montevideo branch where the account is maintained was wrongfully refused, *Sokoloff* v. *National City Bank,* 250 N. Y. 69, 164 N. E. 745; [27] and two recent decisions by this Court establish that it is New York law which here determines the nature and existence of property rights for federal tax lien purposes.

In *United States* v. *Bess,* 357 U. S. 51, the taxpayer died leaving income taxes unpaid for a prior year. Several life insurance policies were part of his estate. The Court said:

> "We must now decide whether Mr. Bess possessed in his lifetime, within the meaning of § 3670, any 'property' or 'rights to property' in the insurance policies to which the perfected lien for the 1946 taxes might attach. Since § 3670 creates no property

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property is within another district, but within the same state, such action may be brought in either district.

"Any defendant not so personally notified may, at any time within one year after final judgment, enter his appearance, and thereupon the court shall set aside the judgment and permit such defendant to plead on payment of such costs as the court deems just."

[27] See *Bluebird Undergarment Corp.* v. *Gomez,* 139 Misc. 742, 249 N. Y. S. 319; *Cronan* v. *Schilling,* 100 N. Y. S. 2d 474, aff'd 282 App. Div. 940, 126 N. Y. S. 2d 192; *Newtown Jackson Co.* v. *Animashaun,* 148 N. Y. S. 2d 66; *McCloskey* v. *Chase Manhattan Bank,* 11 N. Y. 2d 936, 183 N. E. 2d 227; *Zimmerman* v. *Hicks,* 7 F. 2d 443, aff'd *sub nom., Zimmermann* v. *Sutherland,* 274 U. S. 253. And see *Richardson* v. *Richardson* [1927] Prob. 228, 137 L. T. R. (n. s.) 492; Comment, 56 Mich. L. Rev. 90 (1957); Note, 48 Cornell L. Q. 333 (1963).

The bank account is a contract for payment on demand at the Montevideo branch. If demand were wrongfully refused, a cause of action for breach of contract would be created on which Omar could sue in New York. Thus, analytically, it is not the account itself which would become payable in New York, but damages for breach of the contract to pay on demand in Montevideo.

> rights but merely attaches consequences, federally defined, to rights created under state law, . . . we must look first to Mr. Bess' right in the policies as defined by state law." 357 U. S., at 55.[28]

Since Bess had had no right to the *proceeds* of the policies during his lifetime, no federal tax lien could have attached to them. But Bess could have drawn on the cash surrender value; thus under state law he had "rights to property" during his lifetime to that extent. However, it was also true under state law that no creditor was permitted to attach the cash surrender value of the policies. In answer to the contention that the Government should be treated no differently than any other creditor, the Court said:

> "[O]nce it has been determined that state law creates sufficient interests in the insured to satisfy the requirements of § 3670, state law is inoperative to prevent the attachment of liens created by federal statutes in favor of the United States." 357 U. S., at 56–57.

On the basis of this analysis—that state law creates property rights, but federal law determines whether liens should attach to them—the Court concluded that the lien could be enforced against the beneficiary of the policies to the extent of the cash surrender value.

Even under *Bess* an argument could be made for permitting a federal lien in this instance to attach in New

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[28] Section 3670 is now Internal Revenue Code of 1954, § 6321. It provides:

"If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, additional amount, addition to tax, or assessable penalty, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

York. New York law, which treats branch banks as separate entities and makes Omar's account payable in the first instance only in Montevideo, was developed primarily to meet the problems created by ordinary garnishing creditors, and arguably has no application to a claim by the United States. But the Court, in *Aquilino* v. *United States,* 363 U. S. 509, chose to accept state property law just as it found it, and not to evaluate its underlying rationale in light of the needs of federal revenue collection. There the Government sued a general contractor who had defaulted both on the payment of federal taxes and on the payment of amounts due to subcontractors with mechanics' liens. Money payable by the property owner to the general contractor was the subject of the suit. The subcontractors contended that under New York lien law the general contractor had "mere title" to the contested fund, holding it in trust for the subcontractors; thus, it was argued, he himself had no right to the property within the meaning of the federal lien statute. In remanding the case to determine if the New York law was as the subcontractors contended, the Court indicated it would accept this argument despite the fact that the only practical effect that New York's definition of the general contractor's property rights could have would be to control which creditors prevailed against the property. (See my dissenting opinion, 363 U. S., at 516.) The Court said:

> "The application of state law in ascertaining the taxpayer's property rights and of federal law in reconciling the claims of competing lienors is based both upon logic and sound legal principles. This approach strikes a proper balance between the legitimate and traditional interest which the State has in creating and defining the property interest of its citizens, and the necessity for a uniform administration of the federal revenue statutes." 363 U. S., at 514.

The State of New York has determined that branch banks should be treated as separate entities, primarily in order to avoid the crippling effects which could result from requiring each branch to be aware of and liable to make payments to depositors and garnishing creditors on accounts maintained in other branches.[29] If New York, based upon this policy, has determined that Omar has no immediate right to payment in New York, federal lien law, under *Bess* and *Aquilino,* cannot create one. The rule of those cases would not, I think, go so far as to allow an incidental contract provision adopted by two contracting parties simply for their own convenience to thwart the operation of federal lien law—for instance, an agreement that the parties would meet at a certain place to consummate their transaction—but in the present case the policy determination has been made by the State, not by private parties, and cannot be treated as incidental. The only right to property which New York recognizes in Omar is the conditional right to payment predicated on a wrongful refusal in Montevideo. The Government can, of course, levy on that conditional right, but the satisfaction it will derive from doing so is obviously limited.

The Government seeks to analogize various insurance company cases in which liens are permitted to attach to the cash surrender value of policies despite a contract condition that the policyholder must surrender his policy in order to collect.[30] It is contended that just as federal courts can override the requirement of policy surrender, they can override the requirement of demand and wrongful refusal in Montevideo. The insurance cases, however, are readily distinguishable. The policy

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[29] See Comment, 56 Mich. L. Rev. 90 (1957).

[30] *E. g., Equitable Life Assurance Society of the United States* v. *United States,* 331 F. 2d 29; *United States* v. *Metropolitan Life Ins. Co.,* 256 F. 2d 17; but see *United States* v. *Metropolitan Life Ins. Co.,* 130 F. 2d 149.

surrender requirement is of the order of an incidental rule of contract between two private contracting parties; indeed, it has been characterized as a housekeeping detail.[31] And if the purpose of requiring surrender of an insurance policy is to protect the company against suit at some later time, a court decree would fully satisfy it. The District Court guaranteed and could guarantee Citibank no such protection from suit by Omar.

In conclusion on the *quasi in rem* branch of this case, it should be remembered that it is a statute which we are interpreting.[32] Section 1655, 28 U. S. C., pertaining to "Lien enforcement; absent defendants," provides for *quasi in rem* jurisdiction in federal district courts over property "within the district." Courts of other countries would recognize that the *situs* of the Omar account was in Montevideo.[33] Courts of New York State would so hold,[34] and where, as here, the common understanding would be that the *situs* of an account payable to a Uruguayan corporation in Montevideo is in Montevideo, we should not indulge a wholly novel interpretation of the governing statute.

CONCLUSION.

The only case cited by the Court relating to injunctions involving property outside the United States is *New Jersey* v. *New York City,* 283 U. S. 473, in which this Court enjoined New York City from dumping its garbage

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[31] *Equitable Life Assurance Society of the United States* v. *United States,* 331 F. 2d 29, 33.

[32] *Crane* v. *Commissioner,* 331 U. S. 1. See also *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, at 356–357.

[33] *Richardson* v. *Richardson,* [1927] Prob. 228, 137 L. T. R. (n. s.) 492.

[34] If the law of Uruguay were known, New York might look to it as a matter of conflicts law.

I would not decide at this juncture whether federal courts in all situations would be required to enforce liens against property which the State would hold to be within its jurisdiction.

in the sea off the coast of New Jersey.[35] In the face of this slender reed stands *De Beers,* basically indistinguishable from the case at bar, plus the powerful equitable considerations enumerated above. The clear preponderance of the competing considerations leads to the conclusion that the issuance of this freeze order was not "appropriate for the enforcement of the internal revenue laws" (§ 7402 (a), n. 3, *supra*), and therefore that the District Court, even though it possessed the naked power to act as it did, had no "jurisdiction" (*ibid.*) to issue the challenged order. The same result follows even if naked power be considered as synonymous with jurisdiction (a proposition which for me is wholly unacceptable) for in that event the action of the District Court must be regarded as entailing an abuse of discretion of such magnitude and mischievous radiations in our general jurisprudence as to make the order a proper subject of review by this Court under its supervisory powers.[36]

While I have the utmost sympathy with the Government's efforts to protect the revenue, I do not think the course it has taken here can be sustained without extending federal court jurisdiction beyond permissible limits.

I vote to affirm the judgment of the Court of Appeals.

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[35] See n. 18, *supra.*

[36] Under the Court's opinion there appears, even now, to be no limit on the further length of time in which the Government can delay before acquiring personal jurisdiction over Omar.

Syllabus.

WHITNEY NATIONAL BANK IN JEFFERSON PARISH *v.* BANK OF NEW ORLEANS & TRUST CO. ET AL.

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

No. 26. Argued November 12, 1964.—Decided January 18, 1965.*

A New Orleans-based national bank, desiring to expand but prohibited from operating branches beyond its home parish, formed a holding company which in turn organized a new national bank to operate in an adjoining parish. Pursuant to the Bank Holding Company Act of 1956, the Federal Reserve Board (FRB), after receiving favorable advice from the Comptroller of the Currency (Comptroller), held hearings on the application by the holding company. The FRB approved the plan on May 3, 1962. The sole remaining action needed to enable the new bank to operate was a certificate of authority from the Comptroller acting under the National Bank Act. On June 9, 1962, three state banks brought this action in federal district court to restrain the Comptroller from issuing the certificate. On June 13, 1962, two respondent banks filed a petition with the FRB for reconsideration, which was denied as untimely and without substantial merit. Thereafter, on June 30, 1962, the Court of Appeals for the Fifth Circuit was asked to review the FRB action under the Bank Holding Company Act of 1956, which suit is still pending. On July 10, 1962, a Louisiana law was passed making it unlawful for any bank owned or controlled by a bank holding company to open, whether or not it had a charter or certificate to engage in banking. The District Court in this suit held that the Bank Holding Company Act of 1956 reserved to the States final authority to bar subsidiaries of bank holding companies and that the Louisiana statute prevented the Comptroller from issuing the certificate. Accordingly, it issued a permanent injunction against the Comptroller. On appeal the Court of Appeals held that the new bank would be but a branch of the old one, which was prohibited by the Banking Act

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*Together with No. 30, *Saxon, Comptroller of the Currency* v. *Bank of New Orleans & Trust Co. et al.*, also on certiorari to the same court.

of 1933, and therefore found it unnecessary to rule on the effect of the new Louisiana law. *Held:* Since the issues here concern essentially the organization and relationship of the holding company and the new national bank, matters within the cognizance of the FRB rather than the Comptroller, upon whom the FRB's approval of a holding company plan is binding, the statutory scheme set forth in the Bank Holding Company Act of 1956—FRB determination, subject to review by a court of appeals—should be followed. The FRB should have an opportunity to consider the effect of the supervening Louisiana statute and the parties are given 60 days to proceed before the Court of Appeals for the Fifth Circuit to secure a remand to the FRB. That court has ample power to protect its jurisdiction and prevent the opening of the new bank pending resolution of the issues. Pp. 417–426.

116 U. S. App. D. C. 285, 323 F. 2d 290, reversed and remanded.

Dean Acheson argued the cause for petitioner in No. 26. With him on the briefs were *Malcolm L. Monroe, Brice M. Clagett* and *Walter J. Suthon III.*

Ralph S. Spritzer argued the cause for petitioner in No. 30. On the brief were *Solicitor General Cox, Philip B. Heymann, Morton Hollander* and *David L. Rose.*

Edward L. Merrigan argued the cause for respondents. With him on the brief for respondent banks were *A. J. Waechter, Jr., James W. Bean* and *Charles W. Lane.* With him on the brief for respondent Louisiana State Bank Commissioner was *Joseph H. Kavanaugh,* Assistant Attorney General of Louisiana.

Briefs of *amici curiae,* urging affirmance, were filed by *James F. Bell* for the National Association of Supervisors of State Banks, and by *Horace R. Hansen* for the Independent Bankers Association.

Mr. Justice Clark delivered the opinion of the Court.

This suit is a facet of the complicated controversy between the Whitney National Bank of New Orleans (Whitney-New Orleans) and three of its state-chartered

banking competitors over the establishment by Whitney-New Orleans of a national bank (Whitney-Jefferson) in Jefferson Parish, Louisiana, which adjoins the Parish of Orleans. In order to avoid the restrictions of the national banking laws as to branch banking [1] and still tap the banking market in Jefferson Parish, Whitney-New Orleans resorted to the organization of a bank holding company. After approval of the plan by the Federal Reserve Board on May 3, 1962, two of the respondent banks filed this declaratory judgment action on June 9, 1962, seeking a declaration that the Comptroller of the Currency had no power to grant the necessary authority and praying in addition for injunctive relief restraining him from issuing a certificate of authority for the new bank.

Four days later two of the respondent banks petitioned the Board for reconsideration of its approval of the Whitney application. Their petition was denied, and on June 30, 1962, they sought judicial review of the Federal Reserve Board decision in the Court of Appeals for the Fifth Circuit.[2] That suit is presently pending there awaiting our decision here.

Meanwhile, in this suit the United States District Court for the District of Columbia assumed jurisdiction and held on the merits that § 7 of the Bank Holding Company Act of 1956 [3] reserved to the States final authority

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[1] La. Rev. Stat. § 6:54 (1950) prohibits banks from opening branch offices in parishes other than their home parish, and these geographical limitations are made applicable to national banks by § 23 of the Banking Act of 1933, 12 U. S. C. § 36 (c)(2) (1958 ed.).

[2] Section 9 of the Bank Holding Company Act of 1956, 12 U. S. C. § 1848 (1958 ed.) provides for review of Federal Reserve Board action in the Court of Appeals.

[3] 12 U. S. C. § 1846 (1958 ed.) provides:

"The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

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to prohibit the opening of subsidiaries of bank holding companies within their borders and that Louisiana had adopted such a law (albeit subsequent to the approval of the plan involved here by the Federal Reserve Board) [4] which prevented the Comptroller from issuing the certificate. A permanent injunction was issued against the Comptroller restraining the issuance of the authority. 211 F. Supp. 576. On appeal the Court of Appeals upheld the jurisdiction of the District Court, rejecting the contention that the competitor banks lacked standing to sue. It related bank charters to semi-exclusive franchises conferring upon their holders a right to be free from the competition of a branch bank the operation of which was violative of the Banking Act of 1933, 12 U. S. C. § 36 (1958 ed.). On the merits it concluded that the proposed Jefferson Parish bank would be but a branch of Whitney-New Orleans which was prohibited by the Act. It therefore found it unnecessary to pass upon the effect of Louisiana's law prohibiting the opening or operation of subsidiaries by bank holding companies. 116 U. S. App. D. C. 285, 323 F. 2d 290. In view of the tangle in which the parties had thus involved themselves and the national banking laws as well, we granted certiorari. 376 U. S. 948. We have concluded that the District Court for the District of Columbia had no jurisdiction to pass on the merits of the holding company proposal; that appropriate disposition of the controversy cannot be made without further consideration of the case by the Federal Reserve Board, where original exclusive jurisdiction rests; and that since the application for review of its decision is

[4] The Board approval was on May 3, 1962, while Louisiana Act No. 275 of 1962, La. Rev. Stat. §§ 6:1001–6:1006 (1962 Supp.), did not become effective until July 10, 1962, at which time the Board's approval was not final, being on review in the Court of Appeals for the Fifth Circuit in *Bank of New Orleans & Trust Co. et al.* v. *Board of Governors of the Federal Reserve System*, No. 19788 (C. A. 5th Cir.).

now pending in the Court of Appeals for the Fifth Circuit, reasonable time should be allowed for that court to act. We, therefore, reverse these judgments and order dismissal of the complaint. But issuance of our judgment is stayed for a period of 60 days in order to give the parties time to move in the Court of Appeals for the Fifth Circuit for an order remanding that case to the Federal Reserve Board; and, in the event of such a remand, to permit the Court of Appeals to issue such orders as will protect its jurisdiction pending final determination of the matter.

I.

The facts are undisputed. Whitney-New Orleans desired to extend its banking business into the expanding urban areas beyond the Parish of Orleans, its home base. It could not open branches beyond the parish line because Louisiana law, La. Rev. Stat. § 6:54 (1950), applicable to national banks, prohibited its operating a branch bank outside of its home parish. After discussions with the Deputy Comptroller of the Currency it was decided that the bank should establish a holding company (Whitney Holding Corporation) under federal law with a capital of $350,000 taken from the bank's undivided profits and represented by 5,600 shares of stock of the holding company to be distributed to the bank's shareholders. The holding company would then organize a new national bank, the Crescent City National Bank, with the $350,000 it had on hand. Whitney-New Orleans would then be merged into the Crescent City and the resulting bank would be known as Whitney-New Orleans. The new Whitney-New Orleans bank would declare a dividend of $650,000 from its undivided profits which would go to its owner, the holding company. The latter would then organize, with this $650,000, another national bank, Whitney-Jefferson, which would be located in Jefferson Parish. The net result of the maneuver would be that

the original stockholders of the old Whitney-New Orleans would own the holding company which in turn would own and operate both banks, *i. e.,* the new Whitney-New Orleans and Whitney-Jefferson.

Approval of the stockholders of Whitney-New Orleans was first obtained, over 88% of the shares voting for the plan. It was then submitted to the Comptroller who on October 3, 1961, gave preliminary approval, subject to the action of the Federal Reserve Board and the consummation of the various transactions outlined. On July 14, 1961, applications were filed with the Board; thereafter notice was published in the Federal Register and three potential competitors expressed opposition. However, none of the respondents appeared or made any filings. After receiving the advice of the Comptroller pursuant to § 3 (b) of the Bank Holding Company Act of 1956, 12 U. S. C. § 1842 (b) (1958 ed.), which was favorable, the Board ordered a public proceeding to be held on January 17, 1962, "to afford further opportunity for the expression of views and opinions by interested persons." At this hearing testimony was heard and opposition submitted by objecting stockholders and potential competitors but none of the respondents took any part therein. The Board by a 6–1 vote approved the plan on May 3, 1962. This suit was filed on June 9, 1962. Thereafter on June 13, 1962, a petition for reconsideration was filed with the Federal Reserve Board by two of the respondent banks and was later joined by the Bank Commissioner of Louisiana. This application was denied on the ground of untimeliness and because the Board found it "without substantial merit." The application for judicial review was then filed on June 30, 1962, with the Court of Appeals for the Fifth Circuit pursuant to § 9 of the Bank Holding Company Act of 1956, 12 U. S. C. § 1848 (1958 ed.). That case, as we have said, awaits our decision here.

II.

The Bank Holding Company Act of 1956 prohibits a bank holding company from acquiring ownership or control of a national bank, new or existing, without the approval of the Federal Reserve Board. 12 U. S. C. § 1842 (a) (1958 ed.). Provision is made for a full administrative proceeding before the Board in which all interested persons may participate and the views of the interested supervisory authorities may be obtained. 12 U. S. C. § 1842 (b) (1958 ed.). The Board's determination is subject to judicial review by specified courts of appeals which must accept the administrative findings if they are supported by substantial evidence. 12 U. S. C. § 1848 (1958 ed.).

Thus, if the plan here merely encompassed the acquisition of an existing national bank already enjoying the Comptroller's certificate of authority to do business, only the approval of the Board would be necessary, and the Comptroller would be involved only to the extent that he provided his views and recommendations. But, of course, this is not the case. Here it is a newly created national bank not yet authorized to do business that is sought to be organized and operated by a bank holding company. This authorization is the sole function of the Comptroller, requiring his appraisal of the bank's assets, directorate, etc., and his action is therefore necessary in addition to that of the Board approving the organization of the bank by the holding company. It is against this background that we inquire whether the questions raised by the respondents in the District Court against the Comptroller were cognizable by the Board.

III.

We think it clear that the thrust of respondents' complaint goes to the organization of Whitney-Jefferson by the holding company rather than merely the issuance of

authority to Whitney-Jefferson to do business. Respondents' chief contention is that Whitney-Jefferson would be but a branch bank of Whitney-New Orleans. But this would not follow simply by virtue of the issuance of authority for the opening of the new bank. Such a situation would occur, if at all, when the Board approved the holding company plan including the organization of Whitney-Jefferson as its subsidiary. Thus, it is the plan of organization by the holding company which lies at the heart of respondents' argument.

The Bank Holding Company Act of 1956 directs the Board to consider both "the convenience, needs, and welfare of the communities and the area concerned" and "whether or not the effect of such acquisition . . . would be to expand the size or extent of the bank holding company system involved beyond limits consistent with . . . the public interest . . . ." 12 U. S. C. §§ 1842 (c)(4) and (5) (1958 ed.). Clearly, if respondents' argument that Whitney-Jefferson would be a branch bank were sound, the Board would be compelled to disapprove the arrangement, for a plan of organization violative of federal law would hardly be consistent with the statutory command that no bank holding company should be expanded beyond the limits consistent with the public interest.

The respondents also argue that the operation of Whitney-Jefferson is barred by a valid state law prohibiting any subsidiary of a bank holding company from opening for business "whether or not, a charter, permit, license or certificate to open for business has already been issued." Here, as with their first argument, respondents' quarrel is in actuality not merely with the opening of the bank, but rather with its opening as a subsidiary of Whitney Holding Corporation. Otherwise, the opening would not be prohibited by Louisiana law. Again,

the Board could not approve a holding company arrangement involving the organization and opening of a new bank if the opening of the bank, by reason of its ownership by a bank holding company, would be prohibited by a valid state law.[5]

We therefore conclude that respondents' complaint tenders issues cognizable by the Federal Reserve Board, and we turn to the question of whether such objections must first be raised there.

IV.

We believe Congress intended the statutory proceedings before the Board to be the sole means by which questions as to the organization or operation of a new bank by a bank holding company may be tested. Admittedly the acquisition of an existing bank is exclusively within the jurisdiction of the Board. We know of no persuasive reason for finding a different procedure required where it is a new bank that is sought to be organized and operated simply because the Comptroller there performs a function in addition to that of the Board, *i. e.*, the issuance of the certificate to do business.

Moreover, the Bank Holding Company Act makes the Board's approval of a holding company arrangement binding upon the Comptroller. A provision designed to make the decision of the Comptroller, rather than that of the Board, final was rejected when the Act was being framed. 101 Cong. Rec. 8186–8187. This legislative history clearly indicates that Congress had no intention to give the Comptroller a veto over the Board in such cases. It follows that it is the exclusive function of the Board to act in such cases and contests must be pursued

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[5] The Board has indicated that in its view § 7 of the Act permits the States to prohibit the formation of bank holding companies. See *Trans-Nebraska Co.*, 49 Fed. Res. Bull. 633 (1963).

before it, not before the Comptroller. This position is also supported by legislative history which shows that Congress rejected a proposal for a *de novo* review in the district courts of Board decisions on holding company proposals. Compare 12 U. S. C. § 1848 (1958 ed.) and S. Rep. No. 1095, pt. 1, 84th Cong., 1st Sess., 9, and pt. 2, 84th Cong., 2d Sess., 5, with § 9 of H. R. 6227, 101 Cong. Rec. 8187, and H. R. Rep. No. 609, 84th Cong., 1st Sess., 22, 25–26. Such a procedure would have been similar to that employed here against the Comptroller by respondents. However, the Congress decided otherwise, providing instead for review in the courts of appeals based on the facts found by the Board supported by substantial evidence. We think these congressional actions point clearly to the conclusion that it intended that challenges to Board approval of the organization and operation of a new bank by a bank holding company be pursued solely as provided in the statute.

This view is confirmed by our cases holding that where Congress has provided statutory review procedures designed to permit agency expertise to be brought to bear on particular problems, those procedures are to be exclusive. See, *e. g., Callanan Road Improvement Co.* v. *United States,* 345 U. S. 507 (1953); *Myers* v. *Bethlehem Shipbuilding Corp.,* 303 U. S. 41 (1938); *Texas & Pac. R. Co.* v. *Abilene Cotton Oil Co.,* 204 U. S. 426 (1907). Congress has set out in the Bank Holding Company Act of 1956 a carefully planned and comprehensive method for challenging Board determinations. That action by Congress was designed to permit an agency, expert in banking matters, to explore and pass on the ramifications of a proposed bank holding company arrangement. To permit a district court to make the initial determination of a plan's propriety would substantially decrease the effectiveness of the statutory design. As we stated in

Far East Conference v. *United States,* 342 U. S. 570 (1952):

> "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure." At 574–575.

Here the Court of Appeals held that the relationship of Whitney-Jefferson to Whitney-New Orleans would be that of a branch bank notwithstanding the fact that they were organized under a bank holding company arrangement. The District Court found the proposal barred by Louisiana Act No. 275 of 1962. We believe that these are the very types of questions that Congress has committed to the Board, and we hold that the Board should make the determination of the plan's propriety in the first instance. The soundness of this conclusion is especially evident when it is remembered that the Board has played a vital role in the development of the national banking laws, a role which makes its views of particular benefit to the courts where ultimately the validity of the arrangement will be tested.

Moreover, we reject the notion that the Board's determination may be collaterally attacked in the District

Court by a suit against the Comptroller. Opponents of the opening of a new bank by a bank holding company must first attack the arrangement before the Board, subject only to review by the Courts of Appeals. *City of Tacoma* v. *Taxpayers of Tacoma,* 357 U. S. 320 (1958); *United States* v. *Corrick,* 298 U. S. 435 (1936). That Congress has not expressly provided that the statutory procedure is to be exclusive does not require a different conclusion. For Congress has expressly rejected proposed provisions for review in these cases in the district courts. Moreover, it has enacted a specific statutory scheme for obtaining review, and where Congress has directed such a procedure as that found in the Bank Holding Company Act of 1956, the doctrine of exhaustion of administrative remedies comes into play and requires that the statutory mode of review be adhered to notwithstanding the absence of an express statutory command of exclusiveness.

A rejection of this doctrine here would result in unnecessary duplication and conflicting litigation. Some opponents might participate before the Board; others might well wait for termination of the Board's activities and then sue in the district courts for an injunction accomplishing the same ultimate end. The different records, applications of different standards and conflicting determinations that would surely result from such duplicative procedures all militate in favor of the conclusion that the statutory steps provided in the Act are exclusive.

Respondents attempt to ground support for the District Court's asserted jurisdiction on the Administrative Procedure Act, 5 U. S. C. §§ 1001, 1009 (1958 ed.), which provides that "Every . . . final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. . . ." The short answer to this, of course, is, as we have pointed out, that the Comptroller's action in issuing a certificate is not "final"; it is

the action of the Board permitting consummation of the organization of the new bank by the holding company that is final, and its decision is subject to review only in the courts of appeals, not before the Comptroller or in the district courts.

Furthermore, the respondents contend that no provisions for review of the Comptroller's decision are included in any of the pertinent Acts; indeed, they say, he has admitted as much in this case. Respondents again overlook the fact that the decision here approving the organization of the Whitney-Jefferson Bank is not for the Comptroller. He only checks the condition of the new bank, its capital, directorate, etc., as provided by the National Bank Act. 12 U. S. C. § 26 (1958 ed.). That the action of the Comptroller is not final is made crystal-clear here where, assuming he should issue the desired authority to Whitney-Jefferson to open for business, it would be completely negated in the event that on review the Board's approval of the holding company plan was reversed. As we have said, it is the ownership of Whitney-Jefferson by the holding company that is at the heart of the project, not the permission to open for business which is acted upon routinely by the Comptroller once the authority to organize is given by the Board.

We do not say that under no circumstances may the Comptroller be restrained in equity from issuing a certificate to a new bank. We do hold, however, that where a bank holding company seeks to open a new bank pursuant to a plan of organization the propriety of which must, under the Bank Holding Company Act, be determined by the Board, the statutory review procedure set out in the Act must be utilized by those dissatisfied with the Board's ruling despite the fact that the Comptroller's certificate is a necessary prerequisite to the opening of the bank. Otherwise the commands of the Congress would be completely frustrated.

V.

It is for this reason that the Fifth Circuit case reviewing the Board's former action should be remanded to it. Section 3 (5) of Louisiana Act No. 275 of 1962, La. Rev. Stat. § 6:1003 (5) (1962 Supp.), provides that "It shall be unlawful . . . for any bank holding company or subsidiary thereof to open for business any bank not now opened for business, whether or not, a charter, permit, license or certificate to open for business has already been issued. . . ." [6] This Act was passed on July 10, 1962, several days after the Board denied respondents' petition for reconsideration. It was not considered by the Board as one of the factors in the application for registration as a bank holding company. The petition for review, attacking the Board's determination before the Fifth Circuit, is, of course, not before this Court. Nevertheless it is perfectly obvious that the two cases are closely related. We have discussed earlier the importance which Congress has attached in the Bank Holding Company Act of 1956 to the principle that the Federal Reserve Board, with its expertise in the banking field, should make the initial determination of the propriety of the plan of organization giving full consideration to the legislative guidelines set out in the Act. Section 7 of the Bank Holding Company Act of 1956, 12 U. S. C. § 1846 (1958 ed.), provides:

> "The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof."

[6] Our disposition obviates the necessity of passing upon the contention of the petitioners that Louisiana's law is invalid under the Supremacy Clause and the Equal Protection Clause.

Here the Board has not had an opportunity to determine the applicability and effect of the new Louisiana statute. We are of the opinion that this is the very type of question that Congress envisioned as being resolved in the first instance by the Board. In line with this legislative policy, and in the interest of judicial economy and proper administrative practice, the Board should have an opportunity to act in the light of Louisiana's new law. It is for this reason that we give the parties not exceeding 60 days to proceed before the Court of Appeals for the Fifth Circuit to secure such a remand.

It appears from the record that the Comptroller advised the District Court that "if the preliminary injunction entered herein is vacated, and if Whitney National Bank in Jefferson Parish so requests, inasmuch as upon a careful examination of the facts within my knowledge it appears that such association is lawfully entitled to commence the business of banking, it is my present intention to issue such certificate." R. 310. Our disposition, however, does not free the Comptroller to authorize the opening of the bank, for the Court of Appeals has the power to prevent the issuance of the certificate pending final disposition of the matter. As the Comptroller himself notes, the certificate may issue only when the applicant is "lawfully entitled to commence the business of banking." It would not be "lawfully entitled" to open in the event the Court of Appeals stayed the order of approval of the Federal Reserve Board pending final disposition of the review proceeding. The court, of course, is empowered under 28 U. S. C. § 1651 (1958 ed.) to do so. See *Scripps-Howard Radio, Inc.* v. *FCC,* 316 U. S. 4 (1942); *Board of Governors of Federal Reserve System* v. *Transamerica Corp.,* 184 F. 2d 311 (1950). In the event such a stay were issued we feel certain that the Comptroller would not

attempt to issue the certificate.[7] But if he did and the Court of Appeals should find it necessary to take direct action to maintain the status quo and prevent the opening of the bank, it has ample power to do so. The Whitney Holding Corporation, a party presently before the Fifth Circuit, owns and controls both banks and through it the court could reach the technical applicant, Whitney-Jefferson. We think it clear that the Court of Appeals can appropriately fashion an order designed to compel Whitney Holding Corporation not only to refrain from acting itself but to require that its subsidiary refrain from requesting the certificate and from opening the bank. Indeed, upon proper application by the respondents the Court of Appeals could stay the hand of Whitney-Jefferson itself since it is within the jurisdiction of that court. It is sufficient to say here that the Fifth Circuit's power to protect its jurisdiction is beyond question.

In the instant proceedings, the judgments of the Court of Appeals are reversed and the case is remanded to the District Court with direction to dismiss the complaint. Issuance of our judgment is stayed for 60 days to afford the parties opportunity to proceed as outlined in this opinion.

It is so ordered.

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[7] As we have said there may be exceptional circumstances under which equity may stay the hand of the Comptroller in issuing a certificate to a new bank. Obviously if the holding company application has not been acted upon by the Board, the Comptroller would have no power to issue the certificate and his persistence in doing so would subject him to the temporary orders of a court of competent jurisdiction.

Such an action would not require an impermissible collateral attack on the merits of the proposal, which are reserved for the Board. Its sole purpose would be to prevent the Comptroller from acting without the Board's approval—an objective that would protect the jurisdiction of the reviewing court of appeals rather than run afoul of it.

MR. JUSTICE DOUGLAS, dissenting.

I dissent from the ruling of the Court that the District Court for the District of Columbia has no jurisdiction over this present controversy with the Comptroller of the Currency.

Two federal agencies are involved in this bank acquisition program:

The Federal Reserve Board has jurisdiction under the Bank Holding Company Act of 1956 to grant or deny an application by a holding company of the right to acquire the shares of any bank. 12 U. S. C. § 1842.

The Comptroller of the Currency has jurisdiction under the National Bank Act to license the opening of a banking operation where it appears that the applicant "is lawfully entitled to commence the business of banking." 12 U. S. C. § 27.

It is thus apparent that the two administrative proceedings involve different, though related, matters; different, though related, applicants; and different, though related, issues.

The decision of the Board is subject to review in the Court of Appeals as provided in 12 U. S. C. § 1848. But, as stated by the Solicitor General, "The National Bank Act . . . makes no provision for an administrative hearing or for judicial review, and the Comptroller's decisions are made informally, without an administrative record." The courts, however, have held that judicial cognizance of a controversy with the Comptroller may be taken and judicial power exercised to keep the Comptroller within statutory bounds. *Camden Trust Co.* v. *Gidney,* 112 U. S. App. D. C. 197, 301 F. 2d 521; *Union Savings Bank* v. *Saxon,* 118 U. S. App. D. C. 296, 298, 335 F. 2d 718, 720, and cases cited. That conclusion is consistent with our holding in *Columbia Broadcasting System, Inc.* v. *United States,* 316 U. S. 407, 423–424, that, absent a congressional

design to bar all judicial review (*Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297), injunctive relief is available where administrative remedies are either inapplicable or inadequate. This rule keeps the Comptroller from being a free-wheeling agency dispensing federal favors; and it gives some assurance that he will render principled decisions within the rule of law laid down by Congress.

The facts of this case dramatize the importance of the jurisdiction of the District Court. Shortly after the Board's final action in this case, and before review of its action by the Court of Appeals had been sought, Louisiana passed a law (La. Rev. Stat. §§ 6:1001 to 6:1006 (1962 Supp.)) which provides in pertinent part: "It shall be unlawful . . . for any bank holding company or subsidiary thereof to open for business any bank not now opened for business . . . ." The Bank Holding Company Act, 12 U. S. C. § 1846, specifically reserves to the States a broad power seemingly sufficient to bar bank holding companies or their subsidiaries from extending their domains.[1]

In spite of the pending review of the Board's order in the Court of Appeals and in spite of the intervening Louisiana law, the Comptroller on August 9, 1962, advised the District Court in affidavit form:

> "Upon consideration of these subsequent developments, and after careful examination of the Louisiana statute, I have concluded that there has occurred no reason to alter the Comptroller's prior determina-

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[1] Section 7 of the Act reads as follows:

"The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof." 12 U. S. C. § 1846.

> tion that a certificate of authority should be issued to Whitney National Bank in Jefferson Parish, pursuant to 12 U. S. C. § 27.
>
> "Accordingly, if the preliminary injunction entered herein is vacated, and if Whitney National Bank in Jefferson Parish so requests, inasmuch as upon a careful examination of the facts within my knowledge it appears that such association is lawfully entitled to commence the business of banking, it is my present intention to issue such certificate." [2]

This threat makes a mockery of the Solicitor General's assurance that the parties have a full and adequate remedy in the Court of Appeals review of the Board's order and of his position that the present suit is designed as a collateral attack on the review of that order. For without the injunction issued by the District Court the Comptroller candidly states that the new branch bank

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[2] The Comptroller and the applicant bank, Whitney-Jefferson, made a speedy accommodation as shown in Whitney-Jefferson's brief in this Court:

"On May 10, 1962, Whitney-Jefferson executed and delivered to the new Comptroller of the Currency its articles of association and its certificate of organization, thereby establishing its corporate existence as a national banking association in accordance with 12 U. S. C. § 24. On May 18, 1962, the Comptroller approved the final corporate formalities necessary to complete the program. On May 24, 1962, the duly elected and qualified directors of Whitney-Jefferson adopted by-laws and took action by which the new bank became a member of the Federal Reserve System.

"Thereafter, the sole remaining legal step necessary to permit the opening of Whitney-Jefferson for business was the issuance to it by the Comptroller, under 12 U. S. C. § 27, of a certificate authorizing it to commence the business of banking. The Comptroller was about to issue such a certificate when this action was commenced on June 9, 1962. Whitney-Jefferson was prepared to open its doors for business, and would have commenced operations virtually as soon as it received a certificate."

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would be in business, flouting the new Louisiana law, whose prototype we have already sustained.[3]

The ruling of the Court that the District Court had no jurisdiction in this case promises serious consequences. It means there may be an hiatus during which the Comptroller can take the law into his own hands without restraint from anyone. The Court looks to the Court of Appeals to give protection during that hiatus. In this case the Board of Governors of the Federal Reserve System approved the holding company application on May 3, 1962. The action in the District Court was filed on June 9, 1962. But judicial review of the Board's action by the Court of Appeals was not sought until June 30, 1962.

If respondents had accelerated their review of the Board's action, they still would not have had any protection against the Comptroller for he was not a party to the action in the Court of Appeals; and as the record shows if he had been freed from the restraint of the District Court, his alliance with Whitney-Jefferson would have resulted in a flouting of the law.

Whitney-Jefferson, moreover, was not a party in the Fifth Circuit proceeding. Nor will either the applicant "branch bank" or the holding company normally be a party to the appeal in the Court of Appeals. The statute providing for judicial review of a Board order at the instance of the "party aggrieved" does not make them parties. 12 U. S. C. § 1848. The governing rule of the Court

[3] See *Braeburn Securities Corp.* v. *Smith,* 15 Ill. 2d 55, 153 N. E. 2d 806, where a state statute forbade holding-company shareholders from acquiring stock of national banks. We dismissed the appeal "for want of a substantial federal question." 359 U. S. 311. Accord: *Trans-Nebraska Co.,* 49 Fed. Res. Bull. 633, 638 (1963). That decision was in line with federal policy of making state law the standard when it comes to certain kinds of branch banking. See *United States* v. *Philadelphia National Bank,* 374 U. S. 321, 328.

of Appeals for the Fifth Circuit says that the "agency, board, commission or officer concerned shall be named as respondent"; but it is nowhere provided that those who were successful before the board or agency shall also be made respondents. Rule 39, 28 U. S. C. A. As it happens, Whitney Holding Corporation seems to have intervened in the appeal to support the Board. But this is a fortuitous circumstance. After today's decision it will no doubt occur to those who find themselves in Whitney's position that possibly they may, with the help of the Comptroller, be able to open their doors for business in defiance of state law simply by staying out of the review proceeding in the Court of Appeals and keeping their holding company master out of it also. Perhaps, as the Court suggests, the Court of Appeals will always be able to find the means to prevent such an eventuality by resort to 28 U. S. C. § 1651; perhaps it will not. But there can be no doubt that maintenance of the jurisdiction of the District Court is essential both for keeping the dual jurisdiction of the Board and of the Comptroller from a collision course and for keeping the Comptroller within bounds of the law.

I also dissent from remitting the constitutionality of the Louisiana Act to the Federal Reserve Board and thus giving administrative "expertise" new and surprising dimensions.

Heretofore we have remitted causes to federal agencies where "issues of fact not within the conventional experience of judges" are raised or where the case requires "the exercise of administrative discretion." *Far East Conference* v. *United States,* 342 U. S. 570, 574. Here the facts are known and the bare, bald question of the constitutionality of Louisiana's law is tendered. It is presented in this action in the District Court; the Comptroller threatens to flout that law; yet if it is a valid law, the new bank is not "lawfully entitled to commence the

business of banking" within the meaning of the National Bank Act, 12 U. S. C. § 27. I would decide that issue here and now.

MR. JUSTICE BLACK, dissenting.

For the reasons given in his dissenting opinion, I agree with my Brother DOUGLAS that the District Court has jurisdiction over this controversy and that the question of the Louisiana Act's constitutionality should not be remitted to the Federal Reserve Board, and I join his dissent on both those points. I would go further, however, and affirm the District Court's judgment. As pointed out in MR. JUSTICE DOUGLAS' dissent, Louisiana now has a law making it unlawful for any bank holding company to open for business in that State and Congress has consented for States to pass such a law. Accordingly, neither the Comptroller nor the Federal Reserve Board has power to permit the Whitney Holding Corporation to open a bank in Louisiana. Under these circumstances there is no reason whatever, except an entirely technical one, to let the litigation over this matter proceed any further. I would therefore end it by affirming the judgments of the Court of Appeals affirming the judgment of the District Court, a disposition which would, of course, call for a dismissal of the related controversy now pending in the Court of Appeals for the Fifth Circuit.

Syllabus.

FORTSON, SECRETARY OF STATE OF GEORGIA *v.* DORSEY ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 178. Argued December 10, 1964.—
Decided January 18, 1965.

Under Georgia's 1962 Senatorial Reapportionment Act the State is divided into senatorial districts that are conceded to be substantially equal in population. Except for the seven most populous counties, from one to eight counties comprise a district and the voters therein, on a district-wide basis, elect the senator for that district. The seven most populous counties are divided into from two to seven districts each and the voters in each such county, instead of electing only one senator from the district in which they reside, elect, on a county-wide basis, that number of senators that the county has districts. Appellees, registered voters in multi-district counties of Georgia, brought this action in the Federal District Court against the Secretary of State and local election officials, seeking a decree that the county-wide voting requirement in the seven multi-district counties violates the Equal Protection Clause of the Fourteenth Amendment. A three-judge District Court granted appellees' motion for summary judgment, holding that the difference between electing senators in districts comprising a county or group of counties and in the multi-district counties constitutes invidious discrimination. *Held:* Equal protection does not necessarily require formation of all single-member districts in a State's legislative apportionment scheme. *Reynolds* v. *Sims,* 377 U. S. 533, followed. Pp. 436–439.

228 F. Supp. 259, reversed.

Paul Rodgers, Assistant Attorney General of Georgia, argued the cause for appellant. With him on the brief was *Eugene Cook,* Attorney General of Georgia.

Edwin F. Hunt argued the cause for appellees. With him on the brief were *William C. O'Kelley* and *Charles A. Moye, Jr.*

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Georgia's 1962 Senatorial Reapportionment Act [1] apportions the 54 seats of the Georgia Senate among the State's

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[1] Ga. Laws, Sept.-Oct. 1962, Extra. Sess., pp. 7–31; Ga. Code Ann. § 47–102 (Cum. Supp. 1963). Section 9, the provision in question here, provides in pertinent part that:

"Each Senator must be a resident of his own Senatorial District and shall be elected by the voters of his own District, *except that the Senators from those Senatorial Districts consisting of less than one county shall be elected by all the voters of the county in which such Senatorial District is located.*" (Emphasis supplied.)

Shortly after the enactment of this statute, and prior to the election of senators under it in the 1962 general elections, an action was brought in a state court that challenged the validity of the above provision under the Georgia Constitution. The state court held that the exception in the 1962 statute was unconstitutional as a matter of state law under the then-existing Georgia Constitution. *Finch* v. *Gray,* No. A 96441 (Fulton County Super. Ct., Oct. 30, 1962). The court entered a permanent injunction requiring that elections in Fulton and DeKalb Counties be held on a district-wide basis only. Appeal was taken from this decision but was withdrawn. In its opinion the Georgia Court noted that the Georgia Legislature had authorized the submission of a constitutional amendment to the people ratifying the 1962 reapportionment statute with its multi-district-voting exception and all elections held under that statute. (The amendment was ratified. See Ga. Const. Art. III, § II, par. I; Ga. Code Ann. § 2–1401 (Cum. Supp. 1963).) The court stated concerning the proposed amendment:

"It is to be observed that by Paragraph (b) of said proposed Amendment to the Constitution, the General Assembly submitted to the people the question whether they would ratify the Reapportionment Act and elections thereunder. This proposed Amendment, of course, is prospective and will become a part of the Constitution only if ratified by the voters in the coming general election.

"The effect of ratification by the people of the Reapportionment Act containing the unconstitutional exception aforesaid is not now before the Court for determination. See, however, on this subject: *Walker* v. *Wilcox Co.,* 95 Apps. 185; *Hammond* v. *Clark,* 136 Ga. 313; *Bailey* v. *Housing Authority of City of Bainbridge,* 214 Ga.

159 counties. The 54 senatorial districts created by the Act are drawn, so far as possible, along existing county lines. Thirty-three of the senatorial districts are made up of from one to eight counties each,[2] and voters in these districts elect their senators by a district-wide vote. The remaining 21 senatorial districts are allotted in groups of from two to seven among the seven most populous counties, but voters in these districts do not elect a senator by a district-wide vote; instead they join with the voters of the other districts of the county in electing all the county's senators by a county-wide vote.

The appellees, registered voters of Georgia, brought this action in the District Court for the Northern District of Georgia against the Secretary of State of Georgia and local election officials seeking a decree that the requirement of county-wide voting in the seven multi-district counties violates the Equal Protection Clause of the Fourteenth Amendment. A three-judge court granted appellees' motion for summary judgment, stating that "The statute causes a clear difference in the treatment accorded voters in each of the two classes of senatorial districts. It is the same law applied differently to dif-

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790; *Grayson-Robinson Stores, Inc.* v. *Oneida, Ltd.*, 209 Ga. 613; 9 Mercer L. Rev. 194, 195; 11 Am. Juris., page 832, section 151. The importance here of the aforesaid proposed constitutional Amendment is simply for the light it sheds upon the intention of the General Assembly in enacting the Reapportionment statute."

The question of Georgia law raised by the decisions cited by the court as to whether a statute declared unconstitutional under Georgia law may be revived by a subsequent constitutional amendment was not raised below and has not been urged here. Of course, this question of Georgia law is not for us; our decision concerns only the federal constitutional question presented and argued.

[2] These 33 senatorial districts embrace 152 of the State's 159 counties. Of the 33 districts, only two consist of single counties; the remaining 31 districts are comprised of from two to eight counties each.

ferent persons. The voters select their own senator in one class of districts. In the other they do not. They must join with others in selecting a group of senators and their own choice of a senator may be nullified by what voters in other districts of the group desire. This difference is a discrimination as between voters in the two classes. . . . The statute here is nothing more than a classification of voters in senatorial districts on the basis of homesite, to the end that some are allowed to select their representatives while others are not. It is an invidious discrimination tested by any standard." 228 F. Supp. 259, 263. We noted probable jurisdiction, 379 U. S. 810. We reverse.

Only last Term, in our opinion in *Reynolds* v. *Sims,* 377 U. S. 533, decided after the decision below, we rejected the notion that equal protection necessarily requires the formation of single-member districts. In discussing the impact on bicameralism of the equal-protection standards, we said, "One body could be composed of single-member districts while the other could have *at least some* multi-member districts." 377 U. S., at 577. (Emphasis supplied.) Again, in holding that a State might legitimately desire to maintain the integrity of various political subdivisions, such as counties, we said: "Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multi-member or floterial districts. *Whatever the means of accomplishment, the overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State.*" 377 U. S., at 579. (Emphasis supplied.)

It is not contended that there is not "substantial equality of population" among the 54 senatorial districts. The equal protection argument is focused solely upon the question whether county-wide voting in the seven multi-

district counties results in denying the residents therein a vote "approximately equal in weight to that of" voters resident in the single-member constituencies. Contrary to the District Court, we cannot say that it does. There is clearly no mathematical disparity. Fulton County, the State's largest constituency, has a population nearly seven times larger than that of a single-district constituency and for that reason elects seven senators. Every Fulton County voter, therefore, may vote for seven senators to represent his interests in the legislature. But the appellees assert that this scheme is defective because county-wide voting in multi-district counties could, as a matter of mathematics, result in the nullification of the unanimous choice of the voters of a district, thereby thrusting upon them a senator for whom no one in the district had voted. But this is only a highly hypothetical assertion [3] that, in any event, ignores the practical reali-

[3] Appellees take as their example Senatorial District 34, in which there are 82,195 of Fulton County's total of 556,326 voters. They say, as a matter of mathematics, that even if every voter in District 34 voted for the same candidate from that district, less than 18% of the voters in the other six districts within the county (*i. e.*, approximately 85,000 of the remaining 474,131 voters in the county) could outvote the unanimous choice of District 34 voters. First of all, there is no demonstration that this is likely in light of the political composition of District 34 *vis-à-vis* that of the rest of the county. (In fact, the 1962 elections in both Fulton and DeKalb Counties—wherein all appellees reside—were conducted on a district-wide basis rather than a county-wide basis. See note 1, *supra*.) But apart from this, appellees' mathematics are misleading, for not only will the 18%, or 85,000, of the remaining Fulton County voters vote for a senatorial candidate resident in District 34, but also the remaining 389,131 voters will presumably participate in his election. Assuming these additional voters split their votes almost evenly between two candidates running from District 34—the most "favorable" assumption for appellees in that it will produce the smallest possible percentage of voters who can outvote the unanimous choice of the voters in District 34—there will be approximately 280,000 votes against the

ties of representation in a multi-member constituency. It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all the people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator. If the weight of the vote of any voter in a Fulton County district, when he votes for seven senators to represent him in the Georgia Senate, is not the exact equivalent of that of a resident of a single-member constituency, we cannot say that his vote is not "approximately equal in weight to that of any other citizen in the State."

In reversing the District Court we should emphasize that the equal-protection claim below was based upon an alleged infirmity that attaches to the statute on its face. Agreeing with appellees' contention that the multi-member constituency feature of the Georgia scheme was *per se* bad, the District Court entered the decree on summary judgment. We treat the question as presented in that

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choice of the voters in the 34th District, or about 59% of the remaining, out-of-district vote. This is a far cry from the 18% figure calculated by appellees. And, even if, on some odd chance, only 85,000 voters outside of District 34 participate in the selection of a senator from that district, and all vote against the unanimous choice of District 34 voters, the 18% figure is still misleading. For in this eventuality, the relevant voting constituency consists of something under 170,000 voters, and close to 100%—not 18%—of the out-of-district vote has to be cast against the choice of the in-district vote in order to outvote the latter. Our decision should not be read, however, as resting upon the misleading aspects of appellees' calculations.

context, and our opinion is not to be understood to say that in all instances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause. It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster. This question, however, is not presented by the record before us. It is true that appellees asserted in one short paragraph of their brief in this Court that the county-wide election method was resorted to by Georgia in order to minimize the strength of racial and political minorities in the populous urban counties. But appellees never seriously pressed this point below and offered no proof to support it, the District Court did not consider or rule on its merits, and in oral argument here counsel for appellees stressed that they do not rely on this argument. The record thus does not contain any substantiation of the bald assertion in appellees' brief. Since, under these circumstances, this issue has "not been formulated to bring it into focus, and the evidence has not been offered or appraised to decide it, our holding has no bearing on that wholly separate question." *Wright* v. *Rockefeller,* 376 U. S. 52, 58.

Reversed.

MR. JUSTICE HARLAN, concurring.

Under the compulsion of last Term's reapportionment decisions I join the opinion and judgment of the Court, but with one reservation. There is language in today's opinion, unnecessary to the Court's resolution of this case, that might be taken to mean that the constitutionality of

state legislative apportionments must, in the last analysis, always be judged in terms of simple arithmetic.

As this Court embarks on the difficult business of putting flesh on the bones of *Reynolds* v. *Sims*, 377 U. S. 533, and its companion decisions of last June, I desire expressly to reserve for a case which squarely presents the issue, the question of whether the principles announced in those decisions require such a sterile approach to the concept of equal protection in the political field.

MR. JUSTICE DOUGLAS, dissenting.

Georgia—whose political hierarchy was long constructed on the county-unit* basis—has made an important change. The Georgia Constitution was amended to read:

> "The Senate shall consist of 54 members. The General Assembly shall have authority to create, rearrange and change *senatorial districts* and to provide *for the election of Senators from each senatorial district,* or from several districts embraced within one county, in such manner as the General Assembly may deem advisable." (Italics added.) Art. III, § II, par. I.

The "senatorial district" is thus made the unit in the election of senators. But the Senatorial Reapportionment Act provides in relevant part:

> "Each Senator must be a resident of his own senatorial district and shall be elected by the voters of his own district, except that the Senators from those senatorial districts consisting of less than one county shall be elected by all the voters of the county in which such senatorial district is located."

Thus "senatorial districts" are put into two classifications: first, those comprising one or more counties; sec-

South v. *Peters*, 339 U. S. 276.

ond, those consisting of less than one county. The "equal protection" problem under the Fourteenth Amendment arises by reason of the fact that all electors of the districts in the first group choose their own senators, while the electors of the districts in the second group must share the choice of their senators with all the other electors in their county. I agree with the District Court: ". . . voters in some senatorial districts cannot be treated differently from voters in other senatorial districts. The statute here is nothing more than a classification of voters in senatorial districts on the basis of homesite, to the end that some are allowed to select their representatives while others are not." 228 F. Supp. 259, 263.

There are seven senatorial districts within Fulton County:

District 34 containing 82,195 voters.
District 35 containing 82,888 voters.
District 36 containing 79,023 voters.
District 37 containing 78,540 voters.
District 38 containing 78,953 voters.
District 39 containing 79,713 voters.
District 40 containing 74,834 voters.

There are three senatorial districts in De Kalb County:

District 41 containing 75,117 voters.
District 42 containing 95,032 voters.
District 43 containing 86,633 voters.

As appellees point out, even if a candidate for one of those districts obtained all of the votes in that district, he could still be defeated by the foreign vote, while he would of course be elected if he were running in a district in the first group. I have no idea how this weighted voting might produce prejudice race-wise, religion-wise, politics-wise. But to allow some candidates to be chosen by the electors in their districts and others to be defeated by the voters of foreign districts is in my view an "invidi-

ous discrimination"—the test of unequal protection under the Fourteenth Amendment. *Baker* v. *Carr,* 369 U. S. 186, 244. I had assumed we had settled this question in *Gray* v. *Sanders,* 372 U. S. 368, 379, where we said: "Once the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit. This is required by the Equal Protection Clause of the Fourteenth Amendment."

HENRY *v.* MISSISSIPPI.

CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI.

No. 6. Argued October 13, 1964.—
Decided January 18, 1965.

The Mississippi Supreme Court, reviewing petitioner's appeal from a conviction for disturbing the peace, first filed an opinion which reversed the conviction and remanded for a new trial. The court held that petitioner's wife's consent to a search of his automobile did not waive his rights and, in the belief that petitioner had out-of-state counsel unfamiliar with local practice, reversed in spite of petitioner's failure to comply with the state requirement of contemporaneous objection to the introduction of illegal evidence. The court noted that petitioner moved for a directed verdict at the close of the State's case, assigning as one ground the use of the illegal evidence. After the State filed a Suggestion of Error, pointing out that petitioner was represented by local as well as out-of-state counsel, the court substituted another opinion, affirming the conviction and holding that mistakes of counsel, even if honest, are binding on the client. *Held:* The question whether the non-federal procedural ground (the contemporaneous-objection requirement) is adequate to bar review—that is, whether its imposition in this case serves a legitimate state interest—is not decided, for the record indicates, but is insufficient to establish, that petitioner, personally or through counsel, may have knowingly forgone his opportunity to raise his federal claims. *Fay* v. *Noia*, 372 U. S. 391, 439. The interests of sound judicial administration call for a remand to permit the State to establish whether or not there was a waiver. This may avoid the necessity for a decision by this Court on the adequacy of the state procedural ground, and it permits the State to determine the waiver question, which would otherwise be open on federal habeas corpus, even if the state ground were adequate. Pp. 449–453.

154 So. 2d 289, reversed and remanded.

Barbara A. Morris argued the cause for petitioner. With her on the brief were *Robert L. Carter, Jack H. Young, R. Jess Brown, Jr.,* and *Alvin K. Hellerstein.*

G. Garland Lyell, Jr., Assistant Attorney General of Mississippi, argued the cause for respondent. With him on the brief was *Joe T. Patterson,* Attorney General of Mississippi.

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Petitioner was convicted of disturbing the peace, by indecent proposals to and offensive contact with an 18-year-old hitchhiker to whom he is said to have given a ride in his car. The trial judge charged the jury that "you cannot find the defendant guilty on the unsupported and uncorroborated testimony of the complainant alone." The petitioner's federal claim derives from the admission of a police officer's testimony, introduced to corroborate the hitchhiker's testimony. The Mississippi Supreme Court held that the officer's testimony was improperly admitted as the fruit of "an unlawful search and was in violation of § 23, Miss. Constitution 1890." 154 So. 2d 289, 294.[1] The tainted evidence tended to substantiate the hitchhiker's testimony by showing its accuracy in a detail which could have been seen only by one inside the car. In particular, it showed that the right-hand ashtray of the car in which the incident took place was full of Dentyne chewing gum wrappers, and that the cigarette lighter did not function. The police officer testified that after petitioner's arrest he had returned to the petitioner's home and obtained the permission of peti-

[1] The Mississippi Supreme Court wrote two opinions. The first is reported in the July 11, 1963, issue of the Southern Reporter advance sheets, 154 So. 2d 289. This was withdrawn when the court filed the second opinion, which appears at the same page in the bound volume of the Southern Reporter. Citations hereinafter will designate the bound volume or the advance sheet if the cited material appears in only one opinion. The material referred to at this point in the text appears in both opinions.

tioner's wife to look in petitioner's car. The wife provided the officer with the keys, with which the officer opened the car. He testified that he tried the lighter and it would not work, and also that the ashtray "was filled with red dentyne chewing gum wrappers."

The Mississippi Supreme Court first filed an opinion which reversed petitioner's conviction and remanded for a new trial. The court held that the wife's consent to the search of the car did not waive petitioner's constitutional rights, and noted that the "[t]estimony of the State's witness . . . is, in effect, uncorroborated without the evidence disclosed by the inspection of defendant's automobile." 154 So. 2d, at 296 (advance sheet).[2] Acting in the belief that petitioner had been represented by nonresident counsel unfamiliar with local procedure, the court reversed despite petitioner's failure to comply with the Mississippi requirement that an objection to illegal evidence be made at the time it is introduced. The court noted that petitioner had moved for a directed verdict at the close of the State's case, assigning as one ground the use of illegally obtained evidence; it did not mention petitioner's renewal of his motion at the close of all evidence.

After the first opinion was handed down, the State filed a Suggestion of Error, pointing out that petitioner was in fact represented at his trial by competent local counsel, as well as by out-of-state lawyers. Thereupon the Mississippi Supreme Court withdrew its first opinion and filed a new opinion in support of a judgment

[2] The complaining witness also testified as to the last four digits of petitioner's license plate, and to the fact that the first three digits were obscured; these facts were independently substantiated. Since the license plate could be seen from outside the car, and petitioner denied that the complaining witness had ever been in his car, the Mississippi Supreme Court apparently accepted the officer's testimony concerning the Dentyne wrappers and cigarette lighter as the only cogent corroborative evidence.

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affirming petitioner's conviction. The new opinion is identical with the first save for the result, the statement that petitioner had local counsel, and the discussion of the effect of failure for whatever reason to make timely objection to the evidence. "In such circumstances, even if honest mistakes of counsel in respect to policy or strategy or otherwise occur, they are binding upon the client as a part of the hazards of courtroom battle." 154 So. 2d, at 296 (bound volume). Moreover, the court reasoned, petitioner's cross-examination of the State's witness before the initial motion for directed verdict, and introduction of other evidence of the car's interior appearance afterward, "cured" the original error and estopped petitioner from complaining of the tainted evidence. We granted certiorari, 376 U. S. 904. We vacate the judgment of conviction and remand for a hearing on the question whether the petitioner is to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of the illegally seized evidence.

It is, of course, a familiar principle that this Court will decline to review state court judgments which rest on independent and adequate state grounds, even where those judgments also decide federal questions. The principle applies not only in cases involving state substantive grounds, *Murdock* v. *City of Memphis,* 20 Wall. 590, but also in cases involving state procedural grounds. Compare *Herb* v. *Pitcairn,* 324 U. S. 117, 125–126, with *Davis* v. *Wechsler,* 263 U. S. 22. But it is important to distinguish between state substantive grounds and state procedural grounds. Where the ground involved is substantive, the determination of the federal question cannot affect the disposition if the state court decision on the state law question is allowed to stand. Under the view taken in *Murdock* of the statutes conferring appellate jurisdiction

on this Court, we have no power to revise judgments on questions of state law. Thus, the adequate nonfederal ground doctrine is necessary to avoid advisory opinions.

These justifications have no application where the state ground is purely procedural. A procedural default which is held to bar challenge to a conviction in state courts, even on federal constitutional grounds, prevents implementation of the federal right. Accordingly, we have consistently held that the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question. Cf. *Lovell* v. *City of Griffin,* 303 U. S. 444, 450. As Mr. Justice Holmes said:

> "When as here there is a plain assertion of federal rights in the lower court, local rules as to how far it shall be reviewed on appeal do not necessarily prevail. . . . Whether the right was denied or not given due recognition by the [state court] . . . is a question as to which the plaintiffs are entitled to invoke our judgment." *Love* v. *Griffith,* 266 U. S. 32, 33–34.

Only last Term, we reaffirmed this principle, holding that a state appellate court's refusal, on the ground of mootness, to consider a federal claim, did not preclude our independent determination of the question of mootness; that is itself a question of federal law which this Court must ultimately decide. *Liner* v. *Jafco, Inc.,* 375 U. S. 301. These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the

state procedural rule ought not be permitted to bar vindication of important federal rights.[3]

The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided. But on the record before us it appears that this purpose of the contemporaneous-objection rule may have been substantially served by petitioner's motion at the close of the State's evidence asking for a directed verdict because of the erroneous admission of the officer's testimony. For at this stage the trial judge could have called for elaboration of the search and seizure argument and, if persuaded, could have stricken the tainted testimony or have taken other appropriate corrective action. For example, if there was sufficient competent evidence without this testimony to go to the jury, the motion for a directed verdict might have been denied, and the case submitted to the jury with a properly worded appropriate cautionary instruction.[4] In these circumstances, the delay until the

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[3] This will not lead inevitably to a plethora of attacks on the application of state procedural rules; where the state rule is a reasonable one and clearly announced to defendant and counsel, application of the waiver doctrine will yield the same result as that of the adequate nonfederal ground doctrine in the vast majority of cases.

[4] The view of the Mississippi court in its first opinion seems to have been that there was insufficient evidence apart from the tainted testimony to support the conviction. Hence, appropriate corrective action as a matter of state law might have included granting petitioner's motion. We have not overlooked the fact that the first opinion remanded for a new trial, although the usual practice of the Mississippi Supreme Court where a motion for directed verdict, renewed at the close of all the evidence, is improperly denied is to

close of the State's case in presenting the objection cannot be said to have frustrated the State's interest in avoiding delay and waste of time in the disposition of the case. If this is so, and enforcement of the rule here would serve no substantial state interest, then settled principles would preclude treating the state ground as adequate; giving effect to the contemporaneous-objection rule for its own sake "would be to force resort to an arid ritual of meaningless form." *Staub* v. *City of Baxley,* 355 U. S. 313, 320; see also *Wright* v. *Georgia,* 373 U. S. 284, 289–291.[5]

We have no reason, however, to decide that question now or to express any view on the merits of petitioner's substantial constitutional claim.[6] For even assuming

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dismiss the prosecution. See *Lewis* v. *State,* 198 Miss. 767, 23 So. 2d 401; *Adams* v. *State,* 202 Miss. 68, 30 So. 2d 593; *Smith* v. *State,* 205 Miss. 170, 38 So. 2d 698. The opinion offers no explanation of the mandate; the answer is probably that the court refers only to the motion at the end of the State's case, 154 So. 2d, at 294, 295, and overlooks the fact that it was renewed at the close of all the evidence, just as it overlooks the presence of local counsel. If the motion were not renewed, the appellate court could not dismiss the prosecution. See *Smith* v. *State, supra.*

[5] We do not rely on the principle that our review is not precluded when the state court has failed to exercise discretion to disregard the procedural default. See *Williams* v. *Georgia,* 349 U. S. 375. We read the second Mississippi Supreme Court opinion as holding that there is no such discretion where it appears that petitioner was represented by competent local counsel familiar with local procedure.

[6] Thus, consistently with the policy of avoiding premature decision on the merits of constitutional questions, we intimate no view whether the pertinent controlling federal standard governing the legality of a search or seizure, see *Ker* v. *California,* 374 U. S. 23, is the same as the Mississippi standard applied here, which holds that the wife's consent cannot validate a search as against her husband. Nor do we rule at this time on the question whether petitioner's cross-examination of the officer, before raising any objection, "cured" the effect of the inadmissible testimony; this Court has not yet ruled on the role of harmless error in search and seizure cases. Cf. *Jackson* v. *Denno,* 378 U. S. 368, 376. Of course, nothing occurring after the judge's refusal to honor petitioner's objection could have this curative effect.

that the making of the objection on the motion for a directed verdict satisfied the state interest served by the contemporaneous-objection rule, the record suggests a possibility that petitioner's counsel deliberately bypassed the opportunity to make timely objection in the state court, and thus that the petitioner should be deemed to have forfeited his state court remedies. Although the Mississippi Supreme Court characterized the failure to object as an "honest mistake," 154 So. 2d, at 296 (bound volume), the State, in the brief in support of its Suggestion of Error in the Supreme Court of Mississippi asserted its willingness to agree that its Suggestion of Error "should not be sustained if either of the three counsel [for petitioner] participating in this trial would respond hereto with an affidavit that he did not know that at some point in a trial in criminal court in Mississippi that an objection to such testimony must have been made." The second opinion of the Mississippi Supreme Court does not refer to the State's proposal and thus it appears that the Court did not believe that the issue was properly presented for decision. Another indication of possible waiver appears in an affidavit attached to the State's brief in this Court; there, the respondent asserted that one of petitioner's lawyers stood up as if to object to the officer's tainted testimony, and was pulled down by co-counsel. Again, this furnishes an insufficient basis for decision of the waiver questions at this time. But, together with the proposal in the Suggestion of Error, it is enough to justify an evidentiary hearing to determine whether petitioner "after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate by-passing of state procedures . . . ." *Fay* v. *Noia,* 372 U. S. 391, 439.

The evidence suggests reasons for a strategic move. Both the complaining witness and the police officer testified that the cigarette lighter in the car did not work. After denial of its motion for a directed verdict the defense called a mechanic who had repaired the cigarette lighter. The defense might have planned to allow the complaining witness and the officer to testify that the cigarette lighter did not work, and then, if the motion for directed verdict were not granted, to discredit both witnesses by showing that it did work, thereby persuading the jury to acquit. Or, by delaying objection to the evidence, the defense might have hoped to invite error and lay the foundation for a subsequent reversal. If either reason motivated the action of petitioner's counsel, and their plans backfired, counsel's deliberate choice of the strategy would amount to a waiver binding on petitioner and would preclude him from a decision on the merits of his federal claim either in the state courts or here.[7] Although trial strategy adopted by counsel without prior consultation with an accused will not, where the circumstances are exceptional, preclude the accused from asserting constitutional claims, see *Whitus* v. *Balkcom,* 333 F. 2d 496 (C. A. 5th Cir. 1964), we think that the deliberate bypassing by counsel of the contempora-

[7] The state court's holding that petitioner was estopped because his counsel brought up the question of the car's interior appearance on direct examination and cross-examination, see p. 446, *supra,* amounts to a holding that petitioner waived his federal right. In the absence of a showing that this was prompted by litigation strategy, the present record is insufficient to support such a holding. The cross-examination during the State's case, amounting to little more than a half-page in the printed record, adds little to petitioner's failure to make contemporaneous objection. The evidence brought in on direct examination was only after petitioner had moved for a directed verdict, pointing to the illegal evidence. This would scarcely support a finding of waiver.

neous-objection rule as a part of trial strategy would have that effect in this case.

Only evidence extrinsic to the record before us can establish the fact of waiver, and the State should have an opportunity to establish that fact. In comparable cases arising in federal courts we have vacated the judgments of conviction and remanded for a hearing, suspending the determination of the validity of the conviction pending the outcome of the hearing. See *United States* v. *Shotwell Mfg. Co.,* 355 U. S. 233; *Campbell* v. *United States,* 365 U. S. 85. We recently adopted a similar procedure to determine an issue essential to the fairness of a state conviction. See *Jackson* v. *Denno,* 378 U. S. 368, 393–394; *Boles* v. *Stevenson,* 379 U. S. 43. We think a similar course is particularly desirable here, since a dismissal on the basis of an adequate state ground would not end this case; petitioner might still pursue vindication of his federal claim in a federal habeas corpus proceeding in which the procedural default will not alone preclude consideration of his claim, at least unless it is shown that petitioner deliberately bypassed the orderly procedure of the state courts. *Fay* v. *Noia, supra,* at 438.

Of course, in so remanding we neither hold nor even remotely imply that the State must forgo insistence on its procedural requirements if it finds no waiver. Such a finding would only mean that petitioner could have a federal court apply settled principles to test the effectiveness of the procedural default to foreclose consideration of his constitutional claim. If it finds the procedural default ineffective, the federal court will itself decide the merits of his federal claim, at least so long as the state court does not wish to do so. By permitting the Mississippi courts to make an initial determination of waiver, we serve the causes of efficient administration of criminal justice, and of harmonious federal-state judicial relations. Such a disposition may make unnecessary the processing

of the case through federal courts already laboring under congested dockets,[8] or it may make unnecessary the relitigation in a federal forum of certain issues. See *Townsend* v. *Sain,* 372 U. S. 293, 312–319. The Court is not blind to the fact that the federal habeas corpus jurisdiction has been a source of irritation between the federal and state judiciaries. It has been suggested that this friction might be ameliorated if the States would look upon our decisions in *Fay* v. *Noia, supra,* and *Townsend* v. *Sain, supra,* as affording them an opportunity to provide state procedures, direct or collateral, for a full airing of federal claims.[9] That prospect is better served by a remand than by relegating petitioner to his federal habeas remedy. Therefore, the judgment is vacated and the case is remanded to the Mississippi Supreme Court for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, dissenting.

Petitioner contends that his conviction was based in part on evidence obtained by an allegedly unlawful search in violation of the United States Constitution. I would decide this federal question here and now. I do not believe that the Mississippi procedural trial rule relied on by the State can shut off this Court's review, nor do I find a particle of support for the Court's suggestion that

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[8] Habeas corpus petitions filed by state prisoners in federal district courts increased from 1,903 to 3,531, or 85.5%, from the 1963 to the 1964 fiscal year. Annual Report of the Director, Administrative Office of the United States Courts, p. 46 (1964); our own Miscellaneous Docket, where cases of state prisoners are primarily listed, continues to show substantial increases. The number has increased from 878 for the 1956 Term to 1,532 for the 1963 Term.

[9] See Meador, Accommodating State Criminal Procedure and Federal Postconviction Review, 50 A. B. A. J. 928 (October 1964). And see Brennan, Some Aspects of Federalism, 39 N. Y. U. L. Rev. 945, 957–959 (1964).

petitioner knowingly waived his right to have this constitutional question decided by the state trial court.

As far as the issue of waiver is concerned, I agree with the Mississippi Supreme Court, which considered the failure to object one of the "honest mistakes" which any lawyer might make,[1] since I believe that the record is completely barren of evidence to support a finding of a conscious and intentional waiver of petitioner's due process right to have the trial court decide whether evidence used against him had been unconstitutionally seized. Therefore I would not remand for a hearing by the State Supreme Court or the trial court on the issue of waiver.[2] And even if I considered that a real issue of waiver had been shown and was properly before us, I would decide it here. I cannot agree to the Court's judgment remanding the case to the state courts for a hearing on that issue alone, thereby giving the State a chance to supplement the trial record to save its conviction from constitutional challenge in a summary hearing before a court without a jury. This is the kind of piecemeal prosecution invented and used by this Court several years ago in *United States* v. *Shotwell Mfg. Co.*, 355 U. S. 233. I expressed my dissent from such an unjust, if not unconstitutional, fragmentizing technique in *Shotwell*, 355 U. S., at 246–252,

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[1] 154 So. 2d 289, 296 (bound volume).

[2] I think that the very "evidence" cited in the Court's opinion points up the fact that there was no evidence from which it can be inferred that a conscious waiver was made. I can find no support, as the Court does, from an affidavit filed for the first time as an appendix to the State's brief in this Court, stating that the district attorney who tried the case had seen one of petitioner's counsel start to rise from his chair when the evidence from the search was introduced, but that another of petitioner's counsel gave a "jerk on the coat tail" of the lawyer, "returning him to his seat." It is hard for me to see how one could infer from this "jerk on the coat tail" even a suspicion that petitioner had consciously and knowingly waived his right to object to the evidence offered against him.

and again last year when the Court again applied it in *Jackson* v. *Denno,* 378 U. S. 368, dissenting opinion at 401, 409–410. See also *Boles* v. *Stevenson,* 379 U. S. 43, dissent noted at 46. I have the same objections to "*Shotwell*ing" the present case. And I do not think this dangerous *Shotwell*ing device should be expanded so that the State may invoke it merely by challenging petitioner's counsel here to deny knowledge of Mississippi's procedural rule.

Nor do I believe that Mississippi's procedural rule concerning the stage of a trial at which constitutional objections should be made is the kind of rule that we should accept as an independent, adequate ground for the State Supreme Court's refusal to decide the constitutional question raised by petitioner. In *Williams* v. *Georgia,* 349 U. S. 375, this Court held that where a State allows constitutional questions "to be raised at a late stage and be determined by its courts as a matter of discretion, we are not concluded from assuming jurisdiction and deciding whether the state court action in the particular circumstances is, in effect, an avoidance of the federal right." [3] No Mississippi court opinions or state statutes have been called to our attention that I read as denying *power* of the State Supreme Court, should that court wish to do so, to consider and determine constitutional questions presented at the time this one was. In fact, as I understand counsel for the State, the Supreme Court of Mississippi does have power in its discretion to consider such questions regardless of when they are presented.[4] As that court has said most persuasively:

> "Constitutional rights in serious criminal cases rise above mere rules of procedure. . . . Errors affect-

[3] 349 U. S., at 383 (footnote omitted).

[4] The attorneys for the State of Mississippi have no doubt that the State Supreme Court has this power. When the case was argued

> ing fundamental rights are exceptions to the rule that questions not raised in the trial court cannot be raised for the first time on appeal." *Brooks* v. *State,* 209 Miss. 150, 155, 46 So. 2d 94, 97.

After stating this to be the rule it followed, and citing a number of its past decisions which stated and applied the same rule, the highest court of Mississippi, in the opinion quoted from, because of that rule reversed a conviction obtained through the use of unconstitutionally seized evidence, even though as in the present case there had been no objection made at the time the evidence was presented. The court noted that it had applied this same rule in other cases where proper objection had not been made at the trial, citing its holdings in *Fisher* v. *State,* 145 Miss. 116, 110 So. 361, and *Carter* v. *State,* 198 Miss. 523, 21 So. 2d 404. In all of those cases the defendant appears to have been represented by local counsel. Yet this Court now apparently holds that the state court may, if it chooses to do so, depart from its prior cases and apply a new, stricter rule against this defendant and thereby prevent this Court from reviewing the case to see that his federal constitutional rights were safeguarded. I do not believe the cherished federal constitutional right of a defendant to object to unconstitutionally seized evidence

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before this Court, the following exchange took place between a Justice and counsel for the State:

"Q. Does that mean there is a discretion in the [state] court where it can waive [a failure to object] if it sees fit under the circumstances?

"A. It did so in that case I'm talking about [*Brooks* v. *State, infra* in text] where in several respects the defendant's rights were just completely trampled.

"Q. It means that it's not an absolutely rigid, unbreakable, irrevocable rule?

"A. That's right. That's right, your honor.

"Q. And that the court can waive it if the circumstances in its judgment justify?

"A. That's correct."

offered against him can be cut off irrevocably by state-court discretionary rulings which might be different in particular undefined circumstances in other cases. I think such a procedural device for shutting off our review of questions involving constitutional rights is too dangerous to be tolerated.

For these reasons I dissent from the disposition of this case.

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

Flying banners of federalism, the Court's opinion actually raises storm signals of a most disquieting nature. While purporting to recognize the traditional principle that an adequate procedural, as well as substantive, state ground of decision bars direct review here of any federal claim asserted in the state litigation, the Court, unless I wholly misconceive what is lurking in today's opinion, portends a severe dilution, if not complete abolition, of the concept of "adequacy" as pertaining to state procedural grounds.

In making these preliminary observations I do not believe I am seeing ghosts. For I cannot account for the remand of this case in the face of what is a demonstrably adequate state procedural ground of decision by the Mississippi Supreme Court except as an early step toward extending in one way or another the doctrine of *Fay* v. *Noia*, 372 U. S. 391, to direct review. In that case, decided only two Terms ago, the Court turned its back on history (see dissenting opinion of this writer, at 448 *et seq.*), and did away with the adequate state ground doctrine in federal habeas corpus proceedings.

Believing that any step toward extending *Noia* to direct review should be flushed out and challenged at its earliest appearance in an opinion of this Court, I respectfully dissent.

I.

The Mississippi Supreme Court did not base its ultimate decision upon petitioner's federal claim that his wife's consent could not validate an otherwise improper police search of the family car, but on the procedural ground that petitioner (who was represented by three experienced lawyers) had not objected at the time the fruits of this search were received in evidence. This Court now strongly implies, but does not decide (in view of its remand on the "waiver" issue) that enforcement of the State's "contemporaneous-objection" rule was inadequate as a state ground of decision because the petitioner's motion for a directed verdict of acquittal afforded the trial judge a satisfactory opportunity to take "appropriate corrective action" with reference to the allegedly inadmissible evidence. Thus, it is suggested, this may be a situation where "giving effect to the contemporaneous-objection rule for its own sake 'would be to force resort to an arid ritual of meaningless form.' " (*Ante*, p. 449.)

From the standpoint of the realities of the courtroom, I can only regard the Court's analysis as little short of fanciful. The petitioner's motion for a verdict could have provoked one of three courses of action by the trial judge, none of which can reasonably be considered as depriving the State's contemporaneous-objection rule of its capacity to serve as an adequate state ground.

1. The trial judge might have granted the directed verdict. But had this action been appropriate, the Supreme Court of Mississippi, in its first opinion, would have ordered the prosecution dismissed. Since it did not, and the matter is entirely one of state law, further speculation by this Court should be foreclosed.[1]

[1] The court, as a matter of state law, could have found (a) that there was sufficient corroborative evidence, (b) that none was necessary, or (c) that retrial was necessary to prevent defendants in crim-

2. The trial judge might have directed a mistrial. The State's interest in preventing mistrials through the contemporaneous-objection requirement is obvious.

3. The remaining course of action is the example given by the Court; the trial judge could have denied the motion for a directed verdict, but, *sua sponte,* called for elaboration of the argument, determined that the search of the automobile was unconstitutional, and given cautionary instructions to the jury to disregard the inadmissible evidence when the case was submitted to it.

The practical difficulties with this approach are manifestly sufficient to show a substantial state interest in their avoidance, and thus to show an "adequate" basis for the State's adherence to the contemporaneous-objection rule. To make my point I must quote the motion for directed verdict in full.

> "Atty Carter: We're going to make a motion, your Honor, for a directed verdict in this case. We are going to base our motion on several grounds. First, we think that this whole process by which this defendant was brought or attempted to be brought into the jurisdiction of this Court is illegal and void. There is nothing in the record in this case to show that the warrant that was issued against this defendant was based upon—it must be based in this State and any other State on an affidavit, on a proper affidavit or a proper complaint by any party. True, there is some testimony that some affidavit was made, and the complaining witness said so, but in the rec-

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inal cases from hanging back until the completion of the State's case and then for the first time moving to strike a piece of evidence crucial to getting the case to the jury.

The Court's suggestion (*ante,* p. 449, n. 4) that we may proceed on the speculation that the Mississippi Supreme Court "overlooked" the renewal of the motion for directed verdict made at the completion of the case hardly requires comment.

ord in this case which is before the Court, no such affidavit is present and there is a verification from the Justice of the Peace that no such affidavit is present in this case; therefore, we contend that the warrant under which this defendant was subjected to arrest was illegal and without force and effect. Secondly, we contend that the warrant having been issued and the testimony of this Mr. Collins on the stand to the effect that after he had placed this man under arrest, he then proceeded to go and search his car, and clearly, this is a violation of his rights under the Fourth Amendment, and it is unlawful search and seizure so the evidence that they have secured against this defendant is illegal and unlawful. Finally, we contend that on the basis of these facts that the affidavit under which the defendant was tried before the Justice of the Peace Court, as we contended yesterday, based upon the statement that was sworn to by the County Attorney, not on information and belief, but directly that this is void and defective and could give the Justice of the Peace no jurisdiction in this case. We contend under these circumstances that the State—that this is an illegal process; that this man's rights have been violated under the Fourteenth Amendment, and finally, we contend that the State has failed to prove beyond a reasonable doubt to any extent to implicate this man in this case. Now, on these basis [*sic*] we contend that this whole process is illegal and void, and that it has permeated and contended [*sic*] the whole process insofar as the jurisdiction of this Court is concerned or jurisdiction over this individual is concerned; therefore, he should be released, and we move for a directed verdict.

"Court: Motion overruled. Bring the jury back."

The motion was renewed at the completion of the defense in the following language:

> "Atty Carter: Your Honor, at this time at the close of the case we want to make a motion for a directed verdict. We base it on the grounds and the reasons which we set forth in our motion for a directed verdict at the close of the State's case. We make it now at the close of the entire case on those grounds and on the grounds that the evidence has not shown beyond any reasonable doubt under the law that the defendant is guilty of the charge. We therefore make a motion for a directed verdict at this time.
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> "Court: Motion is overruled."

The single sentence in the first motion (*supra,* p. 460) is the only direct reference to the search and seizure question from beginning to end of the trial.

As every trial lawyer of any experience knows, motions for directed verdicts are generally made as a matter of course at the close of the prosecution's case, and are generally denied without close consideration unless the case is clearly borderline. It is simply unrealistic in this context to have expected the trial judge to pick out the single vague sentence from the directed verdict motion and to have acted upon it with the refined imagination the Court would require of him. Henry's three lawyers apparently regarded the search and seizure claim as makeweight. They had not mentioned it earlier in the trial and gave no explanation for their laxity in raising it. And when they did mention it, they did so in a cursory and conclusional sentence placed in a secondary position in a directed verdict motion. The theory underlying the search and seizure argument—that a wife's freely given permission to search the family car is invalid—is subtle to say the very least, and as the matter

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was presented to the trial judge it would have been extraordinary had he caught it, or even realized that there was a serious problem to catch. But this is not all the Court would require of him. He must, in addition, realize that despite the inappropriateness of granting the directed verdict requested of him, he could partially serve the cause of the defense by taking it upon himself to frame and give cautionary instructions to the jury to disregard the evidence obtained as fruits of the search.[2]

Contrast with this the situation presented by a contemporaneous objection. The objection must necessarily be directed to the single question of admissibility; the judge must inevitably focus on it; there would be no doubt as to the appropriate form of relief, and the effect of the trial judge's decision would be immediate rather than remote. Usually the proper timing of an objection will force an elaboration of it. Had objection been made in this case during the officer's testimony about the search, it would have called forth of its own force the specific answer that the wife had given her permission and, in turn, the assertion that the permission was ineffective. The issue, in short, would have been advertently

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[2] Furthermore, even if counsel had fully elaborated the argument and had made it in the context of a motion to strike rather than a motion for directed verdict, the trial judge could properly have exercised his discretion (as the Mississippi Supreme Court did) and denied any relief. This power is recognized in trial judges in the federal system in order to prevent the "ambushing" of a trial through the withholding of an objection that should have been made when questionable evidence was first introduced. Federalism is turned upside down if it is denied to judges in the state systems. See Fed. Rules Crim. Proc. 41 (e) and 26; *United States* v. *Milanovich,* 303 F. 2d 626, cert. denied, 371 U. S. 876; *Hollingsworth* v. *United States,* 321 F. 2d 342, 350; *Isaacs* v. *United States,* 301 F. 2d 706, 734–735, cert. denied, 371 U. S. 818; *United States* v. *Murray,* 297 F. 2d 812, 818, cert. denied, 369 U. S. 828; *Metcalf* v. *United States,* 195 F. 2d 213, 216–217.

faced by the trial judge and the likelihood of achieving a correct result maximized.

Thus the state interest which so powerfully supports the contemporaneous-objection rule is that of maximizing correct decisions and concomitantly minimizing errors requiring mistrials and retrials. The alternative for the State is to reverse a trial judge who, from a long motion, fails to pick out and act with remarkable imagination upon a single vague sentence relating to admissibility of evidence long since admitted. A trial judge is a decision-maker, not an advocate. To force him out of his proper role by requiring him to coax out the arguments and imaginatively reframe the requested remedies for the counsel before him is to place upon him more responsibility than a trial judge can be expected to discharge.

There was no "appropriate corrective action" that could have realistically satisfied the purposes of the contemporaneous-objection rule. Without question the State had an interest in maintaining the integrity of its procedure, and thus without doubt reliance on the rule in question is "adequate" to bar direct review of petitioner's federal claim by this Court.[3]

II.

The real reason for remanding this case emerges only in the closing pages of the Court's opinion. It is pointed out that even were the contemporaneous-objection rule considered to be an adequate state ground, this would not, under *Fay* v. *Noia,* preclude consideration of Henry's fed-

[3] As the first opinion by the Mississippi Supreme Court shows, there is discretion in certain circumstances to lower the procedural bar. It does not follow that this Court is completely free to exercise that discretion. Even in cases from lower federal courts we do so only if there has been an abuse. If, in order to insulate its decisions from reversal by this Court, a state court must strip itself of the discretionary power to differentiate between different sets of circumstances, the rule operates in a most perverse way.

eral claim in federal habeas corpus unless it were made to appear that Henry had deliberately waived his federal claim in the state proceedings. It is then said that in the interest of "efficient administration of criminal justice" and "harmonious" relations between the federal and state judiciaries the Mississippi courts should be given the opportunity to pass, in the first instance, on the waiver issue; the prospect is entertained that such action on the part of this Court will encourage the States to grasp the "opportunity" afforded by *Fay* v. *Noia* and *Townsend* v. *Sain* by providing "state procedures, direct or collateral, for a full airing of federal claims." It is "suggested" that were this to be done "irritation" and "friction" respecting the exercise of federal habeas corpus power *vis-à-vis* state convictions "might be ameliorated."

What does all this signify? The States are being invited to voluntarily obliterate all state procedures, however conducive they may be to the orderly conduct of litigation, which might thwart state-court consideration of federal claims. But what if the States do not accept the invitation? Despite the Court's soft-spoken assertion that "settled principles" will be applied in the future, I do not think the intimation will be missed by any discerning reader of the Court's opinion that at the least a substantial dilution of the adequate state-ground doctrine may be expected. A contrary prediction is belied by the implication of the opinion that under "settled principles," the contemporaneous-objection rule relied upon in this case could be declared inadequate.

To me this would not be a move toward "harmonious" federalism; any further disrespect for state procedures, no longer cognizable at all in federal habeas corpus, would be the very antithesis of it. While some may say that, given *Fay* v. *Noia*, what the Court is attempting to do is justifiable as a means of promoting "efficiency" in the administration of criminal justice, it is the sort of

efficiency which, though perhaps appropriate in some watered-down form of federalism, is not congenial to the kind of federalism I had supposed was ours. I venture to say that to all who believe the federal system as we have known it to be a priceless aspect of our Constitutionalism, the spectre implicit in today's decision will be no less disturbing than what the Court has already done in *Fay* v. *Noia*.

Believing that the judgment below rests on an adequate independent state ground, I would dismiss the writ issued in this case as improvidently granted.

TURNER *v.* LOUISIANA.

CERTIORARI TO THE SUPREME COURT OF LOUISIANA.

No. 53. Argued November 19, 1964.—Decided January 18, 1965.

During petitioner's three-day murder trial, which resulted in his being found guilty and being sentenced to death, two deputy sheriffs who were the principal prosecution witnesses had custody of the jurors and as a result were in close and continuous association with them, freely mingling and conversing with them throughout the trial period. Though disapproving of the practice of officers who are witnesses having charge of the jury, the State Supreme Court found no prejudice to petitioner and affirmed his conviction. *Held:* the close and continuous association between key witnesses and the jury deprived the petitioner of the right to trial by an impartial jury which the Due Process Clause of the Fourteenth Amendment requires. Pp. 471–474.

244 La. 447, 152 So. 2d 555, reversed and remanded.

Allen B. Pierson, Jr., argued the cause for petitioner. With him on the brief was *Burrell J. Carter.*

Leonard E. Yokum argued the cause for respondent. With him on the brief were *Jack P. F. Gremillion,* Attorney General of Louisiana, *M. E. Culligan,* Assistant Attorney General, and *Duncan S. Kemp.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner, Wayne Turner, was indicted in Tangipahoa Parish, Louisiana, upon a charge of murder committed during the course of a robbery. After a three-day trial a jury found him guilty as charged. He was sentenced to death. The conviction was affirmed by the Supreme Court of Louisiana,[1] and we granted certiorari [2] to consider the claim that the circumstances attending

[1] 244 La. 447, 152 So. 2d 555.

[2] 376 U. S. 949.

the trial were such as to deprive Turner of a right secured to him by the Fourteenth Amendment.

The two principal witnesses for the prosecution at the trial were Vincent Rispone and Hulon Simmons. Both were deputy sheriffs of Tangipahoa Parish. On direct examination Rispone described in detail an investigation he said he had made at the scene of the murder. He further testified that he and Simmons later took Turner into custody, and that Turner had led them to a place in the woods where the cartridge clip from the murder weapon was recovered. Simmons corroborated Rispone's testimony about apprehending Turner and finding the cartridge clip, and also told of certain damaging admissions which he said had been made by Turner at the time of his apprehension. In addition, Simmons described the circumstances under which he said he had later prevailed upon Turner to make a written confession. This confession was introduced in evidence. Both Rispone and Simmons were cross-examined at length with respect to all aspects of their testimony. Turner did not take the witness stand in his own behalf.[3]

The members of the jury were sequestered in accordance with Louisiana law during the course of the trial,[4] and were "placed in charge of the Sheriff" by the

[3] Out of the presence of the jury, Turner did testify upon the issue of the voluntariness of his confession, stating among other things that he had had no sleep and nothing to eat for a period of 48 hours before he confessed, but he was not in custody during much of that period. He also stated that he was not advised of his "legal rights" before he confessed.

[4] "From the moment of the acceptance of any juror until the rendition of verdict or the entry of a mistrial, as the case may be, the jurors shall be kept together under the charge of an officer in such a way as to be secluded from all outside communication; provided that in cases not capital the judge may, in his discretion, permit the jurors to separate at any time before the actual delivery of his charge." La. Rev. Stat. § 15:394.

trial judge. In practice, this meant that the jurors were continuously in the company of deputy sheriffs of Tangipahoa Parish during the three days that the trial lasted. The deputies drove the jurors to a restaurant for each meal, and to their lodgings each night. The deputies ate with them, conversed with them, and did errands for them.[5]

Two of the deputy sheriffs who were in this close and continual association with the jurors were Vincent Rispone and Hulon Simmons. Turner's counsel moved for a mistrial when Rispone testified as a witness for the prosecution, and made the same motion when Simmons testified. The brief hearings on these motions established that both Rispone and Simmons had in fact freely mingled and conversed with the jurors in and out of the courthouse during the trial.[6] The court denied the mo-

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[5] In adjourning court after the first day of trial, the judge told the jury: "Anything that you need you will have to obtain through the Deputy, and any calls that you want to make the Deputies will have to make for you."

[6] Rispone testified in part as follows:

"Q. Have you been assisting the other Deputies during the course of this trial, in retiring the Jury and in caring for their needs? A. I have.

"Q. As much as any other Deputy on the Sheriff's staff? A. I would say as much.

"Q. Isn't it a fact that you have been sitting in this vicinity through the course of the trial? A. That is a fact.

"Q. Have you spoken at any time during the course of the trial to any of the Jurors? About anything? A. About anything?

"By the Counsel: Yes. A. I have.

"Q. In connection with providing for their needs . . . seeing that they were comfortable . . . showing them when to go into the Jury Room et cetera? A. Yes."

Simmons testified in part as follows:

"Q. Dy. Simmons have you been with the Jury during the course of this trial? A. I have been with them, yes sir.

[*Footnote 6 continued on p. 469*]

tions, however, upon the ground that there was no showing that either deputy had talked with any member of the jury about the case itself.

"Q. On how many occasions, do you know? A. I can't answer that.

"Q. A number of occasions? A. I have been with them or around them throughout the trial.

"Q. Speaking to them about various and sundry matters? A. Yes sir.

"Q. Have you ever discussed this case with any one of them? A. No sir.

"Q. But you have spoken to them? A. I have talked to them, yes sir.

"Q. Made the acquaintance of some of them? A. I knew most of them.

"Q. But, you have made new acquaintances? A. I would say yes. One or two that I didn't know.

"Q. Do you get along well with the Jury Members? A. I try to get along with everbody [*sic*].

"Q. There has been no friction in your relationship during these last two days? A. Not as far as I know Sir.

"Q. Have you stayed here any night and watched over the Jury? A. No sir.

"Q. Have you had several meals with the Jury? A. I have had at least two meals with them.

"Q. Sitting at the same table with them? A. That is correct.

"Q. You have ridden in automobiles with them to and from the restaurant? A. I have.

"Q. Dy. Simmons you are the Chief Deputy? A. Chief Criminal Deputy, yes sir.

"Q. As such you have a position superior to the other Deputies on the Staff? In other words, are you considered the boss or the supervisor, or the superior of the other Deputies? A. I make an effort to supervise them, yes sir.

"Q. That is your job? A. That is my job.

"Q. In the conduct of the Jury is it not true that you have been in charge of this? A. Yes sir, I would say so.

"Q. You are the Chief Deputy Sheriff handling the Jury? A. Yes sir. I designate certain Deputies to do certain things with the Jury.

"Q. And some of the things you do yourself? A. That is correct."

The court did not direct Rispone or Simmons to cease associating with the jury, and, so far as the record shows, the association continued for the remainder of the trial. After the jury returned its verdict of guilty, Turner's counsel filed a motion for a new trial upon substantially the same ground as had been urged in support of the earlier motions for a mistrial—that the two principal witnesses for the prosecution "were in actual charge of the jury; that they were physically present with the jurors in and out of the jury room, in automobiles and in eating places with the jury members, mingling with the jurors . . . ." This motion was denied without any further evidentiary hearing, and Turner was sentenced to death by electrocution.

The bill of exceptions filed by the trial court, upon which Turner's appeal to the Supreme Court of Louisiana was based, clearly included a Fourteenth Amendment claim.[7] In affirming the conviction, the State Supreme Court said:

> "As we have pointed out, under the jurisprudence of this court unless there is a showing of prejudice, a conviction will not be set aside simply because officers who are witnesses in the case have the jury under their charge. This court is inclined to look upon the practice with disapproval, however, because in such cases there may be prejudice of a kind exceedingly difficult to establish. The practice should be especially condemned where, for instance, the testimony of the officer and that of the accused are in direct conflict and the jury is called upon to weigh the credibility of each, or where the officer is the principal

[7] After reciting in detail what had been shown as to Rispone's and Simmons' fraternization with the jurors throughout the trial, the bill of exceptions stated "that the presence of state's witnesses, whether they be deputies or not, is of itself prejudicial to the constitutional rights of Defendant and violative of due process of law."

> prosecuting witness." 244 La., at 454; 152 So. 2d, at 557–558.

While thus casting its judgment in terms of state law, the court's affirmance of Turner's conviction necessarily rejected his claim that the conduct of the trial had violated the Fourteenth Amendment.[8] We hold otherwise with respect to the federal constitutional issue, and accordingly reverse the judgment before us.

This case does not involve the question whether the Fourteenth Amendment requires a State to accord a jury trial to a defendant charged with murder.[9] The question, rather, goes to the nature of the jury trial which the Fourteenth Amendment commands when trial by jury is what the State has purported to accord. We had occasion to consider this basic question less than four years ago in *Irvin* v. *Dowd,* 366 U. S. 717. That case did not involve the conduct of the trial itself, for there we found that the conviction could not constitutionally stand because the jury had been infected by prejudice before the actual trial proceedings had commenced. But what the Court said in that case is controlling here:

> "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal

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[8] The court's opinion did discuss and seemingly rely on a case decided by the United States Court of Appeals for the Tenth Circuit, *Odell* v. *Hudspeth,* 189 F. 2d 300. In that case, an appeal from a federal district court's denial of habeas corpus to a prisoner convicted in a Kansas court, it was held on facts apparently similar to those in the present case that there had been no violation of the Fourteenth Amendment.

[9] It appears that every state constitution provides for trial by jury. See, *e. g.,* Alaska Const., Art. 1, § 11; Idaho Const., Art. 1, § 7; Nevada Const., Art. I, § 3; North Dakota Const., Art. I, § 7; see Columbia University Legislative Drafting Research Fund, Index Digest of State Constitutions, 579 (1959).

> standards of due process. *In re Oliver,* 333 U. S. 257; *Tumey* v. *Ohio,* 273 U. S. 510. 'A fair trial in a fair tribunal is a basic requirement of due process.' *In re Murchison,* 349 U. S. 133, 136. In the ultimate analysis, only the jury can strip a man of his liberty or his life. In the language of Lord Coke, a juror must be as 'indifferent as he stands unsworne.' Co. Litt. 155b. His verdict must be based upon the evidence developed at the trial. Cf. *Thompson* v. *City of Louisville,* 362 U. S. 199. This is true, regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies. It was so written into our law as early as 1807 by Chief Justice Marshall in 1 Burr's Trial 416 . . . ." 366 U. S., at 722.

The requirement that a jury's verdict "must be based upon the evidence developed at the trial" goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury.[10] "The jury is an essential instrumentality—an appendage—of the court, the body ordained to pass upon guilt or innocence. Exercise of calm and informed judgment by its members is essential to proper enforcement of law." *Sinclair* v. *United States,* 279 U. S. 749, 765. Mr. Justice Holmes stated no more than a truism when he observed that "Any judge who has sat with juries knows that in spite of forms they are extremely likely to be impregnated by the environing atmosphere." *Frank* v. *Mangum,* 237 U. S. 309, at 349 (dissenting opinion).

In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that the "evi-

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[10] The Sixth Amendment provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the State and district wherein the crime shall have been committed . . . ." (Emphasis supplied.)

dence developed" against a defendant shall come from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel. What happened in this case operated to subvert these basic guarantees of trial by jury. It is to be emphasized that the testimony of Vincent Rispone and Hulon Simmons was not confined to some uncontroverted or merely formal aspect of the case for the prosecution. On the contrary, the credibility which the jury attached to the testimony of these two key witnesses must inevitably have determined whether Wayne Turner was to be sent to his death. To be sure, their credibility was assailed by Turner's counsel through cross-examination in open court. But the potentialities of what went on outside the courtroom during the three days of the trial may well have made these courtroom proceedings little more than a hollow formality. Cf. *Rideau* v. *Louisiana,* 373 U. S. 723.

It is true that at the time they testified in open court Rispone and Simmons told the trial judge that they had not talked to the jurors about the case itself. But there is nothing to show what the two deputies discussed in their conversations with the jurors thereafter. And even if it could be assumed that the deputies never did discuss the case directly with any members of the jury, it would be blinking reality not to recognize the extreme prejudice inherent in this continual association throughout the trial between the jurors and these two key witnesses for the prosecution. We deal here not with a brief encounter, but with a continuous and intimate association throughout a three-day trial—an association which gave these witnesses an opportunity, as Simmons put it, to renew old friendships and make new acquaintances among the members of the jury.[11]

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[11] See note 6, *supra.*

It would have undermined the basic guarantees of trial by jury to permit this kind of an association between the jurors and two key prosecution witnesses who were *not* deputy sheriffs. But the role that Simmons and Rispone played as deputies made the association even more prejudicial. For the relationship was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial.[12] And Turner's fate depended upon how much confidence the jury placed in these two witnesses.

The judgment is reversed and the case is remanded to the Supreme Court of Louisiana for further proceedings not inconsistent with this opinion.

It is so ordered.

MR. JUSTICE CLARK, dissenting.

It is with regret that I dissent in this case. If I were sitting on the Supreme Court of Louisiana I would vote to reverse it and do everything possible to put a stop to the practice of permitting an officer who testifies in a case also to be in charge of the jury.

However, I cannot say that where no prejudice whatever is shown—as is the case here—the practice reaches federal due process proportions. I understand that it has the approval of the highest courts of a number of other jurisdictions [1] and is recognized by Wharton, American Jurisprudence and Corpus Juris Secundum.[2] Indeed, in

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[12] See notes 5 and 6, *supra*.

[1] *E. g., Hendrix* v. *State,* 200 Ark. 973, 141 S. W. 2d 852 (1940); *State* v. *Hart,* 226 N. C. 200, 37 S. E. 2d 487 (1946); *Newby* v. *State,* 17 Okla. Cr. R. 291, 188 P. 124 (1920); *Underwood* v. *State,* 118 Tex. Cr. R. 348, 39 S. W. 2d 45 (1931).

[2] 5 Wharton's Criminal Law and Procedure § 2109, at 290, n. 2 (Anderson ed. 1957); 53 Am. Jur., Trial, § 858, at 625; 23A C. J. S., Criminal Law, § 1352, at 946. See also Ann. Cas. 1912 C, at 882; Ann. Cas. 1917 B, at 254.

a similar case from the Tenth Circuit,[3] in which this Court denied certiorari in 1951, the court upheld the conviction on the ground that there was no evidence that a testifying sheriff had acted irregularly in performing as custodian of the jury.

In view of this widespread acceptance of the practice I cannot say that it is violative of the Fourteenth Amendment's Due Process Clause. Cf. my dissent in *Rideau* v. *Louisiana,* 373 U. S. 723 (1963).

[3] *Odell* v. *Hudspeth,* 189 F. 2d 300, cert. denied, 342 U. S. 873 (1951).

STANFORD *v.* TEXAS.

CERTIORARI TO THE FIFTY-SEVENTH JUDICIAL DISTRICT COURT OF TEXAS.

No. 40. Argued November 12, 1964.—Decided January 18, 1965.

Pursuant to a Texas statute a district judge issued a warrant describing petitioner's home and authorizing the search and seizure there of "books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas." Officers conducted a search for more than four hours, seizing more than 2,000 items, including stock in trade of petitioner's business and personal books, papers and documents, but no "records of the Communist Party" or any "party lists and dues payments." Petitioner filed a motion with the magistrate who issued the warrant to have it annulled and the property returned; but the motion was denied. *Held:* The protections of the Fourth Amendment are by the Fourteenth Amendment guaranteed against invasion by the States, and the States may not constitutionally issue general warrants which do not describe with particularity the things to be seized, a requirement of the most scrupulous exactitude where the seizure also impinges upon First Amendment freedoms. Pp. 480–486.

Order vacated and cause remanded.

Maury Maverick, Jr., and *John J. McAvoy* argued the cause for petitioner. With them on the briefs was *Melvin L. Wulf*.

James E. Barlow and *Hawthorne Phillips* argued the cause for respondent. With them on the brief were *Waggoner Carr*, Attorney General of Texas, and *Howard M. Fender* and *Lonny F. Zwiener*, Assistant Attorneys General.

MR. JUSTICE STEWART delivered the opinion of the Court.

On December 27, 1963, several Texas law-enforcement officers presented themselves at the petitioner's San

Antonio home for the purpose of searching it under authority of a warrant issued by a local magistrate. By the time they had finished, five hours later, they had seized some 2,000 of the petitioner's books, pamphlets, and papers. The question presented by this case is whether the search and seizure were constitutionally valid.

The warrant was issued under § 9 of Art. 6889–3A of the Revised Civil Statutes of Texas. That Article, enacted in 1955 and known as the Suppression Act, is a sweeping and many-faceted law which, among other things, outlaws the Communist Party and creates various individual criminal offenses, each punishable by imprisonment for up to 20 years. Section 9 authorizes the issuance of a warrant "for the purpose of searching for and seizing any books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings, or any written instruments showing that a person or organization is violating or has violated any provision of this Act." The section sets forth various procedural requirements, among them that "if the premises to be searched constitute a private residence, such application for a search warrant shall be accompanied by the affidavits of two credible citizens."

The application for the warrant was filed in a Bexar County court by the Criminal District Attorney of that County. It recited that the applicant

> ". . . has good reason to believe and does believe that a certain place and premises in Bexar County, Texas, described as two white frame houses and one garage, located at the address of 1118 West Rosewood, in the City of San Antonio, Bexar County, Texas, and being the premises under the control and in charge of John William Stanford, Jr., is a place where books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments

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concerning the Communist Party of Texas, and the operations of the Communist Party in Texas are unlawfully possessed and used in violation of Articles 6889–3 [1] and 6889–3A, Revised Civil Statutes of the State of Texas, and that such belief of this officer is founded upon the following information:

"That this officer has received information from two credible persons that the party named above has such books and records in his possession which are books and records of the Communist Party including party lists and dues payments, and in addition other items listed above. That such information is of recent origin and has been confirmed by recent mailings by Stanford on the 12th of December, 1963 of pro-Communist material."

Attached to the application was an affidavit signed by two Assistant Attorneys General of Texas. The affidavit repeated the words of the application, except that the basis for the affiants' belief was stated to be as follows:

"Recent mailings by Stanford on the 12th of December, 1963, of material from his home address, such material being identified as pro-Communist material and other information received in the course of investigation that Stanford has in his possession the books and records of the Texas Communist Party."

The district judge issued a warrant which specifically described the premises to be searched, recited the allegations of the applicant's and affiants' belief that the premises were "a place where books, records, pamphlets,

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[1] Article 6889–3 of the Revised Civil Statutes of Texas, enacted in 1951 and known as the Texas Communist Control Law, provides, among other things, that various people and organizations defined by the law who fail to register with the Texas Department of Public Safety are guilty of criminal offenses punishable by imprisonment of up to 10 years.

cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas are unlawfully possessed and used in violation of Article 6889–3 and Article 6889–3A, Revised Civil Statutes of the State of Texas," and ordered the executing officers "to enter immediately and search the above described premises for such items listed above unlawfully possessed in violation of Article 6889–3 and Article 6889–3A, Revised Civil Statutes, State of Texas, and to take possession of same."

The warrant was executed by the two Assistant Attorneys General who had signed the affidavit, accompanied by a number of county officers. They went to the place described in the warrant, which was where the petitioner resided and carried on a mail order book business under the trade name "All Points of View." [2] The petitioner was not at home when the officers arrived, but his wife was, and she let the officers in after one of them had read the warrant to her.

After some delay occasioned by an unsuccessful effort to locate the petitioner in another part of town, the search began. Under the general supervision of one of the Assistant Attorneys General the officers spent more than four hours in gathering up about half the books they found in the house. Most of the material they took came from the stock in trade of the petitioner's business, but they took a number of books from his personal library as well. The books and pamphlets taken comprised approximately 300 separate titles, in addition to numerous issues of several different periodicals. Among the books taken were works by such diverse writers as Karl Marx, Jean Paul Sartre, Theodore Draper, Fidel Castro, Earl

[2] The petitioner had obtained a certificate to transact business under this trade name in accordance with the Texas "Assumed Name Law."

Browder, Pope John XXIII, and Mr. Justice Hugo L. Black. The officers also took possession of many of the petitioner's private documents and papers, including his marriage certificate, his insurance policies, his household bills and receipts, and files of his personal correspondence. All this material was packed into 14 cartons and hauled off to an investigator's office in the county courthouse. The officers did not find any "records of the Communist Party" or any "party lists and dues payments."

The petitioner filed a motion with the magistrate who had issued the warrant, asking him to annul the warrant and order the return of all the property which had been seized under it. The motion asserted several federal constitutional claims. After a hearing the motion was denied without opinion. This order of denial was, as the parties agree, final and not appealable or otherwise reviewable under Texas law. See *Ex parte Wolfson,* 127 Tex. Cr. R. 277, 75 S. W. 2d 440. Accordingly, we granted certiorari, 377 U. S. 989. See *Thompson* v. *City of Louisville,* 362 U. S. 199, 202–203.

The petitioner has attacked the constitutional validity of this search and seizure upon several grounds. We rest our decision upon just one, without pausing to assess the substantiality of the others. For we think it is clear that this warrant was of a kind which it was the purpose of the Fourth Amendment to forbid—a general warrant. Therefore, even accepting the premise that some or even all of the substantive provisions of Articles 6889–3 and 6889–3A of the Revised Civil Statutes of Texas are constitutional and have not been pre-empted by federal law,[3] even accepting the premise that the warrant sufficiently specified the offense believed to have been committed and was issued upon probable cause,[4] the

[3] See *Pennsylvania* v. *Nelson,* 350 U. S. 497.

[4] See *Aguilar* v. *Texas,* 378 U. S. 108.

magistrate's order denying the motion to annul the warrant and return the property must nonetheless be set aside.

It is now settled that the fundamental protections of the Fourth Amendment are guaranteed by the Fourteenth Amendment against invasion by the States. *Wolf* v. *Colorado,* 338 U. S. 25, 27; *Mapp* v. *Ohio,* 367 U. S. 643; *Ker* v. *California,* 374 U. S. 23. The Fourth Amendment provides that "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.*" (Emphasis supplied.)

These words are precise and clear. They reflect the determination of those who wrote the Bill of Rights that the people of this new Nation should forever "be secure in their persons, houses, papers, and effects" from intrusion and seizure by officers acting under the unbridled authority of a general warrant. Vivid in the memory of the newly independent Americans were those general warrants known as writs of assistance under which officers of the Crown had so bedeviled the colonists. The hated writs of assistance had given customs officials blanket authority to search where they pleased for goods imported in violation of the British tax laws. They were denounced by James Otis as "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book," because they placed "the liberty of every man in the hands of every petty officer." The historic occasion of that denunciation, in 1761 at Boston, has been characterized as "perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country. 'Then and there,' said John Adams, 'then and there was the first scene of the first act of opposition to the arbi-

trary claims of Great Britain. Then and there the child Independence was born.'" *Boyd* v. *United States*, 116 U. S. 616, 625.

But while the Fourth Amendment was most immediately the product of contemporary revulsion against a regime of writs of assistance, its roots go far deeper. Its adoption in the Constitution of this new Nation reflected the culmination in England a few years earlier of a struggle against oppression which had endured for centuries. The story of that struggle has been fully chronicled in the pages of this Court's reports,[5] and it would be a needless exercise in pedantry to review again the detailed history of the use of general warrants as instruments of oppression from the time of the Tudors, through the Star Chamber, the Long Parliament, the Restoration, and beyond.

What is significant to note is that this history is largely a history of conflict between the Crown and the press. It was in enforcing the laws licensing the publication of literature and, later, in prosecutions for seditious libel that general warrants were systematically used in the sixteenth, seventeenth, and eighteenth centuries. In Tudor England officers of the Crown were given roving commissions to search where they pleased in order to suppress and destroy the literature of dissent, both Catholic and Puritan.[6] In later years warrants were sometimes more specific in content, but they typically authorized the arrest and search of the premises of all persons connected with the publication of a particular libel, or

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[5] See *Marcus* v. *Search Warrant*, 367 U. S. 717, 724–729; *Frank* v. *Maryland*, 359 U. S. 360, 363–366 and 376–377 (dissenting opinion); see also *Boyd* v. *United States*, 116 U. S. 616.

[6] See Siebert, Freedom of the Press in England, 1476–1776, pp. 83, 85–86, 97.

the arrest and seizure of all the papers of a named person thought to be connected with a libel.[7]

It was in the context of the latter kinds of general warrants that the battle for individual liberty and privacy was finally won—in the landmark cases of *Wilkes* v. *Wood*[8] and *Entick* v. *Carrington*.[9] The *Wilkes* case arose out of the Crown's attempt to stifle a publication called The North Briton, anonymously published by John Wilkes, then a member of Parliament—particularly issue No. 45 of that journal. Lord Halifax, as Secretary of State, issued a warrant ordering four of the King's messengers "to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers."[10] "Armed with their roving commission, they set forth in quest of unknown offenders; and unable to take evidence, listened to rumors, idle tales, and curious guesses. They held in their hands the liberty of every man whom they were pleased to suspect."[11] Holding that this was "a ridiculous warrant against the whole English nation,"[12] the Court of Common Pleas awarded Wilkes damages against the Secretary of State. John Entick was the author of a publication called Monitor or British Freeholder. A warrant was issued specifically naming him and that publication, and authorizing his arrest for seditious libel and the seizure of his "books and papers." The King's messengers executing the warrant ransacked Entick's home for four hours and carted

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[7] See Siebert, *supra,* pp. 374–376.

[8] 19 How. St. Tr. 1153 (1763).

[9] 19 How. St. Tr. 1029 (1765).

[10] See Lasson, Development of the Fourth Amendment, p. 43.

[11] II May's Constitutional History of England, 246 (Am. ed. 1864).

[12] *Id.,* at 247.

away quantities of his books and papers. In an opinion which this Court has characterized as a wellspring of the rights now protected by the Fourth Amendment,[13] Lord Camden declared the warrant to be unlawful. "This power," he said, "so assumed by the secretary of state is an execution upon all the party's papers, in the first instance. His house is rifled; his most valuable secrets are taken out of his possession, before the paper for which he is charged is found to be criminal by any competent jurisdiction, and before he is convicted either of writing, publishing, or being concerned in the paper." *Entick* v. *Carrington*.[14] Thereafter, the House of Commons passed two resolutions condemning general warrants, the first limiting its condemnation to their use in cases of libel, and the second condemning their use generally.[15]

This is the history which prompted the Court less than four years ago to remark that "[t]he use by government of the power of search and seizure as an adjunct to a system for the suppression of objectionable publications is not new." *Marcus* v. *Search Warrant,* 367 U. S. 717, at 724. "This history was, of course, part of the intellectual matrix within which our own constitutional fabric was shaped. The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Id.,* at 729. As Mr. Justice Douglas has put it, "The commands of our First Amend-

[13] "As every American statesman, during our revolutionary and formative period as a nation, was undoubtedly familiar with this monument of English freedom, and considered it as the true and ultimate expression of constitutional law, it may be confidently asserted that its propositions were in the minds of those who framed the Fourth Amendment to the Constitution . . . ." *Boyd* v. *United States,* 116 U. S. 616, at 626–627.

[14] 19 How. St. Tr., at 1064.

[15] See XVI Hansard's Parliamentary History of England 207 *et seq.*

ment (as well as the prohibitions of the Fourth and the Fifth) reflect the teachings of *Entick* v. *Carrington, supra.* These three amendments are indeed closely related, safeguarding not only privacy and protection against self-incrimination but 'conscience and human dignity and freedom of expression as well.'" *Frank* v. *Maryland,* 359 U. S. 360, 376 (dissenting opinion).

In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the "things to be seized" is to be accorded the most scrupulous exactitude when the "things" are books, and the basis for their seizure is the ideas which they contain.[16] See *Marcus* v. *Search Warrant,* 367 U. S. 717; *A Quantity of Books* v. *Kansas,* 378 U. S. 205. No less a standard could be faithful to First Amendment freedoms. The constitutional impossibility of leaving the protection of those freedoms to the whim of the officers charged with executing the warrant is dramatically underscored by what the officers saw fit to seize under the warrant in this case.[17]

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." *Marron* v. *United States,*

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[16] The word "books" in the context of a phrase like "books and records" has, of course, a quite different meaning. A "book" which is no more than a ledger of an unlawful enterprise thus might stand on a quite different constitutional footing from the books involved in the present case. See *Marron* v. *United States,* 275 U. S. 192, 198–199. And in some situations books even of the kind seized here might, for purposes of the Fourth Amendment, be constitutionally indistinguishable from other goods—*e. g.,* if the books were stolen property.

[17] See pp. 479–480, *supra.*

275 U. S. 192, at 196. We need not decide in the present case whether the description of the things to be seized would have been too generalized to pass constitutional muster, had the things been weapons, narcotics or "cases of whiskey." See *Steele* v. *United States No. 1,* 267 U. S. 498, 504.[18] The point is that it was not any contraband of that kind which was ordered to be seized, but literary material—"books, records, pamphlets, cards, receipts, lists, memoranda, pictures, recordings and other written instruments concerning the Communist Party of Texas, and the operations of the Communist Party in Texas." The indiscriminate sweep of that language is constitutionally intolerable. To hold otherwise would be false to the terms of the Fourth Amendment, false to its meaning, and false to its history.

Two centuries have passed since the historic decision in *Entick* v. *Carrington,* almost to the very day. The world has greatly changed, and the voice of nonconformity now sometimes speaks a tongue which Lord Camden might find hard to understand. But the Fourth and Fourteenth Amendments guarantee to John Stanford that no official of the State shall ransack his home and seize his books and papers under the unbridled authority of a general warrant—no less than the law 200 years ago shielded John Entick from the messengers of the King.

The order is vacated and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

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[18] "The authority to the police officers under the warrants issued in this case . . . poses problems not raised by . . . warrants to seize 'gambling implements' and 'all intoxicating liquors' . . . . For the use of these warrants implicates questions whether the procedures leading to their issuance and surrounding their execution were adequate to avoid suppression of constitutionally protected publications." *Marcus* v. *Search Warrant,* 367 U. S. 717, at 731.

JANKOVICH ET AL., DOING BUSINESS AS CALUMET AVIATION CO. *v.* INDIANA TOLL ROAD COMMISSION.

CERTIORARI TO THE SUPREME COURT OF INDIANA.

No. 60. Argued December 10, 1964.—Decided January 18, 1965.

Petitioners, operators of a municipal airport, brought suit in a state court for injunctive relief and damages against respondent toll road commission which had constructed a toll road whose height at a point from a planned runway petitioners contended exceeded that permitted by the municipal airport zoning ordinance. The State Supreme Court reversed the trial court's award of damages to petitioners, holding that the ordinance purported to authorize an appropriation of property (airspace) without compensation which was unlawful under the Indiana Constitution and under the Fourteenth Amendment. *Held:*

1. In holding that the ordinance effected a taking of respondent's property right in the airspace above its land without compensation, the State Supreme Court rested its decision upon independent and adequate state grounds, even though it also relied on similar federal grounds, and this Court is therefore deprived of jurisdiction to review the state court judgment. Pp. 489–492.

2. The state court decision is compatible with the Federal Airport Act which does not defeat this respondent's right under state law to compensation for the taking of airspace. Pp. 493–495.

Certiorari dismissed as improvidently granted.

Reported below: 244 Ind. 574, 193 N. E. 2d 237.

Bernard Dunau argued the cause for petitioners. With him on the briefs were *Straley Thorpe, Robert C. Lester* and *Rita C. Davidson.*

Hugh B. Cox argued the cause for respondent. With him on the brief were *Charles A. Miller, Paul J. DeVault* and *Philip E. Byron, Jr.*

Briefs of *amici curiae,* urging reversal, were filed by *Solicitor General Cox* and *Roger P. Marquis* for the

United States; by *Edwin K. Steers,* Attorney General of Indiana, *Harold L. Folley,* Deputy Attorney General, and *John J. Dillon* for the Aeronautics Commission of Indiana et al.; by *Roger Arnebergh, Alexander G. Brown, J. Elliott Drinard, Sidney Goldstein, Daniel B. Goldberg, Henry P. Kucera, John C. Melaniphy, Robert E. Michalski, Thomas J. Neenan, John W. Sholenberger, Barnett I. Shur, Fred G. Stickel III, Charles S. Rhyne, Brice W. Rhyne* and *Alfred J. Tighe, Jr.,* for the National Institute of Municipal Law Officers; and by *John E. Stephen* and *George S. Laphan, Jr.,* for the Air Transport Association.

Mr. Justice White delivered the opinion of the Court.

Pursuant to a 20-year lease with the City of Gary, Indiana, petitioners are the operators of Gary Municipal Airport, one of the airports included in the National Airport Plan. They seek review of a decision invalidating the city's airport zoning ordinance, which, with regard to buildings and other structures in the immediate vicinity of the airport, prescribes height limitations based upon a 40-to-1 glide angle for approaching aircraft (*i. e.,* at a distance of 40 feet from the end of the planned runway, structures may not exceed one foot in height). After passage of the ordinance, respondent, the Indiana Toll Road Commission, constructed a toll road parallel to the south side of the airport and 443 feet from the end of the planned runway. Contending that at that location the ordinance prescribes a maximum height of 18.08 feet above the surrounding land and that respondent's toll road (which is raised 29.8 feet above the surrounding land surface) violates the ordinance, petitioners brought suit in the Indiana courts for injunctive relief and damages. Although it refused to grant an injunction, the trial court awarded petitioners damages of $164,000 and costs. That judgment was reversed by the Supreme Court of

Indiana, which concluded that "the ordinance purported to authorize an unlawful and unconstitutional appropriation of property rights without payment of compensation." 244 Ind. 574, 584, 193 N. E. 2d 237, 242. Because it appeared that the case involved the validity of airport zoning regulations under the Fourteenth Amendment of the Constitution of the United States and therefore presented important questions affecting the National Airport Plan not previously considered by this Court, we granted certiorari. 377 U. S. 942.

Respondent suggests, however, that we are without jurisdiction to review the judgment of the Supreme Court of Indiana because that judgment was based on an independent and adequate state ground. It is undoubtedly

> " 'the settled rule that where the judgment of a state court rests upon two grounds, one of which is federal and the other non-federal in character, our jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment.' *Fox Film Corp.* v. *Muller,* 296 U. S. 207, 210." *Cramp* v. *Board of Public Instruction,* 368 U. S. 278, 281.

As we have concluded that respondent is correct in its contention that the judgment sought to be reviewed is supported by an independent and adequate state ground, we dismiss the writ of certiorari as improvidently granted.

In the Indiana Supreme Court respondent relied on the just compensation requirement of the Indiana Constitution as well as on the Due Process Clause of the Fourteenth Amendment. The Indiana Supreme Court stated the issue for decision as whether "the ordinance purport[s] to effect a taking of private property for public use in violation of the provisions of Article 1, § 21 of

the Indiana Constitution [1] and the Fourteenth Amendment to the Constitution of the United States." 244 Ind., at 577, 193 N. E. 2d, at 238. In resolving that issue, however, the Indiana Supreme Court, quite understandably, did not analyze separately the effect of the two provisions but considered them together. From that fact petitioners would have us conclude that the state ground of decision—invalidity of the zoning ordinance under Art. 1, § 21, of the Indiana Constitution—"is so interwoven with the other as not to be an *independent* matter . . . ." *Enterprise Irrig. District* v. *Canal Co.*, 243 U. S. 157, 164 (dictum). (Emphasis added.) We cannot agree.

Quoting both Art. 1, § 21, of the Indiana Constitution and § 1 of the Fourteenth Amendment and citing both a decision of this Court, *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, and one of its own decisions, *General Outdoor Advertising Co.* v. *City of Indianapolis*, 202 Ind. 85, 172 N. E. 309 (1930), the Indiana Supreme Court began its analysis with the proposition that private property may not be taken for public use without compensation. Two issues were singled out as determinative of whether the ordinance under consideration violated that constitutional protection: "(1) Whether air space above land is a constitutionally protected property right, and (2) whether in the instant case there has been a constitutionally proscribed taking." 244 Ind., at 578, 193 N. E. 2d, at 239.

In holding that landowners did have a protected property interest in the airspace above their land, the court first discussed an Indiana statute, Acts 1927, c. 43, § 3,

[1] Art. 1, § 21, Ind. Const.:

"No man's particular services shall be demanded, without just compensation. No man's property shall be taken by law, without just compensation; nor, except in case of the State, without such compensation first assessed and tendered."

Burns Ind. Stat. Ann. § 14–103 (1950 Repl.) ("The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, . . ."), and a prior interpretation of state law, *Capitol Airways, Inc.* v. *Indianapolis P. & L. Co.*, 215 Ind. 462, 466, 18 N. E. 2d 776, 778 (1939) (airport operator has no right to damages from public utility whose power line obstructs flight into and out of airport). In addition, the Indiana Supreme Court cited and discussed two cases of this Court holding low altitude overflights to constitute a taking of an air easement requiring just compensation under the United States Constitution. *Griggs* v. *Allegheny County*, 369 U. S. 84; *United States* v. *Causby*, 328 U. S. 256. But nothing in the court's opinion suggests that its conclusion that "[i]n the light of the above authorities . . . the reasonable and ordinary use of air space above land is a property right which cannot be taken without the payment of compensation," 244 Ind., at 581, 193 N. E. 2d, at 240, flows from a federal rather than a state source. Indeed, the organization and language of the opinion indicates that, at the least, state law is an equal ground of decision.

The discussion of the second question—whether the ordinance effects a proscribed taking, as opposed to a reasonable regulation under the police power—similarly interlaces Indiana and federal decisions, as well as decisions of other state courts. Again there is no intimation that the conclusion that the ordinance entails "an unlawful and unconstitutional appropriation of property rights without payment of compensation," 244 Ind., at 584, 193 N. E. 2d, at 242, is based less forcefully on the Indiana Constitution than on the Fourteenth Amendment.

In such circumstances, even though a state court's opinion relies on similar provisions in both the State and Federal Constitutions, the state constitutional provision has been held to provide an independent and adequate

ground of decision depriving this Court of jurisdiction to review the state judgment. *New York City* v. *Central Savings Bank,* 306 U. S. 661, explained in *Minnesota* v. *National Tea Co.,* 309 U. S. 551, 556–557; *Lynch* v. *New York ex rel. Pierson,* 293 U. S. 52. This is not a case like those cited by petitioners where the lower court opinion as a whole "leaves the impression that the court probably felt constrained to rule as it did because of [decisions applying the Fourteenth Amendment]," *Minnesota* v. *National Tea Co., supra,* at 554–555, or "because it felt under compulsion of federal law as enunciated by this Court so to hold," *Missouri ex rel. Southern R. Co.* v. *Mayfield,* 340 U. S. 1, 5, with the result that the state and federal grounds are "so interwoven that we are unable to conclude that the judgment rests upon an independent interpretation of the state law," *State Tax Comm'n* v. *Van Cott,* 306 U. S. 511, 514. See also *Perkins* v. *Benguet Mining Co.,* 342 U. S. 437, 443, 448–449; *Enterprise Irrig. District* v. *Canal Co., supra.* Under our settled decisions the state ground in this case must be regarded as an independent and adequate ground of decision, and we so hold.

Petitioners nevertheless contend that the state ground of decision is not *adequate* because it is inconsistent with the policy of the Federal Airport Act, 60 Stat. 170, as amended, 49 U. S. C. § 1101 *et seq.* (1958 ed. and Supp. V), and therefore founders on the Supremacy Clause.[2]

[2] Petitioners' pre-emption argument is not pressed in their petition for certiorari as a separate issue for review but only as bearing on the adequacy of the state ground of decision. Nor have petitioners demonstrated that this issue was presented to the Indiana Supreme Court. In this regard petitioners quote that court's statement that "[t]he federal government has recognized the requirement that easements for the glide angle needed for landing and take-off must be acquired by condemnation proceedings and payment of just compensation," 244 Ind., at 584, 193 N. E. 2d, at 242, but that conclusion

The premises underlying petitioners' argument are that the Federal Airport Act is predicated on a determination by Congress that airport zoning is essential to assure compatible land use in the vicinity of airports without prohibitive cost and that the decision of the Indiana Supreme Court in this case signifies the total nullification of airport zoning. We think the second premise is unfounded. The Indiana Supreme Court had before it a case in which the effect of the ordinance was to establish a maximum height of 18 feet for structures on respondent's land. Although it recognized that zoning regulations may be upheld as a reasonable exercise of the police power "where the owner of property is merely restricted in the use and enjoyment of his property," 244 Ind., at 581, 193 N. E. 2d, at 240–241, the court held that a taking requiring compensation—rather than mere regulation—was effected here because "the City of Gary has attempted, by the passage of the ordinance under consideration, to take and appropriate to its own use *the ordinarily usable* air space of property adjacent to the Gary Airport . . . ." 244 Ind., at 582, 193 N. E. 2d, at 241. (Emphasis added.) As we read the opinion of the Indiana Supreme Court, it certainly does not portend the wholesale invalidation of all airport zoning laws.

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was based on two cases condemning easements over property adjoining federal bases that were decided several years before the recent amendment to the Federal Airport Act, *United States* v. *48.10 Acres of Land,* 144 F. Supp. 258 (D. C. S. D. N. Y. 1956); *United States* v. *4.43 Acres of Land,* 137 F. Supp. 567 (D. C. N. D. Tex. 1956), not on any assessment of the policy of that Act. These circumstances of course bar petitioners from seeking reversal of the judgment below on the basis of their pre-emption claim, and it is therefore questionable whether petitioners may advance the same argument under the guise of an attack on the adequacy of the state ground of decision. We need not consider this problem further, however, because, as is explained in the text, *infra,* the pre-emption claim is insubstantial.

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And no substantial claim can be made that Congress intended to preclude such an application of state law as is involved in the present case. On March 11 of last year Congress did indicate its interest in furthering airport zoning when it amended § 11 of the Federal Airport Act to require as an additional condition of approval of an airport project seeking federal aid that:

> "(4) appropriate action, *including the adoption of zoning laws,* has been or will be taken, to the extent reasonable, to restrict the use of land adjacent to or in the immediate vicinity of the airport to activities and purposes compatible with normal airport operations including landing and take-off of aircraft." P. L. 88–280, 1964 U. S. Code Cong. & Adm. News 514. (Emphasis added.)

That requirement, however, is presently implemented by the Federal Aviation Agency by obtaining an assurance from the project sponsor that he will prevent the construction of obstructions to air navigation "either by the acquisition and retention of easements or other interests in or rights for the use of land or airspace or by the adoption and enforcement of zoning regulations." Form FAA–1624, Part III 7, Sponsor Assurances. And amounts expended to acquire "land or interests therein or easements through or other interests in air space" are among "the allowable project costs" that may be recompensed under § 13 of the Federal Airport Act, 60 Stat. 177, as amended, 49 U. S. C. § 1112 (a)(2) (1958 ed., Supp. V). Appearing as *amicus curiae,* the United States affirms that "[t]here is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation." We conclude that the decision of the Supreme

Court of Indiana in this case is compatible with the congressional policy embodied in the Federal Airport Act.[3]

The writ of certiorari is dismissed as improvidently granted.

It is so ordered.

MR. JUSTICE STEWART, with whom MR. JUSTICE BLACK joins, dissenting.

Although the opinion of the Supreme Court of Indiana relies on state and federal precedents, I can find nowhere in its opinion any clear indication of whether that court's ultimate conclusion is based upon the Federal Constitution, the Constitution of Indiana, or both. Therefore, I think the posture of this case is identical to that presented in *Minnesota* v. *National Tea Co.*, 309 U. S. 551, and that we should, as the Court did there, vacate the judgment of the State Supreme Court and remand the cause for further proceedings.

"It is important that this Court not indulge in needless dissertations on constitutional law. It is fundamental that state courts be left free and unfettered by us in interpreting their state constitutions. But it is equally important that ambiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action. Intelligent exercise of our appellate powers compels us to ask for the elimination of the obscurities and ambiguities from the opinions in such cases. Only then can we ascertain whether or not our jurisdiction to review should be invoked. Only by that procedure can the responsibility for striking down or upholding state legislation be fairly placed. For no other course

[3] Needless to say, we express no opinion in this case regarding the validity under the United States Constitution of the city's airport zoning ordinance.

assures that important federal issues, such as have been argued here, will reach this Court for adjudication; that state courts will not be the final arbiters of important issues under the federal constitution; and that we will not encroach on the constitutional jurisdiction of the states. This is not a mere technical rule nor a rule for our convenience. It touches the division of authority between state courts and this Court and is of equal importance to each. Only by such explicitness can the highest courts of the states and this Court keep within the bounds of their respective jurisdictions." 309 U. S., at 557.

Syllabus.

CITY OF EL PASO *v.* SIMMONS.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

No. 38. Argued November 17, 1964.—Decided January 18, 1965.

In 1910 the Texas State Land Board sold some public land by contract calling for a small down payment plus annual interest and principal payments. State law provided for the termination of the contract and forfeiture of the land for nonpayment of interest, and in such case the purchaser or his vendee could reinstate his claim on written request and payment of delinquent interest, unless rights of third parties intervened. In 1941 the law was amended limiting reinstatement rights to five years from the forfeiture date. Here the land was forfeited in 1947 and appellee, who thereafter took quitclaim deeds to the land, filed for reinstatement and tendered payment more than five years later. His application was denied. The State sold the land to the City of El Paso in 1955 and appellee filed this suit to determine title thereto. The District Court granted appellant's motion for summary judgment on the basis of the 1941 statute. The Court of Appeals reversed, ruling that the 1941 law impaired the obligation of contracts in contravention of Art. I, § 10, of the Constitution, but remanded the case to the District Court for consideration of the City's defenses of laches and adverse possession. *Held:*

1. Although this appeal was improperly brought under 28 U. S. C. § 1254 (2), the Court treats the papers whereon the appeal was filed as a petition for certiorari under 28 U. S. C. § 2103, dismisses the appeal and grants certiorari. Pp. 501–503.

2. It is not every modification of a contractual promise that impairs the obligation of a contract, any more than it is every alteration of existing remedies that violates the Contract Clause. The prohibition against impairment of the obligation of contract "is not an absolute one and is not to be read with literal exactness like a mathematical formula." *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 428. Pp. 506–508.

3. The State has reserved power to safeguard the vital interests of its people, which may modify or affect the obligation of contract but not destroy the constitutional limitation; and the reserved power and this limitation must be construed in harmony with each other. Pp. 508–509.

4. Without affecting the central undertaking of the seller or the primary consideration for the buyer's undertaking, the Texas statute of repose serves significant state objectives: clarification of land titles, elimination of massive litigation over titles and effective utilization of property. Hence, it impairs no protected right under the Contract Clause. Pp. 509–517.

Appeal dismissed and certiorari granted; 320 F. 2d 541, reversed.

William J. Mounce argued the cause for appellant. With him on the brief was *Thornton Hardie.*

Greenberry Simmons, appellee, argued the cause and filed a brief *pro se.*

MR. JUSTICE WHITE delivered the opinion of the Court.

Under the applicable statutes existing in Texas in 1910, the year in which the contracts in this case were made, the State Land Board was authorized to sell the public lands allocated to the Permanent Free School Fund on long-term contracts calling for a down payment of one-fortieth of the principal and annual payment of interest and principal. The time for payment of principal was extended periodically and the principal was never called due. In the event of nonpayment of interest, however, the statutes authorized the termination of the contract and the forfeiture of the lands to the State without the necessity of re-entry or judicial proceedings, the land again to become a part of the public domain and to be resold for the account of the school fund.[1] The provision chiefly in issue in this case provided:

"In any cases where lands have been forfeited to the State for the non-payment of interest, the purchasers

[1] The Act of 1895 provided in pertinent part:

"Sec. 11. If upon the first day of November of any year the interest due on any obligation remains unpaid, the Commissioner of the General Land Office shall endorse on such obligation 'Land Forfeited,' and shall cause an entry to that effect to be made on the account kept with the purchaser, and thereupon said land shall

> or their vendees may have their claims reinstated on their written request, by paying into the treasury the full amount of interest due on such claim up to the date of reinstatement; provided, that no rights of third persons may have intervened. In all such cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred." Tex. Gen. Laws 1897, ch. 129, art. 4218f.

In 1941, the foregoing provisions were amended. Among other things, the offering of forfeited land for sale on a subsequent sale date was made permissive instead of mandatory and a provision was added stating that the right to reinstate lands forfeited thereafter "must be exercised within five (5) years from the date of the forfeiture." Tex Gen. & Spec. Laws 1941, ch. 191, § 3, Vernon's Ann. Civ. Stat., art. 5326. In 1951, the right of reinstatement was limited to the last purchaser from the State and his vendees or heirs. Tex. Gen. & Spec. Laws 1951, ch. 59, § 2, Vernon's Ann. Civ. Stat., art. 5326.[2]

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thereby be forfeited to the State without the necessity of re-entry or judicial ascertainment, and shall revert to the particular fund to which it originally belonged, and be resold under the provisions of this act or any future law: . . . *Provided, further,* that nothing in this section contained shall be construed to inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land, which suits may be instituted by the Attorney General or under his direction, in the proper court of the county in which the land lies or of the county to which such county is attached for judicial purposes: *Provided,* this section shall be printed on the back of receipt." Tex. Gen. Laws 1895, ch. 47.

[2] Art. 5326 now reads:

"If any portion of the interest on any sale should not be paid when due, the land shall be subject to forfeiture by the Commissioner entering on the wrapper containing the papers 'Land Forfeited,' or

In 1910, certain predecessors in title of Simmons, the appellee, executed their installment contracts to purchase school lands from the State of Texas. The original purchasers made a down payment of one-fortieth of the principal and made annual interest payments. The purchase contracts were assigned several times and interest payments fell into arrears during the forties. On July 21, 1947, after a notice of arrears and request for payment, the land was forfeited for nonpayment of interest. A notice of forfeiture and a copy of the 1941 Act allowing reinstatement within five years were sent to the last purchaser of record, but were returned unclaimed. Appellee Simmons, a citizen of Kentucky, thereafter took quit-

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words of similar import, with the date of such action and sign it officially, and thereupon the land and all payments shall be forfeited to the State, and the lands may be offered for sale on a subsequent sale date. In any case where lands have heretofore been forfeited or may hereafter be forfeited to the State for non-payment of interest, the purchasers, or their vendees, heirs or legal representatives, may have their claims re-instated on their written request by paying into the Treasury the full amount of interest due on such claim up to the date of re-instatement, provided that no rights of third persons may have intervened. The right to re-instate shall be limited to the last purchaser from the State or his vendees or their heirs or legal representatives. Such right must be exercised within five (5) years from the date of the forfeiture. . . . In all cases the original obligations and penalties shall thereby become as binding as if no forfeiture had ever occurred. If any purchaser shall die, his heirs or legal representatives shall have one (1) year in which to make payment after the first day of November next after such death, before the Commissioner shall forfeit the land belonging to such deceased purchaser; and should such forfeiture be made by the Commissioner within said time, upon proper proof of such death being made, such forfeiture shall be set aside, provided that no rights of third persons may have intervened. Nothing in this Article shall inhibit the State from instituting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land."

claim deeds to the land in question and filed his applications for reinstatement, tendering the required payments. The applications were denied because they had not been made within five years of the forfeiture as required by the 1941 statute. In 1955, pursuant to special legislation, the land was sold by the State to the City of El Paso. Simmons then filed this suit in the Federal District Court to determine title to the land in question. In its answer the City relied upon the 1941 statute as barring Simmons' claim and also pleaded adverse possession and laches as additional defenses. The District Court granted the City's motion for summary judgment on the ground of the 1941 statute.[3] The Court of Appeals reversed, 320 F. 2d 541 (C. A. 5th Cir.), ruling that the right to reinstate was a vested contractual right and that the prohibition against impairment of contracts contained in Art. I, § 10, of the Constitution of the United States prohibited the application of the 1941 statute to the contract here in question. We noted probable jurisdiction. 377 U. S. 902. We reverse.

I.

Although neither party has raised the issue, we deal at the outset with a jurisdictional matter. The appeal in this case is here under 28 U. S. C. § 1254 (2) (1958 ed.).[4] The Court of Appeals, after holding the Texas statute

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[3] The District Court's judgment does not explicitly refer to the 1941 statute, but the Court of Appeals interpreted that Act to be the basis of the judgment. We accept this interpretation.

[4] "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: . . .

"(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented . . . ."

unconstitutional, remanded the case to the District Court to determine the City's defenses of laches and adverse possession. Under a prior interpretation of § 240 (b) of the Judicial Code, the predecessor provision of § 1254 (2), a final judgment or decree of the Court of Appeals is necessary to the exercise of our jurisdiction over the case by way of appeal, *Slaker* v. *O'Connor,* 278 U. S. 188, which was followed without comment in *South Carolina Electric & Gas Co.* v. *Flemming,* 351 U. S. 901, and questioned but not put to rest in *Chicago* v. *Atchison, Topeka & Santa Fe R. Co.,* 357 U. S. 77, the judgment in that case being deemed a final one. These questions under § 1254 (2) were neither briefed nor argued in this case and it is not appropriate to resolve them here.

In 1962 Congress expanded the scope of 28 U. S. C. § 2103 to apply to appeals from the United States courts of appeals.[5] That section now provides that an appeal improvidently taken from a court of appeals as well as from a state court shall not be dismissed for that reason alone, but that the appeal papers shall be regarded and acted on as a petition for a writ of certiorari. The restriction in 28 U. S. C. § 1254 (2) (1958 ed.) providing that an appeal from the court of appeals "shall preclude review by writ of certiorari at the instance of such appellant" is no bar to our treating this case as here on a

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[5] 28 U. S. C. § 2103 (1958 ed., Supp. V) reads:

"If an appeal to the Supreme Court is improvidently taken from the decision of the highest court of a State, or of a United States court of appeals, in a case where the proper mode of a review is by petition for certiorari, this alone shall not be ground for dismissal; but the papers whereon the appeal was taken shall be regarded and acted on as a petition for writ of certiorari and as if duly presented to the Supreme Court at the time the appeal was taken. Where in such a case there appears to be no reasonable ground for granting a petition for writ of certiorari it shall be competent for the Supreme Court to adjudge to the respondent reasonable damages for his delay, and single or double costs."

petition for certiorari. For this provision means only that if an appeal is proper and has been taken, certiorari will not thereafter be available; where the appeal is not proper, this Court will still consider a timely application for certiorari.[6] *Bradford Electric Light Co.* v. *Clapper,* 284 U. S. 221. No timely application for certiorari has been filed in the instant case. But 28 U. S. C. § 2103 (1958 ed., Supp. V) now requires that we treat the papers whereon the appeal was taken as a petition for certiorari. Accordingly we dismiss the appeal and grant the writ of certiorari.

II.

We turn to the merits. The City seeks to bring this case within the long line of cases recognizing a distinction between contract obligation and remedy and permitting a modification of the remedy as long as there is no substantial impairment of the value of the obligation. *Sturges* v. *Crowninshield,* 4 Wheat. 122, 200; *Von Hoffman* v. *City of Quincy,* 4 Wall. 535, 553–554; *Honeyman* v. *Jacobs,* 306 U. S. 539. More specifically, it invokes three cases in this Court, two from Texas, that held it constitutionally permissible to apply state statutes allowing forfeiture of land purchase rights to land contracts between private persons and the State made when the law did not provide for forfeiture or permitted it only upon

[6] The predecessor of § 1254 (1), § 240 (a) of the Act of February 13, 1925 (the Judges Act), was amended on the floor of the Senate to state that review by certiorari from the courts of appeals would carry the same scope of review "as if the cause had been brought there by unrestricted writ of error or appeal." The word "unrestricted" was added immediately before § 240 (b) (now § 1254 (2)) was introduced, and the sponsor of both amendments, Senator Cummins, explained that review by appeal as provided in that section would be limited "to the Federal question, and that it ought not to extend to the entire controversy that may be in the case," as he envisaged would be the case with certiorari review. See 66 Cong. Rec. 2919 (remarks of Senator Cummins).

court order. *Wilson* v. *Standefer,* 184 U. S. 399; *Waggoner* v. *Flack,* 188 U. S. 595; *Aikins* v. *Kingsbury,* 247 U. S. 484.[7] In those cases the Court reasoned that the state statutes existing when the contracts were made were not to be considered the exclusive remedies available in the event of the purchaser's default since there was no promise, express or implied, on the part of the State not to enlarge the remedy or grant another in case of breach.

The Court of Appeals rejected the City's contention. The Texas cases, according to the Court of Appeals, hold

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[7] In *Wilson* v. *Standefer,* 184 U. S. 399, Texas sold land pursuant to the Act of 1879, which made it the duty of the State in case of default to proceed to enforce its rights by court action. The Texas courts allowed the State to proceed with forfeiture under the 1897 statute providing for forfeiture by endorsement on official documents rather than by court decree. Neither the Texas courts nor this Court read the 1879 statute as providing an exclusive remedy or as a promise by the State not to modify the remedy or provide another one in the event of default. *Waggoner* v. *Flack,* 188 U. S. 595, involved a contract for the sale of state school lands at a time when the existing statutes gave the State no remedy at all upon default in annual payments. This Court found no violation of the Contract Clause in the state proceeding to declare a forfeiture under the 1897 statute. Here again "[t]here was no promise or contract expressed in the statute that the State would not enlarge the remedy or grant another on account of the purchaser's violation of his contract, and we think no such contract is to be implied." 188 U. S., at 603. The principle of *Wilson* v. *Standefer* was held controlling, the Court seeing no difference in principle between the case where the State altered an existing remedy after the contract was entered into and the case where the State supplied the remedy where none existed when the contract was made. The third case came here from the California courts, *Aikins* v. *Kingsbury,* 247 U. S. 484. There the Court found no violation of the Contract Clause in the state proceeding declaring a forfeiture by nonjudicial action as permitted by a statute passed after the contract was made, the prior law requiring the State to proceed with judicial action with a right in the purchaser to redeem within 20 days after decree. *Wilson* and *Waggoner* were considered controlling authority.

that the reinstatement provision confers a vested right which is not subject to legislative alteration.[8] From this it concluded that under state law the five-year limitation on reinstatement was not a mere modification of remedy

[8] The state cases on this issue are unclear. In *Fristoe* v. *Blum,* 92 Tex. 76, 45 S. W. 998, the Texas Supreme Court held that the 1887 Act providing for forfeiture upon default in making payment of "any obligation" applied to contracts made before as well as after the enactment of the Act. Such a construction was not deemed to impair the obligation of contract, for the State had by common law the right as vendor, upon the purchaser's failure to perform his part of the contract, a right to rescind the contract of sale and resume control of the land. The statute giving the Commissioner authority to declare a forfeiture merely supplied a more effective way of enforcing the State's common-law right of rescission.

In regard to the right of reinstatement, *Anderson* v. *Neighbors,* 94 Tex. 236, 59 S. W. 543, and *Davis* v. *Yates,* 63 Tex. Civ. App. 6, 133 S. W. 281, held that intervening third-party rights must be so far perfected as to be vested in order to defeat reinstatement rights. *Cruzan* v. *Walker,* 119 Tex. 189, 26 S. W. 2d 908, and *Freels* v. *Walker,* 120 Tex. 291, 26 S. W. 2d 627, are of similar import. *Hooks* v. *Kirby,* 58 Tex. Civ. App. 335, 124 S. W. 156, dealt with the right of the purchaser of timber to purchase the land itself; it did not deal with reinstatement under the section here involved. *Gulf Production Co.* v. *State,* 231 S. W. 124 (Tex. Civ. App.), the principal support for the Court of Appeals decision, held that the legislature had not intended to defeat the right to reinstatement by reclassifying the land as mineral land, the sale of which then involved retention of mineral rights by the State. The Court in *Gulf* did indicate that it considered the right to reinstatement a vested right with which the State could not arbitrarily interfere. But it was not faced with a statute which actually attempted to modify this right, much less one which put a reasonable time limit upon that right. In *Faulkner* v. *Lear,* 258 S. W. 2d 147 (Tex. Civ. App.), a case involving a forfeiture under the 1941 statute, the Texas court said that the land contract, which was made prior to 1941, "could have been reinstated only in compliance with the statute . . . as amended in 1941." *Id.,* at 149. No constitutional or state law difficulties were noted.

In addition to the State's common-law right of rescission, *Fristoe* v. *Blum, supra,* the forfeiture statute states that nothing in the forfeiture provision "shall be construed to inhibit the State from insti-

but a change in the obligation of a contract. Relying on the theory that it is state law that determines the obligations of the parties, the Court of Appeals found that the 1941 statute abrogated an obligation of the contract and thus violated the Contract Clause of the Constitution.

We do not pause to consider further whether the Court of Appeals correctly ascertained the Texas law at the time these contracts were made, or to chart again the dividing line under federal law between "remedy" and "obligation," or to determine the extent to which this line is controlled by state court decisions, decisions often rendered in contexts not involving Contract Clause considerations.[9] For it is not every modification of a con-

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tuting such legal proceedings as may be necessary to enforce such forfeiture, or to recover the full amount of the interest and such penalties as may be due the State at the time such forfeiture occurred, or to protect any other right to such land." Tex. Gen. Laws 1895, ch. 47, § 11. This statutory language seems sufficiently broad to preserve, with notice to purchasers, the common-law right of rescission, which, unlike statutory forfeiture, was not subject to reinstatement.

[9] The provisions dealing with forfeiture, which is one of the State's remedies in case of breach, and reinstatement, which is the purchaser's remedy to cure his breach, both operate on the rights of a party after breach and thus concern the enforcement of the contract. In this sense they are remedial and the statute of repose challenged here is an alteration of remedy rather than obligation.

But decisions dating from *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, have not placed critical reliance on the distinction between obligation and remedy. At issue in *Blaisdell* was a statute enlarging the mortgagor's right by extending the time of redemption, a measure that the state court characterized as an impairment of the obligation of the mortgage contract. *Id.*, at 420. Thus the question before this Court was whether this impairment contravened the contract clause. The Court in *Blaisdell* stated that " 'Nothing can be more material to the obligation than the means of enforcement. . . . The ideas of validity and remedy are inseparable, and both are parts of the obligation, which is guaranteed by the Constitution.' " 290 U. S., at 430. While noting that a State's control over remedial processes is one justification for modification of the obligation of contract, *id.*, at 430–431, the Court

tractual promise that impairs the obligation of contract under federal law, any more than it is every alteration of existing remedies that violates the Contract Clause.

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went on to note that the State possessed authority "to safeguard the vital interests of its people," *id.*, at 434, and its "economic interests," *id.*, at 437. "It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson* v. *Binford*, 287 U. S. 251, 276." *Id.*, at 434–435. Further the Court stressed that validity does not turn on whether the legislation "affects contracts incidentally, or directly or indirectly, but whether the legislation is addressed to a legitimate end and the measures taken are reasonable and appropriate to that end." *Id.*, at 438.

In *Veix* v. *Sixth Ward Building & Loan Association of Newark*, 310 U. S. 32, the Court upheld a state statute which restricted the contractual rights of investors in a building and loan association to withdraw and recover by suit the amount of their investment. No attempt was made to classify the measure as remedial. Rather the Court noted that the contract was with a financial institution of major importance to the credit system of the State and held that the "obligation of the Association to respond to an application for withdrawal was subject to the paramount police power." *Id.*, at 38. In upholding a statute disallowing a deficiency judgment where the value of the property bought by the mortgagee at a foreclosure sale equals the amount of the debt and interest in *Honeyman* v. *Jacobs*, 306 U. S. 539, the Court found the fact that the provision confined the creditor to securing a fair satisfaction of his debt determinative, notwithstanding that under the law in force when the contract was made the creditor could have recovered the difference between the price at the foreclosure sale and the amount of indebtedness. This holding was reaffirmed by a unanimous Court in *Gelfert* v. *National City Bank*, 313 U. S. 221, again without any regard to whether the measure was substantive or remedial. The Court held that the mortgagee's right under prior law to the advantages of a forced sale was not entitled to constitutional protection under the contract clause. *Id.*, at 234. Similarly in *East New York Savings Bank* v. *Hahn*, 326 U. S. 230, no notice was taken of the remedy-obligation distinction. Rather the Court upheld a moratory statute in postdepression times suspending for the tenth year in succession the mortgagee's right of foreclosure on the ground that contracts are not constitutionally immune from impairment by state measures designed "to safeguard the vital interests of its people." *Id.*, at 232.

Stephenson v. *Binford,* 287 U. S. 251, 276; *Stone* v. *Mississippi,* 101 U. S. 814, 819; *Manigault* v. *Springs,* 199 U. S. 473. Assuming the provision for reinstatement after default to be part of the State's obligation, we do not think its modification by a five-year statute of repose contravenes the Contract Clause.

The decisions "put it beyond question that the prohibition is not an absolute one and is not to be read with literal exactness like a mathematical formula," as Chief Justice Hughes said in *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 428. The *Blaisdell* opinion, which amounted to a comprehensive restatement of the principles underlying the application of the Contract Clause, makes it quite clear that "[n]ot only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' *Stephenson* v. *Binford,* 287 U. S. 251, 276. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. . . . This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court." 290 U. S., at 434–435. Moreover, the "economic interests of the State may justify the exercise of its continuing and dominant protective power notwithstanding interference with contracts." *Id.,* at 437. The State has the "sovereign right . . . to protect the . . . general welfare of the people . . . . Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and

what is not necessary.' " *East New York Savings Bank* v. *Hahn,* 326 U. S. 230, 232–233. As Mr. Justice Johnson said in *Ogden* v. *Saunders,* "[i]t is the motive, the policy, the object, that must characterize the legislative act, to affect it with the imputation of violating the obligation of contracts." 12 Wheat. 213, 291.

Of course, the power of a State to modify or affect the obligation of contract is not without limit. "[W]hatever is reserved of state power must be consistent with the fair intent of the constitutional limitation of that power. The reserved power cannot be construed so as to destroy the limitation, nor is the limitation to be construed to destroy the reserved power in its essential aspects. They must be construed in harmony with each other. This principle precludes a construction which would permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." *Blaisdell, supra,* at 439. But we think the objects of the Texas statute make abundantly clear that it impairs no protected right under the Contract Clause.

III.

Texas, upon entering the Union, reserved its entire public domain, one-half of which was set aside under the 1876 Constitution to finance a universal system of free public education.[10] These lands, over 42,000,000 acres,

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[10] Texas Constitution, art. 7, § 2; Tex. Gen. & Spec. Laws 1935, ch. 312, § 2, Vernon's Ann. Civ. Stat., art. 5416.

"In order to perpetuate the dream of a universal system of free public education which was in the minds of most early Texans, the Constitution of 1876 provided that one-half of the Public Domain of the State, in addition to all funds, lands, and other property thereafter set apart for the support of the public schools, all the alternate sections of land reserved by the State out of grants made to railroads or to corporations, and all sums of money that may come to the State from the sale of any portion of the same, should constitute

were to be sold as quickly as practicable in order to provide revenues for the public school system and to encourage the settlement of the vast public domain. The terms of sale were undemanding and designed to accomplish the widespread sale and development of the public domain. The State required a down payment of one-fortieth of the purchase price, an annual payment of one-fortieth of principal and an annual payment of interest.[11] The terms were frequently modified in favor of purchasers. Periodically, during the course of almost a century, the time for payment of the nominal principal amount was extended.[12] In 1919, the requirement that the purchaser settle on the land or adjoining land was lifted,[13] provisions allowing forfeiting purchasers a first opportunity to repurchase forfeited land at a newly ap-

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a perpetual school fund. The lands belonging to this fund were to be sold under such regulations as prescribed by law.

. . . . . .

"Under these acts the Permanent Free School Fund has been granted more than 42,500,000 acres of land. The first sale of School Land was a 160-acre tract in Bowie County in 1874. Since 1905, the method of sale has been that of sealed competitive bidding, and most of the land making up this great endowment has now been sold and the sum of approximately $95,000,000 placed in the Permanent Free School Fund." Giles, History and Disposition of Texas Public Domain, 14–15 (1945).

[11] *E. g.*, Tex. Gen. Laws 1895, ch. 47, § 9; Tex. Gen. Laws 1919, ch. 163, § 4. In 1941, the required down payment was increased from one-fortieth to one-fifth of the purchase price, and the amount of the annual payments was reduced from one-fortieth of the assessed price to one-fortieth of the unpaid balance. Tex. Gen. & Spec. Laws 1941, ch. 191, § 2, Vernon's Ann. Civ. Stat., art. 5312.

[12] *E. g.*, Tex. Gen. & Spec. Laws 1941, ch. 191, § 1; Tex. Gen. & Spec. Laws 1951, ch. 59, § 1, Vernon's Ann. Civ. Stat., art. 5320a; Tex. Gen. & Spec. Laws 1961, ch. 399, § 1, Vernon's Ann. Civ. Stat., art. 5421c–9.

[13] Tex. Gen. Laws 1919, ch. 163, § 5, as amended by Tex. Gen. Laws 1925, ch. 130, § 3, Vernon's Ann. Civ. Stat., arts. 5306, 5311a.

praised value were thrice added,[14] interest in arrears was forgiven under one of these acts,[15] and reclassification of lands was held not to deprive forfeiting purchasers, upon reinstatement, of their mineral rights in the land.[16] But eventually the evolution of a frontier society to a modern State, attended by the discovery of oil and gas deposits which led to speculation and exploitation of the changes in the use and value of the lands, called forth amendments to the Texas land laws modifying the conditions of sale in favor of the State. Beside increasing the required down payment from one-fortieth to one-fifth of the purchase price,[17] the State restricted the right of reinstatement to the last purchaser from the State or his assigns and required that this right be exercised within five years from the date of forfeiture.

The circumstances behind the 1941 amendment are well described in the Reports of the Commissioner of the General Land Office. The general purpose of the legislation enacted in 1941 was to restore confidence in the stability and integrity of land titles and to enable the State to protect and administer its property in a

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[14] 1938–1940 Report of the Commissioner of the General Land Office 12 (hereafter cited as Rep.). See also Tex. Gen. Laws 1925, ch. 94; Tex. Gen. Laws 1926, ch. 25, § 1, Vernon's Ann. Civ. Stat., art. 5326a.

Under the Act of April 18, 1913, forfeiture for nonpayment of interest did not empower the Commissioner to put land on the market again until after lapse of specific period during which the forfeiting purchaser was given a right to repurchase the tract. *Johnson* v. *Robison,* 111 Tex. 438, 240 S. W. 300.

[15] "Under the Reappraisement Act of 1913, forfeiting owners were allowed to repurchase their land at the reappraised value set by a board, and the accumulated delinquent interest on forfeited contracts was ignored." 1938–1940 Rep. 12.

[16] *Gulf Production Co.* v. *State,* 231 S. W. 124 (Tex. Civ. App.).

[17] Tex. Gen. & Spec. Laws 1941, ch. 191, § 2, Vernon's Ann. Civ. Stat., art. 5312.

businesslike manner. 1938–1940 Rep. 5. "[T]he records [of the land office] show that through the years many thousands of purchase contracts, covering, in the aggregate, millions of acres of school land, have been forfeited by failure of the purchasers to meet the small annual interest payments requisite to the maintenance of the contracts." *Id.*, at 11–12. In 1939, 15,000 sales contracts were found delinquent and subject to forfeiture and there were about 600,000 acres of unsold surveyed school lands, the major portion of which had produced no revenue for a decade. *Ibid.* This state of affairs was principally attributable to the opportunity for speculation to which unlimited reinstatement rights gave rise. Forfeited purchase contracts which had remained dormant for years could be reinstated if and when the land became potentially productive of gas and oil. Where forfeited lands were purchased without reservation of minerals to the State, as was the case in respect to early purchases before discovery of the extensive mineral wealth in the State, all of the mineral rights reverted to the owner of the reinstated claims, regardless of the State's later attempts in forfeited sales to share in the mineral interest. *Gulf Production Co.* v. *State,* 231 S. W. 124 (Tex. Civ. App.). Hence the Land Commissioner noted that the majority of sales and resales under the laws requiring sale to the highest bidder [18] were to purchasers buying a "speculative option," "taken for possible profits on the rights of the surface owners to lease the land for oil and gas." "Under such conditions lands were bid in at highly inflated prices such as no one who expected to keep the land could afford to offer." 1940–1942 Rep. 5. The attempts to assure some stability in land sales through

[18] Tex. Gen. Laws 1905, ch. 103, § 4; Tex. Gen. Laws 1919, ch. 163, § 6, Vernon's Ann. Civ. Stat., arts. 5313, 5314. *Giraud* v. *Robison,* 102 Tex. 488, 119 S. W. 1145.

repurchase acts, allowing delinquent owners a preferential right to buy forfeited land at a reappraised value, and, under one act, without payment of accumulated interest in arrears, proved unsuccessful, and expensive. In regard to one of the State's attempts to quiet titles through a repurchase act, the Land Commissioner in 1925 expressed the belief that the "owners can realize such returns from [the lands] as will enable them to pay interest thereon instead of continuing the recurring annual forfeiture and resale and so on indefinitely." 1924–1926 Rep. 5. In 1939, a new Commissioner noted that 1,872,326 acres had been forfeited and 1,195,993 acres repurchased under the three repurchase acts. The net loss to the School Fund from repurchases was said to be $1,661,980 plus the loss in interest arrears of $418,000. 1938–1940 Rep. 12.

No less significant was the imbroglio over land titles in Texas. The long shadow cast by perpetual reinstatement gave rise to a spate of litigation between forfeiting purchasers and the State or between one or more forfeiting purchasers and other forfeiting purchasers. See, *e. g.*, *Weaver* v. *Robison,* 114 Tex. 272, 268 S. W. 133; *Anderson* v. *Neighbors,* 94 Tex. 236, 59 S. W. 543; *Mound Oil Co.* v. *Terrell,* 99 Tex. 625, 92 S. W. 451. Where the same land had been sold and contracts forfeited several times, as was frequently the case, the right to reinstate could be exercised by any one of the forfeiting purchasers or his vendees. *Hoefer* v. *Robison,* 104 Tex. 159, 135 S. W. 371. Cf. *Faulkner* v. *Lear,* 258 S. W. 2d 147 (Tex. Civ. App.). It was this situation to which the Texas Legislature addressed itself in 1941 and it is in light of this situation that we judge the validity of the amendment.

The Contract Clause of the Constitution does not render Texas powerless to take effective and necessary

measures to deal with the above. We note at the outset that the promise of reinstatement, whether deemed remedial or substantive, was not the central undertaking of the seller nor the primary consideration for the buyer's undertaking. See *Wilson* v. *Standefer,* 184 U. S. 399; *Waggoner* v. *Flack,* 188 U. S. 595; *Aikins* v. *Kingsbury,* 247 U. S. 484. Under this agreement the State promised to transfer title to the buyer upon his payment of the purchase price; in turn the buyer was obliged to make a nominal down payment of one-fortieth of the purchase price and to maintain annual interest payments. Where the buyer breached what was practically his only obligation under the contract, the land reverted back to the school fund, *Boykin* v. *Southwest Texas Oil & Gas Co.,* 256 S. W. 581, and a right of reinstatement arose, conditioned on the State's refusal or failure to dispose of the land by sale or lease. *Hoefer* v. *Robison,* 104 Tex. 159, 135 S. W. 371. We do not believe that it can seriously be contended that the buyer was substantially induced to enter into these contracts on the basis of a defeasible right to reinstatement in case of his failure to perform, or that he interpreted that right to be of everlasting effect. At the time the contract was entered into the State's policy was to sell the land as quickly as possible, and the State took many steps to induce sales. See *Becton* v. *Dublin,* 163 S. W. 2d 907, 910 (Tex. Civ. App.). Thus, for example, the Land Commissioner was required to reclassify forfeited lands by the next sale day and to publicize widely the forfeiture and sale. *Weaver* v. *Robison,* 114 Tex. 272, 268 S. W. 133. This policy clearly indicates that the right of reinstatement was not conceived to be an endless privilege conferred on a defaulting buyer. A contrary construction would render the buyer's obligations under the contract quite illusory while obliging the State to transfer the land whenever the purchaser decided to comply with the con-

tract, all this for a nominal down payment. We, like the Court in *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U. S. 502, 514, believe that "[t]he Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.' *Davis* v. *Mills,* 194 U. S. 451, 457."

The State's policy of quick resale of forfeited lands did not prove entirely successful; forfeiting purchasers who repurchased the lands again defaulted and other purchasers bought without any intention of complying with their contracts unless mineral wealth was discovered. The market for land contracted during the depression. 1938–1940 Rep. 12. These developments hardly to be expected or foreseen, operated to confer considerable advantages on the purchaser and his successors and a costly and difficult burden on the State. This Court's decisions have never given a law which imposes unforeseen advantages or burdens on a contracting party constitutional immunity against change. *Honeyman* v. *Jacobs,* 306 U. S. 539; *Gelfert* v. *National City Bank,* 313 U. S. 221; *East New York Savings Bank* v. *Hahn,* 326 U. S. 230. Laws which restrict a party to those gains reasonably to be expected from the contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract. The five-year limitation allows defaulting purchasers with a bona fide interest in their lands a reasonable time to reinstate. It does not and need not allow defaulting purchasers with a speculative interest in the discovery of minerals to remain in endless default while retaining a cloud on title.

The clouds on title arising from reinstatement rights were not without significance to the State's vital interest in administering its school lands to produce maximum revenue and in utilizing its properties in ways best suited to the needs of a growing population. The uncertainty

of land titles, the massive litigation to which this gave rise, and the pattern of sale and forfeiture were quite costly to the school fund and to the development of land use. Timeless reinstatement rights prevented the State from maintaining an orderly system of land sales and the resultant confusion impeded the effective disposition of lands and utilization of mineral wealth within them. Where sales by the State were not feasible or desirable, the State was prevented from utilizing the lands or permitting its subdivisions to utilize them by the possibility that some one of several purchasers might at some unknowable future date assert the right to reinstatement. In this very case, the legislature authorized by special act the transfer of this land to the City of El Paso, reserving the minerals to the State, in recognition of "[t]he fact that the City of El Paso is in urgent need of expanding its sources of water and of protecting water wells previously drilled," Tex. Gen. & Spec. Laws 1955, ch. 278. This transfer would have been invalid absent the 1941 Act.

The program adopted at the turn of the century for the sale, settlement, forfeiture, and reinstatement of land was not wholly effectual to serve the objectives of the State's land program many decades later. Settlement was no longer the objective, but revenues for the school fund, efficient utilization of public lands, and compliance with contracts of sale remained viable and important goals, as did the policy of relieving purchasers from the hardships of temporary adversity. Given these objectives and the impediments posed to their fulfillment by timeless reinstatement rights, a statute of repose was quite clearly necessary. The measure taken to induce defaulting purchasers to comply with their contracts, requiring payment of interest in arrears within five years, was a mild one indeed, hardly burdensome to the pur-

chaser who wanted to adhere to his contract of purchase, but nonetheless an important one to the State's interest. The Contract Clause does not forbid such a measure.

The judgment is

Reversed.

MR. JUSTICE BLACK, dissenting.

I have previously had a number of occasions to dissent from judgments of this Court balancing away the First Amendment's unequivocally guaranteed rights of free speech, press, assembly and petition.[1] In this case I am compelled to dissent from the Court's balancing away the plain guarantee of Art. I, § 10, that

> "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ,"

a balancing which results in the State of Texas' taking a man's private property for public use without compensation in violation of the equally plain guarantee of the Fifth Amendment, made applicable to the States by the Fourteenth, that

> ". . . private property [shall not] be taken for public use, without just compensation."

The respondent, Simmons, is the loser and the treasury of the State of Texas the ultimate beneficiary of the Court's action.

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[1] "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., Amend. I. See, *e. g., Scales* v. *United States,* 367 U. S. 203, 259 (dissenting opinion); *In re Anastaplo,* 366 U. S. 82, 97 (dissenting opinion); *Konigsberg* v. *State Bar,* 366 U. S. 36, 56 (dissenting opinion); *Braden* v. *United States,* 365 U. S. 431, 438 (dissenting opinion); *Wilkinson* v. *United States,* 365 U. S. 399, 415 (dissenting opinion); *Barenblatt* v. *United States,* 360 U. S. 109, 134 (dissenting opinion); *Uphaus* v. *Wyman,* 360 U. S. 72, 108 (dissenting opinion); *Beauharnais* v. *Illinois,* 343 U. S. 250, 267 (dissenting opinion).

I.

In 1910 Texas obligated itself by contract to sell the land here involved, the purchasers to pay one-fortieth of the price in cash, the balance due at unnamed dates, with annual interest at 3% of the unpaid balance to be paid each succeeding year. The contracts of sale approved on behalf of the State by the Texas Land Commissioner provided that the land was sold "in accordance with the provisions of" two Texas statutes.[2] The provisions of these statutes relating to the sale were thus incorporated in and became a part of the obligation assumed by Texas and the purchasers, just as if they had been spelled out word for word in the contracts. One of these incorporated statutes provided that upon failure to pay any interest due, a purchaser's rights under his contract should be "forfeited to the State," but that even after such forfeiture the purchaser could have his claim under the original contract

> "re-instated on . . . written request by paying into the Treasury the full amount of interest due on such claim up to the date of re-instatement, provided that no rights of third persons may have intervened." [3]

Some 37 years after execution of the contracts involved in this case, interest payments fell into arrears and the State declared the contracts forfeited. Five years and two days later Simmons, having become the owner of the contracts by valid sale and assignment, tendered payment of all interest due [4] and asked the State to carry out its

[2] Tex. Gen. Laws 1895, ch. 47; Tex. Gen. Laws 1897, ch. 129, as amended, Vernon's Ann. Civ. Stat., art. 5326.

[3] Tex. Gen. Laws 1897, ch. 129, art. 4218f, as amended, Vernon's Ann. Civ. Stat., art. 5326.

[4] The tender was received by the Texas Land Commissioner five years and two days after the forfeiture. The record does not indicate when or how the tender was sent or presented.

contractual obligation to reinstate his claim to the land. Since the State still owned the land and admittedly no rights of third persons had intervened, Simmons was unquestionably entitled to reinstatement of his claim under the terms of the State's original obligation. The State nevertheless refused to honor its contracts providing for reinstatement on tender of interest, and several years later sold the land, less mineral rights, to the City of El Paso for a price much higher than it would have received by honoring the contract and selling to Simmons at the contract price.[5] Simmons brought an action in federal court to establish his title. The Court of Appeals, reversing the District Court, held that the Contract Clause of the Constitution, Art. I, § 10, prevented Texas from thus repudiating the obligation it had assumed in its 1910 contracts.

This Court now reverses the Court of Appeals and holds that Texas was justified in dishonoring its contractual obligation because of a state law passed in 1941 which attempted to change the obligation of this contract and the many others like it from one unconditionally allowing reinstatement, provided no rights of third parties had intervened, to one which cast off that right unless "exercised within five (5) years from the date of the forfeiture." [6] The Court says that the State, after making a contractual obligation voluntarily and eagerly when the property was a drug on the market, was nevertheless free to enact the 1941 statute which not only impaired but flatly repudiated its former obligation after the land had greatly increased in value. And strange as

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[5] The contract price for the 620.65 acres involved in this case was $1.50 per acre. The Texas Legislature in 1955 sold it to El Paso for the fair market value to be appraised, "but no less than $6.50 per acre." Tex. Gen. & Spec. Laws 1955, ch. 278.

[6] Tex. Gen. & Spec. Laws 1941, ch. 191, § 3, as amended, Vernon's Ann. Civ. Stat., art. 5326.

it sounds, one of the reasons the Court gives as justification for Texas' repudiation of its obligation to Simmons and many others is that these contracts had turned out to be a bad bargain and Texas had lost millions of dollars by honoring them in the past. If the hope and realization of profit to a contract breaker are hereafter to be given either partial or sufficient weight to cancel out the unequivocal constitutional command against impairing the obligations of contracts, that command will be nullified by what is the most common cause for breaking contracts. I cannot subscribe to such a devitalizing constitutional doctrine.

The Court does not deny that under Texas law the State's contractual promise to permit reinstatement gave the purchaser a right which the State under its law was bound by the contract to honor.[7] The Court carefully

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[7] I cannot agree with the Court's dictum that the Texas cases on this point are unclear. I do not think they could be much clearer. In *Gulf Production Co.* v. *State,* 231 S. W. 124, 131, the Texas Court of Civil Appeals said:

"The provisions for reinstatement were in effect when Kidd purchased the land, and were embraced in the contract between the state and Kidd when the latter purchased, and neither Kidd nor the state could thereafter arbitrarily and without the consent of the other write into the contract any provision or condition varying, restricting, or enlarging the terms thereof."

The court also observed:

"The primary object of the state in placing its public domain upon the market was the securing of actual settlers on these lands. The revenues to be derived from sales was but a secondary consideration, a mere incident to the greater purpose of supplying homes to those who sought and lived in them in good faith. The wisdom of this policy of our forefathers has never been seriously questioned, and the provision for the reinstatement of sales forfeited was an expression of the spirit of that policy. It was right and just that those who had settled upon and improved the state's lands in response to the invitation of the state, and who had endured the hardships incident to such settlement, and the privations incident to such improve-

does not deny that this promise by Texas is the kind of "obligation" which the Contract Clause was written to protect. The Court does not, unless by a most oblique reference in its footnote 9, nor could it in my judgment, allow Texas to escape its obligation by treating this as a mere change in court remedies for enforcement. Instead of relying on such grounds, the Court says that since the State acts out of what this Court thinks are good motives, and has not repudiated its contract except in a way which this Court thinks is "reasonable," therefore the State will be allowed to ignore the Contract Clause of the Constitution. There follow citation of one or two dicta from past cases and a bit of skillful "balancing," and the Court arrives at its conclusion: although the obligation of the contract has been impaired here, this impairment does not seem to the Court to be very serious or evil, and so therefore "The Contract Clause does not forbid such a measure."

II.

In its opinion the Court's discussion of the Contract Clause and this Court's past decisions applying it is brief. For the most part the Court instead discusses the difficulties and regret which the Government of Texas has experienced on account of the contracts it entered. I therefore think that the first thing it is important to point out is that there is no support whatever in history or in

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ment, should be given an opportunity to retrieve their lands when forfeited by reason of temporary misfortunes and the consequent inability to meet their payments in strict compliance with their obligations. Forfeitures by statute or contract are not favored. They must be viewed with a cold and literal scrutiny, that the injury wrought may be held to the minimum. On the other hand, statutes or contracts designed to relieve from the rigors of forfeiture are looked upon warmly and construed liberally, so as to afford the maximum relief. And this reciprocal rule applies as well to the great state of Texas as to its humblest citizen." 231 S. W., at 131. Cf. *State* v. *Walden*, 325 S. W. 2d 705 (Tex. Civ. App.).

this Court's prior holdings for the decision reached in this case. Indeed, I believe that the relevant precedents all point the opposite way.

The Contract Clause was included in the same section of the Constitution which forbids States to pass bills of attainder or *ex post facto* laws. All three of these provisions reflect the strong belief of the Framers of the Constitution that men should not have to act at their peril, fearing always that the State might change its mind and alter the legal consequences of their past acts so as to take away their lives, their liberty or their property. James Madison explained that the people were "weary of the fluctuating policy" of state legislatures and wanted it made clear that under the new Government men could safely rely on States to keep faith with those who justifiably relied on their promises. The Federalist, No. 44, at 301 (Cooke ed. 1961).

The first great case construing the Contract Clause involved, much like the present case, an attempt by a State to relieve itself of the duty of honoring land grants which it regretted having made. In *Fletcher* v. *Peck*, 6 Cranch 87, decided in 1810, this Court speaking through Chief Justice John Marshall held that a law of the State of Georgia which attempted to terminate grants of land made by the State under authority of a prior state law was invalid as a violation of the Contract Clause.[8] Later in *Sturges* v. *Crowninshield,* 4 Wheat. 122, decided in 1819, Chief Justice Marshall again speaking for the Court went on to say that "Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct," [9] thus drawing a distinction between state action deemed to

[8] *Fletcher* v. *Peck* also made clear that the Constitution forbids impairment of a contract whether the contract be executed or, as here, executory. 6 Cranch, at 136–137.

[9] 4 Wheat., at 200.

be a mere change of remedy, that is, the method for enforcing the contract, and state impairment of a contractual obligation.[10] As to the latter he emphasized that a thing promised to be done by a party to a contract is

> "of course, the obligation of his contract. . . . Any law which releases a part of this obligation, must, in the literal sense of the word, impair it. . . .
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> "The words of the constitution, then, are express, and incapable of being misunderstood." [11]

On other occasions this Court held that the Contract Clause prohibits a State from repudiating a tax exemption included by the State in a grant of land. *Gordon* v. *Appeal Tax Court,* 3 How. 133; *New Jersey* v. *Wilson,* 7 Cranch 164.

The Court does not purport to overrule any of these past cases, but I think unless overruled they require a holding that the Texas statute violates the Contract Clause. It is therefore at least a little surprising that the Court does not find it necessary to discuss them. Instead the Court quotes a few abstract statements from some other cases, hardly a solid and persuasive basis for devitalizing one of the few provisions which the Framers deemed of sufficient importance to place in the original Constitution along with companion clauses forbidding States to pass bills of attainder and *ex post facto* laws.

The cases the Court mentions do not support its reasoning. *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, which the Court seems to think practically read the Contract Clause out of the Constitution, actually did

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[10] See also, *e. g., Honeyman* v. *Jacobs,* 306 U. S. 539, 542, and cases there cited; *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 430, 434, and cases there cited at n. 13; *Oshkosh Waterworks Co.* v. *Oshkosh,* 187 U. S. 437, 439.

[11] 4 Wheat., at 197–198.

no such thing, as the *Blaisdell* opinion read in its entirety shows and as subsequent decisions of this Court were careful to point out. *Blaisdell* without resort to "balancing" simply held that a State could constitutionally pass a law extending the period of redemption of a mortgage for two years where it provided for compensation to the mortgagee for the resulting delay in enforcement. In so holding the *Blaisdell* Court relied on and approved the established distinction between an invalid impairment of a contract's obligation and a valid change in the remedy to enforce it.[12] Viewed this way the Court

[12] The *Blaisdell* opinion said, 290 U. S., at 430:

"Chief Justice Marshall pointed out the distinction between obligation and remedy. *Sturges* v. *Crowninshield, supra,* p. 200. Said he: 'The distinction between the obligation of a contract, and the remedy given by the legislature to enforce that obligation, has been taken at the bar, and exists in the nature of things. Without impairing the obligation of the contract, the remedy may certainly be modified as the wisdom of the nation shall direct.' And in *Von Hoffman* v. *City of Quincy, supra,* pp. 553, 554, the general statement above quoted was limited by the further observation that 'It is competent for the States to change the form of the remedy, or to modify it otherwise, as they may see fit, provided no substantial right secured by the contract is thereby impaired. No attempt has been made to fix definitely the line between alterations of the remedy, which are to be deemed legitimate, and those which, under the form of modifying the remedy, impair substantial rights. Every case must be determined upon its own circumstances.' "

Later, in *Honeyman* v. *Jacobs,* 306 U. S. 539, 542, Chief Justice Hughes, the author of *Blaisdell,* quoted with approval the following language from the opinion which he had joined in *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.,* 300 U. S. 124, 128:

"The legislature may modify, limit or alter the remedy for enforcement of a contract without impairing its obligation, but in so doing, it may not deny all remedy or so circumscribe the existing remedy with conditions and restrictions as seriously to impair the value of the right."

Chief Justice Hughes in the *Jacobs* case also referred to numerous past cases as having drawn this distinction, including among them

in *Blaisdell* found no contractual promise or "obligation" by the State to keep the old law as to remedy static. It could and did treat the challenged state law as a general one which did no more than change the remedy to enforce contracts, a change which had carefully provided that parties entitled under the old law to foreclose mortgages should during those two years be paid the fair rental value of the property just as if the foreclosure had taken place. In so holding the Court recognized that contracts are subject to the right of partial or total eminent domain, *West River Bridge Co.* v. *Dix,* 6 How. 507, so long as compensation is paid, and it held that since there was provision that the mortgagees would be paid the Contract Clause would permit such "limited and temporary interpositions" [13] designed to give "temporary relief" [14] through a "temporary and conditional restraint" on the remedy.[15] The Court noted that the mortgage contract was one between private persons rather than one between a private person and the State itself, and relied on past decisions which had held that "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, 357. See also, *e. g., Dillingham* v. *McLaughlin,* 264 U. S. 370, 374; *Marcus Brown Holding Co.* v. *Feldman,* 256

Blaisdell. See 306 U. S., at 542. He concluded that "[t]he reasoning of this Court in *Richmond Mortgage Corp.* v. *Wachovia Bank, supra,* is applicable and governs our decision." 306 U. S., at 543.

[13] 290 U. S., at 439.

[14] *Ibid.*

[15] *Id.*, at 440. Mr. Justice Brandeis in discussing *Blaisdell* the following year said that the statute in that case had been upheld because it had been found "to preserve substantially the right" of the mortgagee to obtain payment. *Louisville Joint Stock Land Bank* v. *Radford,* 295 U. S. 555, 581. See also *id.*, at 597–598.

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U. S. 170, 198; *Manigault* v. *Springs,* 199 U. S. 473, 480. The Contract Clause, said the Court in *Blaisdell,* would *not* be construed to "permit the State to adopt as its policy the repudiation of debts or the destruction of contracts or the denial of means to enforce them." 290 U. S., at 439. That, the Court held, would impair the contract instead of merely delaying enforcement while compensating the creditor for the delay. No such thing can be said about this Texas law, as the Court implicitly recognizes by placing no reliance upon the distinction between the obligation and the remedy, preferring instead its "balancing" technique.[16] Chief Justice Hughes, the author of *Blaisdell,* later reiterated and emphasized that that case had upheld only a temporary restraint which provided for compensation, when four months later he spoke for the Court in striking down a law which did not. *W. B. Worthen Co.* v. *Thomas,* 292 U. S. 426. Other state laws which did not meet the

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[16] One scholar who made a study of all the decisions of this Court concerning the Contract Clause had this to say about *Blaisdell:*

"The Blaisdell case, in the light of subsequent decisions, appears now to have decided merely the very narrow question of the validity of the particular statute under the specific circumstances there existing. So far as any general rule may be said to have emerged, it is merely an apparently limited extension of the principle that reasonable modification of the remedy, especially if adequate time is left for compliance, does not constitute an impairment of the obligation of contracts. If any advance has been made, it consists in that economic conditions may create an emergency in which a scrupulously drafted statute may call upon the police power to grant wide discretion to courts in extending temporary and conditional relief to debtors." Wright, The Contract Clause of the Constitution, 119.

Compare the following language of Mr. Justice Brandeis in *Wright* v. *Vinton Branch,* 300 U. S. 440, 469:

"[I]t is urged that the limitations here placed upon the enforcement of the mortgage are not merely a modification of the remedy recognized as permissible. Compare *Home Building & Loan Assn.* v. *Blaisdell,* 290 U. S. 398, 434."

constitutional standard applied in *Blaisdell* were subsequently struck down. See, *e. g., W. B. Worthen Co.* v. *Kavanaugh,* 295 U. S. 56; *Treigle* v. *Acme Homestead Assn.,* 297 U. S. 189; *Wood* v. *Lovett,* 313 U. S. 362.[17]

None of the other cases which the Court quotes or mentions in passing altered in any way the rule established in *Fletcher* v. *Peck, supra,* and adhered to in *Blaisdell* and thereafter, that a State may not pass a law repudiating contractual obligations without compensating the injured parties.[18] Especially should this be true when, as in the

[17] I dissented in *Wood* v. *Lovett,* 313 U. S., at 372, because, as I there pointed out, I believed that the state law in that case, which protected purchasers of land against loss even though their titles were based only on quitclaim deeds, should have been upheld under *Blaisdell.* Even had my dissent prevailed, however, that case would not have supported the Court's holding in the case before us.

[18] None of the cases mentioned by the Court involved legislation by which a State attempted to repudiate its own contractual obligation without giving compensation, nor did any of them come near suggesting or implying that a State might do so. *Honeyman* v. *Jacobs,* 306 U. S. 539, in an opinion by Chief Justice Hughes, upheld a state statute providing that a mortgagee who bid at a foreclosure sale could not obtain a deficiency judgment if the value of the property equaled or exceeded the amount of the debt plus costs and interest; the Court said that the mortgagee under this law received all the compensation to which his contract entitled him, and that the statute "merely restricted the exercise of the contractual remedy . . . ." *Id.,* at 544, quoting from *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.,* 300 U. S. 124, 131. *Veix* v. *Sixth Ward Building & Loan Assn.,* 310 U. S. 32, held only that by issuing shares of stock at a time when state law permitted shareholders to withdraw their shares in exchange for a cash refund a private company regulated by the State could not prevent the State from applying later general legislation forbidding shareholders to sue for the withdrawal value; this rule of course had been recognized in *Blaisdell* and in cases which it cited, *e. g., Hudson County Water Co.* v. *McCarter,* 209 U. S. 349, and *Manigault* v. *Springs,* 199 U. S. 473. *Gelfert* v. *National City Bank,* 313 U. S. 221, upheld a New York law which redefined fair market value of property purchased by mortgagees at foreclosure sales; again empha-

case before us, the contractual obligation repudiated is the State's own. Compare *Perry* v. *United States,* 294 U. S. 330, with *Norman* v. *Baltimore & O. R. Co.,* 294 U. S. 240.

III.

To subvert the protection of the Contract Clause here, as well as the Fifth and Fourteenth Amendments' prohibition against taking private property for public use without just compensation,[19] the Court has, as I said, imported into this constitutional field what I believe to be a constitutionally insupportable due process "balancing" technique to which I have objected in cases arising under the Due Process Clauses of the Fifth and Fourteenth Amendments,[20] and which has done so much to water down the safeguards of First Amendment freedoms. See note 1, *supra.* The Court says, "Laws which restrict a party to those gains reasonably to be expected from the

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sizing that contracts between private persons could not prevent application of general regulatory laws, the Court held that this law was merely a regulation of the remedy, and did not affect any substantial right given by the contract, relying on *Honeyman* v. *Jacobs,* 306 U. S. 539; *Richmond Mortgage & Loan Corp.* v. *Wachovia Bank & Trust Co.,* 300 U. S. 124; and *Blaisdell. Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U. S. 502, which upheld a law binding all the creditors of a municipal corporation to an adjustment of claims if 85% of them agreed, said simply that as a practical matter the law rather than impairing the creditors' contracts was necessary to keep them from becoming worthless. *East New York Savings Bank* v. *Hahn,* 326 U. S. 230, upheld a mortgage moratorium law much like that in *Blaisdell;* the Court pointed out that the law protected creditors from loss by requiring debtors to pay taxes, insurance, interest and installments on the principal, and again emphasized, citing *Manigault* v. *Springs, supra,* that private persons could not escape state economic regulatory legislation simply because they previously had entered contracts.

[19] See Part IV, pp. 533–535, *infra.*

[20] See, *e. g., Rochin* v. *California,* 342 U. S. 165, 174 (concurring opinion).

contract are not subject to attack under the Contract Clause, notwithstanding that they technically alter an obligation of a contract." Otherwise stated, a person can make a good deal with a State but if it turns out to be a very good deal for him or a very bad deal for the State, the State is free to renege at any time. And whether gains can "reasonably be expected from the contract" is of course, in the Court's view, for this Court to decide. Thus this Court's judgment as to "reasonableness" of a law impairing or even repudiating a valid contract becomes the measure of the Contract Clause's protection.

The Court in its due process "reasonableness" formula, true to the principle of that indefinable standard, weighs what it considers to be the advantages and disadvantages to Texas of enforcing the contract provision, against the advantages and disadvantages to the purchasers. The Court then concludes that in its judgment the scales tip on the side of Texas and therefore refuses to give full faith to the constitutional provision. On the side of the purchasers the Court finds nothing that weighs much: the promise to reinstate was not "central" or "primary"; the contracts as viewed today seem to have been very generous to the buyers; buyers were probably not substantially induced to enter into these contracts by the "defeasible right to reinstatement." The Court tries to downgrade the importance of the reinstatement obligation in the contract by volunteering the opinion that this obligation "was not the central undertaking of the seller [Texas] nor the primary consideration for the buyer's undertaking." Why the Court guesses this we are not told. My guess is different. This particular provision was bound, I think, to have been a great inducement to prospective purchasers of lots and blocks of land that the State of Texas was understandably eager to sell for many reasons. It took purchasers to build up the population of Texas and thereby improve

its business and increase its land values. It is not surprising, therefore, that the State was willing to sell its oversupply of land on liberal terms, nor should it be surprising to suggest that Texas knew that its land could be sold for more, and more quickly, by promising purchasers that so long as Texas kept the property the right of these first purchasers and their assigns to buy at the original prices should never be forfeited. To my way of thinking it demonstrates a striking lack of knowledge of credit buying and selling even to imply that these express contractual provisions safeguarding credit purchasers against forfeitures were not one of the greatest, if not the greatest, selling arguments Texas had to promote purchase of its great surfeit of lands. The Court's factual inference is all the more puzzling since its opinion emphasizes that many people entered these contracts for speculative purposes which without the redemption provision would not have been nearly so attractive.

The Court observes that it believes "[t]he Constitution is 'intended to preserve practical and substantial rights, not to maintain theories.'" [21] Of course I agree with that. But while deprivation of Simmons' right to have Texas carry out its obligation to permit him to reinstate his claim and purchase the land may seem no more than a "theory" to the Court, it very likely seems more than that to Texas, which by repudiating its contract has undoubtedly gained millions of dollars, and to purchasers who have concededly, and I think unconstitutionally, lost those millions. It appears odd to me also to have the Court support its holding on what is nothing more than the Court's theory that all Texas has done is "technically alter an obligation of a contract." Much as has been said about the wealth of Texas, I was unaware until now

[21] Quoting *Faitoute Iron & Steel Co.* v. *City of Asbury Park,* 316 U. S. 502, 514, which in turn quoted *Davis* v. *Mills,* 194 U. S. 451, 457.

that a multi-million dollar windfall for that State could be dismissed as a mere technicality; it sounds like more than a technicality to me, and perhaps to the purchasers whose rights Texas took away from them.

Let us now look at some of the weights the Court throws on the scales on the side of Texas: thousands of purchase contracts were forfeited from time to time by failure of purchasers to pay interest; forfeited claims under many of these contracts could be reinstated by purchasers "if and when the land became potentially productive of gas and oil"; some of the purchases were made for speculative purposes; purchasers thwarted efforts of Texas to repurchase the lands in order to resell them at a higher value; the lands went up in value as the years rolled by, which caused Texas to "lose" millions of dollars; much litigation arose between the State and contract purchasers; the State's policy of quick resale of forfeited lands, in order to cause rights of third parties to intervene, did not prove successful; the market for land contracted during the depression; clouds on titles arose because of reinstatement rights on land which Texas had resold; "interest" and "necessity" prompted Texas to pass the 1941 law repudiating its contractual reinstatement rights; carrying out the obligations would have been "quite costly to the school fund and to the development of land use"; when the land here involved was sold to El Paso in breach of the State's obligation to Simmons, El Paso was " 'in urgent need of expanding its sources of water' "; the State needed more money for its school fund and for efficient utilization of its public lands, money which it could get painlessly if it was allowed to repudiate these obligations, which were "impediments" to the State's desire to raise money by reselling these lands for a higher price.

I do not believe that any or all of the things set out above on which the Court relies are reasons for relieving Texas of the unconditional duty of keeping its contrac-

tual obligations as required by the Contract Clause. At most the Court's reasons boil down to the fact that Texas' contracts, perhaps very wisely made a long time ago,[22] turned out when land soared in value, and particularly after oil was discovered, to be costly to the State. As the Court euphemistically puts it, the contracts were "not wholly effectual to serve the objectives of the State's land program many decades later. Settlement was no longer the objective, but revenues . . ." among other things were. In plainer language, the State decided it had made a bad deal and wanted out. There is nothing unusual in this. It is a commonplace that land values steadily rise when population increases and rise sharply when valuable minerals are discovered, and that many sellers would be much richer and happier if when lands go up in value they were able to welch on their sales. No plethora of words about state school funds can conceal the fact that to get money easily without having to tax the whole public Texas took the easy way out and violated the Contract Clause of the Constitution as written and as applied up to now. If the values of these lands and of valid contracts to buy them have increased, that increase belongs in equity as well as in sound constitutional interpretation not to Texas, but to the many people who agreed to these contracts under what now turns out to have been a mistaken belief that Texas would keep the obligations it gave to those who dealt with it.

All this for me is just another example of the delusiveness of calling "balancing" a "test." With its deprecatory view of the equities on the side of Simmons and other claimants and its remarkable sympathy for the State, the Court through its balancing process states the case in a way inevitably destined to bypass the Contract Clause and let Texas break its solemn obligation. As the Court's

[22] See *Gulf Production Co.* v. *State,* 231 S. W. 124, 131 (Tex. Civ. App.), quoted n. 7, *supra.*

opinion demonstrates, constitutional adjudication under the balancing method becomes simply a matter of this Court's deciding for itself which result in a particular case seems in the circumstances the more acceptable governmental policy and then stating the facts in such a way that the considerations in the balance lead to the result. Even if I believed that we as Justices of this Court had the authority to rely on our judgment of what is best for the country instead of trying to interpret the language and purpose of our written Constitution, I would not agree that Texas should be permitted to do what it has done here. But more importantly, I most certainly cannot agree that constitutional law is simply a matter of what the Justices of this Court decide is not harmful for the country, and therefore is "reasonable." Cf. *Ferguson* v. *Skrupa,* 372 U. S. 726; *Federal Power Comm'n* v. *Natural Gas Pipeline Co.,* 315 U. S. 575, 599 (concurring opinion). James Madison said that the Contract Clause was intended to protect people from the "fluctuating policy" of the legislature. The Federalist, No. 44, at 301 (Cooke ed. 1961). Today's majority holds that people are not protected from the fluctuating policy of the legislature, so long as the legislature acts in accordance with the fluctuating policy of this Court.

IV.

In spite of all the Court's discussion of clouds on land titles and need for "efficient utilization" of land, the real issue in this case is not whether Texas has constitutional power to pass legislation to correct these problems, by limiting reinstatements to five years following forfeiture. I think that there was and is a constitutional way for Texas to do this. But I think the Fifth Amendment forbids Texas to do so without compensating the holders of contractual rights for the interests it wants to destroy. Contractual rights, this Court has held, are property, and

the Fifth Amendment requires that property shall not be taken for public use without just compensation. *Lynch* v. *United States,* 292 U. S. 571; see also *Perry* v. *United States,* 294 U. S. 330; cf. *United States* v. *General Motors Corp.,* 323 U. S. 373. This constitutional requirement is made applicable to the States by the Fourteenth Amendment. See *Griggs* v. *Allegheny County,* 369 U. S. 84, 85; *Pennsylvania Coal Co.* v. *Mahon,* 260 U. S. 393, 415; *Chicago, B. & Q. R. Co.* v. *Chicago,* 166 U. S. 226, 241. The need to clear titles and stabilize the market in land would certainly be a valid public purpose to sustain exercise of the State's power of eminent domain, and while the Contract Clause protects the value of the property right in contracts, it does not stand in the way of a State's taking those property rights as it would any other property, provided it is willing to pay for what it has taken. *Contributors to the Pennsylvania Hospital* v. *City of Philadelphia,* 245 U. S. 20; *City of Cincinnati* v. *Louisville & N. R. Co.,* 223 U. S. 390; *Long Island Water Supply Co.* v. *Brooklyn,* 166 U. S. 685; *West River Bridge Co.* v. *Dix,* 6 How. 507. The Texas statute which the Court upholds, however, took away Simmons' contract rights without any compensation.

The Court seems to say that because it was "necessary" to raise money and clear titles, Texas was not obligated to pay for rights which it took. I suppose that if Texas were building a highway and a man's house stood in the way, it would be "necessary" to tear it down. Until today I had thought there could be no doubt that he would be entitled to just compensation. Yet the Fifth and Fourteenth Amendments protect his rights no more nor less than they do those of people to whom Texas was contractually obligated. Texas' "necessity" as seen by this Court is the mother of a regrettable judicial invention which I think has no place in our constitu-

tional law.[23] Our Constitution provides that property needed for public use, whether for schools or highways or any other public purpose, shall be paid for out of tax-raised funds fairly contributed by all the taxpayers, not just by a few purchasers of land who trusted the State not wisely but too well. It is not the happiest of days for me when one of our wealthiest States is permitted to enforce a law that breaks faith with those who contracted with it. Cf. *Federal Power Comm'n* v. *Tuscarora Indian Nation,* 362 U. S. 99, 124 (dissenting opinion).

I would affirm the judgment of the Court of Appeals.

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[23] The Court's opinion bears an uncanny resemblance to one I once said I feared might be rendered some day if this Court continued to decide cases by "balancing." See Black, The Bill of Rights, 35 N. Y. U. L. Rev. 865, 877–878, reprinted in Cahn ed., The Great Rights, 57–59. I there said, evidently too optimistically, "Of course, I would not decide this case this way nor do I think any other judge would so decide it today."

COX *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 24. Argued October 21, 1964.—Decided January 18, 1965.

Appellant was the leader of a civil rights demonstration in Baton Rouge, Louisiana, of 2,000 Negro students protesting segregation and the arrest and imprisonment the previous day of other Negro students who had participated in a protest against racial segregation. The group assembled a few blocks from the courthouse, where appellant identified himself to officers as the group's leader and explained the purpose of the demonstration. Following his refusal to disband the group, appellant led it in an orderly march toward the courthouse. In the vicinity of the courthouse officers stopped appellant who, after explaining the purpose and program of the demonstration, was told by the Police Chief that he could hold the meeting so long as he confined it to the west side of the street. Appellant directed the group to the west sidewalk, across the street from the courthouse and 101 feet from its steps. There the group, standing five feet deep and occupying almost the entire block but not obstructing the street, displayed signs and sang songs which evoked response from the students in the courthouse jail. Appellant addressed the group. The Sheriff, construing as inflammatory appellant's concluding exhortation to the students to "sit in" at uptown lunch counters, ordered dispersal of the group which, not being directly forthcoming, was effected by tear gas. Appellant was arrested the next day and was convicted of peace disturbance, obstructing public passages, and courthouse picketing. The Louisiana Supreme Court affirmed the convictions, two of which (peace disturbance and obstructing public passages) are involved in this case; the third (courthouse picketing) being involved in No. 49, *post*, at 559. *Held:*

1. In arresting and convicting appellant under the circumstances disclosed by this record, Louisiana deprived him of his rights of free speech and free assembly in violation of the First and Fourteenth Amendments. *Edwards* v. *South Carolina*, 372 U. S. 229; *Fields* v. *South Carolina*, 375 U. S. 44, followed. Pp. 544–551.

2. The breach of the peace statute is unconstitutionally vague in its overly broad scope, for Louisiana has defined "breach of the peace" as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet"; yet one of the very functions of free speech is to invite dispute. *Terminiello* v. *Chi-*

cago, 337 U. S. 1; *Stromberg* v. *California,* 283 U. S. 359, followed. Pp. 551–552.

3. The practice in Baton Rouge of allowing local officials unfettered discretion in regulating the use of streets for peaceful parades and meetings notwithstanding the prohibitions contained in the statute against obstructing public passages abridged appellant's freedom of speech and assembly in violation of the First and Fourteenth Amendments. Pp. 553–558.

(a) The Louisiana Supreme Court construed the obstructing public passages statute as applying to public assemblies which do not have the specific purpose of obstructing traffic. P. 553.

(b) A State has the right to impose nondiscriminatory restrictions on travel on city streets. P. 554.

(c) The rights of free speech and assembly do not mean that everyone may address a group at any public place at any time. Pp. 554–555.

(d) Communication of ideas by picketing and marching on streets is not afforded the same kind of protection under the First and Fourteenth Amendments as is pure speech. P. 555.

(e) Although the statute on its face precludes all street assemblies and parades, the Baton Rouge authorities have not so enforced it but in their uncontrolled discretion have permitted parades and street meetings. Pp. 555–557.

(f) The lodging of such broad discretion in public officials sanctions suppression of free expression and facilitates denial of equal protection. Pp. 557–558.

244 La. 1087, 156 So. 2d 448, reversed.

Carl Rachlin argued the cause for appellant. With him on the brief were *Robert Collins, Nils Douglas* and *Floyd McKissick.*

Ralph L. Roy argued the cause for appellee. With him on the brief was *Jack P. F. Gremillion,* Attorney General of Louisiana.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Appellant, the Reverend Mr. B. Elton Cox, the leader of a civil rights demonstration, was arrested and charged

with four offenses under Louisiana law—criminal conspiracy, disturbing the peace, obstructing public passages, and picketing before a courthouse. In a consolidated trial before a judge without a jury, and on the same set of facts, he was acquitted of criminal conspiracy but convicted of the other three offenses. He was sentenced to serve four months in jail and pay a $200 fine for disturbing the peace, to serve five months in jail and pay a $500 fine for obstructing public passages, and to serve one year in jail and pay a $5,000 fine for picketing before a courthouse. The sentences were cumulative.

In accordance with Louisiana procedure, the Louisiana Supreme Court reviewed the "disturbing the peace" and "obstructing public passages" convictions on certiorari, and the "courthouse picketing" conviction on appeal. The Louisiana court, in two judgments, affirmed all three convictions. 244 La. 1087, 156 So. 2d 448; 245 La. 303, 158 So. 2d 172. Appellant filed two separate appeals to this Court from these judgments contending that the three statutes under which he was convicted were unconstitutional on their face and as applied. We noted probable jurisdiction of both appeals, 377 U. S. 921. This case, No. 24, involves the convictions for disturbing the peace and obstructing public passages, and No. 49 concerns the conviction for picketing before a courthouse.

I.

The Facts.

On December 14, 1961, 23 students from Southern University, a Negro college, were arrested in downtown Baton Rouge, Louisiana, for picketing stores that maintained segregated lunch counters. This picketing, urging a boycott of those stores, was part of a general protest movement against racial segregation, directed by the local chapter of the Congress of Racial Equality, a civil rights

organization. The appellant, an ordained Congregational minister, the Reverend Mr. B. Elton Cox, a Field Secretary of CORE, was an advisor to this movement. On the evening of December 14, appellant and Ronnie Moore, student president of the local CORE chapter, spoke at a mass meeting at the college. The students resolved to demonstrate the next day in front of the courthouse in protest of segregation and the arrest and imprisonment of the picketers who were being held in the parish jail located on the upper floor of the courthouse building.

The next morning about 2,000 students left the campus, which was located approximately five miles from downtown Baton Rouge. Most of them had to walk into the city since the drivers of their busses were arrested. Moore was also arrested at the entrance to the campus while parked in a car equipped with a loudspeaker, and charged with violation of an antinoise statute. Because Moore was immediately taken off to jail and the vice president of the CORE chapter was already in jail for picketing, Cox felt it his duty to take over the demonstration and see that it was carried out as planned. He quickly drove to the city "to pick up this leadership and keep things orderly."

When Cox arrived, 1,500 of the 2,000 students were assembling at the site of the old State Capitol building, two and one-half blocks from the courthouse. Cox walked up and down cautioning the students to keep to one side of the sidewalk while getting ready for their march to the courthouse. The students circled the block in a file two or three abreast occupying about half of the sidewalk. The police had learned of the proposed demonstration the night before from news media and other sources. Captain Font of the City Police Department and Chief Kling of the Sheriff's office, two high-ranking subordinate officials, approached the group and spoke to Cox at the northeast corner of the capitol

grounds. Cox identified himself as the group's leader, and, according to Font and Kling, he explained that the students were demonstrating to protest "the illegal arrest of some of their people who were being held in jail." The version of Cox and his witnesses throughout was that they came not "to protest just the arrest but . . . [also] to protest the evil of discrimination." Kling asked Cox to disband the group and "take them back from whence they came." Cox did not acquiesce in this request but told the officers that they would march by the courthouse, say prayers, sing hymns, and conduct a peaceful program of protest. The officer repeated his request to disband, and Cox again refused. Kling and Font then returned to their car in order to report by radio to the Sheriff and Chief of Police who were in the immediate vicinity; while this was going on, the students, led by Cox, began their walk toward the courthouse.

They walked in an orderly and peaceful file, two or three abreast, one block east, stopping on the way for a red traffic light. In the center of this block they were joined by another group of students. The augmented group now totaling about 2,000 [1] turned the corner and proceeded south, coming to a halt in the next block opposite the courthouse.

As Cox, still at the head of the group, approached the vicinity of the courthouse, he was stopped by Captain Font and Inspector Trigg and brought to Police Chief Wingate White, who was standing in the middle of St. Louis Street. The Chief then inquired as to the purpose of the demonstration. Cox, reading from a prepared paper, outlined his program to White, stating that it would include a singing of the Star Spangled Banner

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[1] Estimates of the crowd's size varied from 1,500 to 3,800. Two thousand seems to have been the consensus and was the figure accepted by the Louisiana Supreme Court, 244 La., at 1095, 156 So. 2d, at 451.

and a "freedom song," recitation of the Lord's Prayer and the Pledge of Allegiance, and a short speech. White testified that he told Cox that "he must confine" the demonstration "to the west side of the street." White added, "This, of course, was not—I didn't mean it in the import that I was giving him any permission to do it, but I was presented with a situation that was accomplished, and I had to make a decision." Cox testified that the officials agreed to permit the meeting. James Erwin, news director of radio station WIBR, a witness for the State, was present and overheard the conversation. He testified that "My understanding was that they would be allowed to demonstrate if they stayed on the west side of the street and stayed within the recognized time," [2] and that this was "agreed to" by White.[3]

The students were then directed by Cox to the west sidewalk, across the street from the courthouse, 101 feet from its steps. They were lined up on this sidewalk about five deep and spread almost the entire length of the block. The group did not obstruct the street. It was close to noon and, being lunch time, a small crowd of 100 to 300 curious white people, mostly courthouse personnel, gathered on the east sidewalk and courthouse steps, about 100 feet from the demonstrators. Seventy-five to eighty policemen, including city and state patrolmen and members of the Sheriff's staff, as well as members of the fire department and a fire truck were stationed in the street between the two groups. Rain fell throughout the demonstration.

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[2] There were varying versions in the record as to the time the demonstration would take. The State's version was that Cox asked for seven minutes. Cox's version was that he said his speech would take seven minutes but that the whole program would take between 17 and 25 minutes.

[3] The "permission" granted the students to demonstrate is discussed at greater length in No. 49, where its legal effect is considered.

Several of the students took from beneath their coats picket signs similar to those which had been used the day before. These signs bore legends such as "Don't buy discrimination for Christmas," "Sacrifice for Christ, don't buy," and named stores which were proclaimed "unfair." They then sang "God Bless America," pledged allegiance to the flag, prayed briefly, and sang one or two hymns, including "We Shall Overcome." The 23 students, who were locked in jail cells in the courthouse building out of the sight of the demonstrators, responded by themselves singing; this in turn was greeted with cheers and applause by the demonstrators. Appellant gave a speech, described by a State's witness as follows:

> "He said that in effect that it was a protest against the illegal arrest of some of their members and that other people were allowed to picket . . . and he said that they were not going to commit any violence,[4] that if anyone spit on them, they would not spit back on the person that did it." [5]

Cox then said:

> "All right. It's lunch time. Let's go eat. There are twelve stores we are protesting. A number of these stores have twenty counters; they accept your money from nineteen. They won't accept it from the

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[4] A few days before, Cox had participated with some of the demonstrators in a "direct non-violent clinic" sponsored by CORE and held at St. Mark's Church.

[5] Sheriff Clemmons had no objection to this part of the speech. He testified on cross-examination as follows:

"Q. Did you have any objection to that part of his talk?

"A. None whatever. If he would have done what he said, there would have been no trouble at all. The whole thing would have been over and done with.

"Q. Did you have any objection to them being assembled on that side of the street while he was making that speech, sir?

"A. I had no objection to it."

> twentieth counter. This is an act of racial discrimination. These stores are open to the public. You are members of the public. We pay taxes to the Federal Government and you who live here pay taxes to the State." [6]

In apparent reaction to these last remarks, there was what state witnesses described as "muttering" and "grumbling" by the white onlookers.[7]

The Sheriff, deeming, as he testified, Cox's appeal to the students to sit in at the lunch counters to be "inflammatory," then took a power microphone and said, "Now, you have been allowed to demonstrate. Up until now your demonstration has been more or less peaceful, but what you are doing now is a direct violation of the law, a disturbance of the peace, and it has got to be broken up immediately." The testimony as to what then happened is disputed. Some of the State's witnesses testified that Cox said, "don't move"; others stated that he made a "gesture of defiance." It is clear from the record, however, that Cox and the demonstrators did not then and there break up the demonstration. Two of the Sheriff's deputies immediately started across the street and told the group, "You have heard what the Sheriff said, now, do what he said." A state witness testified that they

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[6] Sheriff Clemmons objected strongly to these words. He testified on cross-examination as follows:

"Q. Now, what part of his speech became objectionable to him being assembled there?

"A. The inflammatory manner in which he addressed that crowd and told them to go on up town, go to four places on the protest list, sit down and if they don't feed you, sit there for one hour."

[7] The exact sequence of these events is unclear from the record, being described differently not only by the State and the defense, but also by the state witnesses themselves. It seems reasonably certain, however, that the response to the singing from the jail, the end of Cox's speech, and the "muttering" and "grumbling" of the white onlookers all took place at approximately the same time.

put their hands on the shoulders of some of the students "as though to shove them away."

Almost immediately thereafter—within a time estimated variously at two to five minutes—one of the policemen exploded a tear gas shell at the crowd. This was followed by several other shells. The demonstrators quickly dispersed, running back towards the State Capitol and the downtown area; Cox tried to calm them as they ran and was himself one of the last to leave.

No Negroes participating in the demonstration were arrested on that day. The only person then arrested was a young white man, not a part of the demonstration, who was arrested "because he was causing a disturbance." The next day appellant was arrested and charged with the four offenses above described.

II.

The Breach of the Peace Conviction.

Appellant was convicted of violating a Louisiana "disturbing the peace" statute, which provides:

> "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . crowds or congregates with others . . . in or upon . . . a public street or public highway, or upon a public sidewalk, or any other public place or building . . . and who fails or refuses to disperse and move on . . . when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person . . . shall be guilty of disturbing the peace." La. Rev. Stat. § 14:103.1 (Cum. Supp. 1962).

It is clear to us that on the facts of this case, which are strikingly similar to those present in *Edwards* v. *South*

Carolina, 372 U. S. 229, and *Fields* v. *South Carolina,* 375 U. S. 44, Louisiana infringed appellant's rights of free speech and free assembly by convicting him under this statute. As in *Edwards,* we do not find it necessary to pass upon appellant's contention that there was a complete absence of evidence so that his conviction deprived him of liberty without due process of law. Cf. *Thompson* v. *Louisville,* 362 U. S. 199. We hold that Louisiana may not constitutionally punish appellant under this statute for engaging in the type of conduct which this record reveals, and also that the statute as authoritatively interpreted by the Louisiana Supreme Court is unconstitutionally broad in scope.

The Louisiana courts have held that appellant's conduct constituted a breach of the peace under state law, and, as in *Edwards,* "we may accept their decision as binding upon us to that extent," *Edwards* v. *South Carolina, supra,* at 235; but our independent examination of the record, which we are required to make,[8] shows no conduct which the State had a right to prohibit as a breach of the peace.

Appellant led a group of young college students who wished "to protest segregation" and discrimination against Negroes and the arrest of 23 fellow students. They assembled peaceably at the State Capitol building

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[8] Because a claim of constitutionally protected right is involved, it "remains our duty in a case such as this to make an independent examination of the whole record." *Edwards* v. *South Carolina,* 372 U. S. 229, 235; *Blackburn* v. *Alabama,* 361 U. S. 199, 205, n. 5; *Pennekamp* v. *Florida,* 328 U. S. 331, 335; *Fiske* v. *Kansas,* 274 U. S. 380, 385–386. In the area of First Amendment freedoms as well as areas involving other constitutionally protected rights, "we cannot avoid our responsibilities by permitting ourselves to be 'completely bound by state court determination of any issue essential to decision of a claim of federal right, else federal law could be frustrated by distorted fact finding.'" *Haynes* v. *Washington,* 373 U. S. 503, 515–516; *Stein* v. *New York,* 346 U. S. 156, 181.

and marched to the courthouse where they sang, prayed and listened to a speech. A reading of the record reveals agreement on the part of the State's witnesses that Cox had the demonstration "very well controlled," and until the end of Cox's speech, the group was perfectly "orderly." Sheriff Clemmons testified that the crowd's activities were not "objectionable" before that time. They became objectionable, according to the Sheriff himself, when Cox, concluding his speech, urged the students to go uptown and sit in at lunch counters. The Sheriff testified that the sole aspect of the program to which he objected was "[t]he inflammatory manner in which he [Cox] addressed that crowd and told them to go on up town, go to four places on the protest list, sit down and if they don't feed you, sit there for one hour." Yet this part of Cox's speech obviously did not deprive the demonstration of its protected character under the Constitution as free speech and assembly. See *Edwards* v. *South Carolina, supra; Cantwell* v. *Connecticut,* 310 U. S. 296; *Thornhill* v. *Alabama,* 310 U. S. 88; *Garner* v. *Louisiana,* 368 U. S. 157, 185 (concurring opinion of MR. JUSTICE HARLAN).

The State argues, however, that while the demonstrators started out to be orderly, the loud cheering and clapping by the students in response to the singing from the jail converted the peaceful assembly into a riotous one.[9] The record, however, does not support this assertion. It is true that the students, in response to the sing-

[9] The cheering and shouting were described differently by different witnesses, but the most extravagant descriptions were the following: "a jumbled roar like people cheering at a football game," "loud cheering and spontaneous clapping and screaming and a great hullabaloo," "a great outburst," a cheer of "conquest . . . much wilder than a football game," "a loud reaction, not disorderly, loud," "a shout, a roar," and an emotional response "in jubilation and exhortation." Appellant agreed that some of the group "became emotional" and "tears flowed from young ladies' eyes."

ing of their fellows who were in custody, cheered and applauded. However, the meeting was an outdoor meeting and a key state witness testified that while the singing was loud, it was not disorderly. There is, moreover, no indication that the mood of the students was ever hostile, aggressive, or unfriendly. Our conclusion that the entire meeting from the beginning until its dispersal by tear gas was orderly [10] and not riotous is confirmed by a film of the events taken by a television news photographer, which was offered in evidence as a state exhibit. We have viewed the film, and it reveals that the students, though they undoubtedly cheered and clapped, were well-behaved throughout. My Brother BLACK, concurring in this opinion and dissenting in No. 49, *post,* agrees "that

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[10] There is much testimony that the demonstrators were well controlled and basically orderly throughout. G. Dupre Litton, an attorney and witness for the State, testified, "I would say that it was an orderly demonstration. It was too large a group, in my opinion, to congregate at that place at that particular time, which is nothing but my opinion . . . but generally . . . it was orderly." Robert Durham, a news photographer for WBRZ, a state witness, testified that although the demonstration was not "quiet and peaceful," it was basically "orderly." James Erwin, news director of WIBR, a witness for the State, testified as follows:

"Q. Was the demonstration generally orderly?

"A. Yes, Reverend Cox had it very well controlled."

On the other hand, there is some evidence to the contrary: Erwin also stated:

"Q. Was it orderly up to the point of throwing the tear gas?

"A. No, there was one minor outburst after he called for the sit-ins, and then a minor reaction, and then a loud reaction, not disorderly, loud . . . . A loud reaction when the singing occurred upstairs."

And James Dumigan, a police officer, thought that the demonstrators showed a certain disorder by "hollering loud, clapping their hands." But this latter evidence is surely not sufficient, particularly in face of the film, to lead us to conclude that the cheering was so disorderly as to be beyond that held constitutionally protected in *Edwards* v. *South Carolina, supra.*

the record does not show boisterous or violent conduct or indecent language on the part of the . . ." students. *Post,* at 583. The singing and cheering do not seem to us to differ significantly from the constitutionally protected activity of the demonstrators in *Edwards,*[11] who loudly sang "while stamping their feet and clapping their hands." *Edwards* v. *South Carolina, supra,* at 233.[12]

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[11] Moreover, there are not significantly more demonstrators here than in *Fields* v. *South Carolina, supra,* which involved more than 1,000 students.

[12] Witnesses who concluded that a breach of the peace was threatened or had occurred based their conclusions, not upon the shouting or cheering, but upon the fact that the group was demonstrating at all, upon Cox's suggestion that the group sit in, or upon the reaction of the white onlookers across the street. Rush Biossat, a state witness, testified that while appellant "didn't say anything of a violent nature," there was "emotional upset," "a feeling of disturbance in the air," and "agitation"; he thought, however, that all this was caused by Cox's remarks about "black and white together." James Erwin, a state witness, and news director of WIBR, testified that there was "considerable stirring" and a "restiveness," but among the white group. He also stated that the reaction of the white group to Cox's speech "was electrifying." "You could hear grumbling from the small groups of white people, some total of two hundred fifty, perhaps . . . and there was a definite feeling of ill will that had sprung up." He was afraid that "violence was about to erupt" but also thought that Cox had his group under control and did not want violence. G. L. Johnston, a police officer and a witness for the State, felt that the disorderly part of the demonstration was Cox's suggestion that the group sit in. Vay Carpenter, and Mary O'Brien, legal secretaries and witnesses for the State, thought that the mood of the crowd changed at the time of Cox's speech and became "tense." They thought this was because of the sit-in suggestion. Chief Kling of the Sheriff's office, testifying for the State, said that the situation became one "that was explosive and one that had gotten to the point where it had to be handled or it would have gotten out of hand"; however, he based his opinion upon "the mere presence of these people in downtown Baton Rouge . . . in such great numbers." Police Captain Font also testified for the State that the situation was "explosive"; he based this opinion on

Our conclusion that the record does not support the contention that the students' cheering, clapping and singing constituted a breach of the peace is confirmed by the fact that these were not relied on as a basis for conviction by the trial judge, who, rather, stated as his reason for convicting Cox of disturbing the peace that "[i]t must be

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"how they came, such a large group like that, just coming out of nowhere, just coming, filling the streets, filling the sidewalks. We are prepared—we have traffic officers. We can handle traffic situations if we are advised that we are going to have a traffic situation, if the sidewalk is going to be blocked, if the street is going to be blocked, but we wasn't advised of it. They just came and blocked it." He added that he feared "bloodshed," but based this fear upon "when the Sheriff requested them to move, they didn't move; when they cheered in a conquest type of tone; their displaying of the signs; the deliberate agitation that twenty-five people had been arrested the day before, and then they turned right around and just agitated the next day in the same prescribed manner." He also felt that the students displayed their signs in a way which was "agitating." Inspector Trigg testified for the State that "from their actions, I figured they were going to try to storm the Courthouse and take over the jail and try to get the prisoners that they had come down here to protest." However, Trigg based his conclusions upon the students having marched down from the Capitol and paraded in front of the courthouse; he thought they were "violent" because "they continued to march around this Courthouse, and they continued to march down here and do things that disrupts our way of living down here." Sheriff Clemmons testified that the assembly "became objectionable" at the time of Cox's speech. The Sheriff objected to "the inflammatory manner in which he addressed that crowd and told them to go on up town, go to four places on the protest list, sit down and if they don't feed you, sit there for one hour. Prior to that, though, out from under these coats, some signs of—picketing signs. I don't know what's coming out of there next. It could be anything under a coat. It became inflammatory, and when he gestured, go on up town and take charge of these places . . . of business. That is what they were trying to do is take charge of this Courthouse."

A close reading of the record seems to reveal next to no evidence that anyone thought that the shouting and cheering were what constituted the threatened breach of the peace.

recognized to be inherently dangerous and a breach of the peace to bring 1,500 people, colored people, down in the predominantly white business district in the City of Baton Rouge and congregate across the street from the courthouse and sing songs as described to me by the defendant as the CORE national anthem carrying lines such as 'black and white together' and to urge those 1,500 people to descend upon our lunch counters and sit there until they are served. That has to be an inherent breach of the peace, and our statute 14:103.1 has made it so."

Finally, the State contends that the conviction should be sustained because of fear expressed by some of the state witnesses that "violence was about to erupt" because of the demonstration. It is virtually undisputed, however, that the students themselves were not violent and threatened no violence. The fear of violence seems to have been based upon the reaction of the group of white citizens looking on from across the street. One state witness testified that "he felt the situation was getting out of hand" as on the courthouse side of St. Louis Street "were small knots or groups of white citizens who were muttering words, who seemed a little bit agitated." A police officer stated that the reaction of the white crowd was not violent, but "was rumblings." Others felt the atmosphere became "tense" because of "mutterings," "grumbling," and "jeering" from the white group. There is no indication, however, that any member of the white group threatened violence. And this small crowd estimated at between 100 and 300 was separated from the students by "seventy-five to eighty" armed policemen, including "every available shift of the City Police," the "Sheriff's Office in full complement," and "additional help from the State Police," along with a "fire truck and the Fire Department." As Inspector Trigg testified, they could have handled the crowd.

This situation, like that in *Edwards,* is "a far cry from the situation in *Feiner* v. *New York,* 340 U. S. 315." See *Edwards* v. *South Carolina, supra,* at 236. Nor is there any evidence here of "fighting words." See *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. Here again, as in *Edwards,* this evidence "showed no more than that the opinions which . . . [the students] were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." *Edwards* v. *South Carolina, supra,* at 237. Conceding this was so, the "compelling answer . . . is that constitutional rights may not be denied simply because of hostility to their assertion or exercise." *Watson* v. *Memphis,* 373 U. S. 526, 535.

There is an additional reason why this conviction cannot be sustained. The statute at issue in this case, as authoritatively interpreted by the Louisiana Supreme Court, is unconstitutionally vague in its overly broad scope. The statutory crime consists of two elements: (1) congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned," and (2) a refusal to move on after having been ordered to do so by a law enforcement officer. While the second part of this offense is narrow and specific, the first element is not. The Louisiana Supreme Court in this case defined the term "breach of the peace" as "to agitate, to arouse from a state of repose, to molest, to interrupt, to hinder, to disquiet." 244 La., at 1105, 156 So. 2d, at 455. In *Edwards,* defendants had been convicted of a common-law crime similarly defined by the South Carolina Supreme Court. Both definitions would allow persons to be punished merely for peacefully expressing unpopular views. Yet, a "function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with

conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech . . . is . . . protected against censorship or punishment . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello* v. *Chicago,* 337 U. S. 1, 4–5. In *Terminiello* convictions were not allowed to stand because the trial judge charged that speech of the defendants could be punished as a breach of the peace " 'if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.' " *Id.,* at 3. The Louisiana statute, as interpreted by the Louisiana court, is at least as likely to allow conviction for innocent speech as was the charge of the trial judge in *Terminiello.* Therefore, as in *Terminiello* and *Edwards* the conviction under this statute must be reversed as the statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally protected free speech and assembly. Maintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy. As Chief Justice Hughes stated in *Stromberg* v. *California,* 283 U. S. 359, 369: "A statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment."

For all these reasons we hold that appellant's freedoms of speech and assembly, secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment, were denied by his conviction for disturbing the peace. The conviction on this charge cannot stand.

III.

The Obstructing Public Passages Conviction.

We now turn to the issue of the validity of appellant's conviction for violating the Louisiana statute, La. Rev. Stat. § 14:100.1 (Cum. Supp. 1962), which provides:

> *"Obstructing Public Passages*
>
> "No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, watercraft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.
>
> "Providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions."

Appellant was convicted under this statute, not for leading the march to the vicinity of the courthouse, which the Louisiana Supreme Court stated to have been "orderly," 244 La., at 1096, 156 So. 2d, at 451, but for leading the meeting on the sidewalk across the street from the courthouse. *Id.,* at 1094, 1106–1107, 156 So. 2d, at 451, 455. In upholding appellant's conviction under this statute, the Louisiana Supreme Court thus construed the statute so as to apply to public assemblies which do not have as their specific purpose the obstruction of traffic. There is no doubt from the record in this case that this far sidewalk was obstructed, and thus, as so construed, appellant violated the statute.

Appellant, however, contends that as so construed and applied in this case, the statute is an unconstitutional

infringement on freedom of speech and assembly. This contention on the facts here presented raises an issue with which this Court has dealt in many decisions, that is, the right of a State or municipality to regulate the use of city streets and other facilities to assure the safety and convenience of the people in their use and the concomitant right of the people of free speech and assembly. See *Lovell* v. *Griffin,* 303 U. S. 444; *Hague* v. *CIO,* 307 U. S. 496; *Schneider* v. *State,* 308 U. S. 147; *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Cox* v. *New Hampshire,* 312 U. S. 569; *Largent* v. *Texas,* 318 U. S. 418; *Saia* v. *New York,* 334 U. S. 558; *Kovacs* v. *Cooper,* 336 U. S. 77; *Niemotko* v. *Maryland,* 340 U. S. 268; *Kunz* v. *New York,* 340 U. S. 290; *Poulos* v. *New Hampshire,* 345 U. S. 395.

From these decisions certain clear principles emerge. The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy. The control of travel on the streets is a clear example of governmental responsibility to insure this necessary order. A restriction in that relation, designed to promote the public convenience in the interest of all, and not susceptible to abuses of discriminatory application, cannot be disregarded by the attempted exercise of some civil right which, in other circumstances, would be entitled to protection. One would not be justified in ignoring the familiar red light because this was thought to be a means of social protest. Nor could one, contrary to traffic regulations, insist upon a street meeting in the middle of Times Square at the rush hour as a form of freedom of speech or assembly. Governmental authorities have

the duty and responsibility to keep their streets open and available for movement. A group of demonstrators could not insist upon the right to cordon off a street, or entrance to a public or private building, and allow no one to pass who did not agree to listen to their exhortations. See *Lovell* v. *Griffin, supra,* at 451; *Cox* v. *New Hampshire, supra,* at 574; *Schneider* v. *State, supra,* at 160–161; *Cantwell* v. *Connecticut,* supra, at 306–307; *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490; *Poulos* v. *New Hampshire, supra,* at 405–408; see also, *Edwards* v. *South Carolina, supra,* at 236.

We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. See the discussion and cases cited in No. 49, *post,* at 563. We reaffirm the statement of the Court in *Giboney* v. *Empire Storage & Ice Co., supra,* at 502, that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."

We have no occasion in this case to consider the constitutionality of the uniform, consistent, and nondiscriminatory application of a statute forbidding all access to streets and other public facilities for parades and meetings.[13] Although the statute here involved on its face

[13] It has been argued that, in the exercise of its regulatory power over streets and other public facilities, a State or municipality could reserve the streets completely for traffic and other facilities for rest and relaxation of the citizenry. See *Kovacs* v. *Cooper, supra,* at 98 (opinion of Mr. Justice Jackson); *Kunz* v. *New York, supra,* at 298 (Mr. Justice Jackson, dissenting). The contrary, however, has been indicated, at least to the point that some open area must be preserved for outdoor assemblies. See *Hague* v. *CIO, supra,* at 515–516

precludes all street assemblies and parades,[14] it has not been so applied and enforced by the Baton Rouge authorities. City officials who testified for the State clearly indicated that certain meetings and parades are permitted in Baton Rouge, even though they have the effect of obstructing traffic, provided prior approval is obtained. This was confirmed in oral argument before this Court by counsel for the State. He stated that parades and meetings are permitted, based on "arrangements . . . made with officials." The statute itself provides no standards for the determination of local officials as to which assemblies to permit or which to prohibit. Nor are there any administrative regulations on this subject which have been called to our attention.[15] From all

(opinion of Mr. Justice Roberts); *Kunz* v. *New York, supra,* at 293; *Niemotko* v. *Maryland, supra,* at 283 (Mr. Justice Frankfurter, concurring). See generally, *Poulos* v. *New Hampshire, supra,* at 403; *Niemotko* v. *Maryland, supra,* at 272–273.

[14] With the express exception, of course, of labor picketing. This exception points up the fact that the statute reaches beyond mere traffic regulation to restrictions on expression.

[15] Although cited by neither party, research has disclosed the existence of a local ordinance of Baton Rouge, Baton Rouge City Code, Tit. 11, § 210 (1957), which prohibits "parade[s] . . . along any street except in accordance with a permit issued by the chief of police . . . ." A similar ordinance was in existence in *Fields* v. *South Carolina, supra.* As in *Fields,* this ordinance is irrelevant to the conviction in this case as not only was appellant not charged with its violation but the existence of the ordinance was never referred to by the State in any of the courts involved in the case, including this one, and neither the Louisiana trial court nor the Supreme Court relied on the ordinance in sustaining appellant's convictions under the three statutes here involved. Moreover, since the ordinance apparently sets forth no standards for the determination of the Chief of Police as to which parades to permit or which to prohibit, obvious constitutional problems would arise if appellant had been convicted for parading in violation of it. See the discussion in text above; *Lovell* v. *Griffin, supra,* at 452–453; *Hague* v. *CIO, supra,* at 518; *Saia* v. *New York, supra,* at 559–560.

the evidence before us it appears that the authorities in Baton Rouge permit or prohibit parades or street meetings in their completely uncontrolled discretion.

The situation is thus the same as if the statute itself expressly provided that there could only be peaceful parades or demonstrations in the unbridled discretion of the local officials. The pervasive restraint on freedom of discussion by the practice of the authorities under the statute is not any less effective than a statute expressly permitting such selective enforcement. A long line of cases in this Court makes it clear that a State or municipality cannot "require all who wish to disseminate ideas to present them first to police authorities for their consideration and approval, with a discretion in the police to say some ideas may, while others may not, be . . . disseminate[d] . . . ." *Schneider* v. *State, supra,* at 164. See *Lovell* v. *Griffin, supra; Hague* v. *CIO, supra; Largent* v. *Texas, supra; Saia* v. *New York, supra; Niemotko* v. *Maryland, supra; Kunz* v. *New York, supra.*

This Court has recognized that the lodging of such broad discretion in a public official allows him to determine which expressions of view will be permitted and which will not. This thus sanctions a device for the suppression of the communication of ideas and permits the official to act as a censor. See *Saia* v. *New York, supra,* at 562. Also inherent in such a system allowing parades or meetings only with the prior permission of an official is the obvious danger to the right of a person or group not to be denied equal protection of the laws. See *Niemotko* v. *Maryland, supra,* at 272, 284; cf. *Yick Wo* v. *Hopkins,* 118 U. S. 356. It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the

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equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.

It is, of course, undisputed that appropriate, limited discretion, under properly drawn statutes or ordinances, concerning the time, place, duration, or manner of use of the streets for public assemblies may be vested in administrative officials, provided that such limited discretion is "exercised with 'uniformity of method of treatment upon the facts of each application, free from improper or inappropriate considerations and from unfair discrimination' . . . [and with] a 'systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways . . . .'" *Cox* v. *New Hampshire, supra,* at 576. See *Poulos* v. *New Hampshire, supra.*

But here it is clear that the practice in Baton Rouge allowing unfettered discretion in local officials in the regulation of the use of the streets for peaceful parades and meetings is an unwarranted abridgment of appellant's freedom of speech and assembly secured to him by the First Amendment, as applied to the States by the Fourteenth Amendment. It follows, therefore, that appellant's conviction for violating the statute as so applied and enforced must be reversed.

For the reasons discussed above the judgment of the Supreme Court of Louisiana is reversed.

Reversed.

[For concurring opinion of Mr. Justice Black, see *post,* p. 575.]

[For concurring opinion of Mr. Justice Clark, see *post,* p. 585.]

[For opinion of Mr. Justice White, concurring in part and dissenting in part, see *post,* p. 591.]

COX *v.* LOUISIANA.

APPEAL FROM THE SUPREME COURT OF LOUISIANA.

No. 49. Argued October 21–22, 1964.—Decided January 18, 1965.

Appellant was convicted of violating a Louisiana statute prohibiting picketing "near" a courthouse with the intent to obstruct justice, the charge being based on the facts set forth in No. 24, *ante,* at 536; and the conviction was upheld by the Louisiana Supreme Court. *Held:*

1. The statute is narrowly drawn, furthers the State's legitimate interest of protecting its judicial system from pressures which picketing near a courthouse might create, is a valid regulation of conduct as distinguished from pure speech, and does not infringe rights of free speech and assembly. Pp. 562–564.

2. Even assuming the applicability of a "clear and present danger" test, there is no constitutional objection to applying the statute to conduct of the sort engaged in by the demonstrators. Pp. 565–566.

3. The evidence of intent to obstruct justice or influence any judicial official required by the statute was constitutionally sufficient. Pp. 566–567.

4. Appellant was in effect advised by the city's highest police officials that a demonstration at the place where it was held was not "near" the courthouse, and to permit him to be convicted for exercising the privilege they told him was available would be to allow a type of entrapment violative of the Due Process Clause. *Raley* v. *Ohio,* 360 U. S. 423, followed. Pp. 569–571.

5. The dispersal order did not limit the time or place of the demonstration and remove the protection accorded appellant by the original grant of permission but was based on the officials' erroneous conclusion that appellant's remarks constituted a breach of the peace. Pp. 572–573.

245 La. 303, 158 So. 2d 172, reversed.

Nils Douglas argued the cause for appellant. With him on the brief were *Carl Rachlin, Robert Collins* and *Floyd McKissick.*

Ralph L. Roy argued the cause for appellee. With him on the brief was *Jack P. F. Gremillion,* Attorney General of Louisiana.

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

Appellant was convicted of violating a Louisiana statute which provides:

> "Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana . . . shall be fined not more than five thousand dollars or imprisoned not more than one year, or both." La. Rev. Stat. § 14:401 (Cum. Supp. 1962).

This charge was based upon the same set of facts as the "disturbing the peace" and "obstructing a public passage" charges involved and set forth in No. 24, *ante,* and was tried along with those offenses. Appellant was convicted on this charge also and was sentenced to the maximum penalty under the statute of one year in jail and a $5,000 fine, which penalty was cumulative with those in No. 24. These convictions were affirmed by the Louisiana Supreme Court, 245 La. 303, 158 So. 2d 172. Appellant appealed to this Court contending that the statute was unconstitutional on its face and as applied to him. We noted probable jurisdiction, 377 U. S. 921.

I.

We shall first consider appellant's contention that this statute must be declared invalid on its face as an unjustified restriction upon freedoms guaranteed by the First and Fourteenth Amendments to the United States Constitution.

This statute was passed by Louisiana in 1950 and was modeled after a bill pertaining to the federal judiciary, which Congress enacted later in 1950, 64 Stat. 1018, 18 U. S. C. § 1507 (1958 ed.). Since that time, Massachusetts and Pennsylvania have passed similar statutes. Mass. Ann. Laws, c. 268, § 13A; Purdon's Pa. Stat. Ann., Tit. 18, § 4327. The federal statute resulted from the picketing of federal courthouses by partisans of the defendants during trials involving leaders of the Communist Party. This picketing prompted an adverse reaction from both the bar and the general public. A number of groups urged legislation to prohibit it. At a special meeting held in March 1949, the Judicial Conference of the United States passed the following resolution: "*Resolved,* That we condemn the practice of picketing the courts, and believe that effective means should be taken to prevent it." Report of the Judicial Conference of the United States, 203 (1949). A Special Committee on Proposed Legislation to Prohibit Picketing of the Courts was appointed to make recommendations to the Conference on this subject. *Ibid.* In its Report to the Judicial Conference, dated September 23, 1949, at p. 3, the Special Committee stated: "The sentiment of bar associations and individual lawyers has been and is practically unanimous in favor of legislation to prohibit picketing of courts." Upon the recommendation of this Special Committee, the Judicial Conference urged the prompt enactment of the then-pending bill. Report of the Judicial Conference of the United States, 17–18 (1949). Similar recommendations were made by the American Bar Association, numerous state and local bar associations, and individual lawyers and judges. See Joint Hearings before the Subcommittees of the Committees on the Judiciary on S. 1681 and H. R. 3766, 81st Cong., 1st Sess.; H. R. Rep. No. 1281, 81st Cong., 1st Sess.; S. Rep. No. 732, 81st Cong., 1st Sess.; Bills Con-

demning Picketing of Courts Before Congress, 33 J. Am. Jud. Soc. 53 (1949).

This statute, unlike the two previously considered, is a precise, narrowly drawn regulatory statute which proscribes certain specific behavior. Cf. *Edwards* v. *South Carolina,* 372 U. S. 229, 236. It prohibits a particular type of conduct, namely, picketing and parading, in a few specified locations, in or near courthouses.

There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create. Since we are committed to a government of laws and not of men, it is of the utmost importance that the administration of justice be absolutely fair and orderly. This Court has recognized that the unhindered and untrammeled functioning of our courts is part of the very foundation of our constitutional democracy. See *Wood* v. *Georgia,* 370 U. S. 375, 383. The constitutional safeguards relating to the integrity of the criminal process attend every stage of a criminal proceeding, starting with arrest and culminating with a trial "in a courtroom presided over by a judge." *Rideau* v. *Louisiana,* 373 U. S. 723, 727. There can be no doubt that they embrace the fundamental conception of a fair trial, and that they exclude influence or domination by either a hostile or friendly mob. There is no room at any stage of judicial proceedings for such intervention; mob law is the very antithesis of due process. See *Frank* v. *Mangum,* 237 U. S. 309, 347 (Holmes, J., dissenting). A State may adopt safeguards necessary and appropriate to assure that the administration of justice at all stages is free from outside control and influence. A narrowly drawn statute such as the one under review is obviously a safeguard both necessary and appropriate to vindicate the State's interest in assuring justice under law.

Nor does such a statute infringe upon the constitutionally protected rights of free speech and free assembly. The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association. The examples are many of the application by this Court of the principle that certain forms of conduct mixed with speech may be regulated or prohibited. The most classic of these was pointed out long ago by Mr. Justice Holmes: "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic." *Schenck* v. *United States,* 249 U. S. 47, 52. A man may be punished for encouraging the commission of a crime, *Fox* v. *Washington,* 236 U. S. 273, or for uttering "fighting words," *Chaplinsky* v. *New Hampshire,* 315 U. S. 568. This principle has been applied to picketing and parading in labor disputes. See *Hughes* v. *Superior Court,* 339 U. S. 460; *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490; *Building Service Employees* v. *Gazzam,* 339 U. S. 532. But cf. *Thornhill* v. *Alabama,* 310 U. S. 88. These authorities make it clear, as the Court said in *Giboney,* that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney* v. *Empire Storage & Ice Co., supra,* at 502.

Bridges v. *California,* 314 U. S. 252, and *Pennekamp* v. *Florida,* 328 U. S. 331, do not hold to the contrary. Both these cases dealt with the power of a judge to sentence for contempt persons who published or caused to be published writings commenting on judicial proceedings. They involved newspaper editorials, an editorial cartoon, and a telegram sent by a labor leader to the Secretary of Labor. Here we deal not with the contempt power—

a power which is "based on a common law concept of the most general and undefined nature." *Bridges* v. *California, supra,* at 260. Rather, we are reviewing a statute narrowly drawn to punish specific conduct that infringes a substantial state interest in protecting the judicial process. See *Cantwell* v. *Connecticut,* 310 U. S. 296, 307–308; *Giboney* v. *Empire Storage & Ice Co., supra.* We are not concerned here with such a pure form of expression as newspaper comment or a telegram by a citizen to a public official. We deal in this case not with free speech alone, but with expression mixed with particular conduct. In *Giboney,* this Court expressly recognized this distinction when it said, "In holding this, we are mindful of the essential importance to our society of a vigilant protection of freedom of speech and press. *Bridges* v. *California,* 314 U. S. 252, 263. States cannot consistently with our Constitution abridge those freedoms to obviate slight inconveniences or annoyances. *Schneider* v. *State,* 308 U. S. 147, 162. But placards used as an essential and inseparable part of a grave offense against an important public law cannot immunize that unlawful conduct from state control." 336 U. S., at 501–502.

We hold that this statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and that the fact that free speech is intermingled with such conduct does not bring with it constitutional protection.

II.

We now deal with the Louisiana statute as applied to the conduct in this case. The group of 2,000, led by appellant, paraded and demonstrated before the courthouse. Judges and court officers were in attendance to discharge their respective functions. It is undisputed that a major purpose of the demonstration was to protest

what the demonstrators considered an "illegal" arrest of 23 students the previous day. While the students had not been arraigned or their trial set for any day certain, they were charged with violation of the law, and the judges responsible for trying them and passing upon the legality of their arrest were then in the building.

It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial. A State may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process. See S. Rep. No. 732, 81st Cong., 1st Sess., 4.

Appellant invokes the clear and present danger doctrine in support of his argument that the statute cannot constitutionally be applied to the conduct involved here. He says, relying upon *Pennekamp* and *Bridges*, that "[n]o reason exists to apply a different standard to the case of a criminal penalty for a peaceful demonstration in front of a courthouse than the standard of clear and present danger applied in the contempt cases." (Appellant's Br., p. 22.) He defines the standard to be applied to both situations to be whether the expression of opinion presents a clear and present danger to the administration of justice.

We have already pointed out the important differences between the contempt cases and the present one, *supra,* at 563–564. Here we deal not with the contempt power but with a narrowly drafted statute and not with speech in its pristine form but with conduct of a totally different character. Even assuming the applicability of a general clear and present danger test, it is one thing to conclude that the mere publication of a newspaper editorial or a telegram to a Secretary of Labor, however critical of a court, presents no clear and present danger to the administration of justice and quite another thing to conclude that crowds, such as this, demonstrating before a courthouse may not be prohibited by a legislative determination based on experience that such conduct inherently threatens the judicial process. We therefore reject the clear and present danger argument of appellant.

III.

Appellant additionally argues that his conviction violated due process as there was no evidence of intent to obstruct justice or influence any judicial official as required by the statute. *Thompson* v. *Louisville,* 362 U. S. 199. We cannot agree that there was no evidence within the "due process" rule enunciated in *Thompson* v. *Louisville.* We have already noted that various witnesses and Cox himself stated that a major purpose of the demonstration was to protest what was considered to be an illegal arrest of 23 students. Thus, the very subject matter of the demonstration was an arrest which is normally the first step in a series of legal proceedings. The demonstration was held in the vicinity of the courthouse where the students' trials would take place. The courthouse contained the judges who in normal course would be called upon to try the students' cases just as they tried appellant. Ronnie Moore, the student leader of the demonstration, a defense witness, stated, as we understand

his testimony, that the demonstration was in part to protest injustice; he felt it was a form of "moral persuasion" and hoped it would have its effects. The fact that the students were not then on trial and had not been arraigned is not controlling in the face of this affirmative evidence manifesting the plain intent of the demonstrators to condemn the arrest and ensuing judicial proceedings against the prisoners as unfair and unwarranted. The fact that by their lights appellant and the 2,000 students were seeking justice and not its obstruction is as irrelevant as would be the motives of the mob condemned by Justice Holmes in *Frank* v. *Mangum, supra.* Louisiana, as we have pointed out *supra,* has the right to construe its statute to prevent parading and picketing from unduly influencing the administration of justice at any point or time in its process, regardless of whether the motives of the demonstrators are good or bad.

While this case contains direct evidence taking it out of the *Thompson* v. *Louisville* doctrine, even without this evidence, we would be compelled to reject the contention that there was no proof of intent. Louisiana surely has the right to infer the appropriate intent from circumstantial evidence. At the very least, a group of demonstrators parading and picketing before a courthouse where a criminal charge is pending, in protest against the arrest of those charged, may be presumed to intend to influence judges, jurors, witnesses or court officials. Cf. *Screws* v. *United States,* 325 U. S. 91, 107 (opinion of MR. JUSTICE DOUGLAS).

Absent an appropriately drawn and applicable statute, entirely different considerations would apply if, for example, the demonstrators were picketing to protest the actions of a mayor or other official of a city completely unrelated to any judicial proceedings, who just happened to have an office located in the courthouse building. Cf. *In re Brinn,* 305 N. Y. 887, 114 N. E. 2d 430; Joint Hearings, *supra,* at 20.

IV.

There are, however, more substantial constitutional objections arising from appellant's conviction on the particular facts of this case. Appellant was convicted for demonstrating not "in," but "near" the courthouse. It is undisputed that the demonstration took place on the west sidewalk, the far side of the street, exactly 101 feet from the courthouse steps and, judging from the pictures in the record, approximately 125 feet from the courthouse itself. The question is raised as to whether the failure of the statute to define the word "near" renders it unconstitutionally vague. See *Lanzetta* v. *New Jersey,* 306 U. S. 451. Note, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67. It is clear that there is some lack of specificity in a word such as "near." [1] While this lack of specificity may not render the statute unconstitutionally vague, at least as applied to a demonstration within the sight and hearing of those in the courthouse,[2] it is clear that the statute, with respect to the determination of how near the courthouse a particular demonstration can be, foresees a degree of on-the-spot administrative interpretation by officials charged with responsibility for administering and enforcing it. It is apparent that demonstrators, such as those involved

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[1] This is to be contrasted, for example, with the express limitation proscribing certain acts within 500 feet of foreign embassies, legations, or consulates within the District of Columbia. 52 Stat. 30 (1938); D. C. Code, 1961, § 22–1115. See also McKinney's N. Y. Laws, Penal Law § 600 (prohibiting certain activities within 200 feet of a courthouse).

[2] Cf. *United States* v. *National Dairy Products Corp.,* 372 U. S. 29; Note, 109 U. Pa. L. Rev. 67. Cf. *Cole* v. *Arkansas,* 333 U. S. 196 (holding constitutional a statute making certain types of action unlawful if done "at or near" any place where a labor dispute exists, though the issue of the possible vagueness of the word "near" in the context of that case was not expressly faced).

here, would justifiably tend to rely on this administrative interpretation of how "near" the courthouse a particular demonstration might take place. Louisiana's statutory policy of preserving order around the courthouse would counsel encouragement of just such reliance. This administrative discretion to construe the term "near" concerns a limited control of the streets and other areas in the immediate vicinity of the courthouse and is the type of narrow discretion which this Court has recognized as the proper role of responsible officials in making determinations concerning the time, place, duration, and manner of demonstrations. See *Cox* v. *New Hampshire,* 312 U. S. 569; *Poulos* v. *New Hampshire,* 345 U. S. 395. See generally the discussion on this point in No. 24, pp. 553–558, *ante.* It is not the type of unbridled discretion which would allow an official to pick and choose among expressions of view the ones he will permit to use the streets and other public facilities, which we have invalidated in the obstruction of public passages statute as applied in No. 24, *ante.* Nor does this limited administrative regulation of traffic which the Court has consistently recognized as necessary and permissible, constitute a waiver of law which is beyond the power of the police. Obviously telling demonstrators how far from the courthouse steps is "near" the courthouse for purposes of a permissible peaceful demonstration is a far cry from allowing one to commit, for example, murder, or robbery.[3]

The record here clearly shows that the officials present gave permission for the demonstration to take place across the street from the courthouse. Cox testified that they gave him permission to conduct the demonstration

[3] See American Law Institute, Model Penal Code § 2.04 (3) (b) and comment thereon, Tentative Draft No. 4, pp. 17–18, 138–139; Hall and Seligman, Mistake of Law and *Mens Rea,* 8 U. Chi. L. Rev. 641, 675–677 (1941); *People* v. *Ferguson,* 134 Cal. App. 41, 24 P. 2d 965.

on the far side of the street. This testimony is not only uncontradicted but is corroborated by the State's witnesses who were present. Police Chief White testified that he told Cox "he must confine" the demonstration "to the west side of the street." [4] James Erwin, news director of radio station WIBR, agreed that Cox was given permission for the assembly as long as it remained within a designated time. When Sheriff Clemmons sought to break up the demonstration, he first announced, "now, you have been allowed to demonstrate." [5] The Sheriff testified that he had "no objection" to the students "being assembled on that side of the street." Finally, in its brief before this Court, the State did not contend that permission was not granted. Rather in its statement of the facts and argument it conceded that the officials gave Cox and his group some time to demonstrate across the street from the courthouse. This agreement by the State that in fact permission had been granted to demonstrate across the street from the courthouse—at least for a limited period of time, which the State contends was set at seven minutes—was confirmed by counsel for the State in oral argument before this Court.

The record shows that at no time did the police recommend, or even suggest, that the demonstration be held further from the courthouse than it actually was. The police admittedly had prior notice that the demonstration was planned to be held in the vicinity of the courthouse. They were prepared for it at that point and so stationed themselves and their equipment as to keep the demonstrators on the far side of the street. As Cox approached

[4] It is true that the Police Chief testified that he did not subjectively intend to grant permission, but there is no evidence at all that this subjective state of mind was ever communicated to appellant, or in fact to anyone else present.

[5] See p. 572, *infra,* for the Sheriff's full statement at this time.

the vicinity of the courthouse, he was met by the Chief of Police and other officials. At this point not only was it not suggested that they hold their assembly elsewhere, or disband, but they were affirmatively told that they could hold the demonstration on the sidewalk of the far side of the street, 101 feet from the courthouse steps. This area was effectively blocked off by the police and traffic rerouted.

Thus, the highest police officials of the city, in the presence of the Sheriff and Mayor, in effect told the demonstrators that they could meet where they did, 101 feet from the courthouse steps, but could not meet closer to the courthouse. In effect, appellant was advised that a demonstration at the place it was held would not be one "near" the courthouse within the terms of the statute.

In *Raley* v. *Ohio,* 360 U. S. 423, this Court held that the Due Process Clause prevented conviction of persons for refusing to answer questions of a state investigating commission when they relied upon assurances of the commission, either express or implied, that they had a privilege under state law to refuse to answer, though in fact this privilege was not available to them. The situation presented here is analogous to that in *Raley,* which we deem to be controlling. As in *Raley,* under all the circumstances of this case, after the public officials acted as they did, to sustain appellant's later conviction for demonstrating where they told him he could "would be to sanction an indefensible sort of entrapment by the State—convicting a citizen for exercising a privilege which the State had clearly told him was available to him." *Id.,* at 426. The Due Process Clause does not permit convictions to be obtained under such circumstances.

This is not to say that had the appellant, entirely on his own, held the demonstration across the street from the courthouse within the sight and hearing of those

inside, or *a fortiori,* had he defied an order of the police requiring him to hold this demonstration at some point further away out of the sight and hearing of those inside the courthouse, we would reverse the conviction as in this case. In such cases a state interpretation of the statute to apply to the demonstration as being "near" the courthouse would be subject to quite different considerations. See p. 568, *supra.*

There remains just one final point: the effect of the Sheriff's order to disperse. The State in effect argues that this order somehow removed the prior grant of permission and reliance on the officials' construction that the demonstration on the far side of the street was not illegal as being "near" the courthouse. This, however, we cannot accept. Appellant was led to believe that his demonstration on the far side of the street violated no statute. He was expressly ordered to leave, not because he was peacefully demonstrating too near the courthouse, nor because a time limit originally set had expired, but because officials erroneously concluded that what he said threatened a breach of the peace. This is apparent from the face of the Sheriff's statement when he ordered the meeting dispersed: "Now, you have been allowed to demonstrate. Up until now your demonstration has been more or less peaceful, but what you are doing now is a direct violation of the law, a disturbance of the peace, and it has got to be broken up immediately." See discussion in No. 24, *ante,* at 545–551. Appellant correctly conceived, as we have held in No. 24, *ante,* that this was not a valid reason for the dispersal order. He therefore was still justified in his continued belief that because of the original official grant of permission he had a right to stay where he was for the few additional minutes required to conclude the meeting. In addition, even if we were to accept the State's version that the sole reason for terminating the demonstration

was that appellant exceeded the narrow time limits [6] set by the police, his conviction could not be sustained. Assuming the place of the meeting was appropriate—as appellant justifiably concluded from the official grant of permission—nothing in this courthouse statute, nor in the breach of the peace or obstruction of public passages statutes with their broad sweep and application that we have condemned in No. 24, *ante*, at 553–558, authorizes the police to draw the narrow time line, unrelated to any policy of these statutes, that would be approved if we were to sustain appellant's conviction on this ground. Indeed, the allowance of such unfettered discretion in the police would itself constitute a procedure such as that condemned in No. 24, *ante,* at 553–558. In any event, as we have stated, it is our conclusion from the record that the dispersal order had nothing to do with any time or place limitation, and thus, on this ground alone, it is clear that the dispersal order did not remove the protection accorded appellant by the original grant of permission.

Of course this does not mean that the police cannot call a halt to a meeting which though originally peaceful, becomes violent. Nor does it mean that, under properly drafted and administered statutes and ordinances, the authorities cannot set reasonable time limits for assemblies related to the policies of such laws and then order them dispersed when these time limits are exceeded. See the discussion in No. 24, *ante,* at 553–558. We merely hold that, under circumstances such as those present in this case, appellant's conviction cannot be sustained on the basis of the dispersal order.

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[6] As we have pointed out in No. 24, *ante,* at 541, n. 2, the evidence is conflicting as to whether appellant and his group were given only a limited time to hold their meeting and whether, if so, such a time limit was exceeded.

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Nothing we have said here or in No. 24, *ante*, is to be interpreted as sanctioning riotous conduct in any form or demonstrations, however peaceful their conduct or commendable their motives, which conflict with properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions.

Liberty can only be exercised in a system of law which safeguards order. We reaffirm the repeated holdings of this Court that our constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society. We also reaffirm the repeated decisions of this Court that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations. There is an equally plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal; for regulation of conduct that involves freedom of speech and assembly not to be so broad in scope as to stifle First Amendment freedoms, which "need breathing space to survive," *NAACP* v. *Button*, 371 U. S. 415, 433; for appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct; and for all such laws and regulations to be applied with an equal hand. We believe that all of these requirements can be met in an ordered society dedicated to liberty. We reaffirm our conviction that "[f]reedom and viable government

are . . . indivisible concepts." *Gibson* v. *Florida Legislative Comm.*, 372 U. S. 539, 546.

The application of these principles requires us to reverse the judgment of the Supreme Court of Louisiana.

Reversed.

MR. JUSTICE BLACK, concurring in No. 24 and dissenting in No. 49.

I concur in the Court's judgment reversing appellant Cox's convictions for violation of the Louisiana statutes prohibiting breach of the peace and obstructing public passages, but I do so for reasons which differ somewhat from those stated in the Court's opinion. I therefore deem it appropriate to state separately my reasons for voting to hold both these statutes unconstitutional and to reverse the convictions under them. On the other hand, I have no doubt that the State has power to protect judges, jurors, witnesses, and court officers from intimidation by crowds which seek to influence them by picketing, patrolling, or parading in or near the courthouses in which they do their business or the homes in which they live, and I therefore believe that the Louisiana statute which protects the administration of justice by forbidding such interferences is constitutional, both as written and as applied. Since I believe that the evidence showed practically without dispute that appellant violated this statute, I think this conviction should be affirmed.

There was ample evidence for the jury to have found the following to be the facts: On December 14, 1961, 23 persons were arrested and put in jail on a charge of illegal picketing. That night appellant Cox and others made plans to carry on a "demonstration," that is, a parade and march, through parts of Baton Rouge, ending at the courthouse. Their purpose was to "protest"

against what they called the "illegal arrest" of the 23 picketers. They neither sought nor obtained any permit for such a use of the streets. The next morning, December 15, the plan was carried out. Some 2,000 protesters marched to a point 101 feet across the street from the courthouse, which also contained the jail. State and county police officers, for reasons as to which there was a conflict in the evidence from which different inferences could be drawn, agreed that the picketers might stay there for a few minutes. The group sang songs along with the prisoners in the jail and did other things set out in the Court's opinion. Later state and county officials told Cox, the group's leader, that the crowd had to "move on." Cox told his followers to stay where they were and they did. Officers then used tear gas and the picketers ran away. Cox was later arrested.

I. The Breach-of-Peace Conviction.

I agree with that part of the Court's opinion holding that the Louisiana breach-of-the-peace statute [1] on its face and as construed by the State Supreme Court is so broad

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[1] La. Rev. Stat. § 14:103.1 (Cum. Supp. 1962) provides in relevant part:

"Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (1) crowds or congregates with others, providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions, in or upon . . . a public street or public highway, or upon a public sidewalk, or any other public place or building . . . and who fails or refuses to disperse and move on, or disperse or move on, when ordered so to do by any law enforcement officer of any municipality, or parish, in which such act or acts are committed, or by any law enforcement officer of the state of Louisiana, or any other authorized person . . . shall be guilty of disturbing the peace. . . ."

as to be unconstitutionally vague under the First and Fourteenth Amendments. See *Winters* v. *New York,* 333 U. S. 507, 509–510. The statute does not itself define the conditions upon which people who want to express views may be allowed to use the public streets and highways, but leaves this to be defined by law enforcement officers. The statute therefore neither forbids all crowds to congregate and picket on streets, nor is it narrowly drawn to prohibit congregating or patrolling under certain clearly defined conditions while preserving the freedom to speak of those who are using the streets as streets in the ordinary way that the State permits. A state statute of either of the two types just mentioned, regulating *conduct*—patrolling and marching—as distinguished from *speech,* would in my judgment be constitutional, subject only to the condition that if such a law had the effect of indirectly impinging on freedom of speech, press, or religion, it would be unconstitutional if under the circumstances it appeared that the State's interest in suppressing the conduct was not sufficient to outweigh the individual's interest in engaging in conduct closely involving his First Amendment freedoms. As this Court held in *Schneider* v. *State,* 308 U. S. 147, 161:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

See also, *e. g., Brotherhood of R. Trainmen* v. *Virginia ex rel. Virginia State Bar,* 377 U. S. 1; *NAACP* v. *Button,* 371 U. S. 415; *NAACP* v. *Alabama ex rel. Patterson,* 357

U. S. 449; *Martin* v. *City of Struthers,* 319 U. S. 141; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Lovell* v. *City of Griffin,* 303 U. S. 444; *Grosjean* v. *American Press Co.,* 297 U. S. 233. As I discussed at length in my dissenting opinion in *Barenblatt* v. *United States,* 360 U. S. 109, 141–142, when passing on the validity of a regulation of conduct, which may *indirectly* infringe on free speech, this Court does, and I agree that it should, "weigh the circumstances" in order to protect, not to destroy, freedom of speech, press, and religion.

The First and Fourteenth Amendments, I think, take away from government, state and federal, all power to restrict freedom of speech, press, and assembly *where people have a right to be for such purposes.* This does not mean, however, that these amendments also grant a constitutional right to engage in the conduct of picketing or patrolling, whether on publicly owned streets or on privately owned property. See *Labor Board* v. *Fruit & Vegetable Packers & Warehousemen,* 377 U. S. 58, 76 (concurring opinion). Were the law otherwise, people on the streets, in their homes and anywhere else could be compelled to listen against their will to speakers they did not want to hear. Picketing, though it may be utilized to communicate ideas, is not speech, and therefore is not of itself protected by the First Amendment. *Hughes* v. *Superior Court,* 339 U. S. 460, 464–466; *Giboney* v. *Empire Storage & Ice Co.,* 336 U. S. 490; *Bakery & Pastry Drivers & Helpers* v. *Wohl,* 315 U. S. 769, 775–777 (DOUGLAS, J., concurring).

However, because Louisiana's breach-of-peace statute is not narrowly drawn to assure nondiscriminatory application, I think it is constitutionally invalid under our holding in *Edwards* v. *South Carolina,* 372 U. S. 229. See also *Musser* v. *Utah,* 333 U. S. 95, 96–97. *Edwards,* however, as I understand it, did not hold that either private property owners or the States are constitutionally re-

quired to supply a place for people to exercise freedom of speech or assembly. See *Bell* v. *Maryland,* 378 U. S. 226, 344–346 (dissenting opinion). What *Edwards* as I read it did hold, and correctly I think, was not that the Federal Constitution prohibited South Carolina from making it unlawful for people to congregate, picket, and parade on or near that State's capitol grounds, but rather that in the absence of a clear, narrowly drawn, nondiscriminatory statute prohibiting such gatherings and picketing, South Carolina could not punish people for assembling at the capitol to petition for redress of grievances. In the case before us Louisiana has by a broad, vague statute given policemen an unlimited power to order people off the streets, not to enforce a specific, nondiscriminatory state statute forbidding patrolling and picketing, but rather whenever a policeman makes a decision on his own personal judgment that views being expressed on the street are provoking or might provoke a breach of the peace. Such a statute does not provide for government by clearly defined laws, but rather for government by the moment-to-moment opinions of a policeman on his beat. Compare *Yick Wo* v. *Hopkins,* 118 U. S. 356, 369–370. This kind of statute provides a perfect device to arrest people whose views do not suit the policeman or his superiors, while leaving free to talk anyone with whose views the police agree. See *Feiner* v. *New York,* 340 U. S. 315, 321 (dissenting opinion); cf. *Peters* v. *Hobby,* 349 U. S. 331, 349–350 (concurring opinion); *Barsky* v. *Board of Regents,* 347 U. S. 442, 463–464 (dissenting opinion); *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206, 217–218 (dissenting opinion); *Ludecke* v. *Watkins,* 335 U. S. 160, 173 (dissenting opinion). In this situation I think *Edwards* v. *South Carolina* and other such cases invalidating statutes for vagueness are controlling. Moreover, because the statute makes an exception for labor organizations and therefore tries to limit access to

the streets to some views but not others, I believe it is unconstitutional for the reasons discussed in Part II of this opinion, dealing with the street-obstruction statute, *infra*. For all the reasons stated I concur in reversing the conviction based on the breach-of-peace statute.

II. THE OBSTRUCTING-PUBLIC-PASSAGES CONVICTION.

The Louisiana law against obstructing the streets and sidewalks,[2] while applied here so as to convict Negroes for assembling and picketing on streets and sidewalks for the purpose of publicly protesting racial discrimination, expressly provides that the statute shall not bar picketing and assembly by labor unions protesting unfair treatment of union members. I believe that the First and Fourteenth Amendments require that if the streets of a town are open to some views, they must be open to all. It is worth noting in passing that the objectives of labor unions and of the group led by Cox here may have much in common. Both frequently protest discrimination against their members in the matter of employment. Compare *New Negro Alliance* v. *Sanitary Grocery Co.*, 303 U. S. 552, 561. This Louisiana law opens the streets for union assembly, picketing, and

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[2] La. Rev. Stat. § 14:100.1 (Cum. Supp. 1962) provides in relevant part:

"No person shall wilfully obstruct the free, convenient and normal use of any public sidewalk, street, highway, bridge, alley, road, or other passageway, or the entrance, corridor or passage of any public building, structure, watercraft or ferry, by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein.

"Providing however nothing herein contained shall apply to a bona fide legitimate labor organization or to any of its legal activities such as picketing, lawful assembly or concerted activity in the interest of its members for the purpose of accomplishing or securing more favorable wage standards, hours of employment and working conditions. . . ."

public advocacy, while denying that opportunity to groups protesting against racial discrimination. As I said above, I have no doubt about the general power of Louisiana to bar all picketing on its streets and highways. Standing, patrolling, or marching back and forth on streets is conduct, not speech, and as conduct can be regulated or prohibited. But by specifically permitting picketing for the publication of labor union views, Louisiana is attempting to pick and choose among the views it is willing to have discussed on its streets. It thus is trying to prescribe by law what matters of public interest people whom it allows to assemble on its streets may and may not discuss. This seems to me to be censorship in a most odious form, unconstitutional under the First and Fourteenth Amendments. And to deny this appellant and his group use of the streets because of their views against racial discrimination, while allowing other groups to use the streets to voice opinions on other subjects, also amounts, I think, to an invidious discrimination forbidden by the Equal Protection Clause of the Fourteenth Amendment.[3] Moreover, as the Court points out, city officials despite this statute apparently have permitted favored groups other than labor unions to block the streets with their gatherings. For these reasons I concur in reversing the conviction based on this law.

III. THE CONVICTION FOR PICKETING NEAR A COURTHOUSE.

I would sustain the conviction of appellant for violation of Louisiana's Rev. Stat. § 14:401 (Cum. Supp. 1962), which makes it an offense for anyone, under any condi-

[3] It is of interest that appellant Cox, according to a state witness, said this about the reason his group picketed the courthouse: "[H]e said that in effect that it was a protest against the illegal arrest of some of their members and that other people were allowed to picket and that they should have the right to picket . . . ."

tions, to picket or parade near a courthouse, residence or other building used by a judge, juror, witness, or court officer, "with the intent of influencing" any of them.[4] Certainly the record shows beyond all doubt that the purpose of the 2,000 or more people who stood right across the street from the courthouse and jail was to protest the arrest of members of their group who were then in jail. As the Court's opinion states, appellant Cox so testified. Certainly the most obvious reason for their protest at the courthouse was to influence the judge and other court officials who used the courthouse and performed their official duties there. The Court attempts to support its holding by its inference that the Chief of Police gave his consent to picketing the courthouse. But quite apart from the fact that a police chief cannot authorize violations of his State's criminal laws,[5] there was strong, emphatic testimony that if any consent was given it was limited to telling Cox and his group to come no closer to the courthouse than they had already come without the consent of any official, city, state, or federal. And there was also testimony that when told to leave appellant Cox defied the order by telling the crowd not to move. I fail to understand how the Court can justify the reversal of this con-

[4] La. Rev. Stat. § 14:401 (Cum. Supp. 1962) provides in relevant part:

"Whoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty pickets or parades in or near a building housing a court of the State of Louisiana, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, or with such intent uses any sound-truck or similar device or resorts to any other demonstration in or near any such building or residence, shall be fined not more than five thousand dollars or imprisoned not more than one year, or both. . . ."

[5] Cf. *United States* v. *Philadelphia National Bank*, 374 U. S. 321, 350–352; *California* v. *Federal Power Comm'n*, 369 U. S. 482, 484–485; *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 225–227.

viction because of a permission which testimony in the record denies was given, which could not have been authoritatively given anyway, and which even if given was soon afterwards revoked. While I agree that the record does not show boisterous or violent conduct or indecent language on the part of the "demonstrators," the ample evidence that this group planned the march on the courthouse and carried it out for the express purpose of influencing the courthouse officials in the performance of their official duties brings this case squarely within the prohibitions of the Louisiana statute and I think leaves us with no alternative but to sustain the conviction unless the statute itself is unconstitutional, and I do not believe that this statute is unconstitutional, either on its face or as applied.

This statute, like the federal one which it closely resembles,[6] was enacted to protect courts and court officials from the intimidation and dangers that inhere in huge gatherings at courthouse doors and jail doors to protest arrests and to influence court officials in performing their duties. The very purpose of a court system is to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the courtroom according to legal procedures. Justice cannot be rightly administered, nor are the lives and safety of prisoners secure, where throngs of people clamor against the processes of justice right outside the courthouse or jailhouse doors. The streets are not now and never have been the proper place to administer justice. Use of the streets for such purposes has always proved disastrous to individual liberty in the long run, whatever fleeting benefits may have appeared to have been achieved. And minority groups, I venture to suggest, are the ones who always have suffered and always will suffer most when street multitudes are allowed to sub-

[6] 18 U. S. C. § 1507 (1958 ed.).

stitute their pressures for the less glamorous but more dependable and temperate processes of the law. Experience demonstrates that it is not a far step from what to many seems the earnest, honest, patriotic, kind-spirited multitude of today, to the fanatical, threatening, lawless mob of tomorrow. And the crowds that press in the streets for noble goals today can be supplanted tomorrow by street mobs pressuring the courts for precisely opposite ends.

Minority groups in particular need always to bear in mind that the Constitution, while it requires States to treat all citizens equally and protect them in the exercise of rights granted by the Federal Constitution and laws, does not take away the State's power, indeed its duty, to keep order and to do justice according to law. Those who encourage minority groups to believe that the United States Constitution and federal laws give them a right to patrol and picket in the streets whenever they choose, in order to advance what they think to be a just and noble end, do no service to those minority groups, their cause, or their country. I am confident from this record that this appellant violated the Louisiana statute because of a mistaken belief that he and his followers had a constitutional right to do so, because of what they believed were just grievances. But the history of the past 25 years if it shows nothing else shows that his group's constitutional and statutory rights have to be protected by the courts, which must be kept free from intimidation and coercive pressures of any kind. Government under law as ordained by our Constitution is too precious, too sacred, to be jeopardized by subjecting the courts to intimidatory practices that have been fatal to individual liberty and minority rights wherever and whenever such practices have been allowed to poison the streams of justice. I would be wholly unwilling to join in moving this country a single step in that direction.

MR. JUSTICE CLARK, concurring in No. 24 and dissenting in No. 49.

According to the record, the opinions of all of Louisiana's courts and even the majority opinion of this Court, the appellant, in an effort to influence and intimidate the courts and legal officials of Baton Rouge and procure the release of 23 prisoners being held for trial, agitated and led a mob of over 2,000 students in the staging of a modern Donnybrook Fair across from the courthouse and jail. He preferred to resolve the controversy in the streets rather than submit the question to the normal judicial procedures by contacting the judge and attempting to secure bail and an early trial for the prisoners.

Louisiana's statute, § 14:401, under attack here, was taken *in haec verba* from a bill which became 18 U. S. C. § 1507 (1958 ed.). The federal statute was enacted by the Congress in 1950 to protect federal courts from demonstrations similar to the one involved in this case. It applies to the Supreme Court Building where this Court sits. I understand that § 1507 was written by members of this Court after disturbances similar to the one here occurred at buildings housing federal courts. Naturally, the Court could hardly be expected to hold its progeny invalid either on the ground that the use in the statute of the phrase "in or near a building housing a court" was vague or that it violated free speech or assembly. It has been said that an author is always pleased with his own work.

But the Court excuses Cox's brazen defiance of the statute—the validity of which the Court upholds—on a much more subtle ground. It seizes upon the acquiescence of the Chief of Police arising from the laudable motive to avoid violence and possible bloodshed to find that he made an on-the-spot administrative determination that a demonstration confined to the west side of

St. Louis Street—101 feet from the courthouse steps—would not be "near" enough to the court building to violate the statute. It then holds that the arrest and conviction of appellant for demonstrating there constitutes an "indefensible sort of entrapment," citing *Raley* v. *Ohio,* 360 U. S. 423 (1959).

With due deference, the record will not support this novel theory. Nor is *Raley* apposite. This mob of young Negroes led by Cox—2,000 strong—was not only within sight but in hearing distance of the courthouse. The record is replete with evidence that the demonstrators with their singing, cheering, clapping and waving of banners drew the attention of the whole courthouse square as well as the occupants and officials of the court building itself. Indeed, one judge was obliged to leave the building. The 23 students who had been arrested for sit-in demonstrations the day before and who were in custody in the building were also aroused to such an extent that they sang and cheered to the demonstrators from the jail which was in the courthouse and the demonstrators returned the notice with like activity. The law enforcement officials were confronted with a direct obstruction to the orderly administration of their duties as well as an interference with the courts. One hardly needed an on-the-spot administrative decision that the demonstration was "near" the courthouse with the disturbance being conducted before the eyes and ringing in the ears of court officials, police officers and citizens throughout the courthouse.

Moreover, the Chief testified that when Cox and the 2,000 Negroes approached him on the way to the courthouse he was faced with a "situation that was accomplished." From the beginning they had been told not to proceed with their march; twice officers had requested them to turn back to the school; on each occasion they had refused. Finding that he could not stop them with-

out the use of force the Chief told Cox that he must confine the demonstration to the west side of St. Louis Street across from the courthouse.

All the witnesses, including the appellant, state that the time for the demonstration was expressly limited. The State's witnesses say seven minutes, while Cox claims his speech was to be seven minutes but the program would take from 17 to 25 minutes. Regardless of the amount of time agreed upon, it is a novel construction of the facts to say that the grant of permission to demonstrate for a limited period of time was an administrative determination that the west side of the street was not "near" the courthouse. This implies that the amount of time might somehow be relevant in deciding whether an activity is within the prohibitions of the statute. The inclusion of a time limitation is, to me, entirely inconsistent with the view that an administrative determination was made. The only way the Court can support its finding is to ignore the time limitation and hold—as it does *sub silentio*—that once Cox and the 2,000 demonstrators were permitted to occupy the sidewalk they could remain indefinitely. Once the administrative determination was made that the west side of St. Louis Street was not so close to the courthouse as to violate the statute it could not be later drawn within the prohibited zone by Cox's refusal to leave. Thus the 2,000 demonstrators must be allowed to remain there unless in the meanwhile some other statute empowers the State to eject them. This, I submit, is a complete frustration of the power of the State.

Because I am unable to agree that the word "near," when applied to the facts of this case, required an administrative interpretation, and since I feel that the record refutes the conclusion that it was made, I must respectfully dissent from such a finding.

Nor can I follow the Court's logic when it holds that the case is controlled by *Raley* v. *Ohio, supra.* In *Raley* the petitioners whose convictions were reversed were told that they had a right to exercise their privilege and refuse to answer questions propounded to them in an orderly way during the conduct of a hearing. The administrative determination upon which this Court turns the present case was in actuality made, if at all, in the heat of a racial demonstration in a southern city for the sole purpose of avoiding what had the potentialities of a race riot. In *Raley,* there was no large crowd of 2,000 demonstrators endangering a tenuous racial peace. Indeed, the petitioners in *Raley* might well have chosen to waive their privilege and not be subject to prosecution at all but for the advice tendered them by those conducting the hearing. Here the demonstrators were determined to go to the courthouse regardless of what the officials told them regarding the legality of their acts. Here, like the one petitioner in *Raley* whose conviction was affirmed by an equally divided Court, appellant never relied on the advice or determination of the officer. The demonstration, as I have previously noted, was a *fait accompli.* In view of these distinctions, I can see no enticement or encouragement by agents of the State sufficient to establish a *Raley*-type entrapment.

And even though *arguendo* one admits that the Chief's action was an administrative determination, I cannot see how the Court can hold it binding on the State. It certainly was not made in the free exercise of his discretion.

Reading the facts in a way most favorable to the appellant would, in my opinion, establish only that the Chief of Police consented to the demonstration at that location. However, if the Chief's action be consent, I never knew until today that a law enforcement official—city, state or national—could forgive a breach of the criminal laws. I missed that in my law school, in my practice and for

the two years while I was head of the Criminal Division of the Department of Justice.

I have always been taught that this Nation was dedicated to freedom *under law* not under mobs, whether they be integrationists or white supremacists. Our concept of equal justice under law encompasses no such protection as the Court gives Cox today. The contemporary drive for personal liberty can only be successful when conducted within the framework of due process of law. Goals, no matter how laudable, pursued by mobocracy in the end must always lead to further restraints of free expression. To permit, and even condone, the use of such anarchistic devices to influence the administration of justice can but lead us to disaster. For the Court to place its imprimatur upon it is a misfortune that those who love the law will always regret.

I must, therefore, respectfully dissent from this action and join my Brother BLACK on this facet of the case. I also agree with him that the statute prohibiting obstruction of public passages is invalid under the Equal Protection Clause.[1] And, as will be seen, I arrive at the same conclusion for the same reason on the question regarding the breach of the peace statute. However, I cannot agree that the latter Act is unconstitutionally vague.

The statute declares congregating "with intent to provoke a breach of the peace" and refusing to disperse after being ordered so to do by an officer to be an offense. Each of these elements is set out in clear and unequivocal language. Certainly the language in the present statute is no more vague than that in the New York statute which was challenged on vagueness grounds in *Feiner* v. *New York,* 340 U. S. 315.[2] There the Court upheld

[1] See Parts I and II of his opinion.

[2] Section 722 of the Penal Law of New York in effect at that time stated:

"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of

Feiner's conviction on a disorderly conduct charge. I concur completely in the Court's statement that the present case is a "far cry from the situation" presented in *Feiner:*

> "There the demonstration was conducted by only one person and the crowd was limited to approximately 80, as compared with the present lineup of some [2,000] demonstrators and [250] onlookers. . . . Perhaps [appellant's] speech was not so animated but in this setting their actions . . . created a much greater danger of riot and disorder. It is my belief that anyone conversant with the almost spontaneous combustion in some Southern communities in such a situation will agree that the [Sheriff's] action may well have averted a major catastrophe." *Edwards* v. *South Carolina,* 372 U. S. 229, 243–244 (dissenting opinion of CLARK, J.).

Nor can I agree that the instant case is controlled by either *Edwards* v. *South Carolina, supra,* or *Fields* v. *South Carolina,* 375 U. S. 44 (1963). Both went off on their peculiar facts and neither dealt with a situation like the one here before the Court. Moreover, *Edwards* and *Fields* involved convictions for common-law breach of the peace and not violation of a statute.

In any event, I believe the language of the breach of the peace statute is as free from ambiguity or vagueness

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the following acts shall be deemed to have committed the offense of disorderly conduct:

"1. Uses offensive, disorderly, threatening, abusive or insulting language, conduct or behavior;

"2. Acts in such a manner as to annoy, disturb, interfere with, obstruct, or be offensive to others;

"3. Congregates with others on a public street and refuses to move on when ordered by the police;

"4. By his actions causes a crowd to collect, except when lawfully addressing such a crowd."

as is the statute prohibiting picketing of a courthouse which the Court today upholds. There the relevant words are parading "in or near a building housing a court of the State . . ." with the intent of obstructing justice. Certainly, both of the statutes are as clear as the words "below cost" which this Court approved in *United States* v. *National Dairy Products*, 372 U. S. 29 (1963), and cases there cited.

However, because this statute contains an express exclusion for the activities of labor unions, I would hold the statute unconstitutional on the equal protection ground my Brother BLACK enunciated with regard to the statute condemning obstruction of public passages.

On these grounds I dissent.

MR. JUSTICE WHITE, with whom MR. JUSTICE HARLAN joins, concurring in part and dissenting in part.

In No. 49, I agree with the dissent filed by my Brother BLACK in Part III of his opinion. In No. 24, although I do not agree with everything the Court says concerning the breach of peace conviction, particularly its statement concerning the unqualified protection to be extended to Cox's exhortations to engage in sit-ins in restaurants, I agree that the conviction for breach of peace is governed by *Edwards* v. *South Carolina*, 372 U. S. 229, and must be reversed.

Regretfully, I also dissent from the reversal of the conviction for obstruction of public passages. The Louisiana statute is not invalidated on its face but only in its application. But this remarkable emasculation of a prohibitory statute is based on only very vague evidence that other meetings and parades have been allowed by the authorities. The sole indication in the record from the state court that such has occurred was contained in the testimony of the Chief of Police who, in the process of

pointing out that Cox and his group had not announced the fact or purpose of their meeting, said "most organizations that want to hold a parade or a meeting of any kind, they have no reluctance to evidence their desires at the start." There is no evidence in the record that other meetings of this magnitude had been allowed on the city streets, had been allowed in the vicinity of the courthouse or had been permitted completely to obstruct the sidewalk and to block access to abutting buildings. Indeed, the sheriff testified that "we have never had such a demonstration since I have been in law enforcement in this parish." He also testified that "any other organization" would have received the same treatment if it "had conducted such a demonstration in front of the Parish Courthouse," whether it had been "colored or white, Protestant, Catholic, Jewish, any kind of organization, if they had conducted this same type of demonstration . . . ." Similarly the trial judge noted that although Louisiana respects freedom of speech and the right to picket, Louisiana courts "have held that picketing is unlawful when it is mass picketing."

At the oral argument in response to MR. JUSTICE GOLDBERG'S question as to whether parades and demonstrations are allowed in Baton Rouge, counsel said, "arrangements are usually made depending on the size of the demonstration, of course, arrangements are made with the officials and their cooperation is not only required it is needed where you have such a large crowd." In my view, however, all of this evidence together falls far short of justification for converting this prohibitory state statute into an open-ended licensing statute invalid under prior decisions of this Court as applied to this case. This is particularly true since the Court's approach is its own invention and has not been urged or litigated by the parties either in this Court or the courts below.

Certainly the parties have had no opportunity to develop or to refute the factual basis underlying the Court's rationale.

Under the Court's broad, rather uncritical approach it would seem unavoidable that these same demonstrators could have met in the middle of any street during the rush hour or could have extended their meeting at any location hour after hour, day after day, without risking any action under this statute for interfering with the normal use of the streets and sidewalks. I doubt that this bizarre intrusion into local management of public streets is either required or justified by the prior cases in this Court.

Furthermore, even if the obstruction statute, because of prior permission granted to others, could not be applied in this case so as to prevent the demonstration, it does not necessarily follow that the federal license to use the streets is unlimited as to time and circumstance. Two thousand people took possession of the sidewalk in an entire city block. Building entrances were blocked and normal use of the sidewalk was impossible. If the crowd was entitled to obstruct in order to demonstrate as the Court holds, it is nevertheless unnecessary to hold that the demonstration and the obstruction could continue *ad infinitum*. Here the demonstration was permitted to proceed for the period of time that the demonstrators had requested. When they were asked to disband, Cox twice refused. If he could refuse at this point I think he could refuse at any later time as well. But in my view at some point the authorities were entitled to apply the statute and to clear the streets. That point was reached here. To reverse the conviction under these circumstances makes it only rhetoric to talk of local power to control the streets under a properly drawn ordinance.

SECURITIES AND EXCHANGE COMMISSION *v.* AMERICAN TRAILER RENTALS CO.

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

No. 35. Argued November 10, 1964.—
Decided January 18, 1965.

Respondent company, which was in the trailer rental business, was financed by arranging for the sale of trailers to investors on a lease-back agreement. The trailers were placed by respondent at hundreds of gasoline stations which acted as rental agents. The Securities and Exchange Commission (SEC) blocked the further offering of the sale and lease-back agreements without a registration statement, which never became effective. Respondent's vice president then formed a new corporation which sought to exchange its stock for the investor creditors' trailers, but the SEC suspended the exemption from registration for small offerings because there was reasonable cause to believe there were false statements in the material used in making the offer. Respondent then filed a petition and proposed plan of arrangement under Chapter XI of the Bankruptcy Act. The petition showed that respondent never operated at a profit, that it owed large sums to trailer investors, that it made payments to investors whose trailers had not been obtained, that it purchased all trailers from an affiliate which had gone bankrupt owing it money, that 100 trailers were lost, and that substantial funds had been misappropriated. The SEC filed a motion under § 328 of the Bankruptcy Act to transfer the proceeding to Chapter X. A referee in bankruptcy, acting as special master, recommended denial of the motion on the ground that the SEC had not made a sufficient showing. The District Court, although expressing disapproval of the proposed stock arrangement and the preferential treatment of unsecured bank loans, accepted the referee's findings and denied the motion. The Court of Appeals affirmed, holding that the District Court did not abuse its discretion in this borderline case and the SEC did not show that adequate relief was not available under Chapter XI. *Held:*

1. In Chapters X and XI Congress enacted two distinct methods of corporate rehabilitation which are mutually exclusive. Pp. 604–607.

(a) Chapter X affords greater protection to creditors and stockholders by providing judicial control over the entire proceedings and impartial and expert assistance in corporate reorganizations through disinterested trustees and the active participation of the SEC. Pp. 604–605.

(b) Chapter XI is a summary procedure, usually under the control of the debtor, limited to an adjustment of unsecured debts, with only a bare minimum of control or supervision. Pp. 605–607.

(c) These are not alternate routes, with the choice in the debtor's hands. P. 607.

(d) A Chapter X petition may not be filed unless "adequate relief" is not obtainable under Chapter XI. P. 607.

(e) A Chapter XI petition is to be dismissed, or in effect transferred, if the proceedings should have been brought under Chapter X. P. 607.

2. While there is no absolute rule that Chapter X be used in every case in which the debtor is publicly owned, or where publicly held debt is adjusted, as a general rule Chapter X is the appropriate proceeding for adjusting publicly held debt. *SEC* v. *United States Realty & Improvement Co.*, 310 U. S. 434, followed. Pp. 613–614.

(a) Public investors are generally widely scattered and are far less likely than trade creditors to be aware of the financial condition and cause of the collapse of the debtor; they are less commonly organized in groups or committees capable of protecting their interests; they do not have the same interest as do trade creditors in continuing the business relations with the debtor; and, where debt is publicly held, the SEC is likely to have become familiar with the debtor's finances, indicating the desirability of its performing its full Chapter X functions. Pp. 613–614.

(b) In enacting Chapter X Congress had the protection of public investors, and not trade creditors, primarily in mind. P. 614.

3. There are only narrow limits within which there are exceptions to this general rule that the rights of public investor creditors are to be adjusted only under Chapter X. "Simple" compositions are still to be effected under Chapter XI; such situations may exist even where public debt is directly affected, for example, where the public investors are few in number and familiar with the operations of the debtor, or where, although the public investors are greater in number, the adjustment of their debt is relatively minor. P. 614.

4. Even where there is no public debt problem, Chapter X is appropriate where there are widespread public stockholders needing the protection offered thereby, such as accounting for mismanagement or obtaining a change in management, or where the financial condition requires more than a simple composition of unsecured debts. *General Stores Corp.* v. *Shlensky*, 350 U. S. 462, followed. Pp. 614–615.

5. Here, where public debts are being adjusted; the investors are many, widespread, and not intimately connected with the debtor; and the adjustment is major, it is obvious on the above-stated principles that Chapter X is the appropriate proceeding for the debtor's attempted rehabilitation. P. 615.

6. The contention that Chapter X is not here appropriate as the time and expense involved in such a proceeding would be too great is just another way of stating the natural preference of a debtor's management for the "speed and economy" of Chapter XI to the "thoroughness and disinterestedness" of Chapter X, which preference has been rejected by the determination of Congress that the disinterested protection of the public investor outweighs the self-interest "needs" of corporate management for so-called "speed and economy." Pp. 617–618.

(a) Experience in this area has confirmed the view of Congress that the thoroughness and disinterestedness assured by Chapter X not only results in greater protection for the investing public, but often in greater ultimate savings for all interests, public and private, than does the so-called "speed and economy" of Chapter XI. Pp. 617–618.

(b) The requirements of Chapter X are themselves sufficiently flexible so that the District Court can act to keep expenses within proper bounds and insure expedition in the proceedings. P. 618.

(c) Chapters X and XI were not designed to prolong—without good reason and at the expense of the investing public—the corporate life of every debtor suffering from terminal financial ills. P. 618.

7. District courts do not have open-ended discretion to decide in each case whether it is better for a debtor to be in Chapter X or Chapter XI, but must decide the issue pursuant to the principles here reaffirmed. Pp. 619–620.

325 F. 2d 47, reversed and remanded.

Daniel M. Friedman argued the cause for petitioner. With him on the briefs were *Solicitor General Cox, Philip A. Loomis, Jr.,* and *David Ferber.*

Arthur W. Burke, Jr., argued the cause and filed a brief for respondent.

Marcien Jenckes argued the cause and filed a brief for the State Mutual Life Assurance Company of America et al., as *amici curiae.*

MR. JUSTICE GOLDBERG delivered the opinion of the Court.

The issue in this case is whether respondent's attempted corporate rehabilitation under the Bankruptcy Act, materially affecting the rights of widespread public investor creditors, may be conducted under Chapter XI of the Bankruptcy Act, 52 Stat. 905, as amended, 11 U. S. C. § 701 *et seq.* (1958 ed.), or whether dismissal or, in effect, transfer to proceedings under Chapter X of that Act, 52 Stat. 883, as amended, 11 U. S. C. § 501 *et seq.* (1958 ed.), is required upon motion by the Securities and Exchange Commission or any other party in interest, pursuant to § 328 of the Bankruptcy Act, 66 Stat. 432, 11 U. S. C. § 728 (1958 ed.).[1]

[1] "The judge may, upon application of the Securities and Exchange Commission or any party in interest, and upon such notice to the debtor, to the Securities and Exchange Commission, and to such other persons as the judge may direct, if he finds that the proceedings should have been brought under chapter 10 of this title, enter an order dismissing the proceedings under this chapter, unless, within such time as the judge shall fix, the petition be amended to comply with the requirement of chapter 10 of this title for the filing of a debtor's petition or a creditors' petition under such chapter, be filed. Upon the filing of such amended petition, or of such creditors' petition, and the payment of such additional fees as may be required to comply with section 532 of this title, such amended petition or creditors' petition shall thereafter, for all purposes of chapter 10 of this title, be deemed to have been originally filed under such chapter."

I.

Respondent, American Trailer Rentals Company, was organized in 1958 to engage in the automobile-trailer rental business.[2] The business was financed largely through the sale of trailers to investors and their simultaneous lease-back. From 1959 to 1961 hundreds of small investors, scattered throughout the entire western part of the United States, purchased and leased back a total of 5,866 trailers, paying an aggregate price of $3,587,439 (approximately $600 per trailer). Under the usual form of lease-back agreement, the trailer owners were to receive a set 2% of their investment per month for 10 years.[3]

The trailers sold to investors and then leased back are of the general utility type that are attached to the rear bumper of automobiles. They were placed by respondent at gasoline stations, the operators of which acted as respondent's rental agents, without the investors ever having seen them. Respondent had about 700 such service station operators in December 1961, although the number had declined to about 500 by the time the petition for an arrangement was filed a year later.

Respondent's further offering of these sale and lease-back arrangements to the public was halted in 1961, when the SEC advised respondent that these sale and lease-back arrangements were investment contracts and therefore securities, which could not be sold to the public unless and until a registration statement was filed and became

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[2] Respondent was originally one of a group of interrelated companies that later merged into it; for simplicity we have considered it as one company throughout its history.

[3] Although the overwhelming majority of the agreements are of this type, they vary from 2% to 3% per month and from 5 to 10 years. A few provide for a flat 35% of the rental derived from the trailers involved.

effective under the Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.* (1958 ed.). Respondent then filed a registration statement with the SEC pertaining to these sale and lease-back arrangements. This registration statement, however, never became effective, and proceedings were instituted by the SEC to stop distribution of respondent's proposed prospectus on the grounds that it contained false and misleading statements. See Securities Act of 1933, § 8 (d), 48 Stat. 79, 15 U. S. C. § 77h (d) (1958 ed.). In June 1963, respondent consented to the entry of an order stopping distribution of this prospectus. See SEC, Securities Act Release No. 4615 (1963).

After this attempt to register the sale and lease-back agreements had failed, respondent's executive vice president and other persons organized a corporation named Capitol Leasing Corporation, which offered respondent's investor creditors an exchange of its stock for their trailers on the basis of one share of its stock for each $2 the investor creditors had paid for the trailers. After Capitol had acquired approximately 300 of the 5,866 trailers outstanding in exchange for its stock, the SEC suspended the exemption from registration for small offerings, upon which Capitol had relied in making this offer,[4] on the grounds that there was reasonable cause to believe that the material used in making this offer again contained false and misleading statements.

Following this event, respondent filed a petition and a proposed plan of arrangement under Chapter XI of the Bankruptcy Act. The petition, annexed schedules, and other documents show that respondent had never operated at a profit. For the three years ended September

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[4] See Regulation A (17 CFR § 230.251 *et seq.*), promulgated pursuant to the Securities Act of 1933, § 3 (a), 48 Stat. 75, 15 U. S. C. § 77c (a) (1958 ed.).

30, 1961, it had an aggregate income from "gross rentals" of $395,610. In the same period, it made rental payments to investor-trailer owners of $613,021; made payments to gasoline station operators of $118,400; and incurred additional "operating expenses" of $668,698.

The $613,021 paid to trailer owners included payments to investors whose trailers had not yet been obtained and put into the system. In order to make the necessary payments to trailer owners and station operators, respondent had not only borrowed money from its officers, directors, and stockholders but also had used funds obtained for purchase of new trailers. Virtually all the trailers were purchased from an affiliate in which respondent's officers and directors had interests. Many of these trailers proved defective in design or otherwise unsuitable for rental. About a year prior to the filing of respondent's Chapter XI proceeding, this manufacturing affiliate became bankrupt, owing respondent approximately $200,000 for trailers that were never manufactured and an additional amount of approximately $150,000 for trailers that were manufactured but never delivered. These latter trailers had been mortgaged by the affiliate to a third party who took possession upon the affiliate's bankruptcy. In addition, in June 1961, some 100 trailers, as to which respondent, although obligated by the lease-back arrangements to do so, did not have insurance coverage, were unlocatable and considered lost. Finally, certain funds received from investors for the purchase of trailers had been, at an earlier period, misappropriated by a member or members of respondent's management. Respondent's executive vice president, who estimated this misappropriation loss to be at least $141,000, attributed it "almost completely" to a deceased member of the original management group, but did not feel "qualified to make [the] judgment" that the two remaining mem-

bers of that group, including one who owned over 15% of respondent's common stock, could be held liable.

At the time of filing its Chapter XI petition, respondent stated its total assets as $685,608, of which $500,000 represented the stated estimated "value" of its trailer-rental system, an intangible asset. It stated in its petition that its trailer-rental system (which then consisted of arrangements with some 500 service station operator agents) "was built by [respondent] at an estimated cost of $500,000," despite the fact that respondent's balance sheet in 1961 showed the cost of establishing a system of 700 stations as only $33,750, and that in 1961 respondent had estimated that the cost of establishing an additional 800 rental stations would be only $56,000. The total liabilities were stated at $1,367,890, of which $710,597 was owed to trailer owners under their leasing agreements; $200,677 was owed to the investors who had paid for trailers that had never been manufactured; $71,805 was owed to trade and other general creditors; and $285,277 was owed to respondent's officers and directors.

Under the proposed plan of arrangement submitted by respondent the investor-trailer owners were to exchange their entire interests (their rights in the trailers as well as the amounts owed them under the rental agreements) for stock of Capitol on the basis of one share of stock for each $2 of "remaining capital investment in the trailers," which sum was to be determined by deducting from the original purchase price of the trailers the amount, if any, which the owners had received as rental payments.[5] Respondent's officers and directors, as well as trade and other general creditors, were to receive one share of stock

[5] This is, of course, less than the exchange that Capitol had offered some months earlier under the exemption from registration which had been suspended, since there trailer owners had been offered one share of stock for each $2 that they had paid with no deductions for so-called "return of capital." See *supra*, p. 599.

for each $3.50 of their claims. Respondent, itself, in exchange for transferring to Capitol its trailer-rental system, was to receive 107,000 shares which it would then distribute to its stockholders. Finally, obligations to two banks, totaling $55,558, although clearly unsecured, were to be paid in full, presumably because the officers and directors of respondent would otherwise have been liable as guarantors of these obligations.

If this plan were approved and all of the investor-trailer owners participated, a total of approximately 866,000 shares of Capitol's stock would be issued to them, but approximately 81,500 shares would be issued directly to the officers and directors of respondent, 22,400 to trade and other general creditors, and 107,000 to respondent itself to be distributed to its stockholders. More than 60% of respondent's stock was held by eight men, seven of whom are officers and directors and the eighth one of the original promoters of the venture.

The SEC then filed a motion, under § 328 of the Bankruptcy Act, to dismiss the Chapter XI proceeding or, in effect, transfer it to Chapter X on the ground that it should have been brought under Chapter X of the Bankruptcy Act and thus Chapter XI is not available. A referee in bankruptcy to whom, as a special master, the motion was referred, recommended that it be denied on the grounds that the Commission had not made "a sufficient showing to warrant the granting of the Section 328 motion." At his hearing on this matter, the District Judge recognized that, in light of the fact that the investor-trailer owners were widely scattered and the nature of their individual holdings was small, the proposed plan's issuance of approximately 15% of Capitol's stock to respondent's officers and directors would mean that they, rather than the investor-trailer owners, would have effective control over Capitol, and expressed his "disapproval" of such a result. He also expressed dis-

approval of preferential treatment of the banks in order to avoid the obligations of the officer and director guarantors.[6] The District Court, however, "accepted and adopted" the referee's findings and denied the motion without a written opinion. The Court of Appeals affirmed, holding that, "since the granting of the motion rests in the discretion of the [district] court, while we think this is a border-line case, it does not appear that the S. E. C. has shown that adequate relief is not obtainable in Chapter XI proceedings or that there has been an abuse of that discretion warranting reversal." 325 F. 2d 47, 52. We granted certiorari, 376 U. S. 948.

II.

The background and operative procedures of Chapter X and Chapter XI and the interrelationship between them have been reviewed by this Court in *SEC* v. *United States Realty & Improvement Co.*, 310 U. S. 434, and *General Stores Corp.* v. *Shlensky*, 350 U. S. 462. This background was detailed in *United States Realty, supra,* as follows:

Before passage, in 1934, of § 77B of the Bankruptcy Act, 48 Stat. 912, bankruptcy procedures offered no facilities for corporate rehabilitation, which, therefore, was left to equity receiverships, with their attendant paraphernalia of creditors' and security holders' committees, and of rival plans of reorganization. Lack of judicial control of the conditions attending formulation of the plans, inadequate protection of widely scattered security holders, frequent adoption of plans which favored

[6] Following this hearing, the plan was then modified to provide that respondent's officers and directors would receive one share of Capitol stock for each $5.50, instead of each $3.50, of their claims, with this stock having limited voting, dividend and liquidation rights for five years, and that the banks would be treated in the same manner as respondent's other general creditors.

management at the expense of other interests and which afforded the corporation only temporary respite from financial collapse, so often characteristic of equity receivership reorganizations, led to the enactment of § 77B. See S. Doc. No. 65, 72d Cong., 1st Sess., 90; H. R. Rep. No. 1409, 75th Cong., 1st Sess., 2. As does the present Chapter X, § 77B permitted the adjustment of all interests in the debtor, secured creditors, unsecured creditors, and stockholders.

The day preceding the enactment of § 77B, Congress had created the Securities and Exchange Commission as a special agency charged with the function of protecting the investing public, 48 Stat. 885, as amended, 15 U. S. C. § 78d (1958 ed.). At the urging of, and based on extensive studies by the SEC, § 77B was, in 1938, revised and enacted in changed form as Chapter X. 52 Stat. 883–905. The aims of Chapter X as thus revised were to afford greater protection to creditors and stockholders by providing greater judicial control over the entire proceedings and impartial and expert administrative assistance in corporate reorganizations through appointment of a disinterested trustee and the active participation of the SEC. The trustee in a Chapter X proceeding [7] is required to make a thorough examination and study of the debtor's financial problems and management, Bankruptcy Act, §§ 167 (3), (5), and then transmit his independent report to the creditors, stockholders, the SEC, and others. Following this, the trustee gives notice to all creditors and stockholders to submit to him proposals for a plan of reorganization. §§ 167 (5), (6). The trustee then formulates a plan of reorganization which he presents to the court. If the court finds the plan worthy of considera-

[7] Where the debtor's liabilities are less than the minimal sum of $250,000, a situation clearly not present here, Chapter X permits, but does not require, the court to appoint a trustee.

tion, it may refer it to the SEC for its opinion and must so refer it where the debtor's liabilities exceed $3,000,000. § 172. When the proposed plan, after approval by the court, is finally submitted to the debtor's creditors and stockholders, it is accompanied by the advisory report of the SEC, as well as the opinion of the judge who approved the plan. § 175. As to each class of creditors and stockholders whose rights are affected by the plan, the plan must receive the approval of the holders of two-thirds in amount of each class of creditors' claims and, if the debtor has not been found to be insolvent, the holders of a majority of each class of stock. § 179. The plan becomes effective upon final confirmation by the court, based on a finding, *inter alia,* that "the plan is fair and equitable." § 221.

As part of the same Act in which Chapter X was enacted Congress also, in 1938, enacted Chapter XI. 52 Stat. 905–916. Chapter XI is a statutory variation of the common-law composition of creditors and, unlike the broader scope of Chapter X, is limited to an adjustment of unsecured debts. It was sponsored by the National Association of Credit Men and other groups of creditors' representatives whose experience had been in representing trade creditors in small and middle-sized commercial failures. See Hearings before the House Committee on the Judiciary on H. R. 6439 (reintroduced as H. R. 8046 and enacted in 1938), 75th Cong., 1st Sess., 31, 35; 13 J. N. A. Ref. Bankr. 17 (1938). The contrast between the provisions of Chapter X, carefully designed to protect the creditor and stockholder interests involved, and the summary provisions of Chapter XI is quite marked. The formulation of the plan of arrangement, and indeed the entire Chapter XI proceeding, for all practical purposes is in the hands of the debtor, subject only to the requisite consent of a majority in number and amount of unse-

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cured creditors, § 362, and the ultimate finding by the court that the plan is, *inter alia,* "for the best interests of the creditors," § 366.[8] "The process of formulating an arrangement and the solicitation of consent of creditors, sacrifices to speed and economy every safeguard, in the interest of thoroughness and distinterestedness, provided in Chapter X." *United States Realty, supra,* at 450–451. The debtor generally remains in possession and operates the business under court supervision, § 342. A trustee is only provided in the very limited situation where a trustee in bankruptcy has previously been appointed,[9] § 332. There is no requirement for a receiver, but the Court "may" appoint one if it finds it to be "necessary," § 332. The plan of arrangement is proposed by, and only by, the debtor, §§ 306 (1), 323, 357, and creditors have only the choice of accepting or rejecting it. Acceptances may be solicited by the debtor even before filing of the Chapter XI petition and, in fact, must be solicited before court review of the plan, § 336 (4). There are no provisions for an independent study by the court or a trustee, or for advice by them being given to creditors in advance of the acceptance of the arrangement. In short, Chapter XI provides a summary procedure whereby judicial confirmation is obtained on a plan that has been formulated and accepted with only a bare minimum of independent control or supervision. This, of course, is consistent with the basic purpose of Chapter XI: to provide a quick and economical means of facilitating simple compositions among general creditors who have been

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[8] Originally Chapter XI, as well as Chapter X, required that the plan be "fair and equitable." That requirement of Chapter XI was changed to the one stated in the text in 1952. See *infra,* p. 611.

[9] This could only occur when the Chapter XI proceeding had been filed by a debtor already in straight bankruptcy proceedings. See § 321; 8 Collier, Bankruptcy, 587–588 (1964 ed.).

deemed by Congress to need only the minimal disinterested protection provided by that Chapter.

In enacting these two distinct methods of corporate rehabilitations, Congress has made it quite clear that Chapters X and XI are not alternate routes, the choice of which is in the hands of the debtor. Rather, they are legally, mutually exclusive paths to attempted financial rehabilitation. A Chapter X petition may not be filed unless "adequate relief" is not obtainable under Chapter XI, § 146 (2). Likewise, a Chapter XI petition is to be dismissed, or in effect transferred, if the proceedings "should have been brought" under Chapter X, § 328.

III.

The SEC here contends that, as an absolute rule, all proceedings for the financial rehabilitation of a corporate debtor which would alter the rights of public investor creditors must be in Chapter X. Respondent, on the other hand, contends that there is no such absolute rule and that the determination of whether proceedings, on the facts of a particular case, should be in Chapter X or in Chapter XI rests in the discretion of the District Court, which discretion should not be reversed unless it is found to have been clearly abused. Both parties rely on *United States Realty, supra,* and *General Stores Corp., supra,* for their respective contentions.

United States Realty involved a corporation with publicly owned debentures, publicly owned mortgage certificates, and publicly owned stock, which proposed a plan of arrangement that would have left the debentures and stock unaffected but would have both extended the time for payment of the publicly held mortgage certificates and reduced their interest rate. The SEC there argued that Chapter X is the exclusive avenue for financial rehabilitation of large corporations with many stock-

holders. While rejecting this argument as an absolute matter, the Court recognized that "in general . . . the two chapters were specifically devised to afford different procedures, the one [Chapter X] adapted to the reorganization of corporations with complicated debt structures and many stockholders, the other [Chapter XI] to composition of debts of small individual business and corporations with few stockholders . . . ." 310 U. S., at 447. The Court then held that, as the proposed plan of arrangement adversely affected the rights of many, widely scattered public creditors, to wit, the holders of mortgage certificates, the formulation of a plan with the judicial control, statutory SEC participation, and employment of disinterested trustees, assured by Chapter X, would better serve "the public and private interests concerned including those of the debtor," *id.*, at 455, than would the formulation of a Chapter XI plan under the almost complete control of the debtor. In reaching this result, the Court explored at great length the safeguards of Chapter X and their protection of public investors:

> "The basic assumption of Chapter X and other acts administered by the Commission is that the investing public dissociated from control or active participation in the management, needs impartial and expert administrative assistance in the ascertainment of facts, in the detection of fraud, and in the understanding of complex financial problems." *Id.*, at 448–449, n. 6.

Applying these principles, the Court therefore reversed the Court of Appeals' affirmance of the District Court's refusal to dismiss a Chapter XI proceeding which the SEC had challenged on the grounds that it should have been brought under Chapter X.

It should be noted that, prior to *United States Realty*, a bill had been introduced in Congress to draw a numeri-

cal line that would close Chapter XI to any corporation which had any class of its securities owned by 100 or more creditors or stockholders. See Hearing before Special Subcommittee on Bankruptcy and Reorganization of the House Committee on the Judiciary on H. R. 9864, 76th Cong., 3d Sess. In reporting out the bill, the Subcommittee stated:

> "Sections 4, 5, 6, and 7 of the bill, which are eliminated by the last of your committee's amendments, provided for amendments to chapter XI of the Bankruptcy Act which were designed to prevent corporations which are publicly indebted or owned from filing a petition for an arrangement under chapter XI, rather than a petition for reorganization under chapter X, the chapter specially designed for the reorganization of such corporations, and to establish a numerical test of such 'public' indebtedness or ownership.
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> "Your committee believes that, while the amendments proposed by sections 4, 5, 6, and 7 are desirable, the element of emergency requiring their immediate passage has been eliminated by the decision of the United States Supreme Court in *Securities and Exchange Commission* v. *U. S. Realty and Improvement Company*. That decision was rendered on May 27, 1940, after the introduction of the bill. Since immediate action on these proposals does not appear to be necessary, the last of your committee's amendments provides for the striking out of sections 4, 5, 6, and 7. The committee's conclusion is supported by all of the witnesses who testified at the hearings before the committee's Subcommittee on Bankruptcy and Reorganization and also by the report of the Securities and Exchange Commission on the bill." H. R. Rep. No. 2372, 76th Cong., 3d Sess., 2.

In *General Stores Corp.* v. *Shlensky, supra,* a corporation with over 2,000,000 shares of common stock, held by over 7,000 shareholders, but with no publicly held debt of any kind, petitioned under Chapter XI for an arrangement of its unsecured debt, consisting of obligations to trade creditors and one private investor. The District Court had held, with the Court of Appeals affirming, that Chapter XI was unavailable as the debtor needed more extensive reorganization than merely a simple arrangement with unsecured creditors. This Court affirmed. In so doing, the Court again rejected the SEC's argument that, as an absolute matter, Chapter XI is not available where the debtor is publicly owned.

The Court stated:

> "It may well be that in most cases where the debtor's securities are publicly held c. X will afford the more appropriate remedy. But that is not necessarily so. A large company with publicly held securities may have as much need for a simple composition of unsecured debts as a smaller company. And there is no reason we can see why c. XI may not serve that end. The essential difference is not between the small company and the large company but between the needs to be served." 350 U. S., at 466.

The Court pointed out that the "needs to be served" included such factors as requirements of fairness to public debt holders, need for a trustee's evaluation of an accounting from management or determination that new management is necessary, and the need to readjust a complicated debt structure requiring more than a simple composition of unsecured debt. *Id.,* at 466–467.

IV.

We agree with the parties that the principles of *United States Realty* and *General Stores* apply to and govern the result in this case. We reaffirm the holdings of these

cases that there is no absolute rule that Chapter X must be utilized in every case in which the corporate debtor is publicly owned. As this Court has recognized, Congress has drawn no such hard-and-fast line between the two Chapters. The SEC, purporting to bow to these holdings, urges in this case, however, a variation of its absolute-rule argument that, while not requiring Chapter X in all cases in which the debtor is publicly owned, would require the use of Chapter X in 100% of the cases involving the rights of public investor creditors.

It argues, in support of this variation of its absolute rule, that to hold otherwise would deprive the investor creditors of Chapter X's protection of the "fair and equitable" requirement of a plan. As noted above, whereas Chapter X contains the proviso that a plan must be "fair and equitable," Chapter XI only requires that it be "for the best interests of the creditors." The words "fair and equitable" are "words of art" which mean that senior interests are entitled to full priority over junior ones and, in particular, "that in any plan of corporate reorganization unsecured creditors are entitled to priority over stockholders to the full extent of their debts and that any scaling down of the claims of creditors without some fair compensating advantage to them which is prior to the rights of stockholders is inadmissible." *United States Realty, supra,* at 452. The SEC's argument, however, is premised on the assertion, for which we can find no support in either the language or legislative history of Chapters X and XI, that Congress has deemed it necessary in all cases involving public investor creditors that they have the protection of the "fair and equitable" doctrine. In fact, the requirement that a plan be "fair and equitable" was part of Chapter XI, as well as Chapter X, until 1952, when Congress deleted it from Chapter XI and replaced it with the requirement that the plan be "for the best interests of the creditors." Congress clearly deemed this

latter requirement to be sufficient protection in a proceeding properly in Chapter XI in light of the general philosophy of Chapter XI to expedite "simple" compositions. See S. Rep. No. 1395, 82d Cong., 2d Sess., 10, 11–12; H. R. Rep. No. 2320, 82d Cong., 2d Sess., 19, 20–21. There is no indication that in so doing, Congress intended in any way to change the law on the interrelationship between Chapters X and XI. In fact, the history is just the opposite.[10] In the same Act that deleted the "fair and equitable" requirement from Chapter XI, Congress expressly codified, in § 328, the rule of *United States Realty* providing for dismissal, or, in effect transfer, of a Chapter XI proceeding if it "should have been brought" in Chapter X. Nothing in this even suggests transfer as an absolute rule to give Chapter X's "fair and equitable" protection to all cases involving public investors, which presumably if Congress had so intended, it would have so stated. Moreover, as noted above, *supra,* pp. 608–609, a House subcommittee previously approved the *United States Realty* holding of a general, but not absolute, rule, and had not reported out a bill that would have drawn an absolute line.[11]

The SEC further argues that Chapter X is required in all cases involving public investor creditors, because its right to intervene in a Chapter XI proceeding is limited solely to moving under § 328 for a transfer to Chapter X.

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[10] This, of course, also answers respondent's argument that Congress, by deleting the "fair and equitable" requirement from Chapter XI, has somehow overturned the holding and principles of *United States Realty.* See also *infra,* p. 614.

[11] This, of course, does not mean that Chapter X's greater protection for public investor creditors in this regard, as well as protections of greater judicial control, a disinterested trustee, and full statutory SEC participation, is irrelevant in determining whether, as a general rule, Chapter X or Chapter XI would better serve the "public and private interests involved," cf. *General Stores, supra,* at 466. See *infra,* p. 614.

We reject this argument. The District Court, in this case, quite properly recognized that the SEC was not so limited in a Chapter XI proceeding, and we hold that, under the statutory scheme, while not charged with express statutory rights and responsibilities as in Chapter X, the SEC is entitled to intervene and be heard in a Chapter XI proceeding. We therefore reject the SEC's variation of its absolute-rule argument, advanced in this case, that would require the use of Chapter X in all cases in which the rights of public investor creditors are involved. The short answer is that, as with the SEC's original absolute-rule argument, Congress has drawn no such absolute line of demarcation between Chapters X and XI.

This does not mean, however, that we disagree with the holding of *United States Realty* that, although there is no absolute rule requiring that Chapter X be utilized in every case in which the debtor is publicly owned, or even where publicly held debt is adjusted, as a general rule Chapter X is the appropriate proceeding for adjustment of publicly held debt. See *SEC* v. *Canandaigua Enterprises Corp.*, 339 F. 2d 14 (C. A. 2d Cir.). Not only do we not disagree with this holding, but we expressly reaffirm it.[12] Public investors are, as here, generally widely scattered and are far less likely than trade creditors to be aware of the financial condition and cause

[12] While sometimes expressing different rationales for their conclusions it is clear that the courts of appeals have recognized the general rule stated above. See *SEC* v. *Canandaigua Enterprises Corp., supra; SEC* v. *Crumpton Builders, Inc.*, 337 F. 2d 907 (C. A. 5th Cir.); *SEC* v. *Liberty Baking Corp.*, 240 F. 2d 511 (C. A. 2d Cir.); *Mecca Temple* v. *Darrock*, 142 F. 2d 869 (C. A. 2d Cir.); cf. *Grayson-Robinson Stores, Inc.* v. *SEC*, 320 F. 2d 940 (C. A. 2d Cir.); *SEC* v. *Wilcox-Gay Corp.*, 231 F. 2d 859 (C. A. 6th Cir.); *In re Transvision, Inc.*, 217 F. 2d 243 (C. A. 2d Cir.). See also *In re Barchris Construction Corp.*, 223 F. Supp. 229 (D. C. S. D. N. Y.); *In re Herold Radio & Electronics Corp.*, 191 F. Supp. 780 (D. C. S. D. N. Y.).

of the collapse of the debtor. They are less commonly organized in groups or committees capable of protecting their interests. They do not have the same interest as do trade creditors in continuing the business relations with the debtor. Where debt is publicly held, the SEC is likely, as here, to have become familiar with the debtor's finances, indicating the desirability of its performing its full Chapter X functions. It seems clear that in enacting Chapter X Congress had the protection of public investors, and not trade creditors, primarily in mind. As noted above, Chapter X is one of many Acts in which the SEC has the statutory right and responsibility to protect public investors.[13] Finally, again it is clear that Congress was thinking of Chapter XI as primarily concerned with adjustment of the rights of trade creditors when it deemed the "fair and equitable" doctrine to be unnecessary to "simple" compositions in Chapter XI.[14]

General Stores indicates the narrow limits within which there are exceptions to this general rule that the rights of public investor creditors are to be adjusted only under Chapter X. "Simple" compositions are still to be effected under Chapter XI. Such a situation, even where public debt is directly affected may exist, for example, where the public investors are few in number and familiar with the operations of the debtor, or where, although the public investors are greater in number, the adjustment of their debt is relatively minor, consisting, for example, of a short extension of time for payment.

On the other hand, *General Stores* also makes it clear that even though there may be no public debt mate-

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[13] *E. g.*, Securities Act of 1933, 48 Stat. 74, as amended, 15 U. S. C. § 77a *et seq.* (1958 ed.); Securities Exchange Act of 1934, 48 Stat. 881, as amended, 15 U. S. C. § 78a *et seq.* (1958 ed.).

[14] See H. R. Rep. No. 2320, 82d Cong., 2d Sess., 21; S. Rep. No. 1395, 82d Cong., 2d Sess., 11–12. Cf. *United States Realty, supra,* at 454.

rially and directly affected, Chapter X is still the appropriate proceeding where the debtor has widespread public stockholders and the protections of the public and private interests involved afforded by Chapter X are required because, for example, there is evidence of management misdeeds for which an accounting might be made, there is a need for new management, or the financial condition of the debtor requires more than a simple composition of its unsecured debts.

Applying the above principles, it is obvious that Chapter X is the appropriate proceeding for the attempted rehabilitation of respondent in this case. Here public debts are being adjusted. The investors are many and widespread, not few in number intimately connected with the debtor, and the adjustment is quite major and certainly not minor. These facts alone would require Chapter X proceedings under the above-stated principles. In addition there is here, as we have previously pointed out, substantial evidence of misappropriation of assets, and not only is there a need for a complete corporate reorganization, but it is obvious that the proposed plan of arrangement is just that. The trailer owners are exchanging their entire interests, including a sale of their trailers, in exchange for stock in a new corporation, in which other creditors of respondent, including respondent's officers and directors, as well as respondent itself will have substantial interests. Indeed, this is the same complete reorganization, except that the plan here gives the public investor creditors even less than was previously offered, see note 5, *supra,* that the SEC previously stopped as a public offering on the grounds that the offering material contained false and misleading information. The Court of Appeals itself recognized, 325 F. 2d, at 53, "that if the stock involved here were not part of an arrangement, the disclosures made with regard to it [in soliciting the trailer owners' consents to the plan] would be clearly

inadequate. No authority has been found which would indicate that recipients of stock issued in connection with an arrangement are not entitled to as much information as are those persons acquiring stock under ordinary conditions." We agree.

Indeed, the facts of this case aptly demonstrate the need for Chapter X protection as a general rule on the above-stated principles. There is clearly a need for a study by a disinterested trustee to make a thorough examination of respondent's financial problems and management and submit a full report to the public-investor creditors. Respondent has never operated profitably, has always been in precarious financial condition, and apparently was hopelessly insolvent, in both the bankruptcy and equity sense, when the arrangement was proposed. At an earlier period, its management apparently misappropriated substantial corporate funds. Most of the trailers were purchased from an affiliated company; a large number of them, although paid for, were either not manufactured or, if manufactured, were not delivered. The affiliated company is bankrupt. Only approximately two-thirds of the $3,587,439 contributed by the public investors for the purchase of trailers was used for that purpose; the balance apparently having been drained off in high commissions taken by the management on the sale of the trailers to the public. Portions of these commissions on new trailer sales were, in turn, used by the management to pay prior purchasers of trailers the rentals which they had been promised. When respondent filed its petition for an arrangement, its stated liabilities of $1,367,890 were approximately double its stated assets of $685,608; with even most of the latter ($500,000) representing the alleged "estimated" value of the trailer-rental system, *i. e.*, the debtor's arrangements with the service station operators. The District Court itself recognized that "there may be in this situation need

for new management, and there certainly is some question . . . as to whether or not the management that is presently . . . operating it, would continue to do so for the best interests of the investors." It did not find, however, that Chapter X was necessary since this need for new management had "not been clearly established yet." One of the purposes of Chapter X is to give the independent trustee the opportunity to conduct a searching inquiry so as to "clearly establish" whether or not new management is necessary, when there is, as here, a substantial basis for such a belief. See *General Stores, supra,* at 466. Finally, it is clear that there is need for an independent investigation of possible causes of action against the past and present management of respondent, and it is as true now as when Chapter X was enacted, that "a debtor in possession cannot be expected to investigate itself." Hearings before House Committee on the Judiciary on H. R. 6439, 75th Cong., 1st Sess., 176 (my Brother DOUGLAS then testifying as Chairman of the SEC).

Respondent, however, contends that Chapter X is not here appropriate as the time and expense involved in such a proceeding would be too great. This is, however, just another way of stating the natural preference of a debtor's management for the "speed and economy" of Chapter XI, to the "thoroughness and disinterestedness" of Chapter X. In this area, as with other statutes designed to protect the investing public,[15] Congress has made the determination that the disinterested protection of the public investor outweighs the self-interest "needs" of corporate management for so-called "speed and economy." In fact, experience in this area has confirmed the view of Congress that the thoroughness and disinterestedness assured by Chapter X not only result in greater protec-

[15] See note 13, *supra.*

tion for the investing public, but often in greater ultimate savings for all interests, public and private, than do the so-called "speed and economy" of Chapter XI. See Twenty-Eighth Annual Report of the SEC 98 (1963); Twenty-Ninth Annual Report of the SEC 90–91 (1964); Note, 69 Harv. L. Rev. 352, 357–360 (1955). Moreover, the requirements of Chapter X are themselves sufficiently flexible so that the District Court can act to keep expenses within proper bounds and insure expedition in the proceedings.[16] We also reject respondent's further argument that the time and expense of a Chapter X proceeding would be so great that the ultimate result might be straight bankruptcy liquidation, which, respondent contends, "would mean probable total loss for [the] trailer owners." In addition to the above answers to respondent's general-time-and-expense argument, we feel compelled to point out, without indicating any opinion as to the ultimate outcome of the attempted financial rehabilitation in this case, that it must be recognized that Chapters X and XI were not designed to prolong—without good reason and at the expense of the investing public—the corporate life of every debtor suffering from terminal financial ills. See *Fidelity Assurance Assn.* v. *Sims*, 318 U. S. 608.[17]

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[16] The court has, for example, a measure of control over the amount of work performed by the trustee, § 167, and must approve the fees of all participants in the proceedings, §§ 241–250.

[17] Both Chapters X and XI are designed as vehicles for possible financial rehabilitation. Chapter X explicitly requires that a petition brought under it must be dismissed if it has not been brought in "good faith." § 141. "Good faith" is defined so as to exclude from Chapter X those cases, *inter alia*, where "it is unreasonable to expect that a plan of reorganization can be effected." § 146 (3). Such a situation would exist where the debtor is so hopelessly insolvent that straight bankruptcy liquidation is the only available expedient. *Fidelity Assurance Assn.* v. *Sims, supra; Goodman* v. *Michael*, 280 F. 2d 106, 108 (C. A. 1st Cir.); 6 Collier, Bankruptcy,

Finally, respondent argues that the District Court's decision that Chapter XI was the appropriate proceeding here should be affirmed on the basis that it was not a clear abuse of discretion. Respondent relies on certain language in the *General Stores* opinion in support of this contention. However, in making this contention it clearly misreads that opinion and misconceives its holding and import. Nothing in that opinion supports respondent's view that the issue of whether Chapter X or Chapter XI is required permits open-ended discretion by a district court to decide on a case-by-case basis, without reliance on the principles which we have here reaffirmed, whether in its opinion it would be better for a particular debtor to be in Chapter X or Chapter XI.[18] We agree with the statement of the Court of Appeals for the Second Circuit in a recent decision that such open-ended

¶ 6.09 (1964). Chapter XI has a provision that a plan cannot be confirmed unless it is "for the best interests of the creditors and is feasible." § 366 (2). This provision has been construed to preclude confirmation of a plan of arrangement where the plan would pay the creditors substantially less than they might reasonably expect to realize in liquidation. See *In re Bruce Hunt Corp.*, 163 F. Supp. 939 (D. C. N. D. N. Y.); 9 Collier, Bankruptcy, ¶ 9.17 (1964).

[18] Respondent relies on language wherein, after pointing out that it "was the view of two lower courts" that the debtor there "may well need a more thoroughgoing capital readjustment than is possible under c. XI," 350 U. S., at 468, MR. JUSTICE DOUGLAS stated, for the Court: "We could reverse them only if their exercise of discretion transcended the allowable bounds. We cannot say that it does. Rather we think that the lower courts took a fair reading of c. X and the functions it serves and reasonably concluded that this business needed a more pervasive reorganization than is available under c. XI." *Ibid.* It is clear in the context of that case that the discretionary issue there referred to was not discretion to determine the rules governing the issue of whether Chapter X or Chapter XI is appropriate, or whether these rules should be applied in all cases, but rather merely the factual question of whether or not that particular debtor needed a more pervasive reorganization than a simple composition under Chapter XI.

discretion would be bound to result in decisions reflecting the "particular experience and predilections" of the district judge involved. *SEC* v. *Canandaigua Enterprises Corp., supra,* at 19. "The consequence, particularly in a multijudge district, would be that the substantial rights of the parties would depend on the accident of the calendar—in defiance of the memorable admonition, 'It will not do to decide the same question one way between one set of litigants and the opposite way between another,' Cardozo, The Nature of the Judicial Process 33 (1921)." *Ibid.* We therefore also reject this contention of respondent.[19]

Applying the above-stated principles, it is clear that in this case the motion by the SEC to dismiss, or, in effect, to transfer the proceedings to Chapter X, should have been granted.[20] Therefore, the judgment of the Court of Appeals is reversed and the case remanded to that court for proceedings consistent with this opinion.

Reversed and remanded.

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[19] Respondent's further argument that Chapter XI still is appropriate since the plan, despite its clear terms, does not adversely affect the trailer owners because each of them can remove his trailer at will is also without merit. First, as noted above, Chapter X would be required here even if there were no investor-creditors. Second, the argument that the plan is voluntary ignores the fact that the investors were not purchasing trailers but were investing in the corporation. Finally, some trailers were never manufactured, others are missing, and the remainder are scattered at gasoline stations throughout the western part of the United States. It cannot seriously be contended that this right to find a trailer that was not intended to be purchased makes the plan a completely voluntary one.

[20] In so holding, we indicate no opinion as to whether or not a Chapter X reorganization would be appropriate in this case. See note 17, *supra.* We merely hold that all issues relevant to the possible financial rehabilitation of respondent must here be determined within the confines of a Chapter X, rather than a Chapter XI, proceeding. See *United States Realty, supra,* at 453; 9 Collier, *supra,* at ¶ 9.17.

Per Curiam.

FORTSON, SECRETARY OF STATE OF GEORGIA, ET AL. *v.* TOOMBS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

No. 300. Argued November 18–19, 1964.—Decided January 18, 1965.

After holding the Georgia Legislature to be malapportioned the District Court enjoined appellant election officials from placing on the 1964 ballot or subsequent ballots, until the General Assembly is properly apportioned, the question of adopting a new state constitution. Appellees suggested that the issue was moot. *Held:* This part of the decree is vacated and remanded to the District Court to consider the present need for the injunction.

Decree vacated in part and remanded.

E. Freeman Leverett, Deputy Assistant Attorney General of Georgia, argued the cause for appellants. With him on the brief was *Eugene Cook*, Attorney General of Georgia.

Francis Shackelford argued the cause for appellees. With him on the brief were *Emmet J. Bondurant II*, *J. Quentin Davidson*, *Edward S. White* and *Hamilton Lokey*.

PER CURIAM.

The District Court, having held that the Georgia Legislature was malapportioned (*Toombs* v. *Fortson*, 205 F. Supp. 248), enjoined appellants, election officials, "from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely

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new constitution therefor shall be adopted."* Appellants challenge that provision on the merits. Appellees, while defending it on the merits, suggest alternatively that the issue has become moot.

The situation has changed somewhat since the 1964 election, as both the Senate and the House have new members, and appellees, for whose benefit the challenged provision was added, say it is now highly speculative as to what the 1965 legislature will do and suggest the paragraph in question be vacated as moot.

We vacate this part of the decree and remand to the District Court, to whom we give a wide range in moulding a decree (*United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 185; *International Boxing Club* v. *United States*, 358 U. S. 242, 253), for reconsideration of the desirability and need for the on-going injunction in light of the results of the 1964 election and the representations of appellees.

It is so ordered.

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*The entire paragraph reads as follows:

"The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new constitution therefor shall be adopted; provided, however, nothing in this order shall prevent the submission of amendments to the Constitution of the State of Georgia which are separate as to subject matter, in accordance with Article XIII, Section I, Article 1, of the Constitution of the State of Georgia, 1945. (See *Hammond* v. *Clarke*, 136 Ga. 313, for a discussion by the Georgia Supreme Court of what constitutes separate amendments). Nor shall anything in this order prevent the calling by the General Assembly of a 'convention of the people to revise, amend or change the constitution' if the representation 'in the convention is based on population as near as practicable' with the members being elected by the people (see Article XIII, Section I, Article 2). Constitution of the State of Georgia, 1945."

MR. JUSTICE CLARK, concurring.

Although I would prefer to declare this litigation moot and vacate the judgment below, I am joining the opinion and judgment of the Court solely on the basis that it is not reaching the merits regarding the propriety of the order fashioned by the three-judge District Court. In my view, the Court is simply vacating and remanding in order to give the District Court an opportunity to reconsider its order in light of the change in circumstances which has occurred since judgment was entered.

MR. JUSTICE HARLAN, with whom MR. JUSTICE STEWART joins, concurring in part and dissenting in part.

This is the first time that the Court, after plenary briefing and argument, has been called on to consider the propriety of interim arrangements prescribed by a district court pending the effectuation of its decision requiring reapportionment of a branch of a state legislature.

After holding that the House of Representatives of the General Assembly of Georgia was unconstitutionally composed, a decision which is not called into question on this appeal, the three-judge District Court ordered: (1) that the election in 1964 of the legislature to serve in 1965 (the 1965 legislature) might proceed under the State's existing methods of apportionment; (2) that until a properly apportioned legislature took office no other legislature could propose to the electorate, except through the calling of a convention of popularly elected delegates, the adoption of a new state constitution; and (3) that (except for reapportionment legislation) the 1965 House should be "limited," notwithstanding any provision of state law, "to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session" provided by Georgia law. After the State's appeal was filed in this Court this last

provision was in effect abrogated by the District Court with the approval of the parties.[1]

This appeal draws in question the validity of items (2) and (3) above, similarly numbered in the District Court's order. It is contended by the appellees, however, that both these issues have now become moot.

I.

The Court's disposition of this case, of course, involves a holding that at least as to item (2) the case is *not* moot. For, contrary to what my Brother GOLDBERG says in his dissenting opinion (*post,* pp. 636–638) and as my Brother CLARK seems to recognize (*ante*), the Court does not remand the case to the District Court for a determination on the issue of mootness, but only to decide whether any injunctive relief is now appropriate in light of what has transpired since such relief was first granted.

While it may be that the Court's implicit holding on mootness does not reach beyond the portion of the District Court's decree that goes to the submission of a proposed new state constitution (par. (2) of the decree), I would also hold not moot the pronouncement of that decree placing limitations on the functioning of the 1965 State Legislature (original par. (3) of the decree).

As to paragraph (2), it is sufficient to say that the injunction has continuing effect, not only with respect to the 1965 legislature, but also as to any successor legislature if it is found to be "malapportioned." Any alleged "speculativeness" as to whether a new state constitution may be proposed to the electorate before a "constitutional" legislature comes into being, goes not to mootness but only to the question whether the District Court (assuming its power in the premises, see below) should

[1] The full text of the District Court's order and the amendment of item 3 are printed in the dissenting opinion of MR. JUSTICE GOLDBERG as Appendices A and B, respectively. *Post,* pp. 639, 641.

have granted any relief on this score.[2] So far as original paragraph (3) of the decree is concerned (limiting the activities of the 1965 legislature) it was not rendered moot by the District Court's modification after the case had been taken for review by this Court. Analytically, the situation is tantamount to a confession of error at this level, at most relieving this Court of the necessity of making a definitive exposition of its views on this subject (compare the suggestion of my Brother GOLDBERG, *post*, pp. 638–639), but not depriving the question of the attribute of justiciability. Cf. *Young* v. *United States*, 315 U. S. 257, 258–259.

The position adopted by the Court is that although the case is not moot, at least as to the "constitution-submission" issue, decision of that question could be avoided if the District Court chose to vacate that part of its injunction in light of the change in circumstance which has made the need for such relief speculative; the Court therefore remands the case to afford the District Court that opportunity. I do not think that such avoidance as to either question is called for in this case. The Court's reapportionment decisions have pressed district courts onto an uncharted and highly sensitive field of federal-state relations with little more to guide them than the elusive "one-person-one-vote" aphorism. District courts, as courts of first instance, must necessarily fashion remedies for themselves, and the passage of time and the variety of remedies chosen by them may ultimately help this Court to wend its way through this treacherous constitutional terrain. But it is essential that the lower courts at least be launched in the right general direction and not allowed to range so far afield as to hamstring state legislatures and deprive States of effective

[2] See *Labor Board* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U. S. 261, 271; *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm'n*, 219 U. S. 498, 514–515.

legislative government. Paragraphs (2) and (3) of the injunction involved in this case do range that far afield. Absent disapproval by this Court, the decision below, rendered by a distinguished panel, cannot fail to furnish a strong practical, if not legal, precedent for other district courts. I do not think this should be allowed to happen.

II.

I would hold the decree below improvident in both the aspects before us.

As to the provision forbidding submission to the electorate of a legislatively proposed new state constitution, I can find nothing in the Fourteenth Amendment, elsewhere in the Constitution, or in any decision of this Court which requires a State to *initiate* complete or partial constitutional change only by some method in which every voice in the voting population is given an opportunity to express itself. Can there be the slightest constitutional doubt that a State may lodge the power to initiate constitutional changes in any select body it pleases, such as a committee of the legislature, a group of constitutional lawyers, or even a "malapportioned" legislature—particularly one whose composition was considered, prior to this Court's reapportionment pronouncements of June 15, 1964, to be entirely and solely a matter of state concern? [3]

Similarly as to the provision of the lower court's original decree limiting the functions of the 1965 legislature, it seems scarcely open to serious doubt that so long as the federal courts allow this Georgia Legislature to sit, it must be regarded as the *de facto* legislature of the State, possessing the full panoply of legislative powers accorded by Georgia law.

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[3] If, as I believe, a State is not federally restricted in its choice of means for initiating constitutional change, the question of whether, under Georgia law, the proposed new Georgia Constitution should have been initiated by a popularly elected convention instead of by the legislature is not a matter for federal cognizance.

I think that the State of Georgia is entitled to a clear-cut pronouncement from this Court that nothing in its reapportionment decisions contemplated such unheard-of federal court intrusion into state political affairs as the decree before us evinces. Beyond that, for this Court to temporize with important interstitial matters of this kind, deeply affecting the even course of federal-state relations, can only serve to aggravate the confusion which last June's reapportionment cases have left in their wake.[4]

I would modify the decree below by striking therefrom paragraph (2) and approving the substitute for original paragraph (3) as framed by the District Court.

MR. JUSTICE GOLDBERG, dissenting.

I dissent from the Court's disposition of this case. By remanding, the Court is, in effect, asking the District Court to decide whether this appeal, which is pending before us and with respect to which we noted probable jurisdiction and heard argument, should be dismissed as moot due to events occurring after the appeal had been perfected in this Court. Mootness, in my view, is a question which, under these circumstances, this Court has the responsibility to decide. The facts relevant to this issue are undisputed. The District Court is in no better position to resolve the issue of mootness than we. No legitimate purpose is served by asking it to determine a question which is properly before us and which a long line of unbroken precedents would have us decide.[1] Moreover, if the case is moot, as I believe, there is no need for a further time-consuming hearing below and a possible future sec-

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[4] To hold as I think the Court should on these issues would not in any way impair the federal courts' ability to prevent frustration of their reapportionment decrees.

[1] See, *e. g.*, *San Mateo County* v. *Southern Pac. R. Co.*, 116 U. S. 138; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113; *Bus Employees* v. *Wisconsin Board*, 340 U. S. 416; *Oil Workers Unions* v. *Missouri*, 361 U. S. 363, and the numerous cases cited at 368, n. 7 therein.

ond appeal to this Court. Surely both the District Court and this Court have enough to do without this Court creating unnecessary work for both. I would simply vacate the injunction order and dismiss this appeal as moot.

That this case is in fact moot becomes apparent from a consideration of the history of this litigation.

The appeal calls into question the validity of portions of an injunction issued by a three-judge District Court involving the reapportionment of the Georgia House of Representatives. The District Court entered an order on June 30, 1964, holding that the Georgia House of Representatives was unconstitutionally apportioned under the Federal Constitution and declaring invalid state constitutional and statutory apportionment provisions. The court's order allowed the November 1964 elections for the House of Representatives to take place under the then-existing constitutional and statutory provisions, but it required that new elections be held in 1965 in time for a properly apportioned legislature to take office no later than "the second Monday in January, 1966." Paragraph (2) of the court's order further enjoined appellants, state election officials, from placing on the November 1964 election ballot a new state constitution proposed by the then-existing unconstitutionally apportioned legislature, and it also enjoined the submission of a wholly new constitution to the voters by the legislature "at any subsequent election until the [legislature] . . . is reapportioned in accordance with constitutional standards." Paragraph (3) of the District Court's order limited the power of the 1965 legislature to enacting "such legislation as shall properly come before [it] . . . during the regular 1965 45-day session." Appellants' motion for a stay of the District Court's order was denied by MR. JUSTICE BLACK on July 6, 1964.[2]

[2] The District Court's order of June 30, 1964, is printed as Appendix A.

Appellants appealed to this Court. In their jurisdictional statement they did not contest the basic holding that the House of Representatives was unconstitutionally apportioned. They challenged the validity of portions of paragraphs (2) and (3) of the District Court's order.[3] Appellees moved to affirm on the ground that the order was in all respects valid. We noted probable jurisdiction, 379 U. S. 809, and granted appellants' motion to advance the cause for oral argument.

Shortly prior to argument, appellees moved that this appeal be dismissed because events supervening since the entry of the District Court's order rendered this appeal moot. Appellants opposed this motion. Consideration of appellees' motion to dismiss was postponed until the hearing.

Upon argument of this case it appeared without dispute that, since the entry of the order below, the parties had agreed upon modifications which eliminated appellants' objections to paragraph (3) of the District Court's order and that the District Court, on November 3, 1964, had entered an order embodying the agreed-upon modifications.[4] It likewise was agreed at the argument that the new constitution proposed by the legislature was not submitted to the voters in November 1964 and that under Georgia law it has lapsed and cannot be resubmitted. Thus the only issue remaining in this case is the validity of that portion of the District Court's order which prevents the newly elected or any future unconstitutionally

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[3] Appellants interpreted paragraph (3) of the order to mean that the 1965 legislature could only deal with what was legally considered to be "legislation." They feared that the legislature would be unable to conduct investigations, vote pardons, or perform other similar duties. They also were concerned that under the terms of the District Court's order the 1965 legislature might be unable to meet in special session if such a session proved necessary.

[4] This order is printed here as Appendix B.

apportioned legislature from proposing and submitting to the voters a wholly new state constitution.

Appellees in their motion to dismiss and at the argument stated that although they originally sought affirmance of the portion of the District Court's order now under consideration, they no longer do so because, due to supervening events, it is now "highly speculative" as to whether the newly elected legislature [5] or any future unconstitutionally apportioned legislature will ever submit another wholly new constitution to the voters. Appellees state that consequently they no longer need the protection given them by the District Court's prohibition of such a submission, and that "this appeal presents only an abstract, hypothetical controversy in which the 'lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity' is lacking." [6] They suggest that for these reasons controversy over this portion of the order has now become moot and urge that the appeal be dismissed and that this portion of the order be vacated. Appellants

[5] Appellees pointed out at the argument that in the new legislature which will meet in 1965, 20 of the 54 Senators and 67 of the 205 Representatives will have been newly elected at the November 1964 election.

[6] In their Motion to Dismiss at p. 5, appellees state:

"Before the proposed new constitution can be placed on the ballot for ratification in any future general election, it must again be submitted to the General Assembly and passed by an affirmative two-thirds vote of both houses. This Court has repeatedly admonished that 'constitutional questions are not to be dealt with abstractly.' The mere possibility that a similar constitutional proposal may be passed by the General Assembly at some future time is an insufficient basis for invoking the awesome responsibility of constitutional adjudication by this Court. Without further legislative action, this appeal presents only an abstract, hypothetical controversy in which the 'lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity' is lacking." (Citations omitted.)

resist the motion to dismiss on grounds of mootness. They contend that this Court should reach the merits and reverse the basic determination of the District Court that under the Federal Constitution a malapportioned legislature is without power to propose a new constitution to the voters.[7] They argue that a decision on the merits is called for because the issuance of the prior opinion of the District Court granting the injunction will have a precedential and deterrent effect, notwithstanding the vacation of the injunction order.

As this history shows, the appeal, in its present posture, is plainly moot under long-established principles and precedents. The question appellants would have us decide is one of grave import involving the power under the Federal Constitution of a malapportioned legislature to submit a state constitution to a popular vote—a question which necessarily involves a consideration of the varying systems used in different States for proposing constitutional amendments. The doctrine of "mootness," like the related doctrine of "ripeness," has been evolved by this Court so that it will not have to pass upon this type of question except upon the urging of one who is harmed or is currently threatened with harm caused by the allegedly unconstitutional action. See *Stearns* v. *Wood,* 236 U. S. 75. While this Court cannot and will not avoid its constitutional responsibility to decide apportionment cases arising when justiciable problems are presented and pressed for decision by litigants

[7] This portion of the District Court's order also rested upon a determination that under Georgia law the legislature could not submit to the voters a wholly new constitution in the form of an amendment to the existing constitution. Questions are raised as to the correctness of this determination and the propriety of the District Court's having made it. See *Louisiana Power & Light Co.* v. *Thibodaux,* 360 U. S. 25. In light of my resolution of this case, I would not reach these questions.

claiming an abridgment of their constitutional rights,[8] it should not, in apportionment cases, as in other areas, decide moot issues, volunteer judgments or seek out questions which have ceased to be ripe for adjudication [9] and are no longer presented in the context of an actual pending controversy.[10] I strongly, albeit respectfully, disagree with my Brother HARLAN's intimation, grounded on his basic view that the Court should never have entered into reapportionment matters at all, that now that it has been decided that such issues are justiciable, this Court should be more willing in this "sensitive" area than in other areas, to give opinions of an advisory nature, so that "the lower courts [will] at least be launched in the right general direction and not allowed to range so far afield." Opinion of MR. JUSTICE HARLAN, *ante*, p. 625. Moreover, it has already been demonstrated, as was easily predictable from the history of other constitutional issues of a "sensitive" nature, that there is in this area ample opportunity to guide the lower courts within the traditional bounds of concrete, live controversies, actively pressed by real adverse parties. See *Fortson* v. *Dorsey*, *ante*, p. 433; *Scranton* v. *Drew*, *ante*, p. 40.

This Court does not pass upon constitutional questions unless it is necessary to do so to preserve the rights of the parties. See *Liverpool, N. Y. & P. S. S. Co.* v. *Commissioners*, 113 U. S. 33, 39; *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 341, 345–348 (concurring opinion of Mr. Justice Brandeis); *Coffman* v. *Breeze Corps.*, 323 U. S. 316, 325. Nor does it decide abstract questions merely because of the effect such judgments might have

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[8] See *Baker* v. *Carr*, 369 U. S. 186; *Reynolds* v. *Sims*, 377 U. S. 533, and companion cases.

[9] See *United States* v. *Alaska S. S. Co.*, 253 U. S. 113.

[10] See *San Mateo County* v. *Southern Pac. R. Co.*, 116 U. S. 138; *Mills* v. *Green*, 159 U. S. 651; *Jones* v. *Montague*, 194 U. S. 147; *Harris* v. *Battle*, 348 U. S. 803.

upon future actions in similar circumstances. *Little* v. *Bowers,* 134 U. S. 547, 558; *California* v. *San Pablo & T. R. Co.,* 149 U. S. 308, 314; *Kimball* v. *Kimball,* 174 U. S. 158. In the present case we are told by the proponents of the injunction that there exists only a remote possibility that the newly elected legislature or some future one will submit a wholly new constitution to the voters. Cf. *Bus Employees* v. *Missouri,* 374 U. S. 74, 78. If the question of the legislature's power to propose such a constitution were being submitted to a court as an initial matter, the speculativeness of the legislature's future conduct would undoubtedly render this issue unripe for adjudication. See *New Jersey* v. *Sargent,* 269 U. S. 328; *Arizona* v. *California,* 283 U. S. 423; *Electric Bond & Share Co.* v. *SEC,* 303 U. S. 419, 443; *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 471; *United States* v. *Harriss,* 347 U. S. 612. The speculativeness, which has arisen in this case since the order was entered, makes the issue in this appeal, in my view, similarly unsuitable for adjudication. *United States* v. *Alaska S. S. Co.,* 253 U. S. 113.

The appellees themselves, in whose favor the judgment below has run, do not assert the need for the protection of the District Court's order against future submission of a new constitution; they deem the possibility of such a submission too remote. They therefore are agreeable to the vacation of the injunction which they sought and obtained. This obviously will relieve appellants of any burden which the injunction imposes upon them. It also will remove any precedential effect of the opinion of the District Court on this issue. *United States* v. *Munsingwear,* 340 U. S. 36, 39–41; Note, 103 U. Pa. L. Rev. 772, 794. Appellants would have the injunction reversed on the merits as improperly issued rather than vacated as appellees desire. Although there is this difference as to the proper disposition of this case, the net

result is that no party wishes the injunction to remain in effect. In the present posture of the case, the conclusion which emerges is that although the parties differ with respect to the abstract legal question of the validity of the order, there is no longer present here that "real, earnest and vital controversy between individuals" which assures us that a cause is in a "real sense adversary." [11] *Chicago & Grand Trunk R. Co.* v. *Wellman,* 143 U. S. 339, 345; *United States* v. *Johnson,* 319 U. S. 302, 305. Appellants' argument that the order, though vacated, will have an inhibitory effect upon the legislature's activity is but a way of saying that appellants desire to know for their own purposes, as a guide to future conduct, what this Court would have said on the merits, had the issue remained embedded in a real and substantial controversy. Without such a controversy currently existing between those who appear as adverse parties, this Court should not give an opinion upon questions of law "which a party desires to know for . . . his own purposes." [12] *Cleveland* v. *Chamberlain,* 1 Black 419, 426; see *Woodpaper Co.* v. *Heft,* 8 Wall. 333; *South Spring Hill Gold*

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[11] Since their motion to dismiss was reserved until the hearing, appellees have conscientiously argued the merits. However, we cannot ignore the basic fact that they are not pressing for a decision on the merits since they believe they no longer need the protection of the injunction.

[12] That appellants' argument does not show that this Court should reach the merits here is further demonstrated by the fact that any inhibitory effect produced by the District Court's injunction at issue here would also be produced by that part of the injunction prohibiting submission of a new constitution only at the 1964 election. Yet appellants concede, as they must, that this Court would not now review that part of the injunction concerned only with the November 1964 election which has already taken place since the new constitution was not submitted to the voters in November 1964 and under Georgia law it has lapsed and cannot be resubmitted. See *Mills* v. *Green, supra.*

Mining Co. v. *Amador Medean Gold Mining Co.*, 145 U. S. 300.

The situation in this case is a far cry from that presented in *Bus Employees* v. *Missouri, supra,* where an "existing unresolved dispute" made the likelihood of repetition of the conduct in question much greater than the mere "speculative" possibility existing here. *Id.*, at 78. Nor do other decisions [13] relied upon by appellants support their position. In none of these cases was there any assertion, as here, by the party for whose benefit the injunction order was issued, that it had become highly problematical that the conduct which underlay the controversy would be repeated. In *Federal Trade Comm'n* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257; *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332, relied upon by appellants, the party supporting the validity of the order called into question contended that the order was necessary and its validity should be reviewed. In the instant case whether or not the legislature, while still malapportioned, will submit a wholly new constitution to the voters is highly problematical, and the parties supporting the correctness of the injunction themselves feel that it should be vacated since they see no threat that the legislature will repeat conduct they consider illegal. The case is, therefore, much more closely analogous to *United States* v. *Alaska S. S. Co., supra,* in which this Court refused to review the question of the power of the Interstate Commerce Commission to require carriers to comply with an ICC order prescribing certain bills of lading. A three-judge District Court had found the Commission had no such power and had enjoined the Commission from ever issuing such an order. Before argument in this Court,

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[13] *Southern Pacific Terminal Co.* v. *ICC,* 219 U. S. 498; *Federal Trade Comm'n* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257; *J. I. Case Co.* v. *Labor Board,* 321 U. S. 332.

however, it became clear that provisions in the bills of lading prescribed by the Commission conflicted with provisions contained in new legislation passed by Congress after the District Court's decision. Since the particular bills of lading prescribed would have to be withdrawn by the Commission in view of this legislation, and because of the uncertainty as to whether the Commission would prescribe new bills of lading or the form they would take, this Court refused to decide the issue of whether the Commission had the power to prescribe any bills of lading. The Court stated, "However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'" 253 U. S., at 116. The Court reversed the District Court's order and remanded the case to the District Court "with directions to dismiss the petition . . . without prejudice to the right of the complainants to assail in the future any order of the Commission prescribing bills of lading after the enactment of the new legislation." *Id.*, at 116–117. Unless *Alaska S. S. Co.*, is to be overruled or ignored, the Court should act similarly here.

Finally, I find the Court's disposition of this case mystifying, for I cannot understand what the District Court is to do upon remand. Since the District Court's order has been vacated, no injunction will be in effect. Presumably the District Court will have before it two groups of parties, one group urging that no order be entered and the other group claiming that no order is necessary because the likelihood of the legislature's resubmitting a new constitution is too remote. It is inconceivable to me that the District Court would be warranted in rein-

stating its injunction under the present facts. Of course, if circumstances changed, and there was a real, rather than a tenuous threat of further legislative action of the type originally complained of, the District Court, which has retained jurisdiction of this case, would be empowered to entertain an application for appropriate injunctive relief. However, I cannot understand the logic of the Court's decision in asking the District Court now to make a determination which, under the present circumstances, is rightfully our responsibility.

My Brother HARLAN suggests that, contrary to my view, "the Court does not remand the case to the District Court for a determination on the issue of mootness, but only to decide whether any injunctive relief is now appropriate in light of what has transpired since such relief was first granted." *Ante,* p. 624. But with due respect, I suggest that his interpretation of the Court's opinion is not justified by what the Court says or does. The Court explicitly sets forth appellees' contention that the case is moot because "[t]he situation has changed somewhat since the 1964 election," and "it is now highly speculative as to what the 1965 legislature will do" (*ante,* p. 622), and then the Court remands the case for reconsideration of the desirability of and need for the injunction in terms of the contentions raised by appellees, *i. e.,* "in light of the results of the 1964 election and the representations of appellees." *Ibid.* This surely must mean that the Court is asking the District Court to consider appellees' contentions that the case is moot. Further, I might better understand my Brother HARLAN's general distinction between determining whether a case is moot and whether an injunction is still appropriate if there were some issue in this case other than the power of the District Court to issue the injunction. But the only issue presented for decision on the merits is whether the District Court validly issued this type of injunction; thus to decide here

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whether, in light of the changed circumstances and the parties' present desires, continuance of the injunction is still appropriate is to decide the identical question as to whether, in light of these changed circumstances and the present contentions of the parties, the case has become moot. Determining the issue of mootness and deciding "whether any injunctive relief is now appropriate in light of what has transpired since such relief was first granted," both come down to the same thing—the question is whether, at this juncture, as appellees contend, "this appeal presents only an abstract, hypothetical controversy in which the 'lively conflict between antagonistic demands, actively pressed, which make resolution of the controverted issue a practical necessity' is lacking." The question is one for this Court to decide.

I believe that the proper result in this case would be to sustain the appellees' motion to dismiss for mootness and to enter an order vacating paragraph (2) of the District Court's order of June 30, 1964, prohibiting submission of a wholly new constitution to the voters by the legislature at the 1964 election or "at any subsequent election until [it] . . . is reapportioned in accordance with constitutional standards." Thus this portion of the slate would be wiped clean, *United States* v. *Munsingwear, supra,* without any necessity for further proceedings below to try the mootness issue. In view of the parties' stipulations before this Court that they accept the modifications entered by the District Court on November 3, 1964, I believe that the Court is correct in not passing upon the validity of paragraph (3) of the District Court's order of June 30, 1964—that portion of the order which appellants took as limiting the powers of the 1965 legislature. However, because of doubts expressed as to the jurisdiction of the District Court to enter its modified order while appeal is pending in this Court, see *Schempp* v. *School District,* 184 F. Supp. 381 (D. C. E. D. Pa.), the Court

ought also to vacate paragraph (3) of the June 30, 1964, order on the assumption that the District Court will re-enter its modified order of November 3, 1964, in accordance with the agreement of the parties.

The federal district courts have enough to do in deciding ripe reapportionment cases without our requiring them to decide stale ones.

APPENDIX A TO OPINION OF MR. JUSTICE GOLDBERG, DISSENTING.

FINAL ORDER OF THE COURT OF JUNE 30, 1964.

Revised Order.

All parties having consented thereto, the order of the Court dated June 24, 1964, is hereby revised to read as follows:

It is now Ordered, Adjudged and Decreed as follows:

(1) Article III, Section III, Paragraph I (Code Section 2–1501) of the Constitution of Georgia of 1945, is hereby declared to be null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States.

Section 47–101 of the Code of Georgia, as amended, is hereby declared to be prospectively null, void and inoperative, as being in conflict with the Fourteenth Amendment to the Constitution of the United States, for elections to the House of Representatives after the General Election to be held in November of 1964.

(2) The defendants are hereby enjoined from placing on the ballot to be used in the General Election to be held on November 3, 1964, or at any subsequent election until the General Assembly is reapportioned in accordance with constitutional standards, the question whether a constitutional amendment purporting to amend the present state constitution by substituting an entirely new

constitution therefor shall be adopted; provided, however, nothing in this order shall prevent the submission of amendments to the Constitution of the State of Georgia which are separate as to subject matter, in accordance with Article XIII, Section I, Article 1, of the Constitution of the State of Georgia, 1945. (See *Hammond* v. *Clarke,* 136 Ga. 313, for a discussion by the Georgia Supreme Court of what constitutes separate amendments). Nor shall anything in this order prevent the calling by the General Assembly of a "convention of the people to revise, amend or change the constitution" if the representation "in the convention is based on population as near as practicable" with the members being elected by the people (see Article XIII, Section I, Article 2). Constitution of the State of Georgia, 1945.

(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2–1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to the enactment of such legislation as shall properly come before the said Legislature during the regular 1965 45-day session, as provided in the Georgia Constitution, including such legislation as may be necessary for the General Assembly to be reapportioned in accordance with constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly, said elections to be held at such times as may be necessary to permit the Members of such General Assembly to take office as soon as practicable, but in no event later than the second Monday in January, 1966.

APPENDIX B TO OPINION OF MR. JUSTICE GOLDBERG, DISSENTING.

ORDER OF THE DISTRICT COURT OF NOVEMBER 3, 1964.

Both parties agree that the motion for alternative relief should be granted. Therefore, paragraph 3 of the order of June 30, 1964, is hereby stricken and the following paragraph 3 is substituted in lieu thereof:

"(3) The motion of the plaintiffs for further injunctive relief prior to the conduct of the party primaries or conventions and the General Election of November 3, 1964, is hereby denied at this time, provided, however, that, notwithstanding anything in Article III, Section IV, Paragraph I (Code Section 2–1601) of the Constitution of Georgia of 1945 to the contrary, the service of the members of the House of Representatives of the General Assembly of the State of Georgia to be elected at the General Election in November, 1964, shall be limited to a term of one year's duration and provided further that the plaintiffs shall have the right to reapply to this Court for further relief should the General Assembly, which convenes in January, 1965, fail to enact, during the regular 1965 45-day session, as provided in the Georgia Constitution, such legislation as may be necessary for the General Assembly to be reapportioned in accordance with Constitutional requirements and as may be necessary to permit the holding of elections to the newly constituted General Assembly during the calendar year 1965, which elections are to be held at such time as may be necessary to permit the members of such newly constituted General Assembly to take office no later than the second Monday in January, 1966. To the extent that state statutory and constitutional provisions might otherwise conflict with such legislative reapportionment, they are hereby declared to be void and of no effect."

This 3rd day of November, 1964.

ARROW TRANSPORTATION CO. ET AL. *v.* CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY CO. ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO.

No. 544. Decided January 18, 1965.*

The District Court's judgment enjoining the operation of an Interstate Commerce Commission (ICC) order canceling certain railroad rate reductions is vacated and the case remanded to have the ICC reconsider in light of the District Court's determination that the ICC's order was not supported by adequate findings.

229 F. Supp. 572, judgment vacated and case remanded.

Donald Macleay, Richard M. Freeman, John C. Lovett, Byron M. Gray, Nuel D. Belnap, A. Alvis Layne, Charles J. McCarthy and *Robert H. Marquis* for appellants in No. 544.

Robert W. Ginnane, I. K. Hay and *Betty Jo Christian* for appellant in No. 545.

Dean Acheson, Henry P. Sailer and *W. Graham Claytor, Jr.*, for Southern Railway System Companies; *John F. Donelan* and *John M. Cleary* for Southern Governors Conference et al.; *Elbert R. Leigh* for Louisville & Nashville Railroad Co. et al.; *William A. McClain* and *Edgar T. Bellinger* for City of Cincinnati, appellees in both cases.

Solicitor General Cox, Assistant Attorney General Orrick and *Lionel Kestenbaum* filed a memorandum for the United States in both cases.

Neil Brooks filed a memorandum for the Secretary of Agriculture in both cases.

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*Together with No. 545, *Interstate Commerce Commission* v. *Cincinnati, New Orleans & Texas Pacific Railway Co. et al.*, also on appeal from the same court.

PER CURIAM.

These appeals are from a single judgment of a three-judge District Court, 229 F. Supp. 572, which set aside and permanently enjoined the operation, enforcement and execution of the order of the Interstate Commerce Commission, 321 I. C. C. 582, canceling certain rate reductions which had been put into effect by the appellee railroads on the grounds that the new lower rates violated §§ 1 (5) and 3 (1) of the Interstate Commerce Act, 49 U. S. C. §§ 1 (5), 3 (1) (1958 ed.). The judgment of the District Court is vacated and the case is remanded to the District Court with instructions to enter an order remanding the case to the Interstate Commerce Commission for reconsideration by the Commission in light of the District Court's determinations (1) that the Commission's conclusion that § 3 (1) was violated was not supported by adequate findings and (2) that the Commission's conclusion that § 1 (5) was violated was based, at least in part, on its prior conclusion that there was a violation of § 3 (1). See *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20.

MR. JUSTICE BLACK, MR. JUSTICE STEWART, and MR. JUSTICE WHITE would note probable jurisdiction of these appeals and set them for argument on the merits.

NATIONAL LABOR RELATIONS BOARD *v.* ADAMS DAIRY, INC.

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

No. 25. Decided January 18, 1965.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 322 F. 2d 553.

Solicitor General Cox, Arnold Ordman, Dominick L. Manoli and *Norton J. Come* for petitioner.

J. Leonard Schermer for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Eighth Circuit for reconsideration in light of *Fibreboard Paper Products Corp.* v. *Labor Board, ante,* p. 203.

TISONE *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 564. Decided January 18, 1965.

Appeal dismissed and certiorari denied.

Theodore R. Saker for appellant.

Loren E. Van Brocklin for appellee.

PER CURIAM.

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

HALPERT ET AL. *v.* UDALL, SECRETARY OF THE INTERIOR.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA.

No. 552. Decided January 18, 1965.

231 F. Supp. 574, affirmed.

Leo M. Alpert for appellants.

Solicitor General Cox, Roger P. Marquis and *Herbert Pittle* for appellee.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

WINKLE *v.* BANNAN, WARDEN.

APPEAL FROM THE SUPREME COURT OF MICHIGAN.

No. 553. Decided January 18, 1965.

Motion to strike excerpts from motion to dismiss denied; appeal dismissed; and certiorari denied.

Walter A. Kurz and *Dennis Boyle* for appellant.

Frank J. Kelley, Attorney General of Michigan, and *James R. Ramsey,* Assistant Attorney General, for appellee.

PER CURIAM.

The motion to strike excerpts from the motion to dismiss is denied. The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

THORN ET AL. *v.* HARRISBURG TRUST CO.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 557. Decided January 18, 1965.

Appeal dismissed and certiorari denied.
Reported below: 330 F. 2d 3.

Harry S. Shapiro for appellants.

Samuel A. Schreckengaust, Jr., for appellee.

PER CURIAM.

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

WINSHIP ET AL. *v.* CITY OF CORPUS CHRISTI, TEXAS.

APPEAL FROM THE COURT OF CIVIL APPEALS OF TEXAS, THIRTEENTH SUPREME JUDICIAL DISTRICT.

No. 563. Decided January 18, 1965.

Appeal dismissed and certiorari denied.
Reported below: 373 S. W. 2d 844.

Sidney P. Chandler for appellants.

I. M. Singer for appellee.

PER CURIAM.

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

KITTY HAWK DEVELOPMENT CO. *v.* CITY OF COLORADO SPRINGS.

APPEAL FROM THE SUPREME COURT OF COLORADO.

No. 565. Decided January 18, 1965.

Appeal dismissed and certiorari denied.

Reported below: 154 Colo. 535, 392 P. 2d 467.

E. Barrett Prettyman, Jr., for appellant.

Louis Johnson, Charles S. Rhyne, Brice W. Rhyne and *Alfred J. Tighe, Jr.,* for appellee.

PER CURIAM.

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

SHERIDAN *v.* GARDNER ET AL.

APPEAL FROM THE SUPERIOR COURT OF MASSACHUSETTS, SUFFOLK COUNTY.

No. 612. Decided January 18, 1965.

Appeal dismissed for want of a substantial federal question.

Morris M. Goldings, Francis X. McLaughlin and *Thomas J. O'Toole* for appellant.

Edward W. Brooke, Attorney General of Massachusetts, and *Warren K. Kaplan,* Special Assistant Attorney General, for Brooke, and *Marshall Simonds* for Gardner et al., appellees.

PER CURIAM.

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

VOORHES ET AL. *v.* DEMPSEY, GOVERNOR OF CONNECTICUT, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT.

No. 600. Decided January 18, 1965.

231 F. Supp. 975, affirmed.

Colin C. Tait for appellants.

Harold M. Mulvey, Attorney General of Connecticut, and *Raymond J. Cannon,* Assistant Attorney General, for appellees.

PER CURIAM.

The motion to affirm is granted and the judgment is affirmed.

LYLES *v.* BETO, CORRECTIONS DIRECTOR.

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

No. 263, Misc. Decided January 18, 1965.

Certiorari granted; judgment vacated; and case remanded.
Reported below: 329 F. 2d 332.

E. D. Vickery for petitioner.

Waggoner Carr, Attorney General of Texas, and *Sam R. Wilson,* 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 Court of Appeals for reconsideration in light of *Massiah* v. *United States,* 377 U. S. 201.

MORRISON-KNUDSEN CO., INC., ET AL., DOING BUSINESS AS MORRISON-KAISER-PUGET SOUND-GENERAL *v.* WASHINGTON.

APPEAL FROM THE SUPREME COURT OF WASHINGTON.

No. 566. Decided January 18, 1965.

Appeal dismissed and certiorari denied.

Reported below: 64 Wash. 2d 86, 390 P. 2d 712.

Stuart G. Oles and *Seth W. Morrison* for appellants.

John W. Riley, Special Assistant Attorney General of Washington, and *James A. Furber* and *Henry W. Wager,* Assistant Attorneys General, for appellee.

PER CURIAM.

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

REPUBLIC STEEL CORP. *v.* MADDOX.

CERTIORARI TO THE SUPREME COURT OF ALABAMA.

No. 43. Argued November 18, 1964.—Decided January 25, 1965.

Respondent employee sued his employer for severance pay under a collective bargaining agreement existing between his union and employer, which was subject to the Labor Management Relations Act (LMRA). Judgment for respondent was affirmed in the state courts on the ground that the state law did not require him to exhaust contract grievance procedures before suit, which he had not done. *Held:* Under federal policy reflected in the LMRA, contract grievance procedures, which apply to severance as well as other types of claims, must, unless specified as nonexclusive, be exhausted before direct legal redress is sought. *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, and *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653, distinguished. Pp. 652–659.

275 Ala. 685, 158 So. 2d 492, reversed.

Samuel H. Burr argued the cause for petitioner. With him on the brief were *Andrew J. Thomas* and *James R. Forman, Jr.*

Richard L. Jones argued the cause for respondent. With him on the brief were *John D. Prince, Jr.*, and *Edwin L. Brobston.*

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.

Mr. Justice Harlan delivered the opinion of the Court.

Respondent Maddox brought suit in an Alabama state court against his employer, the Republic Steel Corporation, for severance pay amounting to $694.08, allegedly owed him under the terms of the collective bargaining

agreement existing between Republic and Maddox' union. Maddox had been laid off in December 1953. The collective bargaining agreement called for severance pay if the layoff was the result of a decision to close the mine, at which Maddox worked, "permanently." [1] The agreement also contained a three-step grievance procedure to be followed by binding arbitration,[2] but Maddox made no effort to utilize this mode of redress. Instead, in August 1956, he sued for breach of the contract. At all times material to his claim, Republic was engaged in interstate commerce within the meaning of the Labor Management Relations Act,[3] and Republic's industrial relations with Maddox and his union were subject to the provisions of that Act.

The case was tried on stipulated facts without a jury. Judgment was awarded in favor of Maddox, and the appellate courts of Alabama affirmed on the theory that state law applies to suits for severance pay since, with the employment relationship necessarily ended, no further danger of industrial strife exists warranting the application of federal labor law.[4] *Moore* v. *Illinois Cen-*

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[1] The section of the contract dealing with severance allowance provided in relevant part:

"When, in the sole judgment of the Company, it decides to close permanently a plant or discontinue permanently a department of a mine or plant, or substantial portion thereof and terminate the employment of individuals, an Employee whose employment is terminated either directly as a result thereof because he was not entitled to other employment with the Company under the provisions of Section 9 of this Agreement—Seniority and Subsection C of this Section 14, shall be entitled to a severance allowance in accordance with and subject to the provisions hereinafter set forth in this Section 14."

[2] See *infra*, p. 658.

[3] 61 Stat. 136 (1947), as amended, 29 U. S. C. § 141 *et seq.* (1958 ed.).

[4] 275 Ala. 685, 158 So. 2d 492.

tral R. Co., 312 U. S. 630 (1941), and *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653 (1953), cases decided under the Railway Labor Act,[5] were cited to support the proposition. Furthermore, it was held that under Alabama law Maddox was not required to exhaust the contract grievance procedures. We granted Republic's petition for certiorari, 377 U. S. 904, to determine whether the rationale of *Moore* v. *Illinois Central R. Co.* carries over to a suit for severance pay on a contract subject to § 301 (a) of the Labor Management Relations Act.[6] We conclude that the state judgment must be reversed.

I.

As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by employer and union as the mode of redress.[7] If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See *Humphrey* v. *Moore*, 375 U. S. 335; *Labor Board* v. *Miranda Fuel Co.*, 326 F. 2d 172.[8] But

[5] 48 Stat. 1185 (1934), 45 U. S. C. § 151 *et seq.* (1958 ed.).

[6] See *infra*, p. 657.

[7] *Smith* v. *Evening News Assn.*, 371 U. S. 195, 196, n. 1 (by implication); *Belk* v. *Allied Aviation Service Co.*, 315 F. 2d 513, cert. denied, 375 U. S. 847; see Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601, 647–648 (1956). The proviso of § 9 (a) of the National Labor Relations Act, as amended, 29 U. S. C. § 159 (a) (1958 ed.), is not contra; *Black-Clawson Co.* v. *Machinists*, 313 F. 2d 179.

[8] See, *e. g.*, Summers, Individual Rights in Collective Agreements and Arbitration, 37 N. Y. U. L. Rev. 362 (1962); Cox, Rights Under a Labor Agreement, 69 Harv. L. Rev. 601 (1956); Note, Federal Protection of Individual Rights Under Labor Contracts, 73 Yale L. J. 1215 (1964).

unless the contract provides otherwise,[9] there can be no doubt that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203 (d), 29 U. S. C. § 173 (d); § 201 (c), 29 U. S. C. § 171 (c) (1958 ed.). Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.

A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." *Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95, 103.

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[9] See *infra*, pp. 657–658.

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II.

Once it is established that the federal rule discussed above applies to grievances in general, it should next be inquired whether the specific type of grievance here in question—one relating to severance pay—is so different in kind as to justify an exception. *Moore* v. *Illinois Central R. Co.*, and *Transcontinental & Western Air, Inc.* v. *Koppal, supra,* are put forward for the proposition that it is.

In *Moore,* the Court ruled that a trainman was not required by the Railway Labor Act to exhaust the administrative remedies granted him by the Act before bringing suit for wrongful discharge. Mr. Justice Black, for the Court, based the decision on the use of permissive language in the Act—disputes "may be referred . . . to the . . . Adjustment Board . . . ." [10] Mr. Justice Black wrote again in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239 (1950), a declaratory judgment suit brought in a state court by a railroad company against two unions to resolve a representation dispute. The Court held that jurisdiction of the Adjustment Board to resolve such disputes was exclusive. *Moore* was distinguished thus:

> "Moore was discharged by the railroad. He could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, thereby ceasing to be an employee, and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases. A common-law or statutory action for wrongful discharge differs from any remedy which

[10] 45 U. S. C. § 153 (i) (1958 ed.).

> the Board has power to provide, and does not involve questions of future relations between the railroad and its other employees." 339 U. S. 239, at 244.

This distinction was confirmed in *Transcontinental & Western Air, Inc.* v. *Koppal, supra:*

> "Such [a wrongfully discharged] employee may proceed either in accordance with the administrative procedures prescribed in his employment contract or he may resort to his action at law for alleged unlawful discharge if the state courts recognize such a claim. Where the applicable law permits his recovery of damages without showing his prior exhaustion of his administrative remedies, he may so recover, as he did in the *Moore* litigation, *supra,* under Mississippi law." [11] 345 U. S. 653, at 661.

Federal jurisdiction in both *Moore* and *Koppal* was based on diversity; federal law was not thought to apply merely by reason of the fact that the collective bargaining agreements were subject to the Railway Labor Act. Since that time the Court has made it clear that substantive federal law applies to suits on collective bargaining agreements covered by § 204 of the Railway Labor Act, *International Assn. of Machinists* v. *Central Airlines, Inc.,* 372 U. S. 682, and by § 301 (a) of the LMRA, *Textile Workers* v. *Lincoln Mills,* 353 U. S. 448. Thus a major underpinning for the continued validity of the *Moore* case in the field of the Railway Labor Act, and more importantly in the present context, for the extension of its rationale to suits under § 301 (a) of the LMRA, has been removed.

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[11] Mississippi law, which controlled in *Moore* v. *Illinois Central R. Co.,* did not require exhaustion (but see *Illinois Central R. Co.* v. *Bolton,* 240 Miss. 195, 126 So. 2d 524 (1961)). Missouri law controlled in *Koppal* and did require exhaustion. The suing employee therefore lost.

We hold that any such extension is incompatible with the precepts of *Lincoln Mills* and cannot be accepted. Grievances depending on severance claims are not critically unlike other types of grievances. Although it is true that the employee asserting the claim will necessarily have accepted his discharge as final, it does not follow that the resolution of his claim can have no effect on future relations between the employer and other employees. Severance pay and other contract terms governing discharge are of obvious concern to all employees, and a potential cause of dispute so long as any employee maintains a continuing employment relationship. Only in the situation in which no employees represented by the union remain employed, as would be the case with a final and permanent plant shutdown, is there no possibility of a work stoppage resulting from a severance-pay claim. But even in that narrow situation, if applicable law did not require resort to contract procedures, the inability of the union and employer at the contract negotiation stage to agree upon arbitration as the exclusive method of handling permanent shutdown severance claims in all situations could have an inhibiting effect on reaching an agreement. If applicable law permitted a court suit for severance pay in any circumstances without prior recourse to available contract remedies, an employer seeking to limit the modes of redress that could be used against him could do so only by eliminating contract grievance procedures for severance-pay claims. The union would hardly favor the elimination, for it is in the union's interest to afford comprehensive protection to those it represents, to participate in interpretations of the contract, and to have an arbitrator rather than a court decide such questions as whether the company has determined to "close permanently." [12]

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[12] See n. 1, *supra*.

There are, then, positive reasons why the general federal rule should govern grievances based on severance claims as it does others. Furthermore, no positive reasons appear why the general federal rule should not apply. "Comprehensiveness is inherent in the process by which the law is to be formulated under the mandate of *Lincoln Mills,*" and "the subject matter of § 301 (a) 'is peculiarly one that calls for uniform law.' " *Teamsters Local* v. *Lucas Flour Co.,* 369 U. S., at 103. Maddox' suit in the present case is simply on the contract, and the remedy sought, award of $694.08, did not differ from any that the grievance procedure had power to provide. Federal law governs "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter . . . ." [13] Section 301 (a) of the LMRA, 29 U. S. C. § 185 (a) (1958 ed.), *Textile Workers* v. *Lincoln Mills, supra.* The suit by Maddox clearly falls within the terms of the statute and within the principles of *Lincoln Mills,* and because we see no reason for creating an exception, we conclude that the general federal rule applies.[14]

III.

The federal rule would not of course preclude Maddox' court suit if the parties to the collective bargaining agreement expressly agreed that arbitration was not the exclu-

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[13] "Between" in the statute refers to "contracts," not "suits." *Smith* v. *Evening News Assn.,* 371 U. S. 195, 200.

[14] By refusing to extend *Moore* v. *Illinois Central R. Co.* to § 301 suits, we do not mean to overrule it within the field of the Railway Labor Act. Consideration of such action should properly await a case presented under the Railway Labor Act in which the various distinctive features of the administrative remedies provided by that Act can be appraised in context, *e. g.,* the make-up of the Adjustment Board, the scope of review from monetary awards, and the ability of the Board to give the same remedies as could be obtained by court suit.

sive remedy.[13] The section of this contract governing grievances provides, *inter alia:*

> "It is the purpose of this Section to provide procedure for prompt, equitable adjustment of claimed grievances. It is understood and agreed that unless otherwise specifically specified elsewhere in this Agreement grievances to be considered hereunder must be filed within thirty days after the date on which the fact or events upon which such alleged grievance is based shall have existed or occurred.
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> . . . . . .
>
> "Any Employee who has a complaint may discuss the alleged complaint with his Foreman in an attempt to settle it. Any complaint not so settled shall constitute a grievance within the meaning of this Section, 'Adjustment of Grievances'.
>
> "Grievances shall be handled in the following manner:
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> "STEP 1. Between the aggrieved Employee, his Grievance Committeeman or Assistant Grievance Committeeman and the Foreman."

The procedure calls for two more grievance-committee steps capped with binding arbitration of matters not satisfactorily settled by the initial steps.

The language stating that an employee "may discuss" a complaint with his foreman is susceptible to various interpretations; the most likely is that an employee may, if he chooses, speak to his foreman himself without bringing in his grievance committeeman and formally embarking on Step 1. Use of the permissive "may" does not of itself reveal a clear understanding between the contract-

[13] Of course a court suit on the collective bargaining agreement would still be governed by federal law. *Textile Workers* v. *Lincoln Mills*, 353 U. S. 448.

ing parties that individual employees, unlike either the union or the employer, are free to avoid the contract procedure and its time limitations in favor of a judicial suit. Any doubts must be resolved against such an interpretation. See *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U. S. 574; *Belk* v. *Allied Aviation Service Co.,* 315 F. 2d 513, cert. denied, 375 U. S. 847.

Finally, Maddox suggests that it was not possible for him to make use of the grievance procedure, the first step of which called for a discussion within 30 days of his discharge with his foreman, because a mine that has permanently closed has no foreman—indeed, no employees of any kind. This casuistic reading of the contract cannot be accepted. The foreman did not vanish; and it is unlikely that the union grievance procedure broke down within 30 days of Maddox' discharge. In any event, the case is before us on stipulated facts; in neither the facts nor the pleadings is there any suggestion that Maddox could not have availed himself of the grievance procedure instead of waiting nearly three years and bringing a court suit.

Reversed.

MR. JUSTICE BLACK, dissenting.

This is an ordinary, common, run-of-the-mill lawsuit for breach of contract brought by respondent Charlie Maddox, an iron miner employed by petitioner Republic Steel, to recover $694.08 of wages which he said the company owed him. This amount he said was due by the terms of a contract made between the company and the union representing workers at the mine at which Maddox worked, a contract which provided that if any employee should be discharged because the company "permanently" closed the mine, he should continue to be paid the amount of his regular wages for a number of weeks after the discharge. The mine closed down, Maddox lost his job, but

the company nevertheless refused to continue to pay him the wages he said it had obligated itself to pay under the contract. To collect the money he hired a lawyer and went to court. The trial court in Alabama awarded him the $694.08 (the stipulated amount due, if any) and the Supreme Court of the State affirmed. This Court now reverses. It holds that because the contract, agreed to by the union, provided for binding arbitration of all "grievances," federal law has deprived Maddox of his right to hire his own lawyer and to sue in a court of law for the balance of wages due,[1] and has instead left him with only the remedies set out in the contract: a long, involved grievance procedure, controlled by the company and the union, followed by compulsory arbitration, with his claim put in the hands of union officials and union lawyers whether he wants them to handle it or not.

In thus deciding on its own, or deciding that Congress somehow has decided, to expand apparently without limit the kinds of claims subject to compulsory arbitration, to include even wage claims, and in thus depriving individual laborers of the right to handle their wage claims for themselves, today's decision of the Court interprets federal law in a way that is revolutionary. Yet the Court disposes of this case as easily as it would reach the conclusion that 2 plus 2 equal 4. First the Court says that the contract between the union and the company provides that a laborer who wants to assert a "contract grievance" is bound to attempt to use the contract grievance procedure, which requires several stages of company-union meetings, negotiations, etc.,[2] to be followed

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[1] Although the Court calls this "severance pay," it can be seen that the claim was simply one for wages which were to continue for a stated period after discharge.

[2] The grievance procedure set out in the contract was as follows:

"Any Employee who has a complaint may discuss the alleged complaint with his Foreman in an attempt to settle it. Any complaint

by submitting the dispute for final decision to an arbitrator "appointed by mutual agreement" of the union and the company. Next the Court labels Maddox' claim

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not so settled shall constitute a grievance within the meaning of this Section, 'Adjustment of Grievances.'

"Grievances shall be handled in the following manner:

"STEP 1. Between the aggrieved Employee, his Grievance Committeeman or Assistant Grievance Committeeman and the Foreman.

"STEP 2. Between the Employee, his Grievance Committeeman or Assistant Grievance Committeeman and the Superintendent or his representative.

"STEP 3. Between the Grievance Committee, a representative of the International Union, the Superintendent of Industrial Relations, the Superintendent, and such Company representatives as he may select. Accurate minutes of this meeting shall be prepared by the Company not later than five days after the date of the meeting and shall be signed by representatives of the Union and the Company.

"Grievances not appealed from the decision rendered in writing in any of the three steps specified herein, within ten days from the date of such decision, shall be considered settled on the basis of the decision last made and shall not be eligible for further appeal.

"If any grievance is not answered within the time limits hereinafter specified in this Section, unless an extension of time has been mutually agreed upon, either party after notifying the other party by notation on the grievance papers of such intent may appeal to the next step.

"Grievances presented in the first step hereof shall be reduced to writing on forms provided by the Company, dated and signed by the Employee involved and two copies given to the Foreman, the Foreman will have inserted in the appropriate place on the form his disposition of the matter and will sign and date same, returning one copy to the Assistant Grievance Committeeman or Grievance Committeeman.

"The following time shall be allowed the Company to give an answer in each of the respective steps before the grievance may be processed to the next step: Step 1, three days exclusive of Sundays and Holidays; Step 2, seven days; Step 3, fifteen days.

"STEP 4. Except as otherwise expressly provided in this Agreement grievances not satisfactorily settled in Step 3 may by written notice within ten days from the date of the written decision in Step 3, be appealed to an impartial Arbitrator to be appointed by mutual

for wages due him a "grievance"—and, indeed, no one would deny that Maddox was unhappy about the company's failure to pay him what it had promised. Finally the Court, citing as its authority § 301 (a) of the Labor Management Relations Act,[3] lays down for this and future cases the flat rule that no matter what his contractual claim—or "grievance," as the Court prefers to call it—an individual laborer, even though no longer an employee, has no choice but to follow the long, time-consuming, discouraging road to arbitration set out in the union-company contract, including having the union represent him whether he wants it to or not and whether or not he is still in its good graces. And of course the Court's logic leads irresistibly to the conclusion (although it has not yet had occasion to say so) that if instead of seeking wages due on discharge an employee wants to sue his employer for unpaid wages while he is still working, he cannot do that either, but must instead wait until the union processes his claim through the interminable stages of "grievance procedure" and then turns him over to the arbitrator, whom he does not want. Employees are thus denied a judicial hearing and state courts have their ancient power to try simple breach-of-contract cases taken away from them—taken away, not by Congress, I think, but by this Court. Today's holding is in my judgment completely unprecedented, and is the brain-

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agreement of the parties hereto within fifteen days after either party has requested arbitration. The decision of the Arbitrator shall be final."

[3] 61 Stat. 156, 29 U. S. C. § 185 (a) (1958 ed.). Section 301 (a) in its entirety reads as follows:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

child of this Court's recent consistently expressed preference for arbitration over litigation in all types of cases [4] and for accommodating the wishes of employers and unions in all things over the desires of individual workers. Since I do not believe that Congress has passed any law which justifies any inference at all that workers are barred from bringing and courts from deciding cases like this one, and since I am not sure that it constitutionally could, it is impossible for me to concur in this decision.

I think one crucial flaw in the Court's logical presentation is that it treats things as the same which are in fact different. "Grievance" is a word of many meanings in many contexts, and yet the Court uses it without any discrimination among them. As used in the industrial field "grievance" generally signifies something that has happened that is unsatisfactory to employers or employees in connection with their work. Failure to settle serious and widespread grievances has sometimes brought about industrial tensions, strikes and violence, often disrupting the peace and doing irreparable harm to the economy of the Nation. In order to try to prevent such widespread disastrous results to the public, arbitration has come to be accepted as a good way to settle such semi-public controversies, which are more in the nature of power struggles between giants than ordinary justiciable controversies involving individual laborers.[5] When a contract provided for arbitration to settle disputes which affected many workers and which could lead to strikes, this Court

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[4] See, *e. g., Teamsters Local* v. *Lucas Flour Co.*, 369 U. S. 95; *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593; *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574; *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564.

[5] Compare the distinction in cases under the Railway Labor Act, 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.* (1958 ed.) between "major" and "minor" disputes. See, *e. g., Brotherhood of R. Trainmen* v. *Chicago R. & I. R. Co.*, 353 U. S. 30.

approved it and held that since both sides—company and union—had agreed to this method of peaceful settlement, federal law would honor and enforce it. *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448. But to hold that the union and company can bind themselves to arbitrate a dispute of general importance affecting all or many of the union's members and vitally threatening the public welfare is a far cry from saying, as the Court does today, that an ordinary laborer whose employer discharges him and then fails to pay his past-due wages or wage substitutes must, if the union's contract with the employer provides for arbitration of grievances, have the doors of the courts of his country shut in his face to prevent his suing the employer to get his own wages for breach of contract. *Lincoln Mills* was a case involving a real and active collective bargaining dispute between union and employer over general working conditions; but the present case is a controversy not about general working conditions but about whether the company will pay one individual his wages.

For the individual, whether his case is settled by a professional arbitrator or tried by a jury can make a crucial difference. Arbitration differs from judicial proceedings in many ways: arbitration carries no right to a jury trial as guaranteed by the Seventh Amendment; arbitrators need not be instructed in the law; they are not bound by rules of evidence; they need not give reasons for their awards; witnesses need not be sworn; the record of proceedings need not be complete; and judicial review, it has been held, is extremely limited.[6] To say that because the union chose a contract providing for grievance arbitration an individual employee freely and willingly chose this

[6] See *Bernhardt* v. *Polygraphic Co.,* 350 U. S. 198, 203; *Wilko* v. *Swan,* 346 U. S. 427, 436. But see *Independent Petroleum Workers* v. *American Oil Co.,* 324 F. 2d 903 (C. A. 7th Cir.), affirmed by an equally divided Court, 379 U. S. 130.

method of settling any contractual claims of his own which might later arise is surely a transparent and cruel fiction. And even if the employee could with any truth be regarded as having himself agreed to such a thing, until recently this Court refused to recognize and enforce contracts under which individuals were to be denied access to courts and instead left to the comparatively standardless process of arbitration. An insurance company cannot enforce a contract made with its insured to arbitrate all disputes which might arise in the future, this Court said, since such an agreement would be "an attempt to oust the courts of jurisdiction by excluding the assured from all resort to them for his remedy." *Riddlesbarger* v. *Hartford Ins. Co.*, 7 Wall. 386, 391. Cf. *Insurance Co.* v. *Morse*, 20 Wall. 445. The Court holds today, however, that a union representing a worker in a mine or factory can by the union's contract take away from that worker his right to sue, which he would not be able to contract away himself unless the *Riddlesbarger* case is to be overruled. Compare *Moseley* v. *Electronic & Missile Facilities, Inc.*, 374 U. S. 167, 172–173 (concurring opinion). And there is nothing in the legislative history of § 301 which indicates any congressional purpose to overrule or avoid the *Riddlesbarger* rule. Moreover, there is not one word in § 301 about agreements to arbitrate. It is true that this Court said in *Lincoln Mills*, "Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike," and "the entire tenor of the history indicates that the agreement to arbitrate grievance disputes was considered as *quid pro quo* of a no-strike agreement." [7] In that case, however, the Court expressly recognized that its decision and reasoning did "not reach" the right of individual employees to bring suit in court on their individual claims.[8] Forcing Charlie

[7] 353 U. S., at 455.

[8] *Id.*, at 459, n. 9.

Maddox, who is out of a job, to submit his claim to arbitration is not going to promote industrial peace. Charlie Maddox is not threatening to go out in the street by himself and stage a strike against the Republic Steel Corporation to get his unpaid wages. Merely because this Court in *Lincoln Mills* has expressed its preference for arbitration when used to avoid industrial warfare by heading off violent clashes between powerful employers and powerful unions,[9] it does not follow that § 301 should be expanded to require a worker to arbitrate his wage claim or to surrender his right to bring his own suit to enforce that claim in court. Such an expansion would run counter to this Court's long-established policy of preserving the ancient, treasured right to judicial trials in independent courts according to due process of law.

The past decisions of this Court which are closest to the case before us are not *Lincoln Mills* and cases like it, which involved broad conflicts between unions and employers with reference to contractual terms vital to settlement of genuine employer-union disputes. The cases really in point are those which involved agreements governed by the Railway Labor Act [10] and which expressly refused to hold that a discharged worker must pursue collective bargaining grievance procedures before suing in a court for wrongful discharge. *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U. S. 653; *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630. While those were wrongful-discharge cases and the suit here is for wages due on a contract after discharge, the principle of those cases is precisely applicable here, since as was pointed out

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[9] See, *e. g.*, *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U. S. 593; *United Steelworkers* v. *Warrior & Gulf Navigation Co.*, 363 U. S. 574; *United Steelworkers* v. *American Mfg. Co.*, 363 U. S. 564.

[10] 44 Stat. 577, as amended, 45 U. S. C. § 151 *et seq.* (1958 ed.). The Act of April 10, 1936, c. 166, makes the Railway Labor Act applicable to aviation workers. 49 Stat. 1189, 45 U. S. C. § 181 (1958 ed.).

in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244, the claim of a person no longer employed will almost never involve questions substantially affecting future relations between an employer and the remaining employees. The Court recognizes the relevance of *Moore* and *Koppal* and, while declining expressly to overrule them in this case, has raised the overruling axe so high that its falling is just about as certain as the changing of the seasons. Yet although members of Congress and alert counsel for the national unions and employers are bound to have been familiar with *Moore* at the time the comprehensive labor statute of which § 301 is a part was enacted, Congress did not see fit to disown the *Moore* rule and did not express a preference for a different policy with reference to individual suits on collective bargaining agreements covered by the LMRA.

The Court's opinion manifests great concern for the interests of employers and unions, but not, I fear, enough understanding and appreciation for an individual worker caught in the plight Maddox is in. The Court refers with seeming approval to the " 'common law' of the plant," and directs attention to the clear interest that the union has in handling employees' grievances in order to "enhance the union's prestige with employees." It also refers to the great interest that an employer has (and I agree) in having a complicated procedural system which dissatisfied employees are here compelled to follow, which ends up in binding arbitration and which relieves the employer of a lawsuit. The Court then expresses its view that allowing this former employee to sue without going through the grievance procedure and arbitration, as he would be permitted to do in this case by the law of his State,[11] has

[11] Alabama law does not require exhaustion of grievance procedures and arbitration in a case like this one. *Republic Steel Corp.* v. *Maddox*, 275 Ala. 685, 158 So. 2d 492; *Woodward Iron Co.* v. *Stringfellow*, 271 Ala. 596, 126 So. 2d 96.

"little to commend it" and "would deprive *employer* and *union* of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances." I emphasize the words "employer" and "union" to point out that here, as elsewhere in the opinion, theirs seem to be the chief interests on which the Court's attention is focused. The procedure *they* (employer and union) want must be "made exclusive," or else *they* might not like it.[12] Individual workers are to take some comfort, I suppose, in the Court's statement that "it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." I think it can be said, however, and I say it. I think an employee is just as capable of trying to enforce payment of his wages or wage substitutes under a collective bargaining agreement as his union, and he certainly is more interested in this effort than any union would likely be. This is particularly true where the employee has lost his job and is most likely outside the union door looking in instead of on hand to push for his claim. Examples certainly have not been wanting from which the Court might learn that often employees for one reason or another have felt themselves compelled to sue the union as a prerequisite to obtaining any help from the union at all. See, *e. g., Humphrey* v. *Moore,* 375 U. S. 335; *Syres* v. *Oil Workers Int'l Union,* 350 U. S. 892; *Brotherhood of R. Trainmen* v. *Howard,* 343 U. S. 768; *Tunstall* v. *Brotherhood of Locomotive Firemen & Enginemen,* 323 U. S. 210; *Steele* v. *Louisville & N. R. Co.,* 323 U. S. 192. But, says the Court, the employee attempting to recover wages owed him must, unless the collective bargaining

[12] The AFL–CIO has filed an *amicus* brief supporting the employer in this case.

contract of the company and the union provides otherwise, "afford the union the opportunity to act on his behalf." The Court then implies that if the union "refuses to press or only perfunctorily presses the individual's claim," there may be some form of redress available to the worker, but we are left in the dark as to what form that redress might take. It may be that the worker would be allowed to sue after he had presented his claim to the union and after he had suffered the inevitable discouragement and delay which necessarily accompanies the union's refusal to press his claim. But I cannot agree that this is the sort of remedy a worker should have to invoke to bring a simple lawsuit.

I am wholly unable to read § 301 as laying any such restrictive burdens on an employee. And I think the difference between my Brethren and me in this case is not simply one concerning this Court's function in interpreting or formulating laws. There is also apparently a vast difference between their philosophy and mine concerning litigation and the role of courts in our country. At least since Magna Carta people have desired to have a system of courts with set rules of procedure of their own and with certain institutional assurances of fair and unbiased resolution of controversies. It was in Magna Carta, the English Bill of Rights, and other such charters of liberty, that there originally was expressed in the English-speaking world a deep desire of people to be able to settle differences according to standard, well-known procedures in courts presided over by independent judges with jurors taken from the public. Because of these deep-seated desires, the right to sue and be sued in courts according to the "law of the land," known later as "due process of law," became recognized. That right was written into the Bill of Rights of our Constitution and in the constitutions of the States. See *Chambers* v. *Florida,* 309 U. S. 227, 235–238. Even if it be true, which I do not concede,

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that Congress could force a man in this country to have his ordinary lawsuit adjudicated not under due process of law, *i. e.*, without the constitutional safeguards of a court trial, I do not think that this Court should ever feel free to infer or imply that Congress has taken such a step until the words of the statute are written so clearly that no one who reads them can doubt. Cf. *United States ex rel. Toth* v. *Quarles,* 350 U. S. 11; *United States* v. *Lovett,* 328 U. S. 303; *Duncan* v. *Kahanamoku,* 327 U. S. 304; *Reid* v. *Covert,* 354 U. S. 1, 5–10 (opinion announcing judgment); *Barsky* v. *Board of Regents,* 347 U. S. 442, 456 (dissenting opinion); *Stein* v. *New York,* 346 U. S. 156, 197 (dissenting opinion); *Shaughnessy* v. *United States ex rel. Mezei,* 345 U. S. 206, 216 (dissenting opinion); *Galloway* v. *United States,* 319 U. S. 372, 396 (dissenting opinion). Maddox has a justiciable controversy. He has not agreed since the controversy arose, or even for that matter before it arose, to arbitrate it, and so he should not have the doors of the courts shut in his face. Nor do I believe that he or any other member of the union should be treated as an incompetent unable to pursue his own simple breach-of-contract losses. I cannot and do not believe any law Congress has passed provides that when a man becomes a member of a labor union in this country he thereby has somehow surrendered his own freedom and liberty to conduct his own lawsuit for wages. Of course this is not the worst kind of servitude to which a man could be subjected, but it is certainly contrary to the spirit of freedom in this country to infer from the blue that workers lose their rights to appeal to the courts for redress when they believe they are mistreated. Compare *Smith* v. *Evening News Assn.,* 371 U. S. 195, 204–205 (dissenting opinion).

I would affirm.

DAVIS *v.* BALTIMORE & OHIO RAILROAD CO.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND.

No. 560. Decided January 25, 1965.

In this action under the Federal Employers' Liability Act, in which there was conflicting evidence concerning a forklift truck which fell into an open elevator shaft on top of petitioner, petitioner was awarded damages by the jury. The Maryland Court of Appeals held that the issue of employer negligence should not have been submitted to the jury and that the trial court erred in denying the railroad's motions for a directed verdict and judgment *n. o. v.* *Held:* The state appellate court improperly invaded the function and province of the jury.

Certiorari granted; 235 Md. 568, 202 A. 2d 348, reversed.

B. Nathaniel Richter, Charles A. Lord and *Amos I. Meyers* for petitioner.

Fenton L. Martin for respondent.

PER CURIAM.

The petition for writ of certiorari is granted. The judgment of the Maryland Court of Appeals is reversed.

In this action under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, the petitioner was awarded damages by a jury in the Superior Court of Baltimore City. The Court of Appeals held that the issue of employer negligence should not have been submitted to the jury and that the trial court erred in denying the motions of the railroad for a directed verdict and for a judgment *n. o. v.*, 235 Md. 568, 202 A. 2d 348.

The petitioner worked for the railroad as a tallyman and trucker at its Locust Point terminal in Baltimore City. His foreman directed him to find some boxes of merchandise. While working on this assignment near an

open elevator shaft he fell into the shaft and one of the railroad's forklift trucks fell in on top of him. The crucial fact question in the case concerned the forklift truck. There was testimony that the petitioner had mounted the truck and backed it into the shaft. There was also evidence, however, which, if believed by the jury, would support a finding that the operator assigned to use the truck negligently left it unattended, and that it rolled toward the petitioner, either because it was not secured or because it was set in motion by an unauthorized third person, and struck petitioner in the back, propelling him into the shaft. In these circumstances, the Court of Appeals improperly invaded the function and province of the jury. *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500; *Gallick* v. *Baltimore & Ohio R. Co.*, 372 U. S. 108.

MR. JUSTICE HARLAN, concurring.

I continue to hold the views first expressed in my separate opinion in *Rogers* v. *Missouri Pac. R. Co.*, 352 U. S. 500, 559–562, and frequently reiterated since:* (1) cases of this kind are not the proper business of this Court; (2) once accepted for review, however, by the votes of at least four members of the Court, I deem it my duty to participate in their decision. On this basis I join the opinion of the Court.

MR. JUSTICE STEWART, concurring.

I share the views of MR. JUSTICE HARLAN. See *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 111 (concurring opinion).

**E. g.*, *Gibson* v. *Thompson*, 355 U. S. 18, 19; *Crumady* v. *The Joachim Hendrik Fisser*, 358 U. S. 423, 429; *Harris* v. *Pennsylvania R. Co.*, 361 U. S. 15, 25; *Michalic* v. *Cleveland Tankers, Inc.*, 364 U. S. 325, 332; *Guzman* v. *Pichirilo*, 369 U. S. 698, 703; *Gallick* v. *Baltimore & O. R. Co.*, 372 U. S. 108, 122; *Dennis* v. *Denver & R. G. W. R. Co.*, 375 U. S. 208, 212.

LISBON SALESBOOK CO. ET AL. *v.* OHIO.

APPEAL FROM THE SUPREME COURT OF OHIO.

No. 698. Decided January 25, 1965.

Appeal dismissed and certiorari denied.
Reported below: 176 Ohio St. 482, 200 N. E. 2d 590.

Isadore Topper, R. Brooke Alloway and *N. Victor Goodman* for appellants.

PER CURIAM.

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

TEXAS *v.* NEW JERSEY ET AL.

ON BILL OF COMPLAINT.

No. 13, Original. Argued November 9, 1964.—
Decided February 1, 1965.

Jurisdiction to escheat abandoned intangible personal property lies in the State of the creditor's last known address on the debtor's books and records or, absent such address or an escheat law, in the State of corporate domicile—but subject to later escheat to the former State if it proves such an address to be within its borders and provides for escheat of such property. Pp. 680–683.

W. O. Shultz II, Assistant Attorney General of Texas, argued the cause for plaintiff. With him on the brief was *Waggoner Carr,* Attorney General of Texas.

Charles J. Kehoe, Deputy Attorney General of New Jersey, argued the cause for the State of New Jersey, defendant. With him on the brief were *Arthur J. Sills,* Attorney General of New Jersey, and *Theodore I. Botter,* First Assistant Attorney General.

Fred M. Burns, Assistant Attorney General of Florida, argued the cause for the State of Florida, intervenor. With him on the brief were *James W. Kynes,* Attorney General of Florida, and *Jack W. Harnett,* Assistant Attorney General.

Joseph H. Resnick, Assistant Attorney General of Pennsylvania, argued the cause for the State of Pennsylvania, defendant.

Augustus S. Ballard argued the cause for the Sun Oil Company, defendant.

Ralph W. Oman argued the cause for the Life Insurance Association of America, as *amicus curiae.* On the brief were *William B. McElhenny* and *Warren Elliott.*

MR. JUSTICE BLACK delivered the opinion of the Court.

Invoking this Court's original jurisdiction under Art. III, § 2, of the Constitution,[1] Texas brought this action against New Jersey, Pennsylvania, and the Sun Oil Company for an injunction and declaration of rights to settle a controversy as to which State has jurisdiction to take title to certain abandoned intangible personal property through escheat, a procedure with ancient origins[2] whereby a sovereign may acquire title to abandoned property if after a number of years no rightful owner appears. The property in question here consists of various small debts totaling $26,461.65[3] which the Sun Oil Company for periods of approximately seven to 40 years prior to the bringing of this action has owed to approximately 1,730 small creditors who have never appeared to collect them. The amounts owed, most of them resulting from failure of creditors to claim or cash checks, are either evidenced on the books of Sun's two Texas offices or are owing to persons whose last known address was in Texas, or both.[4]

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[1] "The judicial Power shall extend . . . to Controversies between two or more States . . . .

"In all Cases . . . in which a State shall be Party, the supreme Court shall have original Jurisdiction."

28 U. S. C. § 1251 (a) (1958 ed.) provides in relevant part:

"The Supreme Court shall have original and exclusive jurisdiction of:

"(1) All controversies between two or more States . . . ."

[2] See generally Enever, Bona Vacantia Under the Law of England; Note, 61 Col. L. Rev. 1319.

[3] The amount originally reported by Sun to the Treasurer of Texas was $37,853.37, but payments to owners subsequently found reduced the unclaimed amount.

[4] The debts consisted of the following:

(1) Amounts which Sun attempted to pay through its Texas offices owing to creditors some of whose last known addresses were in Texas,

Texas says that this intangible property should be treated as situated in Texas, so as to permit that State to escheat it. New Jersey claims the right to escheat the same property because Sun is incorporated in New Jersey. Pennsylvania claims power to escheat part or all of the same property on the ground that Sun's principal business offices were in that State. Sun has disclaimed any interest in the property for itself, and asks only to be protected from the possibility of double liability. Since we held in *Western Union Tel. Co.* v. *Pennsylvania,* 368 U. S. 71, that the Due Process Clause of the Fourteenth Amendment prevents more than one State from escheating a given item of property, we granted Texas leave to file this complaint against New Jersey, Pennsylvania and Sun, 371 U. S. 873, and referred the case to the Honorable Walter A. Huxman to sit as Special Master to take evi-

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some of whose last known addresses were elsewhere, and some of whom had no last known address indicated:

(a) uncashed checks payable to employees for wages and reimbursable expenses;

(b) uncashed checks payable to suppliers for goods and services;

(c) uncashed checks payable to lessors of oil- and gas-producing land as royalty payments;

(d) unclaimed "mineral proceeds," fractional mineral interests shown as debts on the books of the Texas offices.

(2) Amounts for which various offices of Sun throughout the country attempted to make payment to creditors all of whom had last known addresses in Texas:

(a) uncashed checks payable to shareholders for dividends on common stock;

(b) unclaimed refunds of payroll deductions owing to former employees;

(c) uncashed checks payable to various small creditors for minor obligations;

(d) undelivered fractional stock certificates resulting from stock dividends.

dence and make appropriate reports, 372 U. S. 926.[5] Florida was permitted to intervene since it claimed the right to escheat the portion of Sun's escheatable obligations owing to persons whose last known address was in Florida. 373 U. S. 948.[6] The Master has filed his report, Texas and New Jersey each have filed exceptions to it, and the case is now ready for our decision. We agree with the Master's recommendation as to the proper disposition of the property.

With respect to tangible property, real or personal, it has always been the unquestioned rule in all jurisdictions that only the State in which the property is located may escheat. But intangible property, such as a debt which a person is entitled to collect, is not physical matter which can be located on a map. The creditor may live in one State, the debtor in another, and matters may be further complicated if, as in the case before us, the debtor is a corporation which has connections with many States and each creditor is a person who may have had connections with several others and whose present address is unknown. Since the States separately are without constitutional power to provide a rule to settle this interstate controversy and since there is no applicable federal statute, it becomes our responsibility in the exercise of our original jurisdiction to adopt a rule which will settle the question of which State will be allowed to escheat this intangible property.

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[5] Texas' motion for leave to file the bill of complaint also prayed for temporary injunctions restraining the other States and Sun from taking steps to escheat the property. The other States voluntarily agreed not to act pending determination of this case, and so the motion for injunctions was denied. 370 U. S. 929.

[6] Illinois, which claims no interest in the property involved in this case, also sought to intervene to urge that jurisdiction to escheat should depend on the laws of the State in which the indebtedness was created. Leave to intervene was denied. 372 U. S. 973.

Four different possible rules are urged upon us by the respective States which are parties to this case. Texas, relying on numerous recent decisions of state courts dealing with choice of law in private litigation,[7] says that the State with the most significant "contacts" with the debt should be allowed exclusive jurisdiction to escheat it, and that by that test Texas has the best claim to escheat every item of property involved here. Cf. *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306; *Atkinson* v. *Superior Court*, 49 Cal. 2d 338, 316 P. 2d 960, appeals dismissed and cert. denied *sub nom. Columbia Broadcasting System, Inc.* v. *Atkinson*, 357 U. S. 569. But the rule that Texas proposes, we believe, would serve only to leave in permanent turmoil a question which should be settled once and for all by a clear rule which will govern all types of intangible obligations like these and to which all States may refer with confidence. The issue before us is not whether a defendant has had sufficient contact with a State to make him or his property rights subject to the jurisdiction of its courts, a jurisdiction which need not be exclusive. Compare *McGee* v. *International Life Ins. Co.*, 355 U. S. 220; *Mullane* v. *Central Hanover Bank & Trust Co., supra; International Shoe Co.* v. *Washington*, 326 U. S. 310.[8] Since this Court has held in *Western Union Tel. Co.* v. *Pennsylvania, supra,* that the same property cannot constitutionally be escheated

[7] *E. g., Schmidt* v. *Driscoll Hotel, Inc.*, 249 Minn. 376, 82 N. W. 2d 365; *Auten* v. *Auten*, 308 N. Y. 155, 124 N. E. 2d 99; *Haumschild* v. *Continental Casualty Co.*, 7 Wis. 2d 130, 95 N. W. 2d 814. See also *Clay* v. *Sun Insurance Office, Ltd.*, 377 U. S. 179; *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66; cf. *Richards* v. *United States*, 369 U. S. 1; *Vanston Bondholders Protective Committee* v. *Green*, 329 U. S. 156.

[8] Nor, since we are dealing only with escheat, are we concerned with the power of a state legislature to regulate activities affecting the State, power which like court jurisdiction need not be exclusive. Compare *Osborn* v. *Ozlin*, 310 U. S. 53.

by more than one State, we are faced here with the very different problem of deciding which State's claim to escheat is superior to all others. The "contacts" test as applied in this field is not really any workable test at all—it is simply a phrase suggesting that this Court should examine the circumstances surrounding each particular item of escheatable property on its own peculiar facts and then try to make a difficult, often quite subjective, decision as to which State's claim to those pennies or dollars seems stronger than another's. Under such a doctrine any State likely would easily convince itself, and hope to convince this Court, that its claim should be given priority—as is shown by Texas' argument that it has a superior claim to every single category of assets involved in this case. Some of them Texas says it should be allowed to escheat *because* the last known addresses of the creditors were in Texas, others it claims *in spite of* the fact that the last known addresses were *not* in Texas. The uncertainty of any test which would require us in effect either to decide each escheat case on the basis of its particular facts or to devise new rules of law to apply to ever-developing new categories of facts, might in the end create so much uncertainty and threaten so much expensive litigation that the States might find that they would lose more in litigation expenses than they might gain in escheats.[9]

New Jersey asks us to hold that the State with power to escheat is the domicile of the debtor—in this case New Jersey, the State of Sun's incorporation. This plan has

[9] Texas argues in particular that at least the part of the intangible obligations here which are royalties, rents, and mineral proceeds derived from land located in Texas should be escheatable only by that State. We do not believe that the fact that an intangible is income from real property with a fixed situs is significant enough to justify treating it as an exception to a general rule concerning escheat of intangibles.

the obvious virtues of clarity and ease of application. But it is not the only one which does, and it seems to us that in deciding a question which should be determined primarily on principles of fairness, it would too greatly exalt a minor factor to permit escheat of obligations incurred all over the country by the State in which the debtor happened to incorporate itself.

In some respects the claim of Pennsylvania, where Sun's principal offices are located, is more persuasive, since this State is probably foremost in giving the benefits of its economy and laws to the company whose business activities made the intangible property come into existence. On the other hand, these debts owed by Sun are not property to it, but rather a liability, and it would be strange to convert a liability into an asset when the State decides to escheat. Cf. *Case of the State Tax on Foreign-held Bonds,* 15 Wall. 300, 320. Moreover, application of the rule Pennsylvania suggests would raise in every case the sometimes difficult question of where a company's "main office" or "principal place of business" or whatever it might be designated is located. Similar uncertainties would result if we were to attempt in each case to determine the State in which the debt was created and allow it to escheat. Any rule leaving so much for decision on a case-by-case basis should not be adopted unless none is available which is more certain and yet still fair. We think the rule proposed by the Master, based on the one suggested by Florida, is.

The rule Florida suggests is that since a debt is property of the creditor, not of the debtor,[10] fairness among the States requires that the right and power to escheat the debt should be accorded to the State of the creditor's

[10] On this point Florida stresses what is essentially a variation of the old concept of "*mobilia sequuntur personam,*" according to which intangible personal property is found at the domicile of its owner. See *Blodgett* v. *Silberman,* 277 U. S. 1, 9–10.

last known address as shown by the debtor's books and records.[11] Such a solution would be in line with one group of cases dealing with intangible property for other purposes in other areas of the law.[12] Adoption of such a rule involves a factual issue simple and easy to resolve, and leaves no legal issue to be decided. It takes account of the fact that if the creditor instead of perhaps leaving behind an uncashed check had negotiated the check and left behind the cash, this State would have been the sole possible escheat claimant; in other words, the rule recognizes that the debt was an asset of the creditor. The rule recommended by the Master will tend to distribute escheats among the States in the proportion of the commercial activities of their residents. And by using a standard of last known address, rather than technical legal concepts of residence and domicile, administration and application of escheat laws should be simplified. It may well be that some addresses left by vanished creditors will be in States other than those in which they lived at the time the obligation arose or at the time of the escheat. But such situations probably will be the exception, and any errors thus created, if indeed they could be called errors, probably will tend to a large extent to cancel each other out. We therefore hold that each item of property

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[11] We agree with the Master that since our inquiry here is not concerned with the technical domicile of the creditor, and since ease of administration is important where many small sums of money are involved, the address on the records of the debtor, which in most cases will be the only one available, should be the only relevant last-known address.

[12] See, *e. g.*, *Baldwin* v. *Missouri,* 281 U. S. 586; *Farmers Loan & Trust Co.* v. *Minnesota,* 280 U. S. 204; *Blodgett* v. *Silberman,* 277 U. S. 1. However, it has been held that a State may allow an unpaid creditor to garnish a debt owing to his debtor wherever the person owing that debt is found. *Harris* v. *Balk,* 198 U. S. 215. But cf. *New York Life Ins. Co.* v. *Dunlevy,* 241 U. S. 518.

in question in this case is subject to escheat only by the State of the last known address of the creditor, as shown by the debtor's books and records.[13]

This leaves questions as to what is to be done with property owed persons (1) as to whom there is no record of any address at all, or (2) whose last known address is in a State which does not provide for escheat of the property owed them. The Master suggested as to the first situation—where there is no last known address—that the property be subject to escheat by the State of corporate domicile, provided that another State could later escheat upon proof that the last known address of the creditor was within its borders. Although not mentioned by the Master, the same rule could apply to the second situation mentioned above, that is, where the State of the last known address does not, at the time in question, provide for escheat of the property. In such a case the State of corporate domicile could escheat the property, subject to the right of the State of the last known address to recover it if and when its law made provision for escheat of such property. In other words, in both situations the State of corporate domicile should be allowed to cut off the claims of private persons only, retaining the property for itself only until some other State comes forward with proof that it has a superior right to escheat. Such a solution for these problems, likely to arise with comparative infrequency, seems to us conducive to needed certainty and we therefore adopt it.

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[13] Cf. *Connecticut Mutual Life Ins. Co.* v. *Moore,* 333 U. S. 541. As was pointed out in *Western Union Tel. Co.* v. *Pennsylvania,* 368 U. S. 71, 77–78, none of this Court's cases allowing States to escheat intangible property decided the possible effect of conflicting claims of other States. Compare *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428, 443; *Connecticut Mutual Life Ins. Co.* v. *Moore, supra; Anderson National Bank* v. *Luckett,* 321 U. S. 233; *Security Savings Bank* v. *California,* 263 U. S. 282.

We realize that this case could have been resolved otherwise, for the issue here is not controlled by statutory or constitutional provisions or by past decisions, nor is it entirely one of logic. It is fundamentally a question of ease of administration and of equity. We believe that the rule we adopt is the fairest, is easy to apply, and in the long run will be the most generally acceptable to all the States.

The parties may submit a proposed decree applying the principles announced in this opinion.

It is so ordered.

MR. JUSTICE STEWART, dissenting.

I adhere to the view that only the State of the debtor's incorporation has power to "escheat" intangible property when the whereabouts of the creditor are unknown. See *Western Union Tel. Co.* v. *Pennsylvania,* 368 U. S. 71, 80 (separate memorandum). The sovereign's power to escheat tangible property has long been recognized as extending only to the limits of its territorial jurisdiction. Intangible property has no spatial existence, but consists of an obligation owed one person by another. The power to escheat such property has traditionally been thought to be lodged in the domiciliary State of one of the parties to the obligation. In a case such as this the domicile of the creditor is by hypothesis unknown; only the domicile of the debtor is known. This Court has thrice ruled that where the creditor has disappeared, the State of the debtor's domicile may escheat the intangible property. *Standard Oil Co.* v. *New Jersey,* 341 U. S. 428; *Anderson Nat. Bank* v. *Luckett,* 321 U. S. 233; *Security Savings Bank* v. *California,* 263 U. S. 282. Today the Court overrules all three of those cases. I would not do so. Adherence to settled precedent seems to me far better than giving the property to the State within which is located the one place where we know the creditor is not.

BLOW ET AL. *v.* NORTH CAROLINA.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

No. 387. Decided February 1, 1965.

Negroes denied entry to a restaurant serving whites only were arrested after refusing to leave the property. They were convicted of violating a North Carolina statute making it a crime to enter upon the lands of another without a license after being forbidden to do so, and their convictions were affirmed by the State Supreme Court. The restaurant and the adjoining motel which are under the same management are on an interstate highway and are extensively advertised. *Held:* Since the restaurant serves or offers to serve interstate travelers it is a "place of public accommodation" within § 201 of the Civil Rights Act of 1964, and these convictions although for conduct prior to the enactment thereof are abated by passage of that Act. *Hamm* v. *City of Rock Hill, ante,* p. 306, followed. Pp. 685–686.

Certiorari granted; 261 N. C. 463, 135 S. E. 2d 14; 261 N. C. 467, 135 S. E. 2d 17, judgments vacated and cause remanded.

Jack Greenberg, Constance Baker Motley, James M. Nabrit III, Derrick A. Bell, Jr., Charles L. Black, Jr., Samuel S. Mitchell and *Floyd B. McKissick* for petitioners.

T. W. Bruton, Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for respondent.

PER CURIAM.

Petitioners, two Negroes, approached the Plantation Restaurant in the company of 35 to 40 other Negroes. This restaurant served whites only and carried a sign to that effect on its front door. Pursuant to this policy the owner of the restaurant locked the door against the Negroes, though from time to time he would open the door to admit white customers and relock it after they

had entered. The restaurant was some 60 feet from the highway, the property between the restaurant and the highway being owned by the restaurant proprietor. The Negroes waited outside the door, some on a shrubbery box six or eight feet away, others up to 15 feet distant. The owner asked the Negroes to leave; but they continued to wait quietly outside until they were arrested. For this conduct petitioners were indicted and convicted for violation of § 14–134 of the North Carolina General Statutes, making it an offense to "go or enter upon the lands of another, without a license therefor" and "after being forbidden to do so." The Supreme Court of North Carolina affirmed petitioners' convictions on March 18, 1964. 261 N. C. 463, 135 S. E. 2d 14; 261 N. C. 467, 135 S. E. 2d 17.

The Plantation Restaurant is situated on Interstate Highway 301 in the town of Enfield, North Carolina. Adjoining the restaurant and owned by the same person is the Enfield Motel. The restaurant's menu and other advertising are posted in the rooms of this motel. The Plantation Restaurant and Enfield Motel are advertised on billboards for some miles up and down Highway 301. They are further advertised on the radio and in the newspapers.

Since these facts make it clear that the Plantation Restaurant "serves or offers to serve interstate travelers," it must be held that the restaurant is a "place of public accommodation" within the meaning of §§ 201 (b)(2) and (c) (2) of the Civil Rights Act of 1964.

"The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to the enactment of the Act, the still-pending convictions are abated by its passage." *Hamm* v. *City of Rock Hill, ante,* at 308. Accord-

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ingly, the writ of certiorari is granted, the judgments are vacated, and the cause remanded for dismissal of the indictments.

It is so ordered.

MR. JUSTICE BLACK, MR. JUSTICE HARLAN, and MR. JUSTICE WHITE would affirm the judgments of the Supreme Court of North Carolina for the reasons stated in their dissenting opinions in *Hamm* v. *City of Rock Hill, ante,* at 318, 322, 327.

MR. JUSTICE STEWART would vacate the judgments of the Supreme Court of North Carolina and remand the case to that court for the reasons stated in his dissenting opinion in *Hamm* v. *City of Rock Hill, ante,* at 326.

Per Curiam.

FEDERAL POWER COMMISSION *v.* AMERADA PETROLEUM CORP. ET AL.

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

No. 585. Decided February 1, 1965.

1. Where a supplier sells natural gas to an interstate pipeline company which commingles it with gas from other sources and uses some of the mixture intrastate but sells a substantial portion thereof in interstate commerce, the parties may not avoid the jurisdiction of the Federal Power Commission by stipulating in their contract that, contrary to the actuality of pipeline transportation, all the supplier's gas sold under the contract will be used intrastate. *California* v. *Lo-Vaca Gathering Co., ante,* p. 366, followed. P. 690.
2. The doctrine of collateral estoppel is not applicable here since only the scope of future regulation concerning transactions not governed by past decisions is involved. P. 690.

Certiorari granted; 334 F. 2d 404, reversed.

Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock, Robert L. Russell and *Peter H. Schiff* for petitioner.

William H. Webster, Edwin S. Nail and *Joseph W. Morris* for Amerada Petroleum Corp., and *William R. Allen* and *Cecil E. Munn* for Signal Oil & Gas Co., respondents.

PER CURIAM.

Montana-Dakota (MDU) is an interstate natural gas pipeline company, selling and transporting gas in Montana, North Dakota, South Dakota, and Wyoming. The lines involved here run to the east and west from the Tioga processing plant in North Dakota, jointly owned by Amerada and Signal, producers of natural gas in North Dakota. Also, running north from the Tioga point is

a line extending to the gasoline extraction plants of Hunt-Herbert and TXL (now Texaco), both in North Dakota.

On a peak winter day in 1962–1963 MDU was expected to purchase a total of 70,000 Mcf of North Dakota-produced gas from these four producers: 55,000 Mcf from Amerada-Signal, 10,000 Mcf from TXL, and 5,000 Mcf from Hunt-Herbert. Of the 55,000 Mcf from Amerada-Signal, 50,000 Mcf would flow to the east and be consumed in North Dakota. All of the Hunt-Herbert and TXL gas, plus the remaining 5,000 Mcf of the Amerada-Signal gas, would flow to the west—a total of 20,000 Mcf. Of this westward-flowing gas, 10,200 Mcf would be consumed in North Dakota; the remaining 9,800 Mcf would flow across the state boundary into Montana for consumption outside of North Dakota.

On an average summer day MDU would take about 45,000 Mcf from Amerada-Signal, while continuing to take about 15,000 Mcf from Hunt-Herbert and TXL. Of the Amerada-Signal gas, 13,000 Mcf would flow westward, commingled with the 15,000 Mcf from Hunt-Herbert and TXL. Only 1,680 Mcf of this stream would be consumed in North Dakota; the remaining 26,320 Mcf would flow into Montana to be held in storage for ultimate redelivery to all parts of MDU's interstate system. 32,000 Mcf of gas would flow eastward, all from Amerada-Signal. In contrast to the situation on a peak winter day, only 7,280 Mcf of this eastward-flowing gas would be consumed in North Dakota, while 24,720 Mcf would cross the state boundary and go into storage.

The contracts for the purchase of gas from Hunt-Herbert and TXL admittedly constitute sales of gas for resale within the meaning of § 1 (b) of the Natural Gas Act, 15 U. S. C. § 717. These sellers applied for and were granted certificates of public convenience and necessity by the Commission. 27 F. P. C. 1092.

Prior to entering into the Hunt-Herbert-TXL contracts, MDU entered into contracts with Amerada and Signal which are here in issue. First, MDU concluded the so-called "North Dakota Contracts" with both Amerada and Signal. Under these contracts MDU must buy at least two-thirds of its annual North Dakota requirements from Amerada-Signal, and it may buy up to all of its North Dakota requirements from them if it so elects. The contracts recite that "all gas purchased by Buyer under this agreement shall be transported, used and consumed entirely within the State of North Dakota." Soon thereafter, MDU entered its separate "Interstate Contracts" with Amerada and Signal. These contracts provide that MDU must take or pay for a certain number of Mcf per year (and per day) if available, "less the quantity of gas which Buyer shall pay for with respect to such calendar year under the Amerada [or Signal] North Dakota Contract."

Respondents Amerada and Signal contended before the Federal Power Commission that sales to MDU under the "North Dakota Contracts" would be "nonjurisdictional" since they were not sales in interstate commerce for resale. Relying on its decision in *Lo-Vaca Gathering Co.*, 26 F. P. C. 606 (reversed, 323 F. 2d 190, reversed, *ante,* p. 366), the Commission rejected the contention and asserted its jurisdiction over the sales. 30 F. P. C. 200. The Court of Appeals reversed. 334 F. 2d 404. The Commission has petitioned for writ of certiorari.

All of the gas purchased by MDU from Amerada-Signal under both sets of contracts is delivered into the pipeline at the Tioga plant. According to the testimony of MDU's engineer, on a peak winter day the pipeline would elect to purchase all of the Amerada-Signal gas under the "North Dakota Contracts." Yet, as previously shown, on such a day some of the Amerada-Signal gas flows westward, in a commingled stream with gas from

other sources, and is resold outside of North Dakota. On an average summer day MDU would elect to purchase about 9,000 Mcf of the Amerada-Signal gas under the "North Dakota Contracts," and the remaining 36,000 Mcf under the "Interstate Contracts." Yet, as previously shown, 1,680 Mcf of the 9,000 Mcf consumed in North Dakota would have to be metered off from the westward-flowing commingled stream that is destined in major part for resale out-of-state.

Factually, therefore, the present case is on all fours with *California* v. *Lo-Vaca Gathering Co., ante*, p. 366.

The Court of Appeals thought that its decision in *North Dakota* v. *Federal Power Comm'n*, 247 F. 2d 173, brought collateral estoppel into play in the present case. 334 F. 2d 404, 411–412. But that rule has no place here for no judgment governing past events is in jeopardy, only the scope of future regulation that involves different events and transactions. See *Commissioner* v. *Sunnen*, 333 U. S. 591, 601–602.

Accordingly, the writ of certiorari is granted, and the judgment of the Court of Appeals is reversed.

It is so ordered.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE STEWART joins, concurring.

I agree with the Court that this case is clearly controlled by our recent decision in *California* v. *Lo-Vaca Gathering Co., ante*, p. 366, and thus join the opinion and judgment of the Court. I concur, however, in order to make explicit my understanding of the rationale of the Court's decision in this case.

At the time of this action, respondents, as in *Lo-Vaca*, attributed to themselves a greater percentage of so-called nonjurisdictional gas than their proportionate share of

the gas in the commingled stream.* Thus, here, as in *Lo-Vaca,* we need not and do not reach the issue of whether "in spite of original commingling there might be a separate so-called nonjurisdictional transaction of a precise amount of gas . . . ." 379 U. S., at 370.

MR. JUSTICE HARLAN: Yielding to the Court's view that the case-by-case approach is an acceptable method of procedure in this area of the Commission's functions (see the Court's opinion in the *Lo-Vaca* case at 366 and my dissenting opinion therein at 371), I join the concurring opinion of my Brother GOLDBERG.

*Some years prior to this action Amerada-Signal claimed no more than its proportionate share, and under those circumstances the FPC disclaimed jurisdiction. See *North Dakota* v. *FPC,* 247 F. 2d 173 (C. A. 8th Cir. 1957). The fact that the amount claimed by respondents at the time of this action exceeds Amerada-Signal's proportionate share is due to the addition of new sources of supply to the commingled stream. This change, standing alone, makes inapplicable any doctrine of collateral estoppel based on the FPC's disclaimer or the Court of Appeal's affirmance in *North Dakota* v. *FPC, supra.*

HEARNE ET AL. *v.* SMYLIE, GOVERNOR OF IDAHO, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO.

No. 617. Decided February 1, 1965.

Cause continued.

Herman J. McDevitt for appellants.

Allan G. Shepard, Attorney General of Idaho, and *M. Allyn Dingel, Jr.,* Assistant Attorney General, for Williams et al., appellees.

PER CURIAM.

This cause is continued on the docket until the Court Conference of May 21, 1965, before which time the parties are asked to advise the Court by supplemental briefs as to the progress made in reapportioning the Idaho Legislature.

FORTY-FOURTH GENERAL ASSEMBLY OF COLORADO ET AL. *v.* LUCAS ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO.

No. 661. Decided February 1, 1965.

Judgment with respect to federal questions affirmed; judgment with respect to other questions vacated and cause remanded.

Reported below: 232 F. Supp. 797.

Duke W. Dunbar, Attorney General of Colorado, *Charles S. Vigil, Richard S. Kitchen, Sr., Stephen H. Hart* and *James Lawrence White* for appellants.

Charles Ginsberg and *George Louis Creamer* for appellees.

PER CURIAM.

Insofar as the judgment of the District Court decides federal questions, it is affirmed. Insofar as the judgment decides other questions, it is vacated and the cause is remanded for further consideration in light of the supervening decision of the Colorado Supreme Court in *White* v. *Anderson,* —— Colo. ——, 394 P. 2d 333 (1964).

MR. JUSTICE CLARK, MR. JUSTICE HARLAN, MR. JUSTICE STEWART, and MR. JUSTICE GOLDBERG, concurring.

It is our understanding that the Court's disposition of this case leaves it open to the District Court to abstain on the question as to the severability of the various provisions of Amendment No. 7, pending resolution of that issue with reasonable promptitude in further state court proceedings. We deem it appropriate explicitly to state our view that this is the course which the District Court should follow. On this basis, we join the Court's opinion.

HUGHES ET AL. *v.* WMCA, INC., ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 623. Decided February 1, 1965.*

Affirmed.

John H. Hughes, pro se, for appellants in No. 623.

Leonard B. Sand, Max Gross, Leo A. Larkin, Jack B. Weinstein and *Robert B. McKay* for appellees in No. 623.

Robert Y. Button, Attorney General of Virginia, *R. D. McIlwaine III,* Assistant Attorney General, *David J. Mays* and *Henry T. Wickham* for appellants in No. 718.

Edmund D. Campbell and *E. A. Prichard* for Mann et al., and *Henry E. Howell, Jr., Leonard B. Sachs* and *Sidney H. Kelsey* for Glanville et al., appellees in No. 718.

PER CURIAM.

The motions to affirm are granted and the judgments are affirmed.

MR. JUSTICE WHITE and MR. JUSTICE GOLDBERG join the affirmance in No. 623 since it is their understanding that it in no way interferes with the power of the District Court, in the light of circumstances as they may develop, to vacate or otherwise modify its order requiring an election in the fall of 1965.

MR. JUSTICE HARLAN, whom MR. JUSTICE CLARK joins, dissenting.

Both of these cases, today affirmed summarily by the Court, raise serious problems concerning the scope of

*Together with No. 718, *Davis, Secretary, State Board of Elections, et al.* v. *Mann et al.*, on appeal from the United States District Court for the Eastern District of Virginia.

the discretion of a federal court to fashion interim relief in state reapportionment cases, matters not hitherto decided by this Court.

No. 623.

The New York Constitution, Art. III, § 2, provides that the State Legislature will be elected every two years, serving for two annual sessions. Between sessions the Legislature normally works in committee, conducting hearings and drafting reports to be submitted at the following session. In *WMCA, Inc.* v. *Lomenzo,* 377 U. S. 633, this Court held the New York legislative apportionment formula invalid under the Fourteenth Amendment, and remanded the cause to the District Court for appropriate relief. Among other things, the Court authorized the District Court in its discretion to permit the November 1964 elections to proceed under the invalidated apportionment "in order to give the New York Legislature an opportunity to fashion a constitutionally valid legislative apportionment plan . . . ." 377 U. S., at 655.

The District Court, on July 27, 1964, entered a decree permitting the November 1964 elections to be conducted under the invalidated plan, but limiting the term of the Legislature to one year. The decree also ordered that an election be held in November 1965 under a valid apportionment plan, to be enacted by the Legislature by April 1, 1965,* and that the Legislature elected in 1965 would also serve for only one year so that the November 1966 election would be held as scheduled by state law. As a result of this order New York will have to conduct three elections in as many years, and forgo the normal work of the Legislature between sessions.

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*Such a plan, enacted by the New York Legislature, has recently been approved by the District Court.

No. 718.

Virginia elects its lower house, the House of Delegates, every two years to serve for one biennial session of the General Assembly. The Senate is elected for four years to serve during two sessions of the General Assembly which are held each January following the election of the House of Delegates. In November 1962 the District Court held the Virginia apportionment of both houses unconstitutional, and enjoined any further elections under the invalidated plan. Pending appeal to this Court, THE CHIEF JUSTICE stayed the injunction of the District Court, and the 1963 elections were held under the invalidated plan. After the District Court was affirmed on the merits, *Davis* v. *Mann,* 377 U. S. 678, that court entered a decree on September 18, 1964, directing the General Assembly to reapportion in time for the November 1965 election of the House of Delegates, and ordered further that a special election be held at the same time to elect a properly apportioned Senate to serve for two years. Thus the present Senate, elected in November 1963 to serve for four years, has been limited to a two-year term, and the Senate to be elected next November will also be so limited.

The orders of the District Courts entered in these two cases present for me important questions which deserve plenary consideration by this Court. I would note probable jurisdiction in both cases and set them for argument on the earliest practicable date at the next argument session of the Court commencing March 1.

REPORTER'S NOTE.

The next page is purposely numbered 801. The numbers between 696 and 801 were intentionally omitted, in order to make it possible to publish the orders in the current advance sheets or preliminary prints of the United States Reports with *permanent* page numbers, thus making the official citations immediately available.

ORDERS FROM END OF OCTOBER TERM, 1963, THROUGH FEBRUARY 1, 1965.

Cases Dismissed in Vacation.

No. 38, Misc. Hemmis *v.* Burke, Warden, et al. On petition for writ of certiorari to the Supreme Court of Wisconsin. August 10, 1964. Dismissed pursuant to Rule 60 of the Rules of this Court.

No. 312. Winston, Trustee in Bankruptcy *v.* John J. Reilly, Inc., et al. On petition for writ of certiorari to the Supreme Court of New Hampshire. August 25, 1964. Dismissed pursuant to Rule 60 of the Rules of this Court. Reported below: 105 N. H. 340, 200 A. 2d 21.

No. 93. Grimmett *v.* United States. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. September 8, 1964. Dismissed pursuant to Rule 60 of the Rules of this Court. *John J. Clancy* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 331 F. 2d 703.

No. 275. Swedish American Lines *v.* Ferrante et al. On petition for writ of certiorari to the United States Court of Appeals for the Third Circuit. October 1, 1964. Dismissed pursuant to Rule 60 of the Rules of this Court. *James M. Estabrook* for petitioner. *Harvey Goldstein* and *Samuel M. Cole* for respondents. *Leo I. McGough* for Nacirema Operating Co., Inc., in support of the petition. Reported below: 331 F. 2d 571.

OCTOBER 5, 1964.

Assignment Order.

An order of THE CHIEF JUSTICE designating and assigning MR. JUSTICE REED (retired) to perform judicial duties in the United States Court of Claims beginning October 5, 1964, and ending June 30, 1965, and for such further time as may be required to complete unfinished business, pursuant to 28 U. S. C. § 294 (a), is ordered entered on the minutes of this Court, pursuant to 28 U. S. C. § 295.

Miscellaneous Order.

The Court appoints *William E. Foley,* of Connecticut, to be Deputy Director of the Administrative Office of the United States Courts, pursuant to the provisions of Section 601 of Title 28 of the United States Code.

Probable Jurisdiction Noted.

No. 543. KATZENBACH, ACTING ATTORNEY GENERAL, ET AL. *v.* MCCLUNG ET AL. Appeal from the United States District Court for the Northern District of Alabama. Probable jurisdiction noted. Motion of NAACP Legal Defense and Educational Fund, Inc., for leave to file brief, as *amicus curiae,* granted. Joint motion to expedite briefing and oral argument granted and case set for oral argument on Monday, October 5, 1964, immediately following No. 515. *Solicitor General Cox, Assistant Attorney General Marshall, Ralph S. Spritzer, Philip B. Heymann, Harold H. Greene* and *Gerald P. Choppin* for appellants. *Robert McD. Smith* and *William G. Somerville* for appellees. *Jack Greenberg, Constance Baker Motley, James M. Nabrit III* and *Charles L. Black, Jr.,* for NAACP Legal Defense and Educational Fund, Inc., as *amicus curiae,* in support of appellants. *T. W. Bruton,* Attorney General of North Carolina, and *Ralph Moody,* Deputy Attorney General, for the State of North Carolina, as *amicus curiae,* in support of appellees. Reported below: 233 F. Supp. 815.

No. 515. Heart of Atlanta Motel, Inc. *v.* United States et al. Appeal from the United States District Court for the Northern District of Georgia. Probable jurisdiction noted. Joint motion for acceleration of oral argument granted and case set for oral argument on Monday, October 5, 1964. *Moreton Rolleston, Jr.*, for appellant. *Solicitor General Cox, Assistant Attorney General Marshall, Philip B. Heymann* and *Harold H. Greene* for the United States et al. Briefs of *amici curiae*, in support of appellant, were filed by *Robert Y. Button*, Attorney General of Virginia, and *Frederick T. Gray*, Special Assistant Attorney General, for the Commonwealth of Virginia; and by *James W. Kynes*, Attorney General of Florida, and *Fred M. Burns* and *Joseph C. Jacobs*, Assistant Attorneys General, for the State of Florida. Briefs of *amici curiae*, in support of the United States et al., were filed by *Thomas C. Lynch*, Attorney General of California, *Charles E. Corker* and *Dan Kaufmann*, Assistant Attorneys General, and *Charles B. McKesson* and *Jerold L. Perry*, Deputy Attorneys General, for the State of California; *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Shirley Adelson Siegel*, Assistant Attorney General, for the State of New York; and *Edward W. Brooke*, Attorney General of Massachusetts, for the Commonwealth of Massachusetts. Reported below: 231 F. Supp. 393.

October 10, 1964.

Dismissal Under Rule 60.

No. 77. Federal Cartridge Corp. *v.* Superior Court of Creek County, Bristow Division, et al. Appeal from the Supreme Court of Oklahoma. Dismissed pursuant to Rule 60 of the Rules of this Court. *James H. Ross* and *John L. Laskey* for appellant. *Grant W. Wiprud* for appellee Espy.

744-008 O-65-51

October 12, 1964.

Miscellaneous Orders.

No. 5, Original. United States *v.* California. The motion of Carl Whitson for leave to present oral argument, as *amicus curiae,* is denied. The Chief Justice and Mr. Justice Clark took no part in the consideration or decision of this motion. Movant *pro se. Stanley Mosk,* Attorney General of California, *Charles E. Corker* and *Howard S. Goldin,* Assistant Attorneys General, *Jay L. Shavelson, Warren J. Abbott* and *N. Gregory Taylor,* Deputy Attorneys General, and *Richard H. Keatinge* for defendant, in opposition. [For earlier orders herein, see 375 U. S. 927, 990; 377 U. S. 926, 986.]

No. 13. United States *v.* Gainey (formerly Barrett) et al. (Certiorari, 375 U. S. 962, to the United States Court of Appeals for the Fifth Circuit.) The motion of respondent Cleveland Johns for leave to proceed further herein *in forma pauperis* is granted. *Joseph H. Davis* for movant.

No. 34. Udall, Secretary of the Interior *v.* Tallman et al. (Certiorari, 376 U. S. 961, to the United States Court of Appeals for the District of Columbia Circuit.) The motions of Marathon Oil Co. et al. and Richfield Oil Corp. et al., for leave to file briefs, as *amici curiae,* are granted. *Clayton L. Orn, Marvin J. Sonosky, Oscar L. Chapman, Martin L. Friedman* and *Marion B. Plant* for Marathon Oil Co. et al., and *Abe Fortas, Joseph A. Ball, Gordon A. Goodwin, Francis R. Kirkham* and *Clark M. Clifford* for Richfield Oil Corp. et al., on the motions. *Charles F. Wheatley, Jr.,* and *Robert L. McCarty* for respondents, in opposition to both motions.

No. 1. ANDERSON *v.* KENTUCKY. (Certiorari, 371 U. S. 886, to the Court of Appeals of Kentucky.) The motion for a hearing is denied. Movant *pro se*. *Robert Matthews,* Attorney General of Kentucky, for respondent, in opposition.

No. 20. BRULOTTE ET AL. *v.* THYS CO. (Certiorari, 376 U. S. 905, to the Supreme Court of Washington.) The motion of Well Surveys, Inc., for leave to file a brief, as *amicus curiae,* is granted. *Rufus S. Day, Jr., Robert W. Fulwider* and *Robert J. Woolsey* for movant. *Edward S. Irons* for petitioners, in opposition.

No. 42. SINGER *v.* UNITED STATES. (Certiorari, 377 U. S. 903, to the United States Court of Appeals for the Ninth Circuit.) The motion of Joni Rabinowitz for leave to file a brief, as *amicus curiae,* is granted. The motion of Nicholas Jacop Uselding to dispense with printing motion for leave to file a brief, as *amicus curiae,* and the motion to file a brief, as *amicus curiae,* are granted. *Victor Rabinowitz* and *Leonard B. Boudin* for Joni Rabinowitz. *Justin A. Stanley* for Nicholas Jacop Uselding.

No. 44. AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD. (Certiorari, 377 U. S. 915, to the United States Court of Appeals for the District of Columbia Circuit.) The motion to remove this case from the summary calendar is granted and the case is allotted one and one-half hours for oral argument. *Joseph Forer* and *David Rein* for petitioner on the motion.

No. 182, Misc. LEE *v.* PATE, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 65. VETERANS OF THE ABRAHAM LINCOLN BRIGADE *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD. (Certiorari, 377 U. S. 989, to the United States Court of Appeals for the District of Columbia Circuit.) The motion to remove this case from the summary calendar is granted and the case is allotted one and one-half hours for oral argument. *Leonard B. Boudin* and *David Rein* for petitioner on the motion.

No. 107. COFFEE COUNTY, TENNESSEE *v.* CITY OF TULLAHOMA. On petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 179. CORBETT, GUARDIAN *v.* STERGIOS, ALIAS STERYIAKIS. Appeal from the Supreme Court of Iowa. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 24, Misc. MARIN *v.* UNITED STATES. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 324 F. 2d 66.

No. 20, Misc. AUFLICK *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *James W. Kynes,* Attorney General of Florida, and *A. G. Spicola, Jr.,* Assistant Attorney General, for respondent.

No. 53, Misc. ANDERSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *James W. Kynes,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 65, Misc. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, ET AL. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *James W. Kynes,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondents.

No. 70, Misc. SAMPSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *James W. Kynes,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent.

No. 102, Misc. BEERS *v.* FLORIDA. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *James W. Kynes,* Attorney General of Florida, and *Reeves Bowen,* Assistant Attorney General, for respondent.

No. 106, Misc. UNGER *v.* YEAGER, WARDEN;

No. 114, Misc. HOLMAN *v.* EYMAN, WARDEN, ET AL.;

No. 115, Misc. LAMBERT *v.* RHAY, PENITENTIARY SUPERINTENDENT;

No. 119, Misc. GREY *v.* MINNESOTA;

No. 193, Misc. BURKE *v.* CALIFORNIA;

No. 268, Misc. DUCKETT *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL.;

No. 293, Misc. GARVIE *v.* CALIFORNIA;

No. 300, Misc. FERRIERA *v.* UNITED STATES;

No. 302, Misc. BECK *v.* WAINWRIGHT, CORRECTIONS DIRECTOR;

No. 338, Misc. SCHACK *v.* KELLENBERGER, SHERIFF; and

No. 344, Misc. WILLIAMS *v.* PATE, WARDEN. Motions for leave to file petitions for writs of habeas corpus denied.

No. 25, Misc. CHRISTMAS *v.* FLORIDA. 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. Petitioner *pro se*. *James W. Kynes,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent.

No. 52, Misc. MOSLEY *v.* MISSOURI. 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. Petitioner *pro se*. *Thomas F. Eagleton,* Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent.

No. 108, Misc. BUCHANAN *v.* EYMAN, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied.

No. 81, Misc. PARKER *v.* LUMBARD ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Solicitor General Cox* for Lumbard et al., and *Bruce Bromley* for Columbia Broadcasting System, Inc., et al., respondents.

No. 98, Misc. CRAWFORD *v.* UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied.

No. 314, Misc. WINCKLER & SMITH CITRUS PRODUCTS CO. ET AL. *v.* UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT ET AL. Motion for leave to file petition for writ of mandamus denied. *William C. Dixon* and *Bernard Reich* for petitioners. *Ross C. Fisher* and *Herman F. Selvin* for Sunkist Growers, Inc., et al., respondents.

No. 172, Misc. TANSIMORE *v.* UNITED STATES. Motion for leave to file petition for writ of prohibition denied.

Probable Jurisdiction Noted or Question Postponed.

No. 232. UNITED STATES *v.* BOSTON & MAINE RAILROAD ET AL. Appeal from the United States District Court for the District of Massachusetts. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Orrick* and *Robert B. Hummel* for the United States. *Edward B. Hanify* for Boston & Maine Railroad, and *William T. Griffin, Edward O. Proctor* and *Lothrop Withington* for McGinnis et al., appellees. Reported below: 225 F. Supp. 577.

No. 300. FORTSON, SECRETARY OF STATE OF GEORGIA, ET AL. *v.* TOOMBS ET AL. Appeal from the United States District Court for the Northern District of Georgia. Probable jurisdiction noted. Motion to advance granted and case set for oral argument on November 18, 1964. *Eugene Cook*, Attorney General of Georgia, and *E. Freeman Leverett*, Deputy Assistant Attorney General, for appellants. *Francis Shackelford, Emmet J. Bondurant II, Hamilton Lokey* and *J. Quentin Davidson* for appellees.

No. 86. ZEMEL *v.* RUSK, SECRETARY OF STATE, ET AL. Appeal from the United States District Court for the District of Connecticut. Further consideration of the question of jurisdiction postponed to the hearing of the case on the merits. *Leonard B. Boudin* and *Victor Rabinowitz* for appellant. *Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Lee B. Anderson* for appellees. Reported below: 228 F. Supp. 65.

October 12, 1964. 379 U. S.

No. 96. Reserve Life Insurance Co. *v.* Bowers, Tax Commissioner of Ohio. Appeal from the Supreme Court of Ohio. Probable jurisdiction noted. *Harris K. Weston* and *William E. Miller* for appellant. *William B. Saxbe,* Attorney General of Ohio, and *Daronne R. Tate,* Assistant Attorney General, for appellee. Reported below: 175 Ohio St. 468, 196 N. E. 2d 87.

No. 115. Warren Trading Post Co. *v.* Arizona Tax Commission et al. Appeal from the Supreme Court of Arizona. Probable jurisdiction noted. *Edward Jacobson* for appellant. *Solicitor General Cox, Stephen J. Pollak* and *Roger P. Marquis* for the United States, as *amicus curiae,* in support of appellant. Reported below: 95 Ariz. 110, 387 P. 2d 809.

No. 178. Fortson, Secretary of State of Georgia *v.* Dorsey et al. Appeal from the United States District Court for the Northern District of Georgia. Probable jurisdiction noted. *Eugene Cook,* Attorney General of Georgia, and *Paul Rodgers,* Assistant Attorney General, for appellant. *Edwin F. Hunt* and *Charles A. Moye, Jr.,* for appellees. Reported below: 228 F. Supp. 259.

No. 360. Harman et al. *v.* Forssenius 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, *Richard N. Harris,* Assistant Attorney General, *Joseph C. Carter, Jr.,* and *E. Milton Farley III* for appellants. *L. S. Parsons, Jr.,* and *H. E. Widener, Jr.,* for appellees. Reported below: 235 F. Supp. 66.

Certiorari Granted. (See also No. 6, Misc., *ante,* p. 1; and No. 21, Misc., *ante,* p. 10.)

No. 111. Department of Mental Hygiene of California *v.* Kirchner, Administratrix. Supreme Court of California. Certiorari granted. *Stanley Mosk,* Attorney General of California, *Harold B. Haas,* Assistant Attorney General, and *Elizabeth Palmer, John Carl Porter,* and *Asher Rubin,* Deputy Attorneys General, for petitioner. *John Walton Dinkelspiel* for respondent. Briefs of *amici curiae,* in support of the petition, were filed by *William G. Clark,* Attorney General of Illinois, *Richard E. Friedman,* First Assistant Attorney General, and *Raymond S. Sarnow* and *Jerome F. Goldberg,* Assistant Attorneys General, for the State of Illinois; *Walter E. Alessandroni,* Attorney General of Pennsylvania, and *Edgar R. Casper,* Deputy Attorney General, for the Commonwealth of Pennsylvania; *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Ruth Kessler Toch,* Assistant Solicitor General, for the State of New York; *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Mel Kammerlohr,* Assistant Attorney General, for the State of Nebraska; and by *Helgi Johanneson,* Attorney General of North Dakota, and *Wesley N. Harry,* Special Assistant Attorney General, for the State of North Dakota. Reported below: 60 Cal. 2d 716, 388 P. 2d 720.

No. 148. McKinnie et al. *v.* Tennessee. Supreme Court of Tennessee. Certiorari granted. *Jack Greenberg, James M. Nabrit III, Avon N. Williams* and *Z. Alexander Looby* for petitioners. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent. Reported below: 214 Tenn. 195, 379 S. W. 2d 214.

No. 61. Radio & Television Broadcast Technicians Local Union 1264, International Brotherhood of Electrical Workers, AFL–CIO, et al. *v.* Broadcast Service of Mobile, Inc. Supreme Court of Alabama. Certiorari granted. *J. R. Goldthwaite, Jr.*, for petitioners. *George E. Stone, Jr.*, and *Willis C. Darby, Jr.*, for respondent. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the United States, as *amicus curiae*, in support of the petition. Reported below: 276 Ala. 93, 159 So. 2d 452.

No. 82. Carrington *v.* Rash et al. Supreme Court of Texas. Certiorari granted. *W. C. Peticolas* for petitioner. *Waggoner Carr*, Attorney General of Texas, and *Mary K. Wall*, Assistant Attorney General, for respondent Carr. Reported below: 378 S. W. 2d 304.

No. 123. Federal Power Commission *v.* Union Electric Co. C. A. 8th Cir. Certiorari granted. *Solicitor General Cox, Ralph S. Spritzer, Frank I. Goodman, Richard A. Solomon* and *Howard E. Wahrenbrock* for petitioner. *Robert J. Keefe* and *Robert F. Schlafly* for respondent. Reported below: 326 F. 2d 535.

No. 98. National Labor Relations Board *v.* Metropolitan Life Insurance Co. C. A. 1st Cir. Certiorari granted. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Burton A. Zorn* and *George G. Gallantz* for respondent. Reported below: 327 F. 2d 906.

No. 134. Paragon Jewel Coal Co., Inc. *v.* Commissioner of Internal Revenue. C. A. 4th Cir. Certiorari granted. *Frederick Bernays Wiener* and *LeRoy Katz* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent. Reported below: 330 F. 2d 161.

No. 171. HANNA *v.* PLUMER, EXECUTOR. C. A. 1st Cir. Certiorari granted. *George Welch* for petitioner. *Alfred E. LoPresti* and *James T. Connolly* for respondent. Reported below: 331 F. 2d 157.

No. 240. LOCAL UNION No. 189, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, ET AL. *v.* JEWEL TEA CO., INC. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Based on the District Court's undisturbed finding that the limitation 'was imposed after arm's length bargaining, . . . and was fashioned exclusively by the unions to serve their own interests—how long and what hours members shall work, what work they shall do, and what pay they shall receive' (R. 672), whether the limitation upon market operating hours and the controversy concerning it are within the labor exemption of the Sherman Antitrust Act.

"2. Whether a claimed violation of the Sherman Antitrust Act which falls within the regulatory scope of the National Labor Relations Act is within the exclusive primary jurisdiction of the National Labor Relations Board."

Motion of American Federation of Labor and Congress of Industrial Organizations for leave to file a brief, as *amicus curiae,* granted. *Lester Asher, Bernard Dunau* and *Robert C. Eardley* for petitioners. *George B. Christensen, Fred H. Daugherty* and *Theodore A. Groenke* for respondent. *Solicitor General Cox* for the United States, as *amicus curiae,* in support of the petition. *J. Albert Woll, Robert C. Mayer, Theodore J. St. Antoine* and *Thomas E. Harris* for the American Federation of Labor and Congress of Industrial Organizations, as *amicus curiae,* in support of the petition. Reported below: 331 F. 2d 547.

No. 138. Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes *v.* Association for the Benefit of Non-Contract Employees;

No. 139. United Air Lines, Inc. *v.* National Mediation Board et al.; and

No. 369. National Mediation Board et al. *v.* Association for the Benefit of Non-Contract Employees. C. A. D. C. Cir. Certiorari granted. The cases are consolidated and a total of two hours is allotted for oral argument. *Milton Kramer* and *James L. Highsaw, Jr.*, for petitioner in No. 138. *H. Templeton Brown, Robert L. Stern* and *Stuart Bernstein* for petitioner in No. 139. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *John C. Eldridge* for petitioners in No. 369. *Jerome C. Muys* for respondent in Nos. 138 and 369. *Solicitor General Cox* for respondents in No. 139. *Edward J. Hickey, Jr.*, and *William G. Mahoney* for Railway Labor Executives' Association, as *amicus curiae,* in support of the petition in No. 138. Reported below: 117 U. S. App. D. C. 387, 330 F. 2d 853.

No. 255. American Ship Building Co. *v.* National Labor Relations Board. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted limited to Question 2 presented by the petition which reads as follows:

"2. Whether, under Section 8 (d) (4), the 1947 Amendment to the National Labor Relations Act, an employer lockout is a corollary of the employees' statutory right to strike?"

William S. Tyson for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 118 U. S. App. D. C. 78, 331 F. 2d 839.

No. 313. DOUGLAS *v.* ALABAMA. Petition for writ of certiorari to the Court of Appeals of Alabama granted limited to Question 1 presented by the petition which reads as follows:

"1. Is the defendant in a criminal trial deprived of due process of law when the prosecutor knowingly calls an alleged accomplice to the stand to secure from him a refusal to testify and when his presence on the stand is used as a pretense for reading to the jury an alleged confession of the witness which is inadmissible against the defendant?"

Bryan A. Chancey, Robert S. Gordon and *Charles Cleveland* for petitioner. *Richmond M. Flowers,* Attorney General of Alabama, and *Paul T. Gish, Jr.,* Assistant Attorney General, for respondent. Reported below: 42 Ala. App. 314, 163 So. 2d 477.

No. 10, Misc. POINTER *v.* TEXAS. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Court of Criminal Appeals of Texas granted. Case transferred to the appellate docket. *Orville A. Harlan* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 375 S. W. 2d 293.

No. 212, Misc. ANGELET *v.* FAY, WARDEN. 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. *Leon B. Polsky* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Barry Mahoney,* Assistant Attorney General, and *Brenda Soloff,* Deputy Assistant Attorney General, for respondent. Reported below: 333 F. 2d 12.

No. 149. ARMSTRONG *v.* MANZO ET UX. Court of Civil Appeals of Texas, Eighth Supreme Judicial District. Certiorari granted. *Ewell Lee Smith, Jr.*, for petitioner. *Eugene T. Edwards* for respondents. Reported below: 371 S. W. 2d 407.

Certiorari Denied. (See also No. 68, *ante*, p. 2; No. 250, *ante*, p. 8; No. 259, *ante*, p. 7; No. 260, *ante*, p. 9; No. 329, *ante*, p. 10; No. 273, Misc., *ante*, p. 11; and Misc. Nos. 25, 52 and 108, *supra*.)

No. 70. T. SMITH & SON, INC. *v.* WILSON ET AL. C. A. 5th Cir. Certiorari denied. *Virgil M. Wheeler, Jr.*, for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for respondent Donovan. Reported below: 328 F. 2d 313.

No. 74. MILLER ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Charles S. Wilcox* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Gilbert E. Andrews* and *Crombie J. D. Garrett* for respondent. Reported below: 327 F. 2d 846.

No. 76. CORTEZ CO. *v.* MANATEE COUNTY ET AL. Supreme Court of Florida. Certiorari denied. *Robert E. Knowles* for petitioner. *Kenneth W. Cleary* for Manatee County, and *James W. Kynes,* Attorney General of Florida, and *Robert C. Parker* and *James T. Carlisle,* Assistant Attorneys General, for Trustees of the Internal Improvement Fund of the State of Florida, respondents. Reported below: 159 So. 2d 871.

No. 85. RHODES *v.* TAYLOR ET AL. Supreme Court of Nebraska. Certiorari denied. Reported below: 176 Neb. 130, 125 N. W. 2d 200.

No. 78. Commerce Co., doing business as Lamar Hotel *v.* National Labor Relations Board. C. A. 5th Cir. Certiorari denied. *Charles R. Vickery, Jr.*, for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 328 F. 2d 600.

No. 79. American Airlines, Inc. *v.* Manning et al. C. A. 2d Cir. Certiorari denied. *Arthur M. Wisehart* for petitioner. *Asher W. Schwartz* for respondents. Reported below: 329 F. 2d 32.

No. 80. Smith *v.* United States. Court of Claims. Certiorari denied. *John P. Witsil* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *J. F. Bishop* for the United States.

No. 84. Kemper *v.* Dayton Bar Association. Supreme Court of Ohio. Certiorari denied. *Sidney G. Kusworm, Sr.*, for petitioner. *P. Eugene Smith* for respondent. Reported below: 175 Ohio St. 285, 194 N. E. 2d 431.

No. 87. California *v.* United States. C. A. 9th Cir. Certiorari denied. *R. B. Pegram* for petitioner. *Solicitor General Cox, Roger P. Marquis* and *Hugh Nugent* for the United States. Reported below: 328 F. 2d 729.

No. 92. Albina Engine & Machine Works et al. *v.* O'Leary, Deputy Commissioner, Bureau of Employees' Compensation, Department of Labor, et al. C. A. 9th Cir. Certiorari denied. *Floyd A. Fredrickson* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondent O'Leary. Reported below: 328 F. 2d 877.

No. 88. Eddington *v.* United States. C. A. 7th Cir. Certiorari denied. *John I. Heise, Jr.*, and *Alfred L. Scanlan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 328 F. 2d 760.

No. 94. Perk, County Auditor of Cuyahoga County, Ohio *v.* Park Investment Co. et al. Supreme Court of Ohio. Certiorari denied. *John T. Corrigan* and *John L. Dowling* for petitioner. *John E. Forrester* and *Ralph D. Kovanda* for respondent Park Investment Co. *J. Hall Kellogg* for Cleveland Association of Building Owners and Managers, as *amicus curiae*, in opposition. Reported below: 175 Ohio St. 410, 195 N. E. 2d 908.

No. 97. In re Rogers. Supreme Court of California. Certiorari denied.

No. 101. Raible *v.* Puerto Rico Industrial Development Co. C. A. 1st Cir. Certiorari denied. *Luis E. Dubon* for petitioner.

No. 104. Hug *v.* United States. C. A. 6th Cir. Certiorari denied. *Morris A. Shenker, Murry L. Randall, Jacques M. Schiffer* and *Robert Tross* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 329 F. 2d 475.

No. 106. Fair Share Organization, Inc., et al. *v.* Philip Nagdeman & Sons, Inc. Appellate Court of Indiana. Certiorari denied. *Hilbert L. Bradley* and *Charles P. Howard, Jr.*, for petitioners. *Owen W. Crumpacker* for respondent. Reported below: —— Ind. App. ——, 193 N. E. 2d 257.

No. 108. NATIONAL SURETY CORP. *v.* UNITED STATES FOR THE USE AND BENEFIT OF OLMOS BUILDING MATERIALS CO. C. A. 5th Cir. Certiorari denied. *Dayton G. Wiley* for petitioner. Reported below: 327 F. 2d 254.

No. 109. LETOWT ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Gilbert E. Andrews* for respondent.

No. 112. WEST VIRGINIA EX REL. DANDY *v.* THOMPSON, JUDGE, ET AL. Supreme Court of Appeals of West Virginia. Certiorari denied. *Stanley E. Preiser* for petitioner. *Charles M. Walker* for respondents. Reported below: 148 W. Va. ——, 134 S. E. 2d 730.

No. 113. THOMAS ET UX. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Bayley Kohlmeier* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for the United States. Reported below: 329 F. 2d 119.

No. 119. BROWN *v.* ORLEANS PARISH SCHOOL BOARD. Supreme Court of Louisiana. Certiorari denied. *Edward M. Carmouche* for petitioner. *Samuel I. Rosenberg* for respondent. Reported below: 245 La. 792, 161 So. 2d 274.

No. 122. INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION 1377, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 6th Cir. Certiorari denied. *Thurlow Smoot* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 330 F. 2d 242.

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No. 114. HOPPS *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Edward P. Morgan* and *Edward S. O'Neill* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 331 F. 2d 332.

No. 110. KING *v.* YAEGER, WARDEN. Supreme Court of New Jersey. Certiorari denied. *Samuel Kagle* and *Oscar Brown* for petitioner. Reported below: 41 N. J. 595, 198 A. 2d 443.

No. 117. KING ET VIR *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Hugh L. Bailey* for petitioners. *Solicitor General Cox* for the United States. Reported below: 327 F. 2d 495.

No. 118. HENRIKSEN ET AL. *v.* CORY CORP. C. A. 7th Cir. Certiorari denied. *Fred T. Williams* and *Philip W. Amram* for petitioners. *William J. Stellman* for respondent. Reported below: 327 F. 2d 409.

No. 124. SAUNDERS, EXECUTOR, ET AL. *v.* HANSON. C. A. D. C. Cir. Certiorari denied. *John A. Beck* and *Ellis N. Slack* for petitioners. *John Alexander* and *Walter W. Johnson, Jr.,* for respondent. Reported below: 117 U. S. App. D. C. 191, 327 F. 2d 889.

No. 127. MUNN ET AL. *v.* HORVITZ CO. ET AL. Supreme Court of Ohio. Certiorari denied. *Reese Dill* and *Russell B. Day* for petitioners. *William B. Saxbe,* Attorney General of Ohio, *Harry R. Paulino,* Assistant Attorney General, and *Robert B. Krupansky* for respondents. Reported below: 175 Ohio St. 521, 196 N. E. 2d 764.

No. 125. BERKOWITZ *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *I. Arnold Ross* and *Daniel Wilkes* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph Kovner* and *Robert A. Bernstein* for the United States. Reported below: 328 F. 2d 358.

No. 121. RADIATOR SPECIALTY CO. *v.* MICEK. C. A. 9th Cir. Certiorari denied. *Channing L. Richards* for petitioner. *Horace B. Van Valkenburgh* and *Francis A. Utecht* for respondent. Reported below: 327 F. 2d 554.

No. 126. JACKSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *William B. Bryant* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 330 F. 2d 445.

No. 128. DICKIE, ASSIGNEE *v.* SEWER IMPROVEMENT DISTRICT NO. 1 OF DARDANELLE, ARKANSAS, ET AL. C. A. 8th Cir. Certiorari denied. *William M. Clark* for petitioner. Reported below: 328 F. 2d 296.

No. 132. LEWIS ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *William P. Rosenthal* and *Leonard Schanfield* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Norman H. Wolfe* for respondent. Reported below: 328 F. 2d 634.

No. 135. DELEGAL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Samuel A. Cann* and *Julian Hartridge, Jr.*, for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 329 F. 2d 494.

No. 129. LAKEN *v.* CORNMESSER. Appellate Court of Illinois, Second District. Certiorari denied. *John R. Snively* for petitioner. Reported below: 43 Ill. App. 2d 324, 193 N. E. 2d 337.

No. 136. GRIFFIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Samuel A. Cann* and *Julian Hartridge, Jr.*, for petitioner. *Solicitor General Cox* for the United States. Reported below: 329 F. 2d 495.

No. 137. STRAIGHT ET AL., DOING BUSINESS AS PRYOR HAY & GRAIN CO., ET AL. *v.* JAMES TALCOTT, INC. C. A. 10th Cir. Certiorari denied. *L. Keith Smith* and *Josh J. Evans* for petitioners. *David R. Milsten* for respondent. Reported below: 329 F. 2d 1.

No. 141. RED BALL MOTOR FREIGHT, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *Charles D. Mathews, Allen P. Schoolfield, Jr.*, and *J. Parker Connor* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent.

No. 142. FLORIDA EX REL. FOX *v.* WEBSTER. District Court of Appeal of Florida, Third District. Certiorari denied. *Paul A. Louis* for petitioner. *Everett H. Dudley, Jr.*, for respondent. Reported below: 151 So. 2d 14.

No. 143. CHRAMEK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Paul T. McHenry, Jr.*, for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 331 F. 2d 380.

No. 147. BERLIN ET AL. *v.* E. C. PUBLICATIONS, INC., ET AL. C. A. 2d Cir. Certiorari denied. *Julian T. Abeles* for petitioners. Reported below: 329 F. 2d 541.

No. 144. WOXBERG ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Robert A. Neeb, Jr.*, for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl* and *Philip R. Monahan* for the United States. Reported below: 329 F. 2d 284.

No. 146. COX, ADMINISTRATOR *v.* HECKER ET AL. C. A. 3d Cir. Certiorari denied. *Robert F. Jackson* for petitioner. *Francis E. Shields* for respondents. Reported below: 330 F. 2d 958.

No. 150. MALAXA *v.* KENNEDY, ATTORNEY GENERAL. C. A. D. C. Cir. Certiorari denied. *Henry I. Fillman* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *Pauline B. Heller* for respondent.

No. 151. CHANCE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Edward Worton, Joseph P. Manners, W. G. Ward* and *Chester Bedell* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 322 F. 2d 201.

No. 154. FIDELITY-BALTIMORE NATIONAL BANK *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Richard F. Cleveland* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harold C. Wilkenfeld* and *Crombie J. D. Garrett* for the United States. Reported below: 328 F. 2d 953.

No. 155. BREEN ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Robert N. Anderson* for respondent. Reported below: 328 F. 2d 58.

No. 153. Dilley, Administratrix *v.* Chesapeake & Ohio Railway Co. C. A. 6th Cir. Certiorari denied. *Samuel T. Gaines* for petitioner. *Richard T. Rector* for respondent. Reported below: 327 F. 2d 249.

No. 156. Bassi *v.* United States. C. A. 2d Cir. Certiorari denied. *James J. Hanrahan* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 330 F. 2d 704.

No. 157. American Export Lines, Inc. *v.* Ammar. C. A. 2d Cir. Certiorari denied. *James M. Estabrook* for petitioner. *Herman N. Rabson, Robert Klonsky* and *Philip F. DiCostanzo* for respondent. Reported below: 326 F. 2d 955.

No. 158. Boston Metals Co. et al. *v.* O'Hearne, Deputy Commissioner, Fourth Compensation District, Bureau of Employees' Compensation, Department of Labor. C. A. 4th Cir. Certiorari denied. *Richard C. Whiteford* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *David L. Rose* for respondent. Reported below: 329 F. 2d 504.

No. 160. Smith *v.* United States. C. A. 8th Cir. Certiorari denied. *Maurice J. Walsh* and *Anna R. Lavin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 331 F. 2d 265.

No. 162. L. P. Steuart, Inc. *v.* Matthews. C. A. D. C. Cir. Certiorari denied. *Joseph S. McCarthy* for petitioner. *Joseph D. Bulman, Sidney M. Goldstein* and *Roscoe A. Faretta* for respondent. Reported below: 117 U. S. App. D. C. 279, 329 F. 2d 234.

No. 161. SCOLNICK ET UX. *v.* LEFKOWITZ ET AL. C. A. 2d Cir. Certiorari denied. Petitioners *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Philip Kahaner* and *Herbert J. Wallenstein*, Assistant Attorneys General, for respondents. Reported below: 329 F. 2d 716.

No. 163. ORLANDO *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Melvin B. Lewis* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 327 F. 2d 185.

No. 167. ATLANTIC CITY, NEW JERSEY *v.* CAPOROSSI. C. A. 3d Cir. Certiorari denied. *Samuel P. Orlando* and *George W. Shadoan* for petitioner. *Ralph W. Campbell* for respondent. Reported below: 328 F. 2d 620.

No. 168. CHICAGO & EASTERN ILLINOIS RAILROAD CO. ET AL. *v.* KERN ET AL. Appellate Court of Illinois, First District. Certiorari denied. *James A. Velde* for petitioners. *Mayer Goldberg* for respondents. Reported below: 44 Ill. App. 2d 468, 195 N. E. 2d 197.

No. 170. ZAFFARANO *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Vincent Hallinan* and *Carl B. Shapiro* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 330 F. 2d 114.

No. 173. ALLEN ET AL. *v.* BROWN ET AL. C. A. 4th Cir. Certiorari denied. *Geo. Stephen Leonard* for petitioners. *David W. Robinson* for nonpetitioning School District parties in support of the petition. Reported below: 328 F. 2d 618.

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No. 174. Local 542, International Union of Operating Engineers, AFL–CIO *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 328 F. 2d 850.

No. 175. Montreal Securities, Inc. *v.* United States. Court of Claims. Certiorari denied. *Carl L. Shipley* and *Thomas A. Ziebarth* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Richard S. Salzman* for the United States. Reported below: 165 Ct. Cl. 120, 329 F. 2d 956.

No. 176. Technograph Printed Circuits, Ltd., et al. *v.* Bendix Corp. C. A. 4th Cir. Certiorari denied. *Walter J. Blenko* and *Walter J. Blenko, Jr.,* for petitioners. *Benjamin C. Howard, Harold J. Birch* and *Edward F. McKie, Jr.,* for respondent. Reported below: 327 F. 2d 497.

No. 177. American Can Co. *v.* New Jersey. Supreme Court of New Jersey. Certiorari denied. *Samuel M. Coombs, Jr.,* for petitioner. *Arthur J. Sills,* Attorney General of New Jersey, and *Charles J. Kehoe,* Deputy Attorney General, for respondent. Reported below: 42 N. J. 32, 198 A. 2d 753.

No. 182. Texas State AFL–CIO et al. *v.* Kennedy, Attorney General, et al. C. A. D. C. Cir. Certiorari denied. *Charles J. Morris* and *J. Albert Woll* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for respondents. *Martin L. Friedman* and *Michael J. Shea* for Alvarado et al., intervenor-respondents. Reported below: 117 U. S. App. D. C. 343, 330 F. 2d 217.

No. 180. GIORDANO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob P. Lefkowitz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States.

No. 183. WATSON *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph I. Stone* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 336 F. 2d 183.

No. 184. BENEFICIAL FINANCE CO. OF NORTH JERSEY *v.* RAY, TRUSTEE. C. A. 5th Cir. Certiorari denied. *William Gresham Ward* for petitioner. *J. Edward Worton* for respondent. Reported below: 328 F. 2d 55.

No. 185. THOMAS *v.* YOUNGSTOWN SHEET & TUBE CO. ET AL. C. A. 10th Cir. Certiorari denied. *Allen A. Thoreen* and *Clayton H. Morrison* for petitioner. *Samuel S. Sherman, Jr.*, for respondent Webb & Knapp, Inc. Reported below: 327 F. 2d 667.

No. 186. MENSIK ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *Kinsey T. James* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Meyer Rothwacks* and *Carolyn R. Just* for respondent. Reported below: 328 F. 2d 147.

No. 190. MOUNT HOLLY-BURLINGTON BROADCASTING CO., INC. *v.* HALPERN ET AL., DOING BUSINESS AS BURLINGTON BROADCASTING CO., ET AL. C. A. D. C. Cir. Certiorari denied. *Benito Gaguine* and *Joseph J. Kessler* for petitioner. *Solicitor General Cox* and *Henry Geller* for respondent Federal Communications Commission. Reported below: 118 U. S. App. D. C. 28, 331 F. 2d 774.

No. 187. THOMAS ORGAN CO. *v.* NEAL ET AL., DOING BUSINESS AS WORK SHOP PUBLICATIONS. C. A. 9th Cir. Certiorari denied. *Warren T. Jessup* for petitioner. Reported below: 325 F. 2d 978.

No. 188. FIOCCHI ET AL., DOING BUSINESS AS CAESAR FIOCCHI CO., ET AL. *v.* ROBERT G. REGAN CO. Supreme Court of Illinois. Certiorari denied. *Kenneth S. Lewis* for petitioners. *Gerald C. Snyder* for respondent.

No. 191. HOULIHAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Allen S. Stim* and *Menahem Stim* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 332 F. 2d 8.

No. 192. KEEGAN *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Edward J. Calihan, Jr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 331 F. 2d 257.

No. 194. CASS ET AL. *v.* YOUNGSTOWN SHEET & TUBE CO. C. A. 5th Cir. Certiorari denied. *William Van-Dercreek* for petitioners. *William J. Harnisch* and *John L. Roach* for respondent. Reported below: 329 F. 2d 106.

No. 207. RETAIL CLERKS UNION, 1550, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *S. G. Lippman* and *Tim L. Bornstein* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *John B. Hollister* for Kroger Company, respondents. Reported below: 117 U. S. App. D. C. 336, 330 F. 2d 210.

No. 195. AMERICAN HARDWARE SUPPLY CO. *v.* GENERAL WAREHOUSEMEN & EMPLOYEES UNION No. 636. C. A. 3d Cir. Certiorari denied. *Thomas N. Griggs, D. Malcolm Anderson* and *David B. Fawcett* for petitioner. *Hugh J. Beins* for respondent. Reported below: 329 F. 2d 789.

No. 196. AIR TERMINAL SERVICES, INC. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Edmund D. Campbell* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *Harvey L. Zuckman* for the United States. Reported below: 165 Ct. Cl. 525, 330 F. 2d 974.

No. 197. URGA *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. *John Parkhill* for petitioner.

No. 198. BOURN *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. *Robert C. Handwerk* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Irwin A. Seibel* and *Nathaniel H. Goodrich* for respondents.

No. 200. SPATUZZA ET AL. *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *George F. Callaghan* and *Maurice J. Walsh* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 331 F. 2d 214.

No. 203. APPALACHIAN POWER CO. *v.* FEDERAL POWER COMMISSION. C. A. 4th Cir. Certiorari denied. *Whitney North Seymour, Richard Hawkins, George D. Gibson* and *T. Justin Moore, Jr.*, for petitioner. *Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock, Peter A. Dammann, Josephine H. Klein* and *Drexel D. Journey* for respondent. Reported below: 328 F. 2d 237.

No. 199. CRISTIANI *v.* ICARD, MERRILL, CULLIS & TIMM ET AL. Supreme Court of Florida. Certiorari denied.

No. 204. PEARL BEER DISTRIBUTING CO. OF JEFFERSON COUNTY, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *John H. Benckenstein* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Warren M. Davison* for respondent. Reported below: 331 F. 2d 301.

No. 206. JACKSONVILLE TERMINAL CO. ET AL. *v.* FLORIDA EAST COAST RAILWAY CO. C. A. 5th Cir. Certiorari denied. *Louis Kurz, John S. Cox* and *Edward McCarthy* for petitioners. *Chester Bedell* and *Nathan Bedell* for respondent. Reported below: 328 F. 2d 720.

No. 208. ASSOCIATED STORES, INC. *v.* INDUSTRIAL LOAN & INVESTMENT CO. C. A. 4th Cir. Certiorari denied. *J. C. B. Ehringhaus, Jr.*, for petitioner. *Howard E. Manning* for respondent.

No. 209. STATE NEON SIGN CO., INC. *v.* FRANKLIN LIFE INSURANCE CO. C. A. 5th Cir. Certiorari denied. *Joseph S. Crespi* for petitioner. Reported below: 329 F. 2d 456.

No. 210. BERLENBACH, DOING BUSINESS AS SKI-FREE CO. *v.* ANDERSON & THOMPSON SKI CO., INC. C. A. 9th Cir. Certiorari denied. *Edward B. Gregg* for petitioner. *James W. Dent* for respondent. Reported below: 329 F. 2d 782.

No. 213. W. T. GRANT CO. *v.* SKELTON. C. A. 5th Cir. Certiorari denied. *Hosea Alexander Stephens* for petitioner. Reported below: 331 F. 2d 593.

No. 211. VECCHIO, ADMINISTRATRIX *v.* ANHEUSER-BUSCH, INC. C. A. 2d Cir. Certiorari denied. *Augustin J. San Filippo* and *Borris M. Komar* for petitioner. *William A. Roe* for respondent. Reported below: 328 F. 2d 714.

No. 212. SEMLER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *David M. Richman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 332 F. 2d 6.

No. 214. PHILLIPS & BUTTORFF CORP. *v.* DENNEY ET AL. C. A. 6th Cir. Certiorari denied. *William Waller, Cecil Sims* and *Clarence Evans* for petitioner. *E. J. Walsh* and *John J. Hooker* for respondents. Reported below: 331 F. 2d 249.

No. 215. TEMPLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Myer H. Gladstone* and *James W. Dorsey* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 330 F. 2d 724.

No. 216. TERRY & WRIGHT, INC., ET AL. *v.* BLANCHARD ET AL., DOING BUSINESS AS BLANCHARD & JENKINS CONSTRUCTION CO. C. A. 6th Cir. Certiorari denied. *Robert P. Hobson* and *John P. Sandidge* for petitioners. *Stuart E. Lampe* for respondents. Reported below: 331 F. 2d 467.

No. 220. ROOTED HAIR, INC. *v.* A & B WIG CO., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Robert W. Fiddler* for petitioner. *Maxwell James* for respondents. Reported below: 329 F. 2d 761.

No. 217. General Bancshares Corp. *v.* Commissioner of Internal Revenue. C. A. 8th Cir. Certiorari denied. *Henry C. Lowenhaupt* and *Owen T. Armstrong* for petitioner. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for respondent. Reported below: 326 F. 2d 712.

No. 218. Hyatt et ux. *v.* Commissioner of Internal Revenue. C. A. 5th Cir. Certiorari denied. *Stanley Schoenbaum* and *John Peace* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Michael I. Smith* for respondent. Reported below: 325 F. 2d 715.

No. 219. Fernandez et al. *v.* United States. C. A. 9th Cir. Certiorari denied. *Frederick Bernays Wiener* and *Howard R. Lonergan* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 329 F. 2d 899.

No. 221. Cannon *v.* United States. C. A. 7th Cir. Certiorari denied. *George J. Moran* for petitioner. *Solicitor General Cox* for the United States. Reported below: 328 F. 2d 763.

No. 222. Dean *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *Luther E. Jones, Jr.*, for petitioner. Reported below: 379 S. W. 2d 916.

No. 224. Detroit Vital Foods, Inc. *v.* United States. C. A. 6th Cir. Certiorari denied. *Milton A. Bass* and *Solomon H. Friend* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 330 F. 2d 78.

No. 225. CASTRO ET AL. *v.* CENTRAL AGUIRRE SUGAR CO. C. A. 1st Cir. Certiorari denied. *Ginoris Vizcarra* for petitioners. *Antonio M. Bird* for respondent. Reported below: 330 F. 2d 68.

No. 227. DAVIS ET AL. *v.* MCLAUGHLIN, ADMINISTRATRIX. C. A. 9th Cir. Certiorari denied. *Harry B. Dowsing* for petitioners. *Guy Knupp, Howard S. Smith* and *Katsuro Miho* for respondent. Reported below: 326 F. 2d 881.

No. 230. LEVIN & WEINTRAUB *v.* ROSENBERG, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. *Benjamin Weintraub* for petitioner. Reported below: 330 F. 2d 98.

No. 233. MONGOOSE GIN CO. ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Darrell B. Hester* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn* and *Richard S. Salzman* for the United States. Reported below: 331 F. 2d 483.

No. 235. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1242 *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Richard H. Markowitz* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 330 F. 2d 492.

No. 241. CLOWER ET AL. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. *Jac Chambliss* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *Arthur S. Keyser* for Tennessee Products & Chemical Corp., respondents. Reported below: 329 F. 2d 873.

No. 231. EIGHTEENTH AVENUE LAND CO. *v.* CHERNO, TRUSTEE IN BANKRUPTCY. C. A. 2d Cir. Certiorari denied. *Seymour H. Kligler* for petitioner. *Henry G. Ingraham* and *Emanuel Becker* for respondent.

No. 236. TAUSSIG *v.* MCNAMARA, SECRETARY OF DEFENSE, ET AL. C. A. D. C. Cir. Certiorari denied. *John F. Doyle* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondents.

No. 239. PICKLE *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *William Earl Badgett* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent.

No. 242. WOODSON, TRUSTEE IN BANKRUPTCY, ET AL. *v.* GILMER. C. A. 4th Cir. Certiorari denied. *William S. Aaron, Jr.,* and *James H. Michael, Jr.,* for petitioners. *Carl E. Hennrich* for respondent. Reported below: 331 F. 2d 147.

No. 243. GOODING ET UX. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Ernestine B. Powell* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Richard J. Heiman* for the United States. Reported below: 164 Ct. Cl. 197, 326 F. 2d 988.

No. 248. LITTLE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Malcolm I. Frank* and *Thurman Arnold* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 331 F. 2d 287.

No. 244. CHATSWORTH COOPERATIVE MARKETING ASSOCIATION ET AL. *v.* INTERSTATE COMMERCE COMMISSION. C. A. 7th Cir. Certiorari denied. *Norman Miller* for petitioners. *Solicitor General Cox* and *Robert W. Ginnane* for respondent.

No. 247. JANEL SALES CORP. *v.* PARKE, DAVIS & CO. C. A. 2d Cir. Certiorari denied. *Herman Young* for petitioner. *James F. Hoge* for respondent. Reported below: 328 F. 2d 105.

No. 249. BROWN *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *John S. Wrinkle* for petitioner. *George F. McCanless,* Attorney General of Tennessee, and *Thomas E. Fox,* Assistant Attorney General, for respondent.

No. 252. FLEISCHER, TRUSTEE *v.* A. A. P., INC., ET AL. C. A. 2d Cir. Certiorari denied. *Gustave B. Garfield* for petitioner. *Daniel Huttenbrauck* for A. A. P., Inc., et al., *Louis Nizer* for Paramount Pictures, Inc., et al., *George A. Katz* for Dumont Broadcasting Corp., and *Alfred H. Wasserstrom* for King Features Syndicate, Inc., respondents. Reported below: 329 F. 2d 424.

No. 253. LONG ET AL., DOING BUSINESS AS LONG CONSTRUCTION CO. *v.* JOHNS-MANVILLE SALES CORP. C. A. 6th Cir. Certiorari denied. *Charles L. Levin* for petitioners. *Leroy G. Vandeveer* for respondent. Reported below: 327 F. 2d 611.

No. 257. CARSON *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: 329 F. 2d 319.

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No. 258. STRITE ET AL., EXECUTORS *v.* MCGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Henry D. O'Connor* for petitioners. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for respondent. Reported below: 330 F. 2d 234.

No. 261. MIRABILE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Joseph S. Kaufman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 330 F. 2d 676.

No. 263. STAHL ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *George T. Altman* for petitioners. *Solicitor General Cox* for respondent.

No. 264. TATE, TRUSTEE *v.* NATIONAL ACCEPTANCE CO. OF AMERICA. C. A. 6th Cir. Certiorari denied. *John A. Rowntree* for petitioner. *Murray Seasongood* and *Joseph A. Segal* for respondent. Reported below: 332 F. 2d 648.

No. 266. JOHNS-MANVILLE CORP. *v.* ITALIT, INC. C. A. 5th Cir. Certiorari denied. *C. Willard Hayes, Irvin H. Rimel* and *Joseph J. Kelly* for petitioner. *Stanton T. Lawrence, Jr.,* and *Robert McKay* for respondent. Reported below: 331 F. 2d 663.

No. 269. PULLIAM *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 10th Cir. Certiorari denied. *Morrison Shafroth* and *James H. Skinner, Jr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Loring W. Post* for respondent. Reported below: 329 F. 2d 97.

No. 267. HELLNER ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Paul R. Harmel* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: 163 Ct. Cl. 575.

No. 268. LEARY ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William H. Collins* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Meyer Rothwacks* for the United States. Reported below: 330 F. 2d 497.

No. 270. REPUBLIC ENGINEERING & MANUFACTURING CO. *v.* MOSKOVITZ ET AL. St. Louis Court of Appeals of Missouri. Certiorari denied. *Bernard Mellitz* and *Malcolm I. Frank* for petitioner. *Edmund C. Rogers, Lawrence C. Kingsland* and *Estill E. Ezell* for respondents. Reported below: 376 S. W. 2d 649.

No. 271. WEBSTER ET AL. *v.* CITY OF NEWARK ET AL. Supreme Court of New Jersey. Certiorari denied. *Seymour Margulies* for petitioners. *David L. Krooth, Norman S. Altman, Victor A. Altman, Norman N. Schiff* and *Augustine J. Kelly* for respondents.

No. 273. KOSSICK *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: 330 F. 2d 933.

No. 274. KORZEN, COUNTY TREASURER, COOK COUNTY, ILLINOIS, ET AL. *v.* FORD MOTOR CO. ET AL. Supreme Court of Illinois. Certiorari denied. *Daniel P. Ward* and *Edward J. Hladis* for petitioners. *Solicitor General Cox* for the United States, and *Burke Williamson* for Ford Motor Co., respondents. Reported below: 30 Ill. 2d 314, 196 N. E. 2d 656.

No. 276. UNITED FURNITURE WORKERS OF AMERICA, AFL–CIO, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *Mitchell J. Cooper* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Nancy M. Sherman* for respondent. Reported below: 118 U. S. App. D. C. 350, 336 F. 2d 738.

No. 277. PERRY *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Charles F. Blanchard* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 333 F. 2d 1012.

No. 279. PAPALIA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Terry Milburn* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 333 F. 2d 620.

No. 280. KANAREK *v.* UNITED STATES. Court of Claims. Certiorari denied. *Irving A. Kanarek,* petitioner, *pro se. Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: 161 Ct. Cl. 37, 314 F. 2d 802.

No. 281. WICKER *v.* NATIONAL SURETY CORP. C. A. 4th Cir. Certiorari denied. *Thos. A. Williams, Jr.,* for petitioner. *Aubrey R. Bowles, Jr.,* and *H. Armistead Boyd* for respondent. Reported below: 330 F. 2d 1009.

No. 290. MERRIOTT *v.* UNITED STATES. Court of Claims. Certiorari denied. *John J. Pyne* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: 163 Ct. Cl. 261.

No. 284. A. M. Byers Co. *v.* Jamison, Administrator. C. A. 3d Cir. Certiorari denied. *Wm. A. Schnader* and *Samuel D. Slade* for petitioner. Reported below: 330 F. 2d 657.

No. 287. People's Educational Camp Society, Inc. *v.* Commissioner of Internal Revenue. C. A. 2d Cir. Certiorari denied. *I. Herman Sher* and *Eugene Gressman* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *John B. Jones, Jr.*, for respondent. Reported below: 331 F. 2d 923.

No. 289. Doherty et al. *v.* United States. C. A. 3d Cir. Certiorari denied. *Raymond W. Bergan* and *Edward Davis* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 333 F. 2d 292.

No. 293. Pasha et al. *v.* United States. C. A. 7th Cir. Certiorari denied. *Anna R. Lavin* and *Edward J. Calihan, Jr.*, for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 332 F. 2d 193.

No. 297. Bischoff *v.* Pereles, Guardian, et al. Supreme Court of Wisconsin. Certiorari denied. *Martin R. Paulsen* for petitioner. *Nathan Pereles, Jr., pro se,* for respondents. Reported below: 22 Wis. 2d 198, 125 N. W. 2d 344.

No. 316. Allied Chemical Corp. *v.* Hampton Roads Carriers, Inc. C. A. 4th Cir. Certiorari denied. *Henry N. Longley* for petitioner. *R. Arthur Jett* for respondent. Reported below: 329 F. 2d 387.

No. 299. INTERNATIONAL ORGANIZATION MASTERS, MATES & PILOTS OF AMERICA, INC., ET AL. *v.* INTERNATIONAL ORGANIZATION MASTERS, MATES & PILOTS OF AMERICA, LOCAL No. 2, ET AL. Supreme Court of Pennsylvania. Certiorari denied. *Richard H. Markowitz* for petitioners. *William A. Goichman* and *Paul Ribner* for respondents. Reported below: 414 Pa. 277, 199 A. 2d 432.

No. 303. MELNICK ET UX. *v.* MINA ET UX. C. A. 3d Cir. Certiorari denied. *Edward B. Bergman* for petitioners. Reported below: 329 F. 2d 648.

No. 309. KAVOOKJIAN ET AL. *v.* TOWN OF DARIEN. Supreme Court of Errors of Connecticut. Certiorari denied. *Abraham Davis Slavitt* for petitioners. *Warren W. Eginton* and *John F. Spindler* for respondent. Reported below: 151 Conn. 659, 202 A. 2d 147.

No. 315. RESTAURANT LEAGUE OF NEW YORK, INC., ET AL. *v.* TOWNSEND ET AL. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. *Herbert Burstein* for petitioners. Reported below: 20 App. Div. 2d 852, 248 N. Y. S. 2d 201.

No. 317. CUDDY, ADMINISTRATRIX *v.* WESTERN MARYLAND RAILWAY. C. A. 3d Cir. Certiorari denied. *Elwood S. Levy* for petitioner. *William C. Purnell* for respondent. Reported below: 332 F. 2d 371.

No. 323. RAMEY *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Stanley M. Dietz* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 118 U. S. App. D. C. 355, 336 F. 2d 743.

No. 318. W. R. B. Corp. et al. *v.* Geer, doing business as Odell Geer Co., et al. C. A. 5th Cir. Certiorari denied. *Robert C. Howell* for petitioners. *Coleman Gay* for respondents. Reported below: 332 F. 2d 180.

No. 319. Scurlock et al. *v.* Meltzer; and

No. 326. Sloan et al. *v.* Meltzer. C. A. 4th Cir. Certiorari denied. *Armistead L. Boothe, Ganson Purcell, John A. Beck* and *Louis Koutoulakos* for petitioners in No. 319. *Charles S. Rhyne, Edward D. Means, Jr.,* and *Courts Oulahan* for petitioners in No. 326. *William E. Haudek, Mordecai Rosenfeld* and *Rutherford Day* for respondent. Reported below: 330 F. 2d 946.

No. 320. Allen *v.* United States. C. A. 1st Cir. Certiorari denied. *R. J. Shortlidge, Jr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 333 F. 2d 679.

No. 322. Carter et al. *v.* United States. C. A. 8th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Cox* for the United States. Reported below: 332 F. 2d 728.

No. 324. Local 1566, International Longshoremen's Association, AFL–CIO *v.* National Labor Relations Board. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 330 F. 2d 492.

No. 331. Shapiro *v.* Leach et al. C. A. 6th Cir. Certiorari denied. *Cecile J. Shapiro,* petitioner, *pro se.* Reported below: 330 F. 2d 617.

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No. 325. AMPTO, INC. *v.* AMERICAN PHOTOCOPY EQUIPMENT CO. Superior Court of New Jersey, Appellate Division. Certiorari denied. *Samuel J. Stoll* for petitioner. *Alfred C. Clapp* for respondent. Reported below: 82 N. J. Super. 531, 198 A. 2d 469.

No. 330. BALTIMORE TRANSIT CO. ET AL. *v.* MARYLAND FOR THE USE OF GEILS ET AL. C. A. 4th Cir. Certiorari denied. *George P. Bowie* for petitioners. *Paul Berman* for respondents. Reported below: 329 F. 2d 738.

No. 333. YAGODA ET AL. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Bernard Weiss* and *Louis Bender* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *Richard J. Heiman* for respondent. Reported below: 331 F. 2d 485.

No. 340. SCOTT *v.* UNITED STATES. C. A. 6th 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: 334 F. 2d 72.

No. 341. ZIMMERMAN *v.* MISSISSIPPI VALLEY BARGE LINE CO. C. A. 3d Cir. Certiorari denied. *S. Eldridge Sampliner* and *Harry Alan Sherman* for petitioner. *Hugh Lynch, Jr.*, for respondent. Reported below: 331 F. 2d 308.

No. 342. HAYS CORP. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 7th Cir. Certiorari denied. *John L. Carey*, for petitioner. *Solicitor General Cox* and *Acting Assistant Attorney General Jones* for respondent. Reported below: 331 F. 2d 422.

No. 344. CAMPBELL ET AL. *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari denied. *S. W. Tucker* and *Henry L. Marsh III* for petitioners.

No. 346. FAIR SHARE ORGANIZATION, INC. *v.* MITNICK, DOING BUSINESS AS CENTRAL FOURTH STREET DRUGS. Supreme Court of Indiana. Certiorari denied. *Hilbert L. Bradley* and *Charles P. Howard, Jr.*, for petitioner. *Carl M. Franceschini* for respondent. Reported below: 245 Ind. 324, 198 N. E. 2d 765.

No. 349. CHRISTENSON, DOING BUSINESS AS CHRISTENSON ELECTRIC CO. *v.* DIVERSIFIED BUILDERS INC. ET AL. C. A. 10th Cir. Certiorari denied. *George W. Latimer* and *Keith E. Taylor* for petitioner. *Allan E. Mecham* for respondents. Reported below: 331 F. 2d 992.

No. 351. GRACE LINE INC. *v.* NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION. Court of Appeals of New York. Certiorari denied. *Alfred Giardino* and *E. Barrett Prettyman, Jr.*, for petitioner. *Lee Pressman* and *David Scribner* for respondent.

No. 357. TESTA *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Jacob Kossman* for petitioner. *Solicitor General Cox* for the United States. Reported below: 334 F. 2d 746.

No. 361. ROBINSON, TRADING AS PALMETTO BROADCASTING CO. (WDKD) *v.* FEDERAL COMMUNICATIONS COMMISSION. C. A. D. C. Cir. Certiorari denied. *James A. McKenna, Jr.*, and *Vernon L. Wilkinson* for petitioner. *Solicitor General Cox* and *Henry Geller* for respondent. Reported below: 118 U. S. App. D. C. 144, 334 F. 2d 534.

No. 362. COHEN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Eugene Gressman* for petitioner. Reported below: 235 Md. 62, 200 A. 2d 368.

No. 364. BELL, ADMINISTRATRIX *v.* TUG SHRIKE ET AL. C. A. 4th Cir. Certiorari denied. *Sidney H. Kelsey* for petitioner. *R. Arthur Jett* for respondents. Reported below: 332 F. 2d 330.

No. 367. AMP INC. *v.* BURNDY CORP. ET AL. C. A. 3d Cir. Certiorari denied. *Truman S. Safford* and *William J. Keating* for petitioner. *Morris Relson, Daniel Gersen* and *George M. Szabad* for respondents. Reported below: 332 F. 2d 236.

No. 379. BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY ET AL. *v.* DAVIS ET AL. C. A. 5th Cir. Certiorari denied. *George F. Wood* and *Palmer Pillans* for petitioners. Reported below: 333 F. 2d 53.

No. 385. GROSSMAN ET VIR *v.* STUBBS ET AL. Supreme Court of New Jersey. Certiorari denied. Petitioners *pro se*. *P. Joseph Marley* for respondents.

No. 394. MENDO WOOD PRODUCTS, INC. *v.* MULDER ET AL. District Court of Appeal of California, First Appellate District. Certiorari denied. *John T. Casey* and *James F. Kemp* for petitioner. *David L. Luce* for respondents. Reported below: 225 Cal. App. 2d 619, 37 Cal. Rptr. 479.

No. 169. COWLES MAGAZINES & BROADCASTING, INC. *v.* CEPEDA. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. *William K. Coblentz* for petitioner. Reported below: 328 F. 2d 869.

No. 66. REILING *v.* LOFTSGAARDEN. Supreme Court of Minnesota. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Robert A. Gearin* for petitioner. *Mortimer B. Miley* for respondent. Reported below: 267 Minn. 181, 126 N. W. 2d 154.

No. 81. WAINWRIGHT, CORRECTIONS DIRECTOR *v.* CULLINS ET AL. Motion of respondents for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *James W. Kynes,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for petitioner. *A. K. Black* for respondents. Reported below: 328 F. 2d 481; 328 F. 2d 619.

No. 100. INTERNATIONAL HARVESTER CO. *v.* WIRTZ, SECRETARY OF LABOR, ET AL. C. A. 5th Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *H. Bascom Thomas, Jr.,* and *Hubard T. Bowyer* for petitioner. *Solicitor General Cox, Charles Donahue, Bessie Margolin* and *Isabelle R. Cappello* for respondent Wirtz. Reported below: 331 F. 2d 462.

No. 164. DARDI *v.* UNITED STATES;

No. 165. ROSENTHAL *v.* UNITED STATES; and

No. 166. BERMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions. *William Lee Frost* for petitioner in No. 164. *Edward D. Burns* for petitioner in No. 165. *Jesse Climenko* and *Milton S. Gould* for petitioner in No. 166. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 330 F. 2d 316.

No. 102. CREEK NATION EAST OF THE MISSISSIPPI *v.* UNITED STATES. Court of Claims. Certiorari denied. MR. JUSTICE BLACK took no part in the consideration or decision of this petition. *Charles Bragman* for petitioner. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: 165 Ct. Cl. 479.

No. 189. FANNER MANUFACTURING CO. *v.* PREFORMED LINE PRODUCTS CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Charles J. Merriam* and *Norman M. Shapiro* for petitioner. *Richard F. Stevens* and *Patrick H. Hume* for respondent. Reported below: 328 F. 2d 265.

No. 339. GATE FILM CLUB *v.* PESCE. C. A. 2d Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Emanuel Redfield* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Paxton Blair,* Solicitor General, and *Ruth Kessler Toch,* Assistant Solicitor General, for respondent.

No. 391. DEMOCRATIC COUNTY COMMITTEE OF PHILADELPHIA, ON BEHALF OF MUSMANNO *v.* COUNTY BOARD OF ELECTIONS OF PHILADELPHIA COUNTY ET AL. Motion of Genevieve Blatt to be added as a party respondent granted. Motion of Charles S. Helmig for leave to file a brief, as *amicus curiae,* granted. Petition for writ of certiorari to the Supreme Court of Pennsylvania denied. *Abraham E. Freedman* for petitioner. *Levy Anderson* for County Board of Elections of Philadelphia County, and *Joseph L. Rauh, Jr.,* and *John Silard* for Blatt, respondents. *Paul Ginsburg* for Charles S. Helmig, as *amicus curiae,* in opposition to the petition. Reported below: 415 Pa. 327, 203 A. 2d 212.

No. 1, Misc. McDONALD *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se.* *John T. Corrigan* and *Gertrude Bauer Mahon* for respondent.

No. 3, Misc. RUIZ *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, and *Albert W. Harris, Jr.,* and *Robert R. Granucci,* Deputy Attorneys General, for respondent.

No. 4, Misc. WILKINS *v.* BANMILLER, WARDEN. C. A. 3d Cir. Certiorari denied. Petitioner *pro se.* *Joseph M. Smith* and *James C. Crumlish, Jr.,* for respondent. Reported below: 325 F. 2d 514.

No. 8, Misc. MILLER *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. Petitioner *pro se.* *Charles Nesbitt,* Attorney General of Oklahoma, and *Hugh H. Collum,* Assistant Attorney General, for respondent. Reported below: 390 P. 2d 253.

No. 12, Misc. BEELER *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. Petitioner *pro se.* *Waggoner Carr,* Attorney General of Texas, and *Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 374 S. W. 2d 237.

No. 13, Misc. DREW *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Petitioner *pro se.* *James C. Crumlish, Jr.,* for respondent. Reported below: 327 F. 2d 174.

No. 16, Misc. JEFFERSON *v.* McGEE, CORRECTION ADMINISTRATOR, ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Stanley Mosk,* Attorney General of California, and *Doris H. Maier,* Assistant Attorney General, for respondents.

No. 272. TRUNKLINE GAS CO. *v.* HARDIN COUNTY. Motion to use record in No. 153, October Term, 1963, granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *Cecil N. Cook* for petitioner. *William Robert Smith* for respondent. Reported below: 330 F. 2d 789.

No. 15, Misc. MEDINA *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: 154 Colo. 4, 387 P. 2d 733.

No. 17, Misc. WHITNEY *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Samuel A. Hirshowitz*, First Assistant Attorney General, and *Mortimer S. Sattler*, Assistant Attorney General, for respondent.

No. 18, Misc. CORTEZ *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Fred Hull* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 328 F. 2d 51.

No. 19, Misc. COLES *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Petitioner *pro se*. *Robert Matthews*, Attorney General of Kentucky, and *George F. Rabe*, Assistant Attorney General, for respondent. Reported below: 377 S. W. 2d 157.

No. 26, Misc. PERRY *v.* ATTORNEY GENERAL ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents.

No. 22, Misc. BURKE ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *Walter J. Hurley* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller,* and *Robert S. Erdahl* for the United States. Reported below: 328 F. 2d 399.

No. 23, Misc. PORTER *v.* FLORIDA. Supreme Court of Florida. Certiorari denied. Petitioner *pro se. James W. Kynes,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent. Reported below: 160 So. 2d 104.

No. 27, Misc. JOHNSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *A. K. Black* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 328 F. 2d 883.

No. 28, Misc. STEM *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *Charles L. Abernethy, Jr.,* for petitioner. *T. W. Bruton,* Attorney General of North Carolina, and *Harry W. McGalliard,* Deputy Attorney General, for respondent.

No. 29, Misc. ORTIZ *v.* UNITED STATES. C. A. 5th 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: 329 F. 2d 381.

No. 30, Misc. GARCIA *v.* CALIFORNIA. Appellate Department, Superior Court of California, County of Los Angeles. Certiorari denied. *Caryl Warner* for petitioner. *Roger Arnebergh, Philip E. Grey* and *Wm. E. Doran* for respondent.

No. 31, Misc. WILLIAMS *v.* UNITED STATES. C. A. 2d 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: 328 F. 2d 887.

No. 33, Misc. MARULLO *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Herbert J. Garon* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 328 F. 2d 361.

No. 34, Misc. GAINES *v.* UNITED STATES. Court of Claims and/or C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 37, Misc. HUFFMAN *v.* DOUGLAS AIRCRAFT CO. ET AL. Supreme Court of North Carolina. Certiorari denied. Petitioner *pro se*. *Lewis B. Carpenter* for respondents. Reported below: 260 N. C. 308, 132 S. E. 2d 614.

No. 39, Misc. JONES *v.* THOMAS, WARDEN. Court of Appeals of Kentucky. Certiorari denied. Reported below: 377 S. W. 2d 155.

No. 40, Misc. GRIFFIN *v.* GLEASON ET AL. C. A. D. C. Cir. Certiorari denied. *Donald H. Dalton* for petitioner. *Solicitor General Cox* for respondents.

No. 41, Misc. HLOZANSKY *v.* COX, WARDEN. Supreme Court of New Mexico. Certiorari denied.

No. 45, Misc. RICCI *v.* NEW YORK. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied.

No. 42, Misc. HILL *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Murray L. Williams* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 328 F. 2d 988.

No. 44, Misc. KILBOURNE *v.* NORTH CAROLINA. C. A. 4th Cir. Certiorari denied.

No. 47, Misc. PRINCE *v.* WORKMEN'S COMPENSATION BOARD. Court of Appeals of New York. Certiorari denied. *Harry S. Thau* for petitioner. *Louis J. Lefkowitz*, Attorney General of New York, and *Philip Kahaner* and *Joel Lewittes*, Assistant Attorneys General, for respondent.

No. 48, Misc. TABOR *v.* UNDERWOOD, U. S. DISTRICT JUDGE. C. A. 6th Cir. Certiorari denied.

No. 49, Misc. WARDEN *v.* HOLMAN, ACTING WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Richmond M. Flowers*, Attorney General of Alabama, and *David W. Clark*, Assistant Attorney General, for respondent. Reported below: 330 F. 2d 524.

No. 50, Misc. FITTS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 328 F. 2d 844.

No. 57, Misc. ROBINSON *v.* CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 5th Cir. Certiorari denied. *Howard W. Lenfant* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondent. Reported below: 326 F. 2d 840.

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No. 51, Misc. MASTRACCHIO *v.* SUPERIOR COURT OF RHODE ISLAND FOR PROVIDENCE COUNTY. Supreme Court of Rhode Island. Certiorari denied. Reported below: —— R. I. ——, 200 A. 2d 10.

No. 54, Misc. NELSON *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 55, Misc. JONES *v.* EYMAN, WARDEN. Supreme Court of Arizona. Certiorari denied. Petitioner *pro se*. *Robert W. Pickrell,* Attorney General of Arizona, and *Merton E. Marks,* Assistant Attorney General, for respondent.

No. 60, Misc. BARTIE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *H. Alva Brumfield* and *Sylvia Roberts* for petitioner. *Solicitor General Cox* for the United States. Reported below: 326 F. 2d 754.

No. 62, Misc. SWAM *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *Paul H. Ferguson* for petitioner. *Solicitor General Cox* for the United States et al. Reported below: 327 F. 2d 431.

No. 63, Misc. DRAPER *v.* WASHINGTON ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *John J. O'Connell,* Attorney General of Washington, and *Stephen C. Way,* Assistant Attorney General, for respondents.

No. 69, Misc. BROOKS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 330 F. 2d 757.

No. 56, Misc. COUTURE *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 64, Misc. FLORES *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.

No. 66, Misc. HIPP *v.* SMITH ET AL. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Donald F. Melhorn* for respondents.

No. 67, Misc. ANDREWS *v.* WILSON, WARDEN. Supreme Court of California. Certiorari denied.

No. 68, Misc. VERNEY *v.* ALASKA. Supreme Court of Alaska. Certiorari denied.

No. 71, Misc. GREEN *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied.

No. 73, Misc. BAKER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Philip R. Monahan* for the United States. Reported below: 329 F. 2d 786.

No. 74, Misc. WHITTINGTON *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents.

No. 75, Misc. COOPER *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Reported below: 276 Ala. 492, 164 So. 2d 488.

No. 76, Misc. RICHARDS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Luke G. Galant* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 329 F. 2d 188.

No. 77, Misc. SLIVA *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 78, Misc. HOPKINS *v.* WASSON ET AL. C. A. 6th Cir. Certiorari denied. *John S. Wrinkle* for petitioner. Reported below: 329 F. 2d 67.

No. 79, Misc. WHITE *v.* NEW HAMPSHIRE. Supreme Court of New Hampshire. Certiorari denied. *Gordon M. Tiffany* for petitioner. Reported below: 105 N. H. 159, 196 A. 2d 33.

No. 80, Misc. HAYMAN *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: 329 F. 2d 546.

No. 82, Misc. JOHNSON *v.* SHOVLIN, STATE HOSPITAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Reported below: 329 F. 2d 645.

No. 83, Misc. SACCENTI *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Joseph A. Solovei* for petitioner. Reported below: 14 N. Y. 2d 1, 196 N. E. 2d 885.

No. 85, Misc. MATTHEWSON ET AL. *v.* MCCUNE, JUDGE, ET AL. C. A. 5th Cir. Certiorari denied. Reported below: 327 F. 2d 1001.

No. 84, Misc. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Gilbert Hahn, Jr.,* and *Jo V. Morgan, Jr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 118 U. S. App. D. C. 133, 332 F. 2d 720.

No. 86, Misc. YATES *v.* OHIO. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se. John T. Corrigan* for respondent.

No. 90, Misc. JACKSON *v.* UNITED STATES. C. A. 8th 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: 330 F. 2d 679.

No. 91, Misc. DUGGIN *v.* TENNESSEE. C. A. 6th Cir. Certiorari denied.

No. 92, Misc. WHITE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Alan C. Kohn* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 330 F. 2d 811.

No. 94, Misc. PARISH *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. B. Hodges* for petitioner. *Solicitor General Cox* for the United States. Reported below: 328 F. 2d 610.

No. 96, Misc. BLITZ *v.* BOOG; and

No. 97, Misc. BLITZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for respondent in No. 96, Misc., and for the United States in No. 97, Misc. Reported below: 328 F. 2d 596.

No. 95, Misc. STEVENSON *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 155 Ct. Cl. 592.

No. 100, Misc. FERGUSON *v.* WHITEHURST, COMMONWEALTH'S ATTORNEY FOR CITY OF NORFOLK, VIRGINIA. C. A. 4th Cir. Certiorari denied.

No. 101, Misc. SMITH *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 103, Misc. WHITE *v.* DUNCAN, COMMISSIONER, ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondents.

No. 104, Misc. JACK *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied. Reported below: 63 Wash. 2d 632, 388 P. 2d 566.

No. 110, Misc. WAI LAU *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Gilbert S. Rosenthal* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 329 F. 2d 310.

No. 111, Misc. WISEMAN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 112, Misc. HENIG ET AL. *v.* ODORISIO ET AL. C. A. 3d Cir. Certiorari denied.

No. 113, Misc. HOOD *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 116, Misc. DRAPER *v.* REILLY, SHERIFF, ET AL. C. A. 9th Cir. Certiorari denied.

No. 118, Misc. SCHUMANN *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 121, Misc. BUTLER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 122, Misc. JOHNSON *v.* PENNSYLVANIA BOARD OF PAROLE ET AL. C. A. 3d Cir. Certiorari denied.

No. 124, Misc. DAVIS *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied.

No. 126, Misc. ERENREICH *v.* UNITED STATES. Court of Claims. Certiorari denied. *John Silard* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 164 Ct. Cl. 214.

No. 128, Misc. WALKER *v.* KENTUCKY. Court of Appeals of Kentucky. Certiorari denied. Reported below: 377 S. W. 2d 91.

No. 129, Misc. STELLO *v.* UNITED STATES. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *J. F. Bishop* for the United States. Reported below: 164 Ct. Cl. 750.

No. 130, Misc. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Joseph I. Stone* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 336 F. 2d 183.

No. 131, Misc. TOLER *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. Reported below: 332 F. 2d 425.

No. 132, Misc. SCOTT *v.* CITIZENS NATIONAL BANK OF LOS ANGELES. Supreme Court of California. Certiorari denied.

No. 134, Misc. ALDRIDGE *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 136, Misc. MILLS *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied.

No. 137, Misc. SETH *v.* BRITISH OVERSEAS AIRWAYS CORP. C. A. 1st Cir. Certiorari denied. *John M. Hall* for petitioner. *George N. Tompkins, Jr.*, for respondent. Reported below: 329 F. 2d 302.

No. 138, Misc. MOLE *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Lawrence C. Moore* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 330 F. 2d 1022.

No. 139, Misc. PULLITE *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 142, Misc. MOORE *v.* UNITED STATES. C. A. 8th 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: 329 F. 2d 821.

No. 150, Misc. SIMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 146, Misc. LEGERE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Charles C. Parlin, Jr.*, for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 332 F. 2d 8.

No. 148, Misc. ROBISON *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 329 F. 2d 156.

No. 149, Misc. WILLIAMS *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 151, Misc. HENDRICKS *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 152, Misc. STEBBINS *v.* MACY, CHAIRMAN, U. S. CIVIL SERVICE COMMISSION, ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for respondents.

No. 153, Misc. SORRELL *v.* EYMAN, WARDEN. Supreme Court of Arizona. Certiorari denied.

No. 157, Misc. THOMPSON *v.* MARONEY, WARDEN. C. A. 3d Cir. Certiorari denied. Reported below: 328 F. 2d 313.

No. 161, Misc. CARTER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 164, Misc. GOSS *v.* ALASKA ET AL. Supreme Court of Alaska. Certiorari denied. Reported below: 390 P. 2d 220.

No. 166, Misc. De Paunto, alias Lipscomb *v.* Michigan. C. A. 6th Cir. Certiorari denied. Reported below: 332 F. 2d 396.

No. 167, Misc. Colligan *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 169, Misc. Moorer *v.* South Carolina et al. Supreme Court of South Carolina. Certiorari denied. *John H. Wrighten* for petitioner. *Daniel R. McLeod,* Attorney General of South Carolina, *Everett N. Brandon,* Assistant Attorney General, and *Julian S. Wolfe* for respondents. Reported below: 244 S. C. 102, 135 S. E. 2d 713.

No. 173, Misc. Shields *v.* Texas. Court of Criminal Appeals of Texas. Certiorari denied. *Bernard A. Golding* for petitioner.

No. 178, Misc. Hines *v.* United States. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 179, Misc. Goldberg *v.* United States. Court of Claims. Certiorari denied. *Carl L. Shipley* and *Thomas A. Ziebarth* for petitioner. *Solicitor General Cox* for the United States.

No. 183, Misc. Moore *v.* New York. Court of Appeals of New York. Certiorari denied.

No. 184, Misc. Vaughn *v.* Maxwell, Warden. Supreme Court of Ohio. Certiorari denied. Reported below: 176 Ohio St. 289, 199 N. E. 2d 570.

No. 185, Misc. Cadena *v.* Washington et al. C. A. 9th Cir. Certiorari denied.

No. 186, Misc. WYCOFF *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 187, Misc. BAKER *v.* EYMAN, WARDEN, ET AL. Supreme Court of Arizona. Certiorari denied.

No. 191, Misc. HUDDLESTON *v.* OHIO RIVER CO. C. A. 3d Cir. Certiorari denied. *Louis C. Glasso* for petitioner. *Carl E. Glock* for respondent. Reported below: 328 F. 2d 789.

No. 196, Misc. HORTON *v.* CHESTERFIELD COUNTY ET AL. C. A. 4th Cir. Certiorari denied.

No. 197, Misc. WIGGINS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 235 Md. 97, 200 A. 2d 683.

No. 200, Misc. HILL *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 202, Misc. EVANS *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 204, Misc. RIDEOUT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard Schmude* for the United States.

No. 206, Misc. CROW *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Petitioner *pro se*. *Thomas F. Eagleton,* Attorney General of Missouri, and *Howard L. McFadden,* Assistant Attorney General, for respondent. Reported below: 377 S. W. 2d 129.

No. 203, Misc. McGraw *v.* Maryland. Court of Appeals of Maryland. Certiorari denied. Reported below: 234 Md. 273, 199 A. 2d 229.

No. 205, Misc. Pulaski *v.* Wisconsin. Supreme Court of Wisconsin. Certiorari denied. Reported below: 23 Wis. 2d 138, 126 N. W. 2d 625.

No. 207, Misc. Arnold *v.* Arnold. Supreme Court of California. Certiorari denied.

No. 208, Misc. Lovett *v.* California. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 213, Misc. Conard *v.* Maroney, Correctional Superintendent. C. A. 3d Cir. Certiorari denied.

No. 214, Misc. Burgess *v.* District of Columbia Board of Parole et al. C. A. D. C. Cir. Certiorari denied. *Karl G. Feissner* for petitioner. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *John R. Hess* for respondents.

No. 215, Misc. Dedmon *v.* Heinze, Warden, et al. C. A. 9th Cir. Certiorari denied.

No. 216, Misc. Benson et al. *v.* United States. C. A. 6th Cir. Certiorari denied. *John F. Dugger* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 219, Misc. Douglas *v.* Green, Correctional Superintendent, et al. C. A. 6th Cir. Certiorari denied.

No. 221, Misc. JONES *v.* CIVIL AERONAUTICS BOARD ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* and *Nathaniel H. Goodrich* for respondents. Reported below: 118 U. S. App. D. C. 130, 332 F. 2d 717.

No. 222, Misc. RIZZITELLO ET AL. *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Morris Lavine* for petitioners. Reported below: 225 Cal. App. 2d 25, 37 Cal. Rptr. 118.

No. 223, Misc. GIBBS *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied. Reported below: 332 F. 2d 442.

No. 224, Misc. KING *v.* WASHINGTON ET AL. Superior Court of Washington, Walla Walla County. Certiorari denied.

No. 227, Misc. KINDER *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied.

No. 229, Misc. BISORDI *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 234, Misc. BARNES *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 235, Misc. FRINKS *v.* NORTH CAROLINA. Supreme Court of North Carolina. Certiorari denied. *William M. Kunstler, Arthur Kinoy* and *Samuel S. Mitchell* for petitioner. *Thomas Wade Bruton*, Attorney General of North Carolina, and *Ralph Moody*, Deputy Attorney General, for respondent.

No. 236, Misc. JONES *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 31 Ill. 2d 42, 198 N. E. 2d 821.

No. 230, Misc. DOMINGUEZ *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 238, Misc. BOWIE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 234 Md. 585, 200 A. 2d 557.

No. 241, Misc. MORROW *v.* INDIANA. Supreme Court of Indiana. Certiorari denied. Reported below: 245 Ind. 242, 196 N. E. 2d 408.

No. 242, Misc. PYLES *v.* BOLES, WARDEN. Supreme Court of Appeals of West Virginia. Certiorari denied. Reported below: 148 W. Va. ——, 135 S. E. 2d 692.

No. 245, Misc. WELSH *v.* STATE MEDICAL BOARD OF OHIO. Supreme Court of Ohio. Certiorari denied.

No. 246, Misc. HOLLIDAY *v.* CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 5th Cir. Certiorari denied. *H. Alva Brumfield* for petitioner. *Solicitor General Cox* for respondent. Reported below: 329 F. 2d 320.

No. 249, Misc. NAILLIEUX *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. *Kenneth E. Peery* for petitioner. *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth* and *Richard H. Seaton,* Assistant Attorneys General, for respondent. Reported below: 192 Kan. 809, 391 P. 2d 140.

No. 248, Misc. SPADA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 331 F. 2d 995.

No. 250, Misc. COOPER ET AL. *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox* for the United States. Reported below: 118 U. S. App. D. C. 30, 331 F. 2d 776.

No. 251, Misc. WILKINS *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 255, Misc. MILES *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *David I. Shapiro* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 256, Misc. HARRIS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 257, Misc. PHILLIPS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 259, Misc. BALDWIN ET AL. *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 262, Misc. IKERD *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 266, Misc. HILL *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 269, Misc. KING *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 265, Misc. TERRY *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Reported below: 61 Cal. 2d 137, 390 P. 2d 381.

No. 267, Misc. LATHAM ET AL. *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. *Lawrence Speiser* and *Bernard Roazen* for petitioners. *William M. Ferguson*, Attorney General of Kansas, and *J. Richard Foth* and *Park McGee*, Assistant Attorneys General, for respondent. Reported below: 330 F. 2d 865.

No. 274, Misc. UHLER *v.* BERKS COUNTY COURT. C. A. 3d Cir. Certiorari denied.

No. 280, Misc. PENNSYLVANIA EX REL. RIVERS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. *Herman I. Pollock* for petitioner. *Gordon Gelfond* and *James C. Crumlish, Jr.*, for respondent. Reported below: 414 Pa. 439, 200 A. 2d 303.

No. 283, Misc. JOHNSON *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 332 F. 2d 417.

No. 285, Misc. REED *v.* MAXWELL, WARDEN, ET AL. Supreme Court of Ohio. Certiorari denied. Reported below: 176 Ohio St. 356, 199 N. E. 2d 737.

No. 286, Misc. WRIGHT *v.* RHAY, PENITENTIARY SUPERINTENDENT. Supreme Court of Washington. Certiorari denied.

No. 301, Misc. HARRIS *v.* LANGLOIS, WARDEN. Supreme Court of Rhode Island. Certiorari denied. Reported below: —— R. I. ——, 202 A. 2d 288.

No. 290, Misc. ROPER *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 295, Misc. CONWAY *v.* HEINZE, WARDEN, ET AL. Supreme Court of California. Certiorari denied.

No. 296, Misc. AGNEW *v.* MOODY ET AL. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Roger Arnebergh* and *Bourke Jones* for respondent city officials and police officers. Reported below: 330 F. 2d 868.

No. 297, Misc. PRICE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Stanley R. Jacobs* for petitioner. Reported below: 235 Md. 417, 201 A. 2d 847.

No. 299, Misc. MEREDITH *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William A. Dougherty* for petitioner. *Solicitor General Cox* for the United States. Reported below: 330 F. 2d 9.

No. 303, Misc. CRIDER *v.* MAXWELL, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 304, Misc. MANASEK *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 305, Misc. MCGARY *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 307, Misc. THOMAS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 310, Misc. TYSON *v.* HENING ET AL. Supreme Court of Appeals of Virginia. Certiorari denied. Reported below: 205 Va. 389, 136 S. E. 2d 832.

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No. 318, Misc. HEIRENS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 322, Misc. STILTNER *v.* RHAY, PENITENTIARY SUPERINTENDENT, ET AL. Superior Court of Washington, Walla Walla County. Certiorari denied.

No. 323, Misc. BADGLEY *v.* BETO, CORRECTIONS DIRECTOR. C. A. 5th Cir. Certiorari denied.

No. 324, Misc. SCHACK *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 326, Misc. SPARACO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Peter L. F. Sabbatino* for petitioner.

No. 61, Misc. TAHTINEN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 354, Misc. MCNAIR *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 2, Misc. YOUNG *v.* SOUTH CAROLINA. Motion of American Civil Liberties Union for leave to file brief, as *amicus curiae,* granted. Petition for writ of certiorari to the Supreme Court of South Carolina denied. *King David* for petitioner. *Daniel R. McLeod,* Attorney General of South Carolina, *Everett N. Brandon,* Assistant Attorney General, and *Leonard A. Williamson* for respondent. *Lawrence Speiser* for American Civil Liberties Union, as *amicus curiae,* in support of the petition. Reported below: 243 S. C. 187, 133 S. E. 2d 210.

No. 330, Misc. LAWRENSON *v.* UNITED STATES FIDELITY & GUARANTY CO. C. A. 4th Cir. Certiorari denied. Reported below: 334 F. 2d 464.

No. 162, Misc. ASHBROOK *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 277, Misc. FABIAN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Reported below: 235 Md. 306, 201 A. 2d 511.

No. 72, Misc. LARTIGUE *v.* R. J. REYNOLDS TOBACCO CO. ET AL. Motion to use record in No. 386, Misc., October Term, 1963, granted. Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied. *H. Alva Brumfield, Sylvia Roberts* and *Melvin M. Belli* for petitioner. *Harry McCall, Harry B. Kelleher, Theodore Kiendl, Porter R. Chandler* and *Edwin J. Jacob* for respondents.

No. 158, Misc. GRAVIS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Irwin L. Germaise, Bernard B. Polak* and *Eugene Gressman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 330 F. 2d 316.

No. 333, Misc. WILLIAMS *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted.

No. 5, Misc. RYAN ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se*. *Edward S. Silver* and *William I. Siegel* for respondent.

No. 133, Misc. NIST *v.* RHAY, PENITENTIARY SUPERINTENDENT. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit and for other relief denied.

Rehearing Denied.

No. 84, October Term, 1960. COHEN *v.* HURLEY, 366 U. S. 117, 374 U. S. 857. Motions of New York State Association of Trial Lawyers; and National Lawyers Guild for leave to file briefs, as *amicus curiae*, in support of motion for leave to file a second petition for rehearing granted. Motion for leave to file a second petition for rehearing denied. MR. JUSTICE WHITE and MR. JUSTICE GOLDBERG took no part in the consideration or decision of these motions.

No. 467, October Term, 1962. ALVADO ET AL. *v.* GENERAL MOTORS CORP., 371 U. S. 925, 965, 375 U. S. 871. Motion for leave to file a third petition for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this motion.

No. —, October Term, 1963. KAWAHARA *v.* STAHR, 375 U. S. 918;

No. 15, October Term, 1963. FORD ET AL. *v.* TENNESSEE, 377 U. S. 994; and

No. 23, October Term, 1963. REYNOLDS, JUDGE, ET AL. *v.* SIMS ET AL., 377 U. S. 533. Petitions for rehearing denied.

No. 27, October Term, 1963. VANN ET AL. *v.* BAGGETT, SECRETARY OF STATE OF ALABAMA, ET AL., 377 U. S. 533;

No. 35, October Term, 1963. DRESNER ET AL. *v.* CITY OF TALLAHASSEE, 378 U. S. 539;

No. 41, October Term, 1963. MCCONNELL ET AL. *v.* BAGGETT, SECRETARY OF STATE OF ALABAMA, ET AL., 377 U. S. 533;

No. 95, October Term, 1963. WILLIAMSON *v.* CALIFORNIA, 377 U. S. 994;

No. 99, October Term, 1963. WENZLER ET AL. *v.* CALIFORNIA, 377 U. S. 994;

No. 245, October Term, 1963. BERMAN *v.* UNITED STATES, 378 U. S. 530;

No. 264, October Term, 1963. DONOVAN ET AL. *v.* CITY OF DALLAS ET AL., 377 U. S. 408;

No. 297, October Term, 1963. SWANN *v.* ADAMS, SECRETARY OF STATE OF FLORIDA, ET AL., 378 U. S. 553;

Nos. 379 and 380, October Term, 1963. PAN-AMERICAN LIFE INSURANCE CO. *v.* LORIDO, 377 U. S. 990;

No. 553, October Term, 1963. FINCH ET AL. *v.* CALIFORNIA, 377 U. S. 990;

No. 556, October Term, 1963. UNITED MINE WORKERS OF AMERICA *v.* WHITE OAK COAL CO., INC., 375 U. S. 966;

No. 608, October Term, 1963. NEERING *v.* FLORIDA, 377 U. S. 980;

No. 673, October Term, 1963. PAN-AMERICAN LIFE INSURANCE CO. *v.* RECIO, 377 U. S. 990;

No. 819, October Term, 1963. MARDER *v.* MASSACHUSETTS, 377 U. S. 407;

No. 930, October Term, 1963. SANAPAW ET AL. *v.* WISCONSIN, 377 U. S. 991; and

No. 939, October Term, 1963. CHAMBERLIN ET AL. *v.* DADE COUNTY BOARD OF PUBLIC INSTRUCTION ET AL., 377 U. S. 402. Petitions for rehearing denied.

No. 949, October Term, 1963. SINCLAIR *v.* BAKER ET AL., 377 U. S. 215;

No. 993, October Term, 1963. MITCHELL BROS. TRUCK LINES *v.* UNITED STATES ET AL., 378 U. S. 125;

No. 1062, October Term, 1963. BULLARD *v.* FLORIDA, 377 U. S. 992;

No. 1081, October Term, 1963. WALTHAM PRECISION INSTRUMENT CO., INC., ET AL. *v.* FEDERAL TRADE COMMISSION, 377 U. S. 992;

No. 1102, October Term, 1963. HOUSTON MARITIME ASSOCIATION, INC., ET AL. *v.* NATIONAL LABOR RELATIONS BOARD, 377 U. S. 993;

No. 1110, October Term, 1963. PAN-AMERICAN LIFE INSURANCE CO. *v.* THEYE Y AJURIA, 377 U. S. 997;

No. 1113, October Term, 1963. SMITH ET AL. *v.* VIRGIN ISLANDS ET AL., 377 U. S. 979; and

No. 1188, October Term, 1963. MERINO *v.* UNITED STATES MARSHAL, 377 U. S. 997. Petitions for rehearing denied.

No. 554, October Term, 1963. POPEIL BROTHERS, INC. *v.* ZYSSET ET AL., 376 U. S. 913, 959; and

No. 991, October Term, 1963. SPINELLI *v.* ISTHMIAN STEAMSHIP CO. ET AL., 377 U. S. 935, 1010. Motions for leave to file second petitions for rehearing denied.

No. 481, October Term, 1963. VIKING THEATRE CORP. *v.* PARAMOUNT FILM DISTRIBUTING CORP. ET AL., 378 U. S. 123. Petition for rehearing denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition.

No. 983, October Term, 1963. CHICAGO NORTH SHORE & MILWAUKEE RAILWAY CO. *v.* UNITED STATES, 377 U. S. 964. Motion for leave to file petition for rehearing denied.

No. 323, Misc., October Term, 1963. MEE *v.* UNITED STATES, 377 U. S. 997;

No. 396, Misc., October Term, 1963. LOPEZ *v.* TEXAS, 378 U. S. 567;

No. 942, Misc., October Term, 1963. RAYMOND *v.* PENNSYLVANIA, 377 U. S. 999;

No. 955, Misc., October Term, 1963. PARHAM *v.* CALIFORNIA, 377 U. S. 945;

No. 973, Misc., October Term, 1963. SMITH *v.* UNITED STATES, 377 U. S. 954;

No. 982, Misc., October Term, 1963. REYNOLDS *v.* NEW JERSEY, 377 U. S. 1000;

No. 985, Misc., October Term, 1963. HERB *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, 377 U. S. 987;

No. 1011, Misc., October Term, 1963. ROGERS *v.* UNITED STATES, 378 U. S. 549;

No. 1059, Misc., October Term, 1963. WILSON *v.* ILLINOIS, 377 U. S. 955;

No. 1089, Misc., October Term, 1963. MILLER *v.* UNITED STATES, 377 U. S. 968;

No. 1115, Misc., October Term, 1963. AHLSTEDT *v.* UNITED STATES, 377 U. S. 968;

No. 1133, Misc., October Term, 1963. BERRY *v.* WARDEN, QUEENS HOUSE OF DETENTION, 377 U. S. 981;

No. 1139, Misc., October Term, 1963. REYNOLDS *v.* NEW JERSEY, 377 U. S. 1000;

No. 1143, Misc., October Term, 1963. GAWANTKA *v.* UNITED STATES, 377 U. S. 969;

No. 1150, Misc., October Term, 1963. WILLIAMS *v.* SOUTH CAROLINA, 377 U. S. 1001;

No. 1151, Misc., October Term, 1963. MORRIS *v.* SOUTH CAROLINA, 377 U. S. 1001; and

No. 1179, Misc., October Term, 1963. FISHER *v.* UNITED STATES, 377 U. S. 999. Petitions for rehearing denied.

No. 1203, Misc., October Term, 1963. OSBORNE *v.* TAYLOR, WARDEN, 377 U. S. 1002;

No. 1228, Misc., October Term, 1963. EASTER *v.* BRUNE ET AL., JUDGES, 377 U. S. 951;

No. 1238, Misc., October Term, 1963. LEVY *v.* MACY ET AL., COMMISSIONERS, U. S. CIVIL SERVICE COMMISSION, 377 U. S. 984;

No. 1245, Misc., October Term, 1963. WHITE *v.* DICKSON, WARDEN, 377 U. S. 957;

No. 1268, Misc., October Term, 1963. WILLIAMS *v.* UNITED STATES, 377 U. S. 958;

No. 1281, Misc., October Term, 1963. VAN RENSSELAER ET AL. *v.* GENERAL MOTORS CORP., 377 U. S. 959;

No. 1310, Misc., October Term, 1963. RAMSEY *v.* NATIONAL LABOR RELATIONS BOARD, 377 U. S. 1003;

No. 1320, Misc., October Term, 1963. KURTH *v.* BENNETT, WARDEN, 377 U. S. 972;

No. 1324, Misc., October Term, 1963. HUDSON *v.* DICKSON, WARDEN, 377 U. S. 972;

No. 1328, Misc., October Term, 1963. BENTON *v.* ARIZONA ET AL., 377 U. S. 1003;

No. 1333, Misc., October Term, 1963. DIRRING *v.* UNITED STATES, 377 U. S. 1003;

No. 1347, Misc., October Term, 1963. FLORES *v.* BETO, CORRECTIONS DIRECTOR, 377 U. S. 972;

No. 1352, Misc., October Term, 1963. PHILLIP *v.* NORTH CAROLINA, 377 U. S. 1003;

No. 1404, Misc., October Term, 1963. HORNER *v.* FLORIDA, 377 U. S. 950; and

No. 1416, Misc., October Term, 1963. JACKSON *v.* KROPP, WARDEN, 377 U. S. 1006. Petitions for rehearing denied.

No. 1375, Misc., October Term, 1963. SINETTE *v.* DICKSON, WARDEN, ET AL., 377 U. S. 1005. Motion for leave to file petition for rehearing denied.

No. 115, October Term, 1963. GENERAL MOTORS CORP. *v.* WASHINGTON ET AL., 377 U. S. 436. Motions of Automotive Service Industry Association, Electronic Industries Association, Automotive Manufacturers Association, and the National Association of Manufacturers for leave to file briefs, as *amici curiae,* in support of petition for rehearing granted. Petition for rehearing denied.

No. 636, October Term, 1963. GERMANO ET AL. *v.* KERNER, GOVERNOR OF ILLINOIS, ET AL., 378 U. S. 560. Petition for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition.

OCTOBER 13, 1964.

Dismissal Under Rule 60.

No. 370, Misc. WILLIAMSON ET AL. *v.* GILMER ET AL. On motion for leave to file petition for writ of certiorari to the United States District Court for the Northern District of Texas. Dismissed pursuant to Rule 60 of the Rules of this Court. Petitioners *pro se. William D. Neary* for respondents.

OCTOBER 19, 1964.

Miscellaneous Orders.

No. 159, Misc. BELLUE *v.* MACDOUGALL, CORRECTIONS DIRECTOR. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se. Daniel R. McLeod,* Attorney General of South Carolina, and *Joseph C. Coleman* and *Edward B. Latimer,* Assistant Attorneys General, for respondent.

No. 336, Misc. HAWKINS *v.* DIRECTOR, PATUXENT INSTITUTION. Motion for leave to file petition for writ of habeas corpus denied.

No. 17, Original. NEBRASKA *v.* IOWA. This case is set down for argument on the motion for leave to file a bill of complaint. *Clarence A. H. Meyer,* Attorney General of Nebraska, and *Joseph R. Moore* and *Howard H. Moldenhauer,* Special Assistant Attorneys General, for plaintiff. *Evan Hultman,* Attorney General of Iowa, *W. N. Bump,* Solicitor General, and *William J. Yost,* Assistant Attorney General, for defendant.

No. 46. CALIFORNIA ET AL. *v.* LO-VACA GATHERING CO. ET AL.;

No. 47. SOUTHERN CALIFORNIA GAS CO. ET AL. *v.* LO-VACA GATHERING CO. ET AL.; and

No. 57. FEDERAL POWER COMMISSION *v.* LO-VACA GATHERING CO. ET AL. (Certiorari, 377 U. S. 951, to the United States Court of Appeals for the Fifth Circuit.) The motion of respondent Lo-Vaca Gathering Co. to defer oral argument is denied. MR. JUSTICE WHITE took no part in the consideration or decision of this motion. *Sherman S. Poland* for movant. *Solicitor General Cox* for the Federal Power Commission, in opposition.

No. 156, Misc. JENKINS *v.* MARYLAND. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Thomas B. Finan,* Attorney General of Maryland, and *Robert C. Murphy,* Deputy Attorney General, for respondent.

No. 432, Misc. BLACKBURN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR; and

No. 439, Misc. CRANNER *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. 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.

Certiorari Granted.

No. 363. SIMONS *v.* MIAMI BEACH FIRST NATIONAL BANK, EXECUTOR. District Court of Appeal of Florida, Third District. Certiorari granted. *William Gresham Ward* for petitioner. *Marion E. Sibley* for respondent. Reported below: 157 So. 2d 199.

No. 291. MINNESOTA MINING & MANUFACTURING CO. *v.* NEW JERSEY WOOD FINISHING CO. C. A. 3d Cir. Certiorari granted. The Solicitor General is invited to file a brief expressing the views of the United States. *Sidney P. Howell, Jr.*, and *Charles C. Trelease* for petitioner. Reported below: 332 F. 2d 346.

No. 345. MARYLAND FOR THE USE OF LEVIN ET AL. *v.* UNITED STATES. C. A. 3d Cir. Certiorari granted. *Theodore E. Wolcott* for petitioners. *Solicitor General Cox* for the United States. Reported below: 329 F. 2d 722.

No. 348. LEH ET AL. *v.* GENERAL PETROLEUM CORP. ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit granted limited to Question 6 presented by the petition which reads as follows:

"Whether the statute of limitations was tolled by Section 5 of the Clayton Act during the pendency of the Government's action in *United States* v. *Standard Oil Company of California, et al.* (Civil No. 11584–C)?"

Maxwell Keith for petitioners. *Howard Painter, Francis R. Kirkham, William E. Mussman, Thomas E. Haven, George W. Jansen, Charles E. Beardsley, Jack E. Woods, Moses Lasky, Wayne H. Knight* and *Edmund D. Buckley* for respondents. Reported below: 330 F. 2d 288.

No. 347. JABEN *v.* UNITED STATES. C. A. 8th Cir. Certiorari granted. *Morris A. Shenker* and *Bernard J. Mellman* for petitioner. *Solicitor General Cox* for the United States. Reported below: 333 F. 2d 535.

Certiorari Denied. (See also No. 228, *ante*, p. 14; No. 327, *ante*, p. 17; and Misc. Nos. 432 and 439, *supra*.)

No. 133. STEINGOLD, EXECUTOR, ET AL. *v.* CAPITAL AIRLINES, INC., ET AL. Supreme Court of New York, Kings County. Certiorari denied. *Jacob Rassner* for petitioners. *William J. Junkerman* and *James B. McQuillan* for Capital Airlines, Inc., et al., and *Robert Layton, Phil E. Gilbert, Jr.*, and *Harold A. Segall* for Rolls-Royce, Ltd., et al., respondents. Reported below: 34 Misc. 2d 33, 227 N. Y. S. 2d 639.

No. 254. DIXIE PORTLAND FLOUR MILLS, INC. *v.* BYRD. Court of Appeals of Tennessee. Certiorari denied. *George P. Bowie* and *John S. Carriger* for petitioner. *H. Keith Harber* for respondent. Reported below: —— Tenn. App. ——, 376 S. W. 2d 745.

No. 285. BAER *v.* UNITED STATES. Court of Claims. Certiorari denied. *Alan Miles Ruben* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander* and *Kathryn H. Baldwin* for the United States. Reported below: 164 Ct. Cl. 447.

No. 301. DAY *v.* NORTHWEST DIVISION 1055, AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, ET AL. Supreme Court of Oregon. Certiorari denied. *Sigmund Timberg* for petitioner. *Bernard Cushman* and *Isaac N. Groner* for respondents. Reported below: 238 Ore. 624, 389 P. 2d 42.

No. 305. DEL VALLE ET AL. *v.* HOTEL & RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION, AFL–CIO, ET AL. C. A. 1st Cir. Certiorari denied. *Ginoris Vizcarra* for petitioners. *J. W. Brown, Benjamin Gettler* and *Jonas B. Katz* for respondents. Reported below: 328 F. 2d 885.

No. 306. PENNSYLVANIA RAILROAD CO. *v.* CHICAGO EXPRESS, INC. C. A. 2d Cir. Certiorari denied. *Edward F. Butler* for petitioner. *Sydney Krause* for respondent. Reported below: 332 F. 2d 276.

No. 308. CHOURNOS ET AL. *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Richard S. Salzman* for the United States. Reported below: 331 F. 2d 498.

No. 310. ANDERSON, TRUSTEE IN BANKRUPTCY, ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Harry N. Boureau* and *Herman Ulmer* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal, William E. Gwatkin III* and *Frederick B. Abramson* for the United States. Reported below: 334 F. 2d 111.

No. 332. GLADSTEIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Terry Milburn* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 334 F. 2d 103.

No. 336. KRUEGER *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Merle L. Silverstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 321 F. 2d 283.

No. 328. BENO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *W. Paul Flynn, Bernard P. Kopkind* and *Charles L. Flynn* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 333 F. 2d 669.

No. 334. LOCAL UNION No. 12405, DISTRICT 50, UNITED MINE WORKERS, ET AL. *v.* MARTIN MARIETTA CORP. ET AL. C. A. 7th Cir. Certiorari denied. *Bernard M. Mamet* for petitioners. *Mitchell S. Rieger* and *W. Donald McSweeney* for Martin Marietta Corp., and *Owen Rall* for District 50, United Mine Workers of America, respondents. Reported below: 328 F. 2d 945.

No. 335. R. H. WRIGHT, INC., ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Richard M. White* and *Thomas H. Anderson* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Lionel Kestenbaum* for the United States. Reported below: 329 F. 2d 860.

No. 338. BINS *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Richard R. Booth* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 331 F. 2d 390.

No. 103. TWENTIETH CENTURY-FOX FILM CORP. ET AL. *v.* GOLDWYN ET AL., DOING BUSINESS AS GOLDWYN PRODUCTIONS. C. A. 9th Cir. Certiorari denied. MR. JUSTICE DOUGLAS took no part in the consideration or decision of this petition. *Frederick W. R. Pride, Charles F. Young* and *Arthur B. Dunne* for petitioners. *Joseph L. Alioto, George Slaff* and *Maxwell Keith* for respondents. Reported below: 328 F. 2d 190.

No. 350. BALABAN ET AL. *v.* RUBIN ET AL. Court of Appeals of New York. Certiorari denied. *Frank H. Gordon* for petitioners. *Leo A. Larkin, Seymour B. Quel* and *Benjamin Offner* for respondents. Reported below: 14 N. Y. 2d 193, 199 N. E. 2d 375.

No. 430. ELGISSER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 334 F. 2d 103.

No. 7, Misc. REAL *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 326 F. 2d 441.

No. 383. SCHIFF, EXECUTRIX, ET AL. *v.* METZNER, U. S. DISTRICT JUDGE, ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. *Clendon H. Lee, John C. Farber, Leo Brady* and *Abbott Gould* for petitioners. *Aloysius F. Power, George A. Brooks, Daniel M. Gribbon* and *Frank H. Gordon* for General Motors Corp. et al., respondents. Reported below: 331 F. 2d 963.

No. 278. MONOLITH PORTLAND CEMENT CO. *v.* PUBLIC UTILITIES COMMISSION OF CALIFORNIA ET AL. Motion of Atchison, Topeka & Santa Fe Railway Co. to be added as a party respondent granted. Petition for writ of certiorari to the Supreme Court of California denied. *Joseph T. Enright* and *Norman Elliott* for petitioner. *Mary Moran Pajalich* for Public Utilities Commission of California et al., respondents. *Frederick G. Pfrommer* for Atchison, Topeka & Santa Fe Railway Co.

No. 120. GOTTESMAN ET AL. *v.* GENERAL MOTORS CORP. ET AL. C. A. 2d Cir. Certiorari denied. MR. JUSTICE HARLAN took no part in the consideration or decision of this petition. *Clendon H. Lee, John C. Farber* and *Abbott Gould* for petitioners. *Daniel M. Gribbon, Frank H. Gordon, Aloysius F. Power* and *George A. Brooks* for respondents.

No. 302. NATIONAL LABOR RELATIONS BOARD *v.* WELLINGTON MILL DIVISION, WEST POINT MANUFACTURING CO. C. A. 4th Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for petitioner. *Frank A. Constangy* for respondent. Reported below: 330 F. 2d 579.

No. 343. ALEXANDER ET AL. *v.* PACIFIC MARITIME ASSOCIATION ET AL. C. A. 9th Cir. Certiorari denied. MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that certiorari should be granted. *Howard B. Crittenden, Jr.,* for petitioners. *Richard Ernst* and *Marvin C. Taylor* for Pacific Maritime Association, and *Norman Leonard* for International Longhoremen's & Warehousemen's Union, respondents. Reported below: 332 F. 2d 266.

No. 36, Misc. PREBLE *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Ernest May* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Howard M. Fender, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent. Reported below: 374 S. W. 2d 444.

No. 352, Misc. SULLIVAN *v.* EYMAN, WARDEN. Supreme Court of Arizona. Certiorari denied.

No. 43, Misc. BERRYHILL *v.* PAGE, WARDEN, ET AL. Court of Criminal Appeals of Oklahoma. Certiorari denied. Petitioner *pro se*. *Charles Nesbitt*, Attorney General of Oklahoma, and *Jack A. Swidensky*, Assistant Attorney General, for respondents. Reported below: 391 P. 2d 909.

No. 135, Misc. PAGANO *v.* FITZPATRICK, WARDEN, ET AL. C. A. 2d Cir. Certiorari denied. *Daniel H. Greenberg* for petitioner. *Solicitor General Cox* for respondents. *Edgar H. Booth* and *Harold L. Lipton* for Sahn, Trustee in Bankruptcy. Reported below: 330 F. 2d 953.

No. 270, Misc. CANNON *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 235 Md. 133, 200 A. 2d 919.

No. 306, Misc. CODARRE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *O. John Rogge* and *Melvin L. Wulf* for petitioner. Reported below: 14 N. Y. 2d 370, 200 N. E. 2d 570.

No. 361, Misc. LOGAN *v.* PETERSON, STATE HOSPITAL SUPERINTENDENT. Supreme Court of Missouri. Certiorari denied.

No. 365, Misc. TINDLE *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 117 U. S. App. D. C. 27, 325 F. 2d 223.

No. 366, Misc. BURGE, ALIAS HALE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 332 F. 2d 171.

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No. 374, Misc. GAINES *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied.

No. 117, Misc. PRUITT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 331 F. 2d 232.

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Miscellaneous Orders.

No. 52. DOMBROWSKI ET AL. *v.* PFISTER, CHAIRMAN, JOINT LEGISLATIVE COMMITTEE ON UN-AMERICAN ACTIVITIES OF THE LOUISIANA LEGISLATURE, ET AL. Appeal from the United States District Court for the Eastern District of Louisiana. (Probable jurisdiction noted, 377 U. S. 976.) The motion of National Lawyers Guild for leave to file a brief, as *amicus curiae,* is granted. MR. JUSTICE BLACK took no part in the consideration or decision of this motion. *Ernest Goodman* and *David Rein* on the motion.

No. 590. AHLERS *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Second Circuit. The petition for stay is denied. *Edward Bennett Williams* and *Harold Ungar* on the petition. *Solicitor General Cox* for the United States, in opposition.

No. 105, Misc. HILLERY *v.* WILSON, WARDEN. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, *Doris H. Maier,* Assistant Attorney General, and *Edsel W. Haws,* Deputy Attorney General, for respondent.

No. 387, Misc. WINSTON *v.* UNITED STATES ET AL. Motion for leave to file a petition for writ of certiorari denied. Petitioner *pro se.* *Solicitor General Cox* for the United States.

No. 342, Misc. TAYLOR *v.* WILSON, WARDEN;
No. 447, Misc. AGRESTI *v.* BLACKWELL, WARDEN; and
No. 471, Misc. SHANKS *v.* MARYLAND. Motions for leave to file petitions for writs of habeas corpus denied.

No. 271, Misc. FERRO *v.* WILSON, WARDEN, 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. Petitioner *pro se.* *Thomas C. Lynch,* Attorney General of California, *Arlo E. Smith,* Chief Assistant Attorney General, and *Edward P. O'Brien,* Deputy Attorney General, for respondents.

Probable Jurisdiction Noted.

No. 390. OZARK BUTANE CO., INC. *v.* OKLAHOMA LIQUEFIED PETROLEUM GAS BOARD ET AL. Appeal from the United States District Court for the Western District of Oklahoma. Probable jurisdiction noted. *Morris J. Levin* and *William A. Roberts* for appellant. *Charles R. Nesbitt,* Attorney General of Oklahoma, and *Lee W. Cook,* Assistant Attorney General, for appellees. Reported below: 235 F. Supp. 406.

Certiorari Granted.

No. 355. SUSSER ET AL. *v.* CARVEL CORP. ET AL. C. A. 2d Cir. Certiorari granted. *Sidney W. Rothstein* for petitioners. *Herbert F. Roth* for Carvel Corp. et al.; *Stanley Shaw* for Eagle Cone Corp.; and *John A. Wilson* and *Willard M. L. Robinson* for H. P. Hood & Sons, respondents. Reported below: 332 F. 2d 505.

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No. 237. COMMISSIONER OF INTERNAL REVENUE *v.* MERRITT ET AL. C. A. 4th Cir. Certiorari granted. The case is consolidated with No. 134 and a total of one and one-half hours is allotted for the oral argument of both cases. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for petitioner. *John Y. Merrell* for respondents. Reported below: 330 F. 2d 161.

No. 365. SANSONE *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit granted limited to Questions 1 and 2 presented by the petition which read as follows:

"1. Whether the willful delivery of a false income tax return, a misdemeanor under section 7207 of the Internal Revenue Code of 1954, is a lesser included offense within section 7201 thereof, making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31 (c) of this [the] Federal Rule[s] of Criminal Procedure to a lesser offense instruction with respect thereto.

"2. Whether the willful failure to pay one's income tax, a misdemeanor under section 7203 of the Internal Revenue Code of 1954, is a lesser included offense within section 7201 thereof, making it a felony to willfully attempt in any manner to evade one's income tax, and whether a defendant is entitled under Rule 31 (c) of the Federal Rules of Criminal Procedure to a lesser offense instruction with respect thereto."

Stanley M. Rosenblum and *Merle L. Silverstein* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Burton Berkley* for the United States. Reported below: 334 F. 2d 287.

No. 352. General Motors Corp. *v.* District of Columbia. Motions of Associated Industries of New York State, Inc.; Bethlehem Steel Co.; National Association of Manufacturers; Automobile Manufacturers Association, Inc.; and Electronic Industries Association for leave to file briefs, as *amici curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. *Aloysius F. Power, Donald K. Barnes, Thomas J. Hughes* and *E. Barrett Prettyman, Jr.,* for petitioner. *Chester H. Gray, Milton D. Korman* and *Henry E. Wixon* for respondent. Briefs of *amici curiae,* in support of the petition, were filed by *George R. Fearon* and *John C. Reid* for Associated Industries of New York State, Inc.; *Daniel K. Mayers* for Bethlehem Steel Co.; *Lambert H. Miller* and *Edward R. Duffy* for National Association of Manufacturers; *Louis F. Dahling* and *Richard D. Rohr* for Automobile Manufacturers Association, Inc.; and *John B. Olverson* for Electronic Industries Association. Reported below: 118 U. S. App. D. C. 381, 336 F. 2d 885.

Certiorari Denied. (See also No. 271, Misc., *supra.*)

No. 354. Ballagh et ux. *v.* United States. Court of Claims. Certiorari denied. *Walter B. Gibbons* for petitioners. *Solicitor General Cox, Acting Assistant Attorney General Jones, Gilbert E. Andrews* and *Robert A. Bernstein* for the United States. Reported below: —— Ct. Cl. ——, 331 F. 2d 874.

No. 356. Acro Manufacturing Co. *v.* Commissioner of Internal Revenue. C. A. 6th Cir. Certiorari denied. *John W. Riely* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Melva M. Graney* and *Richard J. Heiman* for respondent. Reported below: 334 F. 2d 40.

No. 366. PHILIP CAREY MANUFACTURING CO. (MIAMI CABINET DIVISION) *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 6th Cir. Certiorari denied. *John B. Hollister* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent National Labor Relations Board. Reported below: 331 F. 2d 720.

No. 358. BUCKHEAD THEATRE CORP. ET AL. *v.* ATLANTA ENTERPRISES, INC., ET AL. C. A. 5th Cir. Certiorari denied. *Edward S. O'Neill* for petitioners. *Robert S. Sams* and *W. Colquitt Carter* for respondents. Reported below: 327 F. 2d 365.

No. 359. MIMS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *Peyton Ford* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 332 F. 2d 944.

No. 370. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, UAW–AFL–CIO, ET AL. *v.* PHILIP CAREY MANUFACTURING CO., MIAMI CABINET DIVISION, ET AL. C. A. 6th Cir. Certiorari denied. *Joseph L. Rauh, Jr., Daniel H. Pollitt* and *Lowell Goerlich* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, and *John B. Hollister* for Philip Carey Manufacturing Co., Miami Cabinet Division, respondents. Reported below: 331 F. 2d 720.

No. 374. MONROE AUTO EQUIPMENT CO. *v.* HECKETHORN MANUFACTURING & SUPPLY CO. C. A. 6th Cir. Certiorari denied. *William W. Rymer* and *A. Donham Owen* for petitioner. *Robert F. Conrad* for respondent. Reported below: 332 F. 2d 406.

No. 368. ANTHONY P. MILLER, INC., ET AL. *v.* WALTER S. KOZDRANSKI CO., INC., ET AL. Appellate Division, Supreme Court of New York, Fourth Judicial Department. Certiorari denied. *John W. Cragun, Paul M. Rhodes* and *Charles A. Hobbs* for petitioners. *John E. Runals* for respondents.

No. 371. FRANKEL, GUARDIAN *v.* VICK ET AL. C. A. 3d Cir. Certiorari denied. *Lipman Redman* for petitioner. *Perry S. Bechtle* and *Francis E. Shields* for respondents. Reported below: 331 F. 2d 309.

No. 373. GREAT LAKES TOWING CO. *v.* AMERICAN STEAMSHIP CO. C. A. 7th Cir. Certiorari denied. *Walter S. Davis* for petitioner. *Fenton F. Harrison* for respondent. Reported below: 333 F. 2d 426.

No. 375. SWANSON *v.* UNITED STATES. Court of Claims. Certiorari denied. *Claude L. Dawson* and *Donald M. Murtha* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: —— Ct. Cl. ——.

No. 376. LOCAL 542, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL–CIO *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 3d Cir. Certiorari denied. *Abraham E. Freedman* and *Martin J. Vigderman* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 331 F. 2d 99.

No. 378. KANTER *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Irwin L. Germaise* and *Bernard B. Polak* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States.

No. 382. BANTOM ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Claude L. Dawson* and *Donald M. Murtha* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: 165 Ct. Cl. 312.

No. 384. GENTILLI *v.* CAPLIN, COMMISSIONER OF INTERNAL REVENUE, ET AL. C. A. D. C. Cir. Certiorari denied. *Daniel Orville Dechert* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Joseph M. Howard* and *John M. Brant* for respondents.

No. 389. MARQUEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Albert J. Krieger* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 332 F. 2d 162.

No. 377. ROCKWELL MANUFACTURING CO., KEARNEY DIVISION *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Kenneth C. McGuiness* and *Theophil C. Kammholz* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 330 F. 2d 795.

No. 144, Misc. HARRIS *v.* ARKANSAS; and

No. 155, Misc. TROTTER *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *George Howard, Jr.,* for petitioner in No. 144, Misc. Petitioner *pro se* in No. 155, Misc. *Bruce Bennett,* Attorney General of Arkansas, and *Jack L. Lessenberry,* Chief Assistant Attorney General, for respondent. Reported below: 237 Ark. 820, 377 S. W. 2d 14.

No. 143, Misc. DUFFY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se*. *Isidore Dollinger* and *Bertram R. Gelfand* for respondent.

No. 168, Misc. CHATFIELD *v.* HARRIS, U. S. DISTRICT JUDGE, ET AL. C. A. 9th Cir. Certiorari denied.

No. 175, Misc. MARTIN *v.* KENTUCKY ET AL. C. A. 6th Cir. Certiorari denied. *John P. Sandidge* for petitioner. *Robert Matthews,* Attorney General of Kentucky, and *George F. Rabe,* Assistant Attorney General, for respondents. Reported below: 331 F. 2d 603.

No. 188, Misc. HALL *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for respondent. Reported below: 329 F. 2d 354.

No. 192, Misc. CARCERANO *v.* GLADDEN, WARDEN. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Robert Y. Thornton,* Attorney General of Oregon, and *C. L. Marsters,* Assistant Attorney General, for respondent.

No. 201, Misc. DIXON *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied. *John Kaplan* for petitioner. *William G. Clark,* Attorney General of Illinois, and *Richard A. Michael,* Assistant Attorney General, for respondent. Reported below: 330 F. 2d 126.

No. 264, Misc. MORGAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch,* Attorney General of California, *Arlo E. Smith,* Chief Assistant Attorney General, and *Albert W. Harris, Jr.,* and *Edward P. O'Brien,* Deputy Attorneys General, for respondent.

No. 244, Misc. GONZALEZ *v.* CALIFORNIA ADULT AUTHORITY. Supreme Court of California. Certiorari denied.

No. 261, Misc. BLAICH *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 284, Misc. SAVAGE *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.

No. 309, Misc. CASSONE *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *John C. Lankenau* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 58, Misc. SHULER ET AL. *v.* FLORIDA. Petition for a writ of certiorari to the Supreme Court of Florida denied without prejudice to an application for a writ of habeas corpus in the appropriate United States District Court. *Howard Dixon* and *Jack Greenberg* for petitioners. *James W. Kynes,* Attorney General of Florida, and *James G. Mahorner,* Assistant Attorney General, for respondent. Reported below: 161 So. 2d 3.

No. 452, Misc. SOSTRE *v.* MCGINNIS, CORRECTION COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, *William D. Bresinhan,* Assistant Attorney General, and *Julius L. Sackman* for respondents. Reported below: 334 F. 2d 906.

No. 254, Misc. WARNOCK *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. Petitioner *pro se*. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *William L. Zessar,* Deputy Attorney General, for respondent.

No. 423, Misc. CARBONARO ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Leon B. Polsky* for petitioners. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 396, Misc. CAPPUCCIO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

OCTOBER 28, 1964.

Certiorari Denied.

No. 636. GOLDWATER *v.* FEDERAL COMMUNICATIONS COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. *Gerald D. Morgan, Arthur H. Schroeder, John B. Kenkel* and *John P. Bankson, Jr.*, for petitioner.

MR. JUSTICE GOLDBERG, with whom MR. JUSTICE BLACK joins, dissenting from the denial of certiorari and application for expedited consideration.

I would grant certiorari and the application of the petitioner to set the case for oral argument on Thursday, October 29, 1964.

In my view the question raised by the petition is substantial and warrants argument, which, in view of the imminence of the election, should be set for Thursday, if petitioner is to be given any practical relief before next Tuesday's election.

Section 315 (a) of the Federal Communications Act of 1934, as amended, 47 U. S. C. § 315 (a) (1958 ed., Supp. V), is as follows:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford equal opportunities to all other such candidates for that office in the use of such broadcasting station: *Provided,* That such licensee shall have no power of censorship

over the material broadcast under the provisions of this section. No obligation is imposed upon any licensee to allow the use of its station by any such candidate. Appearance by a legally qualified candidate on any—

(1) bona fide newscast,

(2) bona fide news interview,

(3) bona fide news documentary (if the appearance of the candidate is incidental to the presentation of the subject or subjects covered by the news documentary), or

(4) on-the-spot coverage of bona fide news events (including but not limited to political conventions and activities incidental thereto),

shall not be deemed to be use of a broadcasting station within the meaning of this subsection. Nothing in the foregoing sentence shall be construed as relieving broadcasters, in connection with the presentation of newscasts, news interviews, news documentaries, and on-the-spot coverage of news events, from the obligation imposed upon them under this chapter to operate in the public interest and to afford reasonable opportunity for the discussion of conflicting views on issues of public importance.

The statute on its face plainly requires that a licensee who permits any legally qualified candidate for any public office to use his broadcast facilities afford equal opportunities to all other qualified candidates. No exemption is made for a legally qualified candidate who is the incumbent President of the United States. The express exceptions to the broad scope of the statute for bona fide broadcasts, news interviews, news documentaries and on-the-spot coverage of bona fide news events do not

appear to apply to the address made by the President on Sunday, October 18, 1964, which does not seem to fit into any of these categories.

The Federal Communications Commission's own interpretations of the statute have not been wholly consistent. The Commission has ruled that a spot announcement wherein President Eisenhower, then a candidate for re-election, appeared appealing for a Community Fund Drive constituted a use requiring equal time to all other candidates. *Columbia Broadcasting System,* 14 Pike & Fischer Radio Reg. 524 (1956). The Commission, in a divided decision, held, in 1956, that the Democratic candidate for President, the Honorable Adlai E. Stevenson, was not entitled to equal time resulting from use of the network facilities by the Republican candidate, President Eisenhower, to report on the Suez crisis. *Columbia Broadcasting System,* 14 Pike & Fischer Radio Reg. 720 (1956). Finally, the Commission has recently held that the full broadcasting of a presidential news conference would be subject to the equal-time requirement. *Columbia Broadcasting System,* F. C. C. 64–887, 56865 (Sept. 30, 1964). These varied holdings of the Commission, and the express language of the Act, confirm my view of the substantiality of the question and the need for immediate argument and speedy decision of this case.

The importance of the question is, I believe, plainly apparent. The statute reflects a deep congressional conviction and policy that in our democratic society all qualified candidates should be given equally free access to broadcasting facilities, regardless of office or financial means, if any candidate is granted free time. This Court, in the recent past, has recognized the importance of making broadcasting facilities "available to candidates for office without discrimination." *Farmers Educational & Cooperative Union* v. *WDAY, Inc.,* 360 U. S. 525, 529.

Perhaps on argument, considerations may be advanced which would cast more light on what now appears to me to be a clear and unequivocal expression of congressional intent. But, since the Court has denied the petition and the application for expedited argument, I am impelled to record this dissent.

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

NOVEMBER 9, 1964.

Order Requiring Bond.

IT IS ORDERED by this Court that the Clerk of this Court, pursuant to 28 United States Code, Section 671 (b), shall furnish bond with good and sufficient surety, or sureties, to be approved by this Court, in the amount of $50,000 in favor of the United States of America and/or the United States of America, for the benefit of the litigants in the Supreme Court of the United States and of all others, as their interests may appear, conditional for the faithful and seasonable discharge of the duties of his office including the recording of the decrees, judgments, and determinations of the Supreme Court of the United States and, also, that he shall well and truly perform the services for which moneys by law or under the rules of this Court are advanced or paid to him, and shall truly and faithfully account for such moneys thus advanced or paid, and for any excess thereof after services are rendered, and also for all other moneys received by him as such Clerk of the Supreme Court of the United States, in accordance with law or the orders of this Court;

AND IT IS FURTHER ORDERED that the bond required by this order, when approved, as provided herein, shall be filed in the Department of Justice pursuant to law.

Miscellaneous Orders.

No. 914, Misc., October Term, 1963. HILL *v.* NEW YORK. (Petition for writ of certiorari to the Court of Appeals of New York denied, 377 U. S. 998.) The respondent is requested to file within twenty days a response to the motion for leave to file a petition for rehearing.

No. 52. DOMBROWSKI ET AL. *v.* PFISTER, CHAIRMAN, JOINT LEGISLATIVE COMMITTEE ON UN-AMERICAN ACTIVITIES OF THE LOUISIANA LEGISLATURE, ET AL. Appeal from the United States District Court for the Eastern District of Louisiana. (Probable jurisdiction noted, 377 U. S. 976.) The motion of NAACP Defense and Educational Fund, Inc., for leave to file a brief, as *amicus curiae,* is granted. The motion of American Civil Liberties Union et al. for leave to file a brief, as *amici curiae,* is granted. MR. JUSTICE BLACK took no part in the consideration or decision of these motions. *Jack Greenberg, Derrick A. Bell, Jr.,* and *Jay H. Topkis* for NAACP Defense and Educational Fund, Inc. *Louis Lusky* and *Melvin L. Wulf* for American Civil Liberties Union et al.

No. 59. UNITED STATES *v.* FIRST NATIONAL CITY BANK. (Certiorari, 377 U. S. 951, to the United States Court of Appeals for the Second Circuit.) The motion for leave to file a memorandum of attorneys for Omar, S. A., as *amicus curiae,* is granted. *Theodore Tannenwald* and *A. Chauncey Newlin* on the motion.

No. 60. JANKOVICH ET AL., DOING BUSINESS AS CALUMET AVIATION CO. *v.* INDIANA TOLL ROAD COMMISSION. (Certiorari, 377 U. S. 942, to the Supreme Court of Indiana.) The motion of Air Transport Association for leave to file a brief, as *amicus curiae,* is granted. *John E. Stephen* and *George S. Lapham, Jr.,* on the motion.

No. 138, October Term, 1963. MURPHY ET AL. *v.* WATERFRONT COMMISSION OF NEW YORK HARBOR. (378 U. S. 52.) The motion to retax costs is denied. *William P. Sirignano* on the motion. *Harold Krieger* for petitioners, in opposition.

No. 82. CARRINGTON *v.* RASH ET AL. (Certiorari, *ante*, p. 812, to the Supreme Court of Texas.) The motion of petitioner for leave to proceed further herein *in forma pauperis* is granted. *W. C. Peticolas* on the motion.

No. 388. AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267 *v.* DADE COUNTY ET AL. On petition for writ of certiorari to the Supreme Court of Florida. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

No. 515. HEART OF ATLANTA MOTEL, INC. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of Georgia. (Probable jurisdiction noted, *ante*, p. 803. Argued October 5, 1964.) The motion to expedite decision is denied. *Moreton Rolleston, Jr.*, on the motion.

No. 392, Misc. LEE *v.* WARDEN, MARYLAND PENITENTIARY;

No. 402, Misc. THOMAS *v.* HOLMAN, WARDEN;

No. 409, Misc. BRAWLEY *v.* HOLMAN, WARDEN;

No. 478, Misc. ROGERS *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT; and

No. 483, Misc. GRAY *v.* ANDERSON, JAIL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

No. 380. TODD ET AL. *v.* JOINT APPRENTICESHIP COMMITTEE ET AL. On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit. The Solicitor General is invited to file a brief in this case expressing the views of the United States.

Certiorari Granted.

No. 399. UNITED STATES *v.* BROWN. C. A. 9th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney* and *George B. Searls* for the United States. *Richard Gladstein* and *Norman Leonard* for respondent. Reported below: 334 F. 2d 488.

Certiorari Denied. (See also Nos. 416 and 426, *ante*, p. 28.)

No. 205. BABCOCK *v.* COMMUNITY REDEVELOPMENT AGENCY OF LOS ANGELES, CALIFORNIA. Supreme Court of California. Certiorari denied. *Austin Clapp* for petitioner. *Henry O. Duque* for respondent. Reported below: 61 Cal. 2d 21, 389 P. 2d 538.

No. 372. MARROSO *v.* UNITED STATES; and

No. 471. SAMARIN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *J. Edward Worton* for petitioner in No. 372. *Alfred L. Scanlan* and *James Easly* for petitioner in No. 471. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome Nelson* for the United States. Reported below: 331 F. 2d 601.

No. 396. BELL HOSIERY MILLS, INC. *v.* MARVEL SPECIALTY CO., INC. C. A. 4th Cir. Certiorari denied. *Warley L. Parrott* for petitioner. *Robert F. Conrad* for respondent. Reported below: 330 F. 2d 164.

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No. 392. KLEINMAN ET AL. *v.* SAMINSKY ET AL. Supreme Court of Delaware. Certiorari denied. *Alex Elson, Willard J. Lassers* and *Aaron S. Wolff* for petitioners. *Alfred Jaretzki, Jr., Marvin Schwartz, James M. Tunnell, Jr.,* and *William S. Megonigal, Jr.,* for respondents. Reported below: —— Del. ——, 200 A. 2d 572.

No. 395. CARTER, U. S. DISTRICT JUDGE, ET AL. *v.* OLYMPIC REFINING CO. ET AL. C. A. 9th Cir. Certiorari denied. *Francis R. Kirkham, William E. Mussman, Howard Painter, Jack E. Woods, George W. Jansen, Wayne H. Knight, Edmund D. Buckley, Irving Slifkin, Andrew A. Hauk* and *Harold C. Morton* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick* and *Robert B. Hummel* for the United States, and *Joseph L. Alioto* for Olympic Refining Co., respondents. Reported below: 332 F. 2d 260.

No. 400. R. H. WRIGHT, INC. *v.* CITY OF FORT LAUDERDALE. C. A. 5th Cir. Certiorari denied. *Richard M. White* and *Thomas H. Anderson* for petitioner. Reported below: 329 F. 2d 871.

No. 401. SOUTH DAKOTA ET AL. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *Frank L. Farrar,* Attorney General of South Dakota, *John B. Wehde,* Assistant Attorney General, *E. W. Stephens* and *Warren May* for petitioners. *Solicitor General Cox, Roger P. Marquis* and *Edmund B. Clark* for the United States. Reported below: 329 F. 2d 665.

No. 403. MOUNT ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Donald V. Yarborough* and *W. E. Johnson* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 333 F. 2d 39.

No. 407. HANCHEY, WARDEN *v.* COLLINS. C. A. 5th Cir. Certiorari denied. *Jack P. F. Gremillion,* Attorney General of Louisiana, for petitioner. Reported below: 329 F. 2d 100; 335 F. 2d 417.

No. 409. TURNER *v.* KENNEDY ET AL. C. A. D. C. Cir. Certiorari denied. *Edward Bennett Williams* and *Vincent J. Fuller* for petitioner. *Solicitor General Cox* for respondents. Reported below: 118 U. S. App. D. C. 104, 332 F. 2d 304.

No. 411. MONROE AUTO EQUIPMENT CO. *v.* SUPERIOR INDUSTRIES, INC. C. A. 9th Cir. Certiorari denied. *William W. Rymer* and *A. Donham Owen* for petitioner. *Francis A. Utecht* for respondent. Reported below: 332 F. 2d 473.

No. 414. LAM TAT SIN *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Abraham Lebenkoff* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for respondent. Reported below: 334 F. 2d 999.

No. 417. GEORGIOU *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles A. Bellows* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 333 F. 2d 440.

No. 418. CHESTER PARK APARTMENTS, INC. *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. *D. D. Wozniak* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Frederick B. Abramson* for the United States. Reported below: 332 F. 2d 1.

No. 419. LAPENSOHN *v.* PENNSYLVANIA; and

No. 420. COHEN ET AL. *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. *Morton Witkin* and *Stanford Shmukler* for petitioner in No. 419. *Edward Davis, John Patrick Walsh* and *John Rogers Carroll* for petitioners in No. 420. *Arlen Specter* and *James C. Crumlish, Jr.*, for respondent.

No. 429. MOUTON, COLLECTOR OF REVENUE OF LOUISIANA *v.* INTERNATIONAL SHOE CO. Supreme Court of Louisiana. Certiorari denied. *Chapman L. Sanford* and *Emmett E. Batson* for petitioner. Brief of *amici curiae*, in support of the petition, was filed by *Warren C. Colver*, Attorney General of Alaska; *Robert W. Pickrell*, Attorney General of Arizona; *Bruce Bennett*, Attorney General of Arkansas; *Duke W. Dunbar*, Attorney General of Colorado, and *John H. Heckers*, Special Assistant Attorney General; *Eugene Cook*, Attorney General of Georgia; *Bert T. Kobayashi*, Attorney General of Hawaii, and *Allen I. Marutani*, Deputy Attorney General; *William Ferguson*, Attorney General of Kansas; *John B. Breckinridge*, Attorney General of Kentucky, and *William S. Riley*, Assistant Attorney General; *Edward W. Brooke*, Attorney General of Massachusetts, and *Herbert E. Tucker, Jr.*, Assistant Attorney General; *Walter F. Mondale*, Attorney General of Minnesota, and *Jerome J. Sicora*, Assistant Attorney General; *Joe T. Patterson*, Attorney General of Mississippi, and *Martin R. McLendon*, Assistant Attorney General; *Thomas F. Eagleton*, Attorney General of Missouri, and *Eugene G. Bushman*, Assistant Attorney General; *William Maynard*, Attorney General of New Hampshire, and *Alexander J. Kalinski*, Assistant Attorney General; *Helgi Johanneson*, Attorney General of North Dakota, and *Paul M. Sand*, First Assistant Attorney General; *Robert Y. Thornton*, Attorney General of Oregon, and *Carlisle B. Roberts* and

Theodore W. de Looze, Assistant Attorneys General; *Walter E. Alessandroni,* Attorney General of Pennsylvania, and *Edward Friedman* and *George W. Keitel,* Deputy Attorneys General; *Frank L. Farrar,* Attorney General of South Dakota; *John J. O'Connell,* Attorney General of Washington; and *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *T. Carl Holbrook* and *William D. Dexter,* Assistant Attorneys General. Reported below: 246 La. 244, 164 So. 2d 314.

No. 421. HALIO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Maurice Edelbaum* for petitioner. *William Cahn* for respondent. Reported below: 13 N. Y. 2d 1073, 195 N. E. 2d 895.

No. 424. OUTDOOR AMERICAN CORP. ET AL. *v.* CITY OF PHILADELPHIA ET AL. C. A. 3d Cir. Certiorari denied. *Lipman Redman* for petitioners. *Levy Anderson* for respondents. Reported below: 333 F. 2d 963.

No. 425. ENGLE *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Ernestine B. Powell* for petitioner. *Solicitor General Cox* for the United States. Reported below: 332 F. 2d 88.

No. 427. R. H. WRIGHT, INC. *v.* HARDRIVES CO., INC., ET AL. C. A. 5th Cir. Certiorari denied. *Richard M. White* and *Thomas H. Anderson* for petitioner. Reported below: 329 F. 2d 868.

No. 433. RUEHRUP *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Gordon Burroughs* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 333 F. 2d 641.

No. 428. LAPIN ET AL. *v.* SHULTON, INC., ET AL. C. A. 9th Cir. Certiorari denied. *Francis George Stapleton* for petitioners. *Melvin H. Siegel* for respondents. Reported below: 333 F. 2d 169.

No. 431. GEORGE ET AL. *v.* DOUGLAS AIRCRAFT CO., INC. C. A. 2d Cir. Certiorari denied. *Wilbur E. Dow, Jr.*, for petitioners. *Harry Seidell* for respondent. Reported below: 332 F. 2d 73.

No. 517. TWOMBLEY *v.* CITY OF LONG BEACH ET AL. C. A. 9th Cir. Certiorari denied. *John B. Ogden* for petitioner. *Thomas C. Lynch,* Attorney General of California, *Jay L. Shavelson,* Assistant Attorney General, and *N. Gregory Taylor,* Deputy Attorney General, for the State of California et al., respondents. *Solicitor General Cox, Roger P. Marquis* and *George S. Swarth* filed a memorandum for the United States in opposition to request for consolidation. Reported below: 333 F. 2d 685.

Nos. 404 and 405. RE *v.* UNITED STATES;

No. 406. CASAGRANDE, ALIAS GRANDE *v.* UNITED STATES; and

No. 410. BATKIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions. *Harris B. Steinberg* for petitioners in Nos. 404 and 405. *Michael P. Direnzo* for petitioners in Nos. 406 and 410. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 336 F. 2d 306.

No. 88, Misc. HOLLAND *v.* MURRAY, POLICE DEPARTMENT CHIEF. C. A. D. C. Cir. Certiorari denied.

No. 220, Misc. NICKENS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 408. WESTERN NATURAL GAS CO. *v.* CITIES SERVICE GAS CO.; and

No. 513. CITIES SERVICE GAS CO. *v.* WESTERN NATURAL GAS CO. Supreme Court of Delaware. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of these petitions. *E. Barrett Prettyman, Jr., Carroll L. Gilliam* and *Clair John Killoran* for petitioner in No. 408 and respondent in No. 513. *Conrad C. Mount, Charles V. Wheeler, Howard L. Williams, Harry S. Littman* and *Melvin Richter* for petitioner in No. 513 and respondent in No. 408. Reported below: 57 Del. ——, 201 A. 2d 164.

No. 127, Misc. ALLEN *v.* BANNAN, WARDEN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Frank J. Kelley,* Attorney General of Michigan, *Robert A. Derengoski,* Solicitor General, and *George E. Mason,* Assistant Attorney General, for respondent. Reported below: 332 F. 2d 399.

No. 170, Misc. PHERIBO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *H. Elliot Wales* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 331 F. 2d 281.

No. 233, Misc. WALDON *v.* CHAPPELL, CHAIRMAN, U. S. BOARD OF PAROLE, ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents.

No. 327, Misc. COLLINS *v.* KLINGER. C. A. 9th Cir. Certiorari denied. Reported below: 332 F. 2d 54.

No. 252, Misc. RICHARDSON *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 329, Misc. FINLEY *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 331, Misc. GOFFMAN *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied. Reported below: 30 Ill. 2d 501, 198 N. E. 2d 323.

No. 334, Misc. SOLLA *v.* HEROLD, STATE HOSPITAL DIRECTOR. 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. 339, Misc. DRAPER ET AL. *v.* WASHINGTON ET AL. Superior Court of Washington, Walla Walla County. Certiorari denied.

No. 341, Misc. BURKS *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 343, Misc. EMORY *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. Reported below: 193 Kan. 52, 391 P. 2d 1013.

No. 349, Misc. THOMPSON *v.* CALIFORNIA. District Court of Appeal of California, Fifth Appellate District. Certiorari denied.

No. 321, Misc. MARTINEZ *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 333 F. 2d 80.

No. 351, Misc. ALBRIGHT *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: 329 F. 2d 70.

No. 357, Misc. TILLMAN *v.* SOUTH CAROLINA ET AL. Supreme Court of South Carolina. Certiorari denied. *Maurice C. Goodpasture* for petitioner. Reported below: 244 S. C. 259, 136 S. E. 2d 300.

No. 358, Misc. RIERA *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. *Richard J. Medalie* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Lillian Z. Cohen,* Deputy Assistant Attorney General, for respondent.

No. 362, Misc. HARRIS *v.* TURNER ET AL. C. A. 6th Cir. Certiorari denied. *John S. Wrinkle* for petitioner. *Sizer Chambliss* for respondents. Reported below: 329 F. 2d 918.

No. 364, Misc. MEIKLE *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. Petitioner *pro se*. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 367, Misc. ENGLING *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 368, Misc. BYNUM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 371, Misc. DESIMONE *v.* RANDOLPH, WARDEN. C. A. 7th Cir. Certiorari denied. *Gerald W. Getty* and *James J. Doherty* for petitioner.

No. 377, Misc. MCDANIEL *v.* UNION TANK CAR CO. Supreme Court of Louisiana. Certiorari denied. *J. Minos Simon* for petitioner. *Hopkins P. Breazeale, Jr.*, for respondent.

No. 383, Misc. SEXTON *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 384, Misc. BYRNES *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 386, Misc. RUSSELL *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 391, Misc. NICHOLS *v.* ILLINOIS. Supreme Court of Illinois. Certiorari denied.

No. 410, Misc. KISSINGER *v.* LANE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 93, Misc. IMBLER *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Gregory S. Stout* for petitioner. *Thomas C. Lynch*, Attorney General of California, *Arlo E. Smith*, Chief Assistant Attorney General, and *Albert W. Harris, Jr.*, Deputy Attorney General, for respondent. Reported below: 60 Cal. 2d 554, 387 P. 2d 6.

No. 369, Misc. NUTT *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 *Kirby W. Patterson* for the United States. Reported below: 335 F. 2d 817.

No. 413, Misc. MINTZER *v.* JOSEPH ET AL. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Charles Seligson* for respondents. Reported below: 332 F. 2d 497.

No. 425, Misc. COOPER *v.* REINCKE, WARDEN. C. A. 2d Cir. Certiorari denied. *Morgan P. Ames* for petitioner. Reported below: 333 F. 2d 608.

No. 231, Misc. DETORO *v.* PEPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William J. McCarthy* for petitioner. *Thomas B. Finan*, Attorney General of Maryland, and *Franklin Goldstein*, Assistant Attorney General, for respondent. Reported below: 332 F. 2d 341.

No. 426, Misc. PATE *v.* PAGE, WARDEN. C. A. 10th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Melvin L. Wulf* for petitioner. *Charles Nesbitt*, Attorney General of Oklahoma, and *Charles L. Owens*, Assistant Attorney General, for respondent.

No. 209, Misc. GORDON ET AL. *v.* ILLINOIS BELL TELEPHONE CO. ET AL. Motion to substitute Ann Gordon in place of Paul Gordon granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. *Edmund Hatfield* for petitioners. *Kenneth F. Burgess* and *James E. S. Baker* for respondents. Reported below: 330 F. 2d 103.

Rehearing Denied.

No. 258. STRITE ET AL., EXECUTORS *v.* MCGINNES, DISTRICT DIRECTOR OF INTERNAL REVENUE, *ante*, p. 836;

No. 66, Misc. HIPP *v.* SMITH ET AL., *ante*, p. 853;

No. 82, Misc. JOHNSON *v.* SHOVLIN, STATE HOSPITAL SUPERINTENDENT, *ante*, p. 854;

No. 85, Misc. MATTHEWSON ET AL. *v.* MCCUNE, JUDGE, ET AL., *ante*, p. 854;

No. 129, Misc. STELLO *v.* UNITED STATES, *ante*, p. 857; and

No. 172, Misc. TANSIMORE *v.* UNITED STATES, *ante*, p. 809. Petitions for rehearing denied.

No. 176, Misc. CEPERO *v.* PRESIDENT OF THE UNITED STATES ET AL., *ante*, p. 12. Petition for rehearing denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition.

NOVEMBER 16, 1964.

Miscellaneous Orders.

No. 5, Original. UNITED STATES *v.* CALIFORNIA. The motion of the State of Alaska for leave to present oral argument, as *amicus curiae*, is granted and thirty minutes are allotted for that purpose. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *Warren C. Colver*, Attorney General of Alaska, and *Avrum M. Gross* and *George N. Hayes*, Special Assistant Attorneys General, on the motion. [For earlier orders herein, see 375 U. S. 927, 990; 377 U. S. 926, 986; *ante*, p. 804.]

No. 372, Misc. SCHWEITZER *v.* KROPP, WARDEN, ET AL. Motion for leave to file petition for writ of certiorari denied.

No. 17, Original. NEBRASKA *v.* IOWA. The motion of Roy M. Harrop et al. for leave to file a petition of intervention is denied. *Roy M. Harrop, pro se,* on the motion. [For earlier order herein, see *ante,* p. 876.]

No. 42. SINGER *v.* UNITED STATES. (Certiorari, 377 U. S. 903, to the United States Court of Appeals for the Ninth Circuit.) The motion of Nicholas Jacop Uselding for leave to present oral argument, as *amicus curiae,* is denied.

No. 300. FORTSON, SECRETARY OF STATE OF GEORGIA, ET AL. *v.* TOOMBS ET AL. Appeal from the United States District Court for the Northern District of Georgia. (Probable jurisdiction noted, *ante,* p. 809.) Further consideration of the motion to dismiss is postponed to the hearing of the case on the merits.

No. 577. POINTER *v.* TEXAS. (Certiorari, *ante,* p. 815, to the Court of Criminal Appeals of Texas.) The motion for the appointment of counsel is granted, and it is ordered that *Orville A. Harlan, Esquire,* of Houston, Texas, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 467, Misc. HARPER *v.* CALIFORNIA ET AL. Motion for leave to file petition for writ of habeas corpus denied.

No. 419, Misc. ROSS *v.* HASKINS, CORRECTIONAL SUPERINTENDENT; and

No. 530, Misc. GROSS *v.* TEXAS ET AL. 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.

Certiorari Granted. (See also No. 298, *ante,* p. 43.)

No. 422. FEDERAL TRADE COMMISSION *v.* CONSOLIDATED FOODS CORP. Motion of Trabon Engineering Corp. et al. for leave to file a brief, as *amici curiae,* granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit granted. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel* and *James McI. Henderson* for petitioner. *Anderson A. Owen* and *Daniel Walker* for respondent. *Bruce Griswold* for Trabon Engineering Corp. et al., as *amici curiae,* in support of the petition. Reported below: 329 F. 2d 623.

No. 443. HUGHES TOOL CO. ET AL. *v.* TRANS WORLD AIRLINES, INC.; and

No. 501. HUGHES TOOL CO. *v.* TRANS WORLD AIRLINES, INC., ET AL. C. A. 2d Cir. Certiorari granted. *Paul A. Porter, Victor H. Kramer* and *Werner J. Kronstein* for petitioners in both cases. *John F. Sonnett, Dudley B. Tenney* and *Raymond L. Falls, Jr.,* for respondent in No. 443. *John F. Sonnett* for Trans World Airlines, Inc., and *Bruce Bromley, William C. Chanler, William M. Bradner, Jr., Edward R. Neaher, John R. Hupper* and *Charles L. Stewart* for Equitable Life Assurance Society of the United States et al., respondents in No. 501. Reported below: 332 F. 2d 602.

No. 454. O'CONNELL ET AL. *v.* MANNING ET AL.; and

No. 455. AMERICAN AIRLINES, INC. *v.* MANNING ET AL. C. A. 2d Cir. Certiorari granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of these petitions. *Martin C. Seham* for petitioners in No. 454. *Arthur M. Wisehart* for petitioner in No. 455. *Asher W. Schwartz* for respondents in both cases. Reported below: 329 F. 2d 11.

No. 437. BURNETT *v.* NEW YORK CENTRAL RAILROAD Co. C. A. 6th Cir. Certiorari granted. *Otto F. Putnick* for petitioner. *Robert M. Dennis* for respondent. Reported below: 332 F. 2d 529.

Certiorari Denied. (See also No. 449, *ante*, p. 47; and Misc. Nos. 419 and 530, *supra.*)

No. 71. BEKINS MOVING & STORAGE Co. *v.* JOHNSON. Supreme Court of Idaho. Certiorari denied. *Russell S. Bernhard, Eldon R. Clawson* and *Maurice H. Greene* for petitioner. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Robert W. Ginnane* and *Leonard S. Goodman* for the Interstate Commerce Commission, as *amicus curiae,* in opposition. Reported below: 86 Idaho 569, 389 P. 2d 109.

No. 434. BOUGHNER *v.* TILLOTSON, SPECIAL AGENT, INTERNAL REVENUE SERVICE. C. A. 7th Cir. Certiorari denied. *William A. Barnett* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Joseph M. Howard* and *Burton Berkley* for respondent. Reported below: 333 F. 2d 515.

No. 440. TRUCK DRIVERS & HELPERS LOCAL UNION No. 728, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 5th Cir. Certiorari denied. *John S. Patton* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 332 F. 2d 693.

No. 398. CALMAR STEAMSHIP CORP. *v.* THOMPSON. C. A. 3d Cir. Certiorari denied. *T. E. Byrne, Jr.,* and *Mark D. Alspach* for petitioner. *Abraham E. Freedman* and *Avram G. Adler* for respondent. Reported below: 331 F. 2d 657.

No. 435. MURDOCK *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Michael F. X. Dolan* for petitioner. Reported below: 235 Md. 116, 200 A. 2d 666.

No. 436. MALONE, EXECUTOR, ET AL. *v.* GRAVES ET AL. C. A. 10th Cir. Certiorari denied. *Warren W. Shaw* for petitioners. *Solicitor General Cox* for respondents. Reported below: 332 F. 2d 100.

No. 441. LOMBARDOZZI ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *William Sonenshine* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 335 F. 2d 414.

No. 444. WILD *v.* BREWER, REVENUE AGENT, INTERNAL REVENUE SERVICE. C. A. 9th Cir. Certiorari denied. *W. Lee McLane* and *Thaddeus Rojek* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones, Joseph M. Howard* and *Burton Berkley* for respondent. Reported below: 329 F. 2d 924.

No. 445. PEARSON *v.* YOUNGSTOWN SHEET & TUBE CO. C. A. 7th Cir. Certiorari denied. *Edmond J. Leeney* for petitioner. *Charles R. Kaufman* and *Lester Murphy, Jr.*, for respondent. Reported below: 332 F. 2d 439.

No. 447. MASSA *v.* C. A. VENEZUELAN NAVIGACION ET AL. Motion of John W. McGrath Corp. to be added as a party respondent granted. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied. *Jacob Rassner* for petitioner. *Robert S. Blanc, Jr.*, for C. A. Venezuelan Navigacion, and *James M. Leonard* for John W. McGrath Corp., respondents. Reported below: 332 F. 2d 779.

No. 450. RHODES *v.* MEYER ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Clarence A. H. Meyer*, Attorney General of Nebraska, and *Robert A. Nelson*, Special Assistant Attorney General, for respondents. Reported below: 334 F. 2d 709.

No. 439. KATZ *v.* PEYTON. C. A. 4th Cir. Certiorari denied. *Stanley D. Perry* for petitioner. Reported below: 334 F. 2d 77.

No. 446. MOONEY AIRCRAFT, INC. *v.* DELRAY BEACH AVIATION CORP. ET AL. C. A. 5th Cir. Certiorari denied. *Hal Rachal* for petitioner. *Dayton G. Wiley* for respondents. Reported below: 332 F. 2d 135.

No. 448. HOOD *v.* HOOD. C. A. 10th Cir. Certiorari denied. *Dale M. Stucky* for petitioner. *Oliver H. Hughes* and *Robert Martin* for respondent. Reported below: 335 F. 2d 585.

No. 451. JOSEPH *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *George S. Fitzgerald* and *Paul B. Mayrand* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 333 F. 2d 1012.

No. 452. UGALDE ET AL. *v.* CONFEDERATION LIFE ASSOCIATION, ALSO KNOWN AS LA CONFEDERACION DEL CANADA, ET AL. Supreme Court of Florida. Certiorari denied. *Wesley G. Carey* and *Samuel Sheradsky* for petitioners. *John G. Laylin* and *Cotton Howell* for respondents. Reported below: 164 So. 2d 1, 3, 813.

No. 281, Misc. BERZIN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Richard D. Friedman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 453. TRUCK DRIVERS UNION LOCAL NO. 413, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. D. C. Cir. Certiorari denied. *David Previant, Herbert S. Thatcher* and *L. N. D. Wells, Jr.*, for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 118 U. S. App. D. C. 149, 334 F. 2d 539.

No. 154, Misc. ROGERS *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: 330 F. 2d 535.

No. 174, Misc. GRIFFIN *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Thomas F. Eagleton*, Attorney General of Missouri, and *Howard L. McFadden*, Assistant Attorney General, for respondent.

No. 325, Misc. NUNN *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 223 Cal. App. 2d 658, 35 Cal. Rptr. 884.

No. 328, Misc. BATEMAN *v.* RHAY, PENITENTIARY SUPERINTENDENT. Superior Court of Washington, Walla Walla County. Certiorari denied.

No. 376, Misc. O'CONNOR *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 42 N. J. 502, 201 A. 2d 705.

No. 335, Misc. RASMUSSEN *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. Reported below: 268 Minn. 42, 128 N. W. 2d 289.

No. 355, Misc. EMANUELSON *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied.

No. 382, Misc. ROSARIO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 405, Misc. LONG *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *William D. Paton* for petitioner. Reported below: 235 Md. 125, 200 A. 2d 641.

No. 411, Misc. NASH *v.* MICHIGAN. Supreme Court of Michigan. Certiorari denied.

No. 458, Misc. HARDERS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 487, Misc. BROWN *v.* PEPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied. Reported below: 334 F. 2d 9.

Rehearing Denied.

No. 146. COX, ADMINISTRATOR *v.* HECKER ET AL., *ante*, p. 823;

No. 244. CHATSWORTH COOPERATIVE MARKETING ASSOCIATION ET AL. *v.* INTERSTATE COMMERCE COMMISSION, *ante*, p. 835;

No. 280. KANAREK *v.* UNITED STATES, *ante*, p. 838;

No. 330. BALTIMORE TRANSIT CO. ET AL. *v.* MARYLAND FOR THE USE OF GEILS ET AL., *ante*, p. 842;

No. 483. BOINEAU ET AL. *v.* THORNTON, SECRETARY OF STATE OF SOUTH CAROLINA, ET AL., *ante*, p. 15;

No. 166, Misc. DE PAUNTO, ALIAS LIPSCOMB *v.* MICHIGAN, *ante*, p. 860.

No. 181, Misc. BINZ *v.* HELVETIA FLORIDA ENTERPRISES, INC., *ante*, p. 12; and

No. 245, Misc. WELSH *v.* STATE MEDICAL BOARD OF OHIO, *ante*, p. 864. Petitions for rehearing denied.

No. 102. CREEK NATION EAST OF THE MISSISSIPPI *v.* UNITED STATES, *ante*, p. 846. Petition for rehearing denied. MR. JUSTICE BLACK took no part in the consideration or decision of this petition.

NOVEMBER 17, 1964.

Dismissal Under Rule 60.

No. 99. POWELL *v.* SILVER, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK. On petition for writ of certiorari to the Court of Appeals of New York and Appellate Division, Supreme Court of New York, Second Judicial Department. Petition dismissed pursuant to Rule 60 of the Rules of this Court. *Maurice Edelbaum* for petitioner.

NOVEMBER 23, 1964.

Miscellaneous Orders.

No. 5, Original. UNITED STATES *v.* CALIFORNIA. The motion of John B. Ogden for leave to present oral argument is denied. THE CHIEF JUSTICE and MR. JUSTICE CLARK took no part in the consideration or decision of this motion. *John B. Ogden, pro se,* on the motion. *Solicitor General Cox* for the United States, and *Thomas C. Lynch,* Attorney General of California, and *Charles E. Corker,* Assistant Attorney General, for the State of California, in opposition to the motion. [For earlier orders herein, see 375 U. S. 927, 990; 377 U. S. 926, 986; *ante,* pp. 804, 910.]

No. 44. AMERICAN COMMITTEE FOR PROTECTION OF FOREIGN BORN *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD. (Certiorari, 377 U. S. 915, to the United States Court of Appeals for the District of Columbia Circuit); and

No. 65. VETERANS OF THE ABRAHAM LINCOLN BRIGADE *v.* SUBVERSIVE ACTIVITIES CONTROL BOARD. (Certio-

rari, 377 U. S. 989, to the United States Court of Appeals for the District of Columbia Circuit.) The motion of Marvin M. Karpatkin and Melvin L. Wulf for leave to present oral argument, as *amici curiae,* is denied. *Melvin L. Wulf* on the motion.

No. 52. DOMBROWSKI ET AL. *v.* PFISTER, CHAIRMAN, JOINT LEGISLATIVE COMMITTEE ON UN-AMERICAN ACTIVITIES OF THE LOUISIANA LEGISLATURE, ET AL. (Probable jurisdiction noted, 377 U. S. 976.) The motion to dismiss is postponed pending the hearing on the merits. MR. JUSTICE BLACK took no part in the consideration or decision of this motion. *Jack N. Rogers* and *Robert H. Reiter* for appellees on the motion.

No. 73. UNITED STATES *v.* MISSISSIPPI ET AL. Appeal from the United States District Court for the Southern District of Mississippi. (Probable jurisdiction noted, 377 U. S. 988.) The motion of American Civil Liberties Union for leave to file a brief, as *amicus curiae,* is granted. *Francis Biddle, Norman Dorsen* and *Melvin L. Wulf* on the motion. *Joe T. Patterson,* Attorney General of Mississippi, *P. M. Stockett* and *Charles Clark,* Special Assistant Attorneys General, *Dugas Shands,* Assistant Attorney General, and *Aubrey Bell* for appellees, in opposition.

No. 178. FORTSON, SECRETARY OF STATE OF GEORGIA *v.* DORSEY ET AL. Appeal from the United States District Court for the Northern District of Georgia. (Probable jurisdiction noted, *ante,* p. 810.) The joint motion to advance is granted and the case is set for argument on Thursday, December 10, 1964. *Eugene Cook,* Attorney General of Georgia, and *Paul Rodgers,* Assistant Attorney General, for appellant. *Edwin F. Hunt* and *Charles A. Moye, Jr.,* for appellees.

Certiorari Denied. (See also Nos. 75, 83 and 140, *ante*, p. 131.)

No. 251. URSICH *v.* DA ROSA ET AL. C. A. 9th Cir. Certiorari denied. *Ben Margolis* and *John T. McTernan* for petitioner. *L. Robert Wood* for respondents. Reported below: 328 F. 2d 794.

No. 456. GRAND LODGE OF THE INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* KING ET AL. C. A. 9th Cir. Certiorari denied. *Plato E. Papps, Edward J. Hickey, Jr., James L. Highsaw, Jr.,* and *John Paul Jennings* for petitioners. *Gerald D. Marcus* for respondents. Reported below: 335 F. 2d 340.

No. 457. PAN-AMERICAN LIFE INSURANCE CO. *v.* RAIJ. Supreme Court of Florida. Certiorari denied. *James A. Dixon* and *Sam Daniels* for petitioner. *Samuel Sheradsky* for respondent. Reported below: 164 So. 2d 204.

No. 458. POWELL *v.* NATIONAL SAVINGS & TRUST CO. C. A. D. C. Cir. Certiorari denied. *Diana Kearny Powell,* petitioner, *pro se.*

No. 460. LAPINE ET AL. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Thomas C. Perkins* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent.

No. 462. KUPER ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 3d Cir. Certiorari denied. *Martin D. Cohen* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Harry Baum* and *Morton K. Rothschild* for respondent. Reported below: 332 F. 2d 562.

No. 461. HALLER ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *James J. Cally* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Julia P. Cooper* for the United States. Reported below: 333 F. 2d 827.

No. 459. PACIFIC INSURANCE ASSOCIATES, LTD. *v.* FASHIONS, INC. C. A. 9th Cir. Certiorari denied. *Robert M. Adams, Jr.*, for petitioner. *Paul M. Rhodes* for respondent.

No. 470. NATIONAL MARITIME UNION OF AMERICA, AFL–CIO *v.* GULFCOAST TRANSIT CO. C. A. 5th Cir. Certiorari denied. *Abraham E. Freedman* for petitioner. *Warren E. Hall, Jr.*, for respondent. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* filed a memorandum for the National Labor Relations Board. Reported below: 332 F. 2d 28.

No. 465. KATZ *v.* KATZ. Supreme Court of Florida. Certiorari denied. *Thomas H. Anderson* for petitioner. *Milton M. Ferrell* and *Paul A. Louis* for respondent.

No. 466. ROBINSON *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *T. Eric Embry* and *Fred Blanton* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 333 F. 2d 950.

No. 467. COHEN *v.* HIGHWAY TRUCK DRIVERS & HELPERS, LOCAL 107, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN & HELPERS OF AMERICA, ET AL. C. A. 3d Cir. Certiorari denied. *Stanford Shmukler* for petitioner. Reported below: 334 F. 2d 378.

No. 463. STOVER ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *P. M. Barceloux* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: 332 F. 2d 204.

No. 468. CITY OF NEW YORK *v.* BERNSTEIN ET AL. C. A. 2d Cir. Certiorari denied. *Leo A. Larkin, Seymour B. Quel* and *Joel L. Cohen* for petitioner. *Solomon R. Agar* for respondents. Reported below: 332 F. 2d 1006.

No. 469. SIGUE *v.* TEXAS GAS TRANSMISSION CORP. Supreme Court of Louisiana. Certiorari denied. *J. Minos Simon* for petitioner.

No. 476. MURPHY *v.* UNITED STATES. Court of Claims. Certiorari denied. *Fred W. Shields* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. Reported below: 165 Ct. Cl. 156.

No. 475. WOLFF *v.* CALIFORNIA. Motion to dispense with printing the petition granted. Petition for a writ of certiorari to the District Court of Appeal of California, Second Appellate District, denied.

No. 59, Misc. YOPPS *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se*. *Thomas B. Finan,* Attorney General of Maryland, for respondent. Reported below: 234 Md. 216, 198 A. 2d 264.

No. 125, Misc. AVELLINO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Harold Dublirer* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States. Reported below: 330 F. 2d 490.

No. 477. LEWIS ET AL. *v.* ALLEN, COMMISSIONER OF EDUCATION OF NEW YORK. Court of Appeals of New York. Certiorari denied. *Martin J. Scheiman* for petitioners. *Charles A. Brind* for respondent. *Thomas B. Finan,* Attorney General of Maryland, and *David T. Mason,* Assistant Attorney General, filed a brief for the Attorney General of Maryland, as *amicus curiae,* in opposition to the petition, joined by the Attorneys General of their respective States as follows: *Richmond M. Flowers* of Alabama, *Robert W. Pickrell* of Arizona, *Bruce Bennett* of Arkansas, *Duke W. Dunbar* of Colorado, *David P. Buckson* of Delaware, *James W. Kynes, Jr.,* of Florida, *Eugene Cook* of Georgia, *Bert T. Kobayashi* of Hawaii, *Allan G. Shepard* of Idaho, *William M. Ferguson* of Kansas, *Robert Matthews* of Kentucky, *Jack P. F. Gremillion* of Louisiana, *Frank E. Hancock* of Maine, *Joe T. Patterson* of Mississippi, *Forrest H. Anderson* of Montana, *William Maynard* of New Hampshire, *T. Wade Bruton* of North Carolina, *Helgi Johanneson* of North Dakota, *Walter E. Alessandroni* of Pennsylvania, *J. Joseph Nugent* of Rhode Island, *Daniel R. McLeod* of South Carolina, *Frank L. Farrar* of South Dakota, *George F. McCanless* of Tennessee, *Waggoner Carr* of Texas, *A. Pratt Kesler* of Utah, *Charles E. Gibson, Jr.,* of Vermont, *Robert Y. Button* of Virginia, *C. Donald Robertson* of West Virginia, and *John F. Raper* of Wyoming.

No. 165, Misc. LIPSCOMB *v.* JOHNSON, PRESIDENT, ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondents.

No. 190, Misc. JONES *v.* TEASLEY ET AL. C. A. 5th Cir. Certiorari denied. *Leonard B. Boudin* and *Benjamin E. Smith* for petitioner. *Charles D. Egan* for respondents.

No. 210, Misc. ROWE *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *Francis D. Murnaghan, Jr.*, for petitioner. *Thomas B. Finan*, Attorney General of Maryland, and *Mathias J. DeVito*, Assistant Attorney General, for respondent. Reported below: 234 Md. 295, 199 A. 2d 785.

No. 232, Misc. CHAPMAN *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 239, Misc. BLAKE *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. Petitioner *pro se*. *Andrew J. Ryan, Jr.*, and *Sylvan A. Garfunkel* for respondent.

No. 381, Misc. DRAPER *v.* RHAY, PENITENTIARY SUPERINTENDENT. C. A. 9th Cir. Certiorari denied.

No. 389, Misc. GRIFFIN *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Reported below: 238 Ore. 103, 392 P. 2d 642.

No. 395, Misc. CORA *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied.

No. 422, Misc. BRADFORD *v.* NASH, WARDEN. C. A. 8th Cir. Certiorari denied.

Rehearing Denied.

No. 129. LAKEN *v.* CORNMESSER, *ante*, p. 822;

No. 144. WOXBERG ET AL. *v.* UNITED STATES, *ante*, p. 823;

No. 194. CASS ET AL. *v.* YOUNGSTOWN SHEET & TUBE CO., *ante*, p. 828; and

No. 197. URGA *v.* FLORIDA, *ante*, p. 829. Petitions for rehearing denied.

No. 259. AGEE *v.* COLUMBUS BAR ASSOCIATION, *ante*, p. 7;

No. 260. JURUS *v.* COLUMBUS BAR ASSOCIATION, *ante*, p. 9;

No. 37, Misc. HUFFMAN *v.* DOUGLAS AIRCRAFT CO. ET AL., *ante*, p. 850;

No. 53, Misc. ANDERSON *v.* WAINWRIGHT, CORRECTIONS DIRECTOR, *ante*, p. 806;

No. 175, Misc. MARTIN *v.* KENTUCKY ET AL., *ante*, p. 891; and

No. 222, Misc. RIZZITELLO ET AL. *v.* CALIFORNIA, *ante*, p. 863. Petitions for rehearing denied.

DECEMBER 7, 1964.

Order Approving Bond.

An order is entered approving the bond of the Clerk of this Court and directing that it be recorded.

Miscellaneous Orders.

No. 543, October Term, 1963. UNITED STATES *v.* MARYLAND FOR THE USE OF MEYER ET AL. (Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied, 375 U. S. 954); and

No. 345. MARYLAND FOR THE USE OF LEVIN ET AL. *v.* UNITED STATES. (Certiorari, *ante*, p. 877, to the United States Court of Appeals for the Third Circuit.) The motion of the respondents in No. 543, October Term, 1963, requesting action on the motion for leave to file a conditional petition for rehearing is denied; for leave to file a brief, as *amici curiae*, in No. 345 is granted; for leave to participate in the oral argument, as *amici curiae*, of No. 345 is denied. *Richard W. Galiher, William E. Stewart, Jr., Louis G. Davidson* and *Peter J. McBreen* on the motion.

No. 508, Misc. WALKER *v.* PATE, WARDEN. Motion for leave to file petition for writ of certiorari denied.

No. 464, Misc. RODRIGUEZ *v.* MCMANN, WARDEN; and

No. 489, Misc. TERRY *v.* PITCHES, SHERIFF. Motions for leave to file petitions for writs of habeas corpus denied.

No. 501, Misc. DANDY *v.* MYERS, CORRECTIONAL SUPERINTENDENT; and

No. 517, Misc. DICKEY *v.* TEXAS ET AL. 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.

Probable Jurisdiction Noted.

No. 496. GRISWOLD ET AL. *v.* CONNECTICUT. Appeal from the Supreme Court of Errors of Connecticut. Probable jurisdiction noted. *Fowler V. Harper* for appellants. *Joseph B. Clark* for appellee. Reported below: 151 Conn. 544, 200 A. 2d 479.

No. 491. LAMONT, DOING BUSINESS AS BASIC PAMPHLETS *v.* POSTMASTER GENERAL. Appeal from the United States District Court for the Southern District of New York. Probable jurisdiction noted. Counsel are directed to discuss in their briefs and oral argument the question of mootness as well as the merits of the case. MR. JUSTICE WHITE took no part in the consideration or decision of this case. *Leonard B. Boudin, Victor Rabinowitz* and *Henry Winestine* for appellant. *Solicitor General Cox, Assistant Attorney General Yeagley, Kevin T. Maroney* and *Lee B. Anderson* for appellee. Reported below: 229 F. Supp. 913.

Certiorari Granted.

No. 245. WATERMAN STEAMSHIP CORP. *v.* UNITED STATES. C. A. 5th Cir. Certiorari granted. *John W. McConnell, Jr.*, and *William H. Armbrecht* for petitioner. *Solicitor General Cox, Acting Assistant Attorney General Jones* and *I. Henry Kutz* for the United States. Reported below: 330 F. 2d 128.

No. 294. ONE 1958 PLYMOUTH SEDAN *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari granted. *Stanford Shmukler* for petitioner. *Walter E. Alessandroni,* Attorney General of Pennsylvania, and *Thomas J. Shannon,* Assistant Attorney General, for respondent. Reported below: 414 Pa. 540, 201 A. 2d 427.

No. 482. FEDERAL COMMUNICATIONS COMMISSION *v.* SCHREIBER ET AL. C. A. 9th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Douglas, Sherman L. Cohn, Harvey L. Zuckman* and *Henry Geller* for petitioner. *Harry M. Plotkin* for respondents. Reported below: 329 F. 2d 517.

No. 489. UNITED STATES *v.* ATLAS LIFE INSURANCE CO. C. A. 10th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett, Philip B. Heymann, John B. Jones, Jr.*, and *Gilbert E. Andrews* for the United States. *Norris Darrell, M. Bernard Aidinoff* and *Thomas C. Thompson, Jr.*, for respondent. Reported below: 333 F. 2d 389.

No. 503. COMMISSIONER OF INTERNAL REVENUE *v.* ESTATE OF NOEL ET AL. C. A. 3d Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Loring W. Post* for petitioner. *Edward F. Merrey, Jr.*, and *Harry Norman Ball* for respondents. Reported below: 332 F. 2d 950.

No. 256. ESTES *v.* TEXAS. Petition for writ of certiorari to the Court of Criminal Appeals of Texas granted limited to Question 2 presented by the petition which reads as follows:

"Whether the action of the trial court, over petitioner's continued objection, denied him due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States, in requiring petitioner to submit to live television of his trial, and in refusing to adopt in this all out publicity case, as a rule of trial procedure, Canon 35 of the Canons of Judicial Ethics of the American Bar Association, and instead adopting and following, over defendant's objection, Canon 28 of the Canons of Judicial Ethics, since approved by the Judicial Section of the integrated (State agency) State Bar of Texas."

Hume Cofer and *John D. Cofer* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Howard M. Fender, Gilbert J. Pena* and *Allo B. Crow, Jr.,* Assistant Attorneys General, for respondent.

Certiorari Denied. (See also No. 436, Misc., *ante,* p. 202, and Misc. Nos. 501 and 517, *supra.*)

No. 223. POORE ET AL. *v.* MAYER, JUDGE, ET AL. Supreme Court of Ohio. Certiorari denied. *Stewart R. Jaffy* for petitioners. *Gerald A. Donahue,* First Assistant Attorney General of Ohio, for respondents. Reported below: 176 Ohio St. 78, 325, 197 N. E. 2d 557, 199 N. E. 2d 392.

No. 413. GENERAL ELECTRIC CO. *v.* INTERNATIONAL UNION OF ELECTRICAL, RADIO & MACHINE WORKERS, AFL–CIO. C. A. 2d Cir. Certiorari denied. *David L. Benetar* and *Sanford Browde* for petitioner. *Benjamin C. Sigal* and *David S. Davidson* for respondent. Reported below: 332 F. 2d 485.

No. 282. WINIFREDE RAILROAD CO. ET AL. *v.* RUMBAUGH; and

No. 283. LOCAL UNION 14182 UNITED MINE WORKERS OF AMERICA ET AL. *v.* RUMBAUGH. C. A. 4th Cir. Certiorari denied. *F. Paul Chambers* and *James K. Brown* for petitioners in No. 282. *M. E. Boiarsky* for petitioners in No. 283. *Ernest Franklin Pauley* for respondent. Reported below: 331 F. 2d 530.

No. 304. CARTHAN *v.* SHERIFF, CITY OF NEW YORK. C. A. 2d Cir. Certiorari denied. *William Sonenshine* for petitioner. *Aaron E. Koota* and *Irving P. Seidman* for respondent. Reported below: 330 F. 2d 100.

No. 473. UNITED STATES *v.* MADISON COUNTY BOARD OF EDUCATION ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for the United States. Reported below: 326 F. 2d 237.

No. 478. OTTAWA TRIBE ET AL. *v.* UNITED STATES. Court of Claims. Certiorari denied. *Louis L. Rochmes* for petitioners. *Solicitor General Cox* and *Roger P. Marquis* for the United States. Reported below: —— Ct. Cl. ——.

No. 479. AWTRY *v.* UNITED STATES. Court of Claims. Certiorari denied. *Penrose Lucas Albright* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. Reported below: 161 Ct. Cl. 681.

No. 480. GEORGE *v.* UNITED STATES. Court of Claims. Certiorari denied. *John P. Witsil* for petitioner. *Solicitor General Cox* for the United States. Reported below: —— Ct. Cl. ——.

No. 484. LAARS ENGINEERS, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Ray L. Johnson, Jr.*, and *Stanley E. Tobin* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Melvin Pollack* for respondent. Reported below: 332 F. 2d 664.

No. 485. REHMAN *v.* CALIFORNIA. Supreme Court of California. Certiorari denied. *A. L. Wirin* and *Fred Okrand* for petitioner. *Thomas C. Lynch,* Attorney General of California, *William E. James,* Assistant Attorney General, and *William B. McKesson* for respondent.

No. 487. HARRIS *v.* WALKER ET AL. C. A. 5th Cir. Certiorari denied. *Eberhard P. Deutsch* for petitioner. *Samuel C. Gainsburgh* for respondents. Reported below: 335 F. 2d 185.

No. 490. MOSES ET UX. *v.* NORTH CAROLINA STATE HIGHWAY COMMISSION. Supreme Court of North Carolina. Certiorari denied. *Robert B. Morgan* for petitioners. *T. Wade Bruton,* Attorney General of North Carolina, and *Harrison Lewis,* Assistant Attorney General, for respondent. Reported below: 261 N. C. 316, 134 S. E. 2d 664.

No. 492. CELSO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Michael A. Querques* and *Daniel E. Isles* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 336 F. 2d 844.

No. 493. VINYARD *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 335 F. 2d 176.

No. 497. RUFFALO *v.* MAHONING COUNTY BAR ASSOCIATION. Supreme Court of Ohio. Certiorari denied. *Charles Alan Wright* for petitioner. *David C. Haynes* for respondent. Reported below: 176 Ohio St. 263, 199 N. E. 2d 396.

No. 498. WHITSON *v.* MINO ET AL. District Court of Appeal of California, Second Appellate District. Certiorari denied.

No. 499. BALKCOM, WARDEN *v.* WHITUS ET AL. C. A. 5th Cir. Certiorari denied. *Eugene Cook,* Attorney General of Georgia, and *Peyton S. Hawes, Jr.,* and *Albert Sidney Johnson,* Assistant Attorneys General, for petitioner. Reported below: 333 F. 2d 496.

No. 500. ADAY ET AL. *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. *Stanley Fleishman* and *Sam Rosenwein* for petitioners. Reported below: 226 Cal. App. 2d 520, 38 Cal. Rptr. 199.

No. 502. UNION LEADER CORP. *v.* HAVERHILL GAZETTE CO. C. A. 1st Cir. Certiorari denied. *James M. Malloy* and *Ralph Warren Sullivan* for petitioner. *Robert H. Goldman* and *Frank Goldman* for respondent. Reported below: 333 F. 2d 808.

No. 504. KINGSPORT PRESS, INC. *v.* MCCULLOCH ET AL. C. A. D. C. Cir. Certiorari denied. *Gerard D. Reilly, Winthrop A. Johns* and *John A. Clark* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board. Reported below: 118 U. S. App. D. C. 365, 336 F. 2d 753.

744-008 O-65-59

No. 507. JAMES *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *William Lee McLane, Nola McLane* and *Thaddeus Rojek* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *John B. Jones, Jr.*, for the United States. Reported below: 333 F. 2d 748.

No. 508. BROTHERHOOD OF LOCOMOTIVE FIREMEN & ENGINEMEN ET AL. *v.* ILLINOIS CENTRAL RAILROAD CO. C. A. 7th Cir. Certiorari denied. *Harold C. Heiss, Russell B. Day, Harold N. McLaughlin, V. C. Shuttleworth, Harry Wilmarth, Burke Williamson* and *Jack A. Williamson* for petitioners. *John W. Foster, Robert S. Kirby, William F. Bunn* and *Joseph H. Wright* for respondent. Reported below: 332 F. 2d 850.

No. 509. KING, ADMINISTRATRIX *v.* SIMMONS, ADMINISTRATRIX. C. A. 4th Cir. Certiorari denied. *Willis Smith, Jr.*, for petitioner. *Howard E. Manning* for respondent. Reported below: 333 F. 2d 178.

Nos. 510 and 542. GIANFRANCESCO *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Edward L. Williams* and *W. Glenn Osborne* for petitioner. *Loren E. Van Brocklin* for respondent in No. 510. *Lynn B. Griffith, Jr.*, for respondent in No. 542.

No. 511. MIDDLESEX COUNTY NATIONAL BANK *v.* HASSAN, TRUSTEE IN BANKRUPTCY. C. A. 1st Cir. Certiorari denied. *Leonard M. Salter* for petitioner. Reported below: 333 F. 2d 838.

No. 516. BANK BUILDING & EQUIPMENT CORP. OF AMERICA *v.* REES. C. A. 7th Cir. Certiorari denied. *Donald N. Clausen, John P. Gorman* and *Fredric H. Stafford* for petitioner. *Lee A. Freeman* for respondent. Reported below: 332 F. 2d 548.

No. 512. ROBERTS ET AL. *v.* STELL ET AL. C. A. 5th Cir. Certiorari denied. *Charles J. Bloch* for petitioners. Statements as *amici curiae,* in support of the petition, were filed by the Attorneys General for their respective States as follows: *Richmond M. Flowers* of Alabama, *Bruce Bennett* of Arkansas, *Jack P. F. Gremillion* of Louisiana, *Joseph T. Patterson* of Mississippi, *Wade Bruton* of North Carolina, *Daniel R. McLeod* of South Carolina, and *Robert Y. Button* of Virginia. Reported below: 333 F. 2d 55.

No. 518. STERLING ET AL. *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *Samuel Bassett* and *John F. Dore* for petitioners. *Solicitor General Cox* for the United States. Reported below: 333 F. 2d 443.

No. 519. DOWERY *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Thad B. Eubanks* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 334 F. 2d 787.

No. 522. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL. *v.* AAXICO AIRLINES, INC.; and

No. 558. AAXICO AIRLINES, INC. *v.* AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL. C. A. 5th Cir. Certiorari denied. *Charles J. Morris* and *Maury Maverick, Jr.,* for petitioners in No. 522 and respondents in No. 558. *John D. Wheeler* for petitioner in No. 558 and respondent in No. 522. Reported below: 331 F. 2d 433.

No. 596. KONIGSBERG *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *Michael A. Querques* and *Daniel E. Isles* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 336 F. 2d 844.

No. 488. In re Local 825, International Union of Operating Engineers, et al. C. A. 3d Cir. Certiorari denied. Mr. Justice Black and Mr. Justice Douglas are of the opinion that certiorari should be granted. *Thomas E. Durkin, Jr.,* and *Louis R. Cerefice* for petitioners. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* filed a memorandum for the National Labor Relations Board.

No. 494. Brotherhood of Railroad Trainmen et al. *v.* Louisville & Nashville Railroad Co. C. A. 5th Cir. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted. *Al G. Rives* for petitioners. *James A. Simpson, W. L. Grubbs, Joseph L. Lenihan, H. G. Breetz* and *M. D. Jones* for respondent. Reported below: 334 F. 2d 79.

No. 505. Warden, Maryland Penitentiary *v.* Ruckle. 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 *John W. Sause, Jr.,* Assistant Attorney General, for petitioner. Respondent *pro se.* Reported below: 335 F. 2d 336.

No. 141, Misc. Benson *v.* Eyman, Warden. Supreme Court of Arizona. Certiorari denied. Petitioner *pro se. Robert W. Pickrell,* Attorney General of Arizona, and *Jerry L. Stahnke,* Assistant Attorney General, for respondent.

No. 123, Misc. McQuaid *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.

No. 506. JONES *v.* GEORGIA. Supreme Court of Georgia. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *Jack Greenberg, James M. Nabrit III* and *Donald L. Hollowell* for petitioner. *J. Walter LeCraw* for respondent. Reported below: 219 Ga. 848, 136 S. E. 2d 358.

No. 514. BAILEY *v.* NEW YORK CENTRAL RAILROAD CO. Court of Appeals of Ohio, Cuyahoga County. Certiorari denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted and the judgments of both courts below reversed. *M. I. Nurenberg* for petitioner. *John F. Dolan* for respondent.

No. 189, Misc. STEWART *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. *Harold B. Anderson* for petitioner. *Bruce Bennett,* Attorney General of Arkansas, and *Jack L. Lessenberry,* Chief Assistant Attorney General, for respondent. Reported below: 237 Ark. 748, 375 S. W. 2d 804.

No. 253, Misc. ALEXANDER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *M. Michael Cramer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 118 U. S. App. D. C. 406, 336 F. 2d 910.

No. 288, Misc. PARHAM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *De Long Harris* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 119 U. S. App. D. C. 242, 339 F. 2d 741.

No. 401, Misc. HUNT *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States.

No. 308, Misc. SMITH ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *William Earl Badgett* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 328 F. 2d 848.

No. 315, Misc. RIVERA *v.* UNITED STATES; and

No. 316, Misc. GUERRA *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner in No. 315, Misc. *Jerome J. Londin* for petitioner in No. 316, Misc. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 334 F. 2d 138.

No. 404, Misc. VANHOOK *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 407, Misc. WOODS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 414, Misc. INDELICATO, ALIAS RED *v.* WARDEN, GREENHAVEN PRISON. C. A. 2d Cir. Certiorari denied. *Peter L. F. Sabbatino* for petitioner. *Frank S. Hogan* and *Harold Roland Shapiro* for respondent.

No. 416, Misc. CONDON *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied.

No. 417, Misc. DUREN *v.* OHIO. Court of Appeals of Ohio, Cuyahoga County. Certiorari denied. *James R. Willis* for petitioner. *John T. Corrigan* for respondent.

No. 418, Misc. THOMAS *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 424, Misc. FROEMBLING *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Reported below: 237 Ore. 616, 391 P. 2d 390.

No. 431, Misc. STEWART *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 235 Md. 210, 201 A. 2d 18.

No. 433, Misc. BANKS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 434, Misc. GARY *v.* NEW YORK; and
No. 435, Misc. BAGLEY ET AL. *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Louis P. Jacobs* for petitioner in No. 434, Misc. *Leon B. Polsky* for petitioners in No. 435, Misc. Reported below: 14 N. Y. 2d 730, 199 N. E. 2d 171.

No. 438, Misc. SANDOVAL *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 442, Misc. ASHBY *v.* GRIM, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied.

No. 446, Misc. HUTH *v.* MAXWELL, WARDEN. Supreme Court of Ohio. Certiorari denied. Reported below: 176 Ohio St. 360, 199 N. E. 2d 741.

No. 448, Misc. DEBERRY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 450, Misc. RAMSEY *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: 332 F. 2d 795.

No. 449, Misc. BERMAN *v.* WARDEN, MARYLAND PENITENTIARY. C. A. 4th Cir. Certiorari denied. Reported below: 333 F. 2d 321.

No. 451, Misc. SIEGLE *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied.

No. 453, Misc. WRIGHT *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 454, Misc. KELLER *v.* TINSLEY, WARDEN. C. A. 10th Cir. 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: 335 F. 2d 144.

No. 459, Misc. GREEN ET AL. *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Johnnie A. Jones* for petitioners. *Jack P. F. Gremillion*, Attorney General of Louisiana, and *Ralph L. Roy* for respondent. Reported below: 245 La. 1081, 1082, 1083, 162 So. 2d 573, 574.

No. 461, Misc. BROWN *v.* WAINWRIGHT, CORRECTIONS DIRECTOR. Supreme Court of Florida. Certiorari denied.

No. 462, Misc. MECKLER *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Frances Kahn* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent.

No. 463, Misc. SPIRES *v.* BOTTORFF. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Owen Voigt* for respondent. Reported below: 332 F. 2d 179.

No. 466, Misc. WILKES *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied. Reported below: 414 Pa. 246, 199 A. 2d 411.

No. 468, Misc. NORTH *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Reported below: 238 Ore. 90, 390 P. 2d 637.

No. 469, Misc. DUNN *v.* FINLEY, DOING BUSINESS AS SANDY BEACH SWIMMING CLUB. Supreme Court of Errors of Connecticut. Certiorari denied. Petitioner *pro se*. *William B. Fitzgerald* for respondent. Reported below: 151 Conn. 618, 201 A. 2d 190.

No. 474, Misc. SMITH *v.* CROUSE, WARDEN. Supreme Court of Kansas. Certiorari denied.

No. 482, Misc. DEL RIO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Samuel A. Neuburger* for petitioner. *Frank S. Hogan* and *H. Richard Uviller* for respondent. Reported below: 14 N. Y. 2d 165, 199 N. E. 2d 359.

No. 488, Misc. GEGENFURTNER *v.* SCHMIDT, DIRECTOR, WISCONSIN DEPARTMENT OF PUBLIC WELFARE, ET AL. Supreme Court of Wisconsin. Certiorari denied.

No. 503, Misc. PICKETT *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 526, Misc. SCHROEDER *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. *Carlos R. Estrada* for petitioner. *Robert W. Pickrell*, Attorney General of Arizona, for respondent. Reported below: 95 Ariz. 255, 389 P. 2d 255.

No. 541, Misc. Epps *v.* New York. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

Rehearing Denied.

No. 160. Smith *v.* United States, *ante*, p. 824;

No. 385. Grossman et vir *v.* Stubbs et al., *ante*, p. 844;

No. 481. Albaugh *v.* Tawes, Governor of Maryland, et al., *ante*, p. 27;

No. 29, Misc. Ortiz *v.* United States, *ante*, p. 849; and

No. 127, Misc. Allen *v.* Bannan, Warden, *ante*, p. 905. Petitions for rehearing denied.

No. 120. Gottesman et al. *v.* General Motors Corp. et al., *ante*, p. 882. Petition for rehearing denied. Mr. Justice Harlan took no part in the consideration or decision of this petition.

No. 249. Brown *v.* Tennessee, *ante*, p. 835. Motion to dispense with printing petition for rehearing granted. Petition for rehearing denied.

No. 2, Misc. Young *v.* South Carolina, *ante*, p. 868. Motion for leave to file a petition for rehearing denied.

December 10, 1964.

Dismissal Under Rule 60.

No. 637, Misc. Reynolds *v.* Fernandez, Chief Justice, Supreme Court of Puerto Rico, et al. Motion for leave to file petition for writ of mandamus dismissed pursuant to Rule 60 of the Rules of this Court. *Conrad J. Lynn* for petitioner.

DECEMBER 14, 1964.

Miscellaneous Orders.

No. 48. UNITED MINE WORKERS OF AMERICA *v.* PENNINGTON ET AL. (Certiorari, 377 U. S. 929, to the United States Court of Appeals for the Sixth Circuit.) The motion of the petitioner to remove this case from the summary calendar is granted. *Harrison Combs* for movant.

No. 240. LOCAL UNION NO. 189, AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL–CIO, ET AL. *v.* JEWEL TEA CO., INC. (Certiorari, *ante*, p. 813, to the United States Court of Appeals for the Seventh Circuit.) The motion of the petitioners to remove this case from the summary calendar is denied. The motion of the Solicitor General, on behalf of the United States, for leave to participate in the oral argument, as *amicus curiae*, is granted and thirty minutes are allotted for that purpose. Counsel for the petitioners and counsel for the respondent are allotted an additional fifteen minutes each for oral argument. *Bernard Dunau* for petitioners.

No. 570, Misc. IN RE PEEBLES; and

No. 571, Misc. EDWARDS *v.* CLEMMER, CORRECTIONS DIRECTOR. 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. 247, Misc. BERRY *v.* WEAKLEY, REFORMATORY SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 505, Misc. PEEK *v.* UNITED STATES ET AL.;

No. 512, Misc. CORONADO *v.* CALIFORNIA;

No. 534, Misc. ALEXANDER *v.* GREEN, CORRECTIONAL SUPERINTENDENT;

No. 540, Misc. MURPHY *v.* FLORIDA; and

No. 542, Misc. RANCE *v.* WARDEN, U. S. PENITENTIARY, TERRE HAUTE, INDIANA. Motions for leave to file petitions for writs of habeas corpus denied.

No. 276, Misc. REXFORD *v.* FLORIDA. 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. Petitioner *pro se*. *James W. Kynes*, Attorney General of Florida, and *George R. Georgieff*, Assistant Attorney General, for respondent.

No. 527. HANNA MINING CO. ET AL. *v.* DISTRICT 2, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL–CIO, ET AL. On petition for writ of certiorari to the Supreme Court of Wisconsin. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 493, Misc. WOLFSOHN, EXECUTRIX *v.* BAZELON, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL. Motion for leave to file petition for writ of mandamus and for other relief denied. *Fred I. Simon* for petitioner. *Gregory Hankin*, respondent, *pro se*.

Probable Jurisdiction Noted.

No. 624. PARSONS, TOWN CLERK OF THE TOWN OF HUBBARDTON, ET AL. *v.* BUCKLEY ET AL.; and

No. 625. HOFF, GOVERNOR OF VERMONT, ET AL. *v.* BUCKLEY ET AL. Appeals from the United States Dis-

trict Court for the District of Vermont. Probable jurisdiction noted. The cases are consolidated and a total of two hours is allotted for oral argument. The appellants are directed to file their briefs on or before January 2, 1965. The appellees are directed to file their briefs on or before January 15, 1965. The cases are set for oral argument on January 18, 1965. That portion of the judgment of the United States District Court for the District of Vermont which is the subject of these appeals is hereby stayed until further order of this Court. *George D. Webster* for appellants in No. 624. *Charles E. Gibson, Jr.*, Attorney General of Vermont, and *Chester S. Ketcham*, Deputy Attorney General, for appellants in No. 625. *Joseph A. McNamara* for appellees in No. 625. Reported below: 234 F. Supp. 191.

Certiorari Granted. (See also No. 535, *ante*, p. 357, and No. 87, Misc., *ante*, p. 358.)

No. 292. Atlantic Refining Co. *v.* Federal Trade Commission. C. A. 7th Cir. Certiorari granted. *Charles I. Thompson, Jr., Roy W. Johns* and *Joel L. Carr* for petitioner. *Solicitor General Cox* and *James McI. Henderson* for respondent. Reported below: 331 F. 2d 394.

No. 296. Goodyear Tire & Rubber Co. *v.* Federal Trade Commission. C. A. 7th Cir. Certiorari granted. *John F. Sonnett* and *H. Richard Schumacher* for petitioner. *Solicitor General Cox* and *James McI. Henderson* for respondent. Reported below: 331 F. 2d 394.

No. 486. Dixon et al. *v.* United States. C. A. 2d Cir. Certiorari granted. *Sanford Saideman* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett* and *Joseph Kovner* for the United States. Reported below: 333 F. 2d 1016.

No. 628. UNITED STATES *v.* MIDLAND-ROSS CORP. C. A. 6th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Wayne G. Barnett* and *Joseph Kovner* for the United States. *Theodore R. Colborn* for respondent. Reported below: 335 F. 2d 561.

No. 526. HARRIS *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit granted limited to Questions 2, 3 and 4 presented by the petition which read as follows:

"2. Whether petitioner was afforded a proper and fair hearing for criminal contempt under Rule 42 (a) Federal Rules of Criminal Procedure and whether *Brown* v. *United States,* 359 U. S. 41 should be reconsidered and overruled by this Court.

"3. Whether petitioner should have been granted a trial by jury on the charge of criminal contempt where he has been sentenced to one year's imprisonment.

"4. Whether the sentence of one year's imprisonment imposed against petitioner in a summary contempt proceeding is constitutionally permissible."

Moses Polakoff and *Daniel H. Greenberg* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 334 F. 2d 460.

No. 107, Misc. JENKINS *v.* UNITED STATES. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to the appellate docket. *H. Thomas Sisk* and *M. Michael Cramer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 117 U. S. App. D. C. 346, 330 F. 2d 220.

Certiorari Denied. (See also Misc. Nos. 276, 570 and 571, *supra.*)

No. 521. WOLFSOHN, EXECUTRIX *v.* HANKIN ET AL. C. A. D. C. Cir. Certiorari denied. *Fred I. Simon* for petitioner. *Gregory Hankin,* respondent, *pro se.*

No. 524. JORDAN *v.* LOUISIANA. Supreme Court of Louisiana. Certiorari denied. *Sam J. D'Amico* for petitioner. *Jack P. F. Gremillion,* Attorney General of Louisiana, and *Ralph L. Roy* for respondent.

No. 520. AMERICAN-HAWAIIAN STEAMSHIP CO. ET AL. *v.* DILLON, SECRETARY OF THE TREASURY, ET AL. C. A. D. C. Cir. Certiorari denied. *George F. Galland, Warren E. Baker, Jeremiah C. Waterman* and *Carl Helmetag, Jr.,* for petitioners. *Solicitor General Cox, Alan S. Rosenthal* and *Kathryn H. Baldwin* for Dillon et al., and *Daniel M. Gribbon* and *William H. Allen* for Sea-Land Service, Inc., respondents. Reported below: 118 U. S. App. D. C. 257, 335 F. 2d 292.

No. 523. FARLEY *v.* FARLEY. District Court of Appeal of California, Third Appellate District. Certiorari denied. *Elmer P. Delaney* for petitioner. *Gilford G. Rowland* for respondent. Reported below: 227 Cal. App. 2d 1, 38 Cal. Rptr. 357.

No. 530. SHELP ET AL. *v.* NATIONAL SURETY CORP. C. A. 5th Cir. Certiorari denied. *Raymond H. Kierr* for petitioners. *Henry B. Curtis* for respondent. Reported below: 333 F. 2d 431.

No. 319, Misc. ZEPEDA *v.* ZEPEDA. Supreme Court of Illinois. Certiorari denied. *Hugh M. Matchett* for petitioner.

No. 528. HY-LAN FURNITURE CO., INC. *v.* WILSON, TRUSTEE IN BANKRUPTCY, ET AL. C. A. 4th Cir. Certiorari denied. *Robert R. Jones* for petitioner. *W. F. Womble* for respondents. Reported below: 332 F. 2d 284.

No. 529. GUARRACINO *v.* LUCKENBACH STEAMSHIP CO., INC. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioner. *Eugene Underwood* for respondent. Reported below: 333 F. 2d 646.

No. 525. IOWA SOUTHERN UTILITIES CO. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 8th Cir. Certiorari denied. *Charles T. Akre* for petitioner. *Solicitor General Cox* for respondent. Reported below: 333 F. 2d 382.

No. 531. THOMAS *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Russell E. Parsons* for petitioner.

No. 532. HUDSON-SHARP MACHINE CO. *v.* ERVING PAPER MILLS. C. A. 7th Cir. Certiorari denied. *Maxwell H. Herriott* for petitioner. *William J. Duffy* for respondent. Reported below: 332 F. 2d 674.

No. 533. INTERNATIONAL ASSOCIATION OF MACHINISTS ET AL. *v.* UNITED AIRCRAFT CORP. C. A. 2d Cir. Certiorari denied. *Plato E. Papps, Mozart G. Ratner* and *William S. Zeman* for petitioners. *Joseph C. Wells* for respondent. Reported below: 333 F. 2d 367.

No. 537. ONEIDA TRIBE OF INDIANS OF WISCONSIN *v.* UNITED STATES. Court of Claims. Certiorari denied. *Louis L. Rochmes* for petitioner. *Solicitor General Cox* for the United States. Reported below: 165 Ct. Cl. 487.

No. 89, Misc. O'HALLORAN *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Gordon Gelfond, Joseph M. Smith* and *James C. Crumlish, Jr.*, for respondent. Reported below: 330 F. 2d 352.

No. 243, Misc. STEWART *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *H. S. Subrin* and *Samuel Goldman* for petitioner. *John S. Ballard* for respondent. Reported below: 176 Ohio St. 156, 198 N. E. 2d 439.

No. 534. PROVENZANO *v.* UNITED STATES. Motion of American Civil Liberties Union of New Jersey for leave to file a brief, as *amicus curiae*, granted. Petition for writ of certiorari to the United States Court of Appeals for the Third Circuit denied. *Arthur Karger* and *Henry G. Singer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. *Emil Oxfeld* for American Civil Liberties Union of New Jersey, as *amicus curiae*, in support of the petition. Reported below: 334 F. 2d 678.

No. 279, Misc. SHAW *v.* NEW YORK. Appellate Division, Supreme Court of New York, Second Judicial Department. Certiorari denied. Petitioner *pro se*. *William Cahn* for respondent.

No. 282, Misc. WILLIAMS *v.* UNITED STATES C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 394, Misc. BARNETT *v.* GLADDEN, WARDEN. Supreme Court of Oregon. Certiorari denied. Reported below: 237 Ore. 76, 390 P. 2d 614.

744-008 O-65-60

No. 337, Misc. DICKEY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. *D. Wendell Reid* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 332 F. 2d 773.

No. 347, Misc. JOHNSON *v.* ARKANSAS. Supreme Court of Arkansas. Certiorari denied. Petitioner *pro se.* *Bruce Bennett,* Attorney General of Arkansas, and *Richard B. Adkisson,* Assistant Attorney General, for respondent. Reported below: 238 Ark. 15, 377 S. W. 2d 865.

No. 406, Misc. CLARK *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: 332 F. 2d 371.

No. 408, Misc. LAUGESEN *v.* OHIO. Supreme Court of Ohio. Certiorari denied. *Ronald M. Benjamin* for petitioner. *John T. Corrigan* and *Harvey R. Monck* for respondent.

No. 429, Misc. FLETCHER *v.* UNITED STATES. C. A. 9th 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: 334 F. 2d 584.

No. 437, Misc. FRAZIER *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States.

No. 455, Misc. GREEN *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Zach H. Douglas* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 332 F. 2d 788.

No. 445, Misc. GARCIA *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. Reported below: 227 Cal. App. 2d 345, 38 Cal. Rptr. 670.

No. 456, Misc. BLAKESLEY *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. Reported below: 332 F. 2d 849.

No. 457, Misc. STEBBINS *v.* YOUNG ET AL. C. A. D. C. Cir. Certiorari denied.

No. 480, Misc. MULLEN *v.* BREWER, DIRECTOR, DEPARTMENT OF PUBLIC WELFARE. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Chester H. Gray, Milton D. Korman* and *Hubert B. Pair* for respondent.

No. 484, Misc. BROYDE *v.* WILLIS ET AL. C. A. 7th Cir. Certiorari denied. *Charles V. Falkenberg* for petitioner.

No. 494, Misc. BOODRY *v.* ARIZONA. Supreme Court of Arizona. Certiorari denied. Reported below: 96 Ariz. 259, 394 P. 2d 196.

No. 496, Misc. IN RE STEBBINS. Court of Claims. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 163 Ct. Cl. 578.

No. 507, Misc. CLARK *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 502, Misc. CANTRELL *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 518, Misc. EMERICH *v.* AL SIRAT GROTTO, MYSTIC ORDER OF THE ENCHANTED REALM, ET AL. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se*. *Fred O. Burkhalter* for respondents.

No. 511, Misc. MOBLEY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 529, Misc. YOUNCE *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.

No. 545, Misc. PHILLIPS *v.* CELEBREZZE, SECRETARY OF HEALTH, EDUCATION AND WELFARE. C. A. 5th Cir. Certiorari denied. *Jerome A. Cooper* for petitioner. *Solicitor General Cox* for respondent. Reported below: 328 F. 2d 427.

No. 594, Misc. SAMARION ET AL. *v.* MCGINNIS, CORRECTION COMMISSIONER, ET AL. C. A. 2d Cir. Certiorari denied. *Jacob D. Hyman* for petitioners. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, *William D. Bresinhan*, Assistant Attorney General, and *Julius L. Sackman* for respondents. Reported below: 334 F. 2d 906.

No. 602, Misc. WITHERSPOON *v.* OGILVIE, SHERIFF, ET AL. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* and *Melvin B. Lewis* for petitioner. *Daniel P. Ward* and *Elmer C. Kissane* for respondents. Reported below: 337 F. 2d 427.

Rehearing Denied.

No. 914, Misc., October Term, 1963. HILL *v.* NEW YORK, 377 U. S. 998; and

No. 1353, Misc., October Term, 1963. JOHNSON *v.* NEW YORK, 377 U. S. 1004. Motions for leave to file petitions for rehearing denied.

No. 1281, Misc., October Term, 1963. VAN RENSSELAER ET AL. *v.* GENERAL MOTORS CORP., 377 U. S. 959, *ante,* p. 874. Motion for leave to file second petition for rehearing denied.

No. 372. MARROSO *v.* UNITED STATES, *ante,* p. 899;

No. 471. SAMARIN *v.* UNITED STATES, *ante,* p. 899; and

No. 165, Misc. LIPSCOMB *v.* JOHNSON, PRESIDENT, ET AL., *ante,* p. 923. Petitions for rehearing denied.

DECEMBER 15, 1964.

Dismissal Under Rule 60.

No. 676. UNITED AIR LINES, INC. *v.* UNITED STATES. On petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit. Dismissed pursuant to Rule 60 of the Rules of this Court. *Pierce Works, Warren M. Christopher* and *James J. McCarthy* for petitioner. Reported below: 335 F. 2d 379.

DECEMBER 17, 1964.

Dismissal Under Rule 60.

No. 36. DEW *v.* HALABY, ADMINISTRATOR, FEDERAL AVIATION AGENCY, ET AL. (Certiorari, 376 U. S. 904, to the United States Court of Appeals for the District of Columbia Circuit.) Writ of certiorari dismissed pursuant to Rule 60 of the Rules of this Court. *David Rein* and *Joseph Forer* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for respondents. Reported below: 115 U. S. App. D. C. 171, 317 F. 2d 582.

JANUARY 13, 1965.

Dismissal Under Rule 60.

No. 588, Misc. ALFORD *v.* NORTH CAROLINA. On petition for writ of certiorari to the Supreme Court of North Carolina. Dismissed pursuant to Rule 60 of the Rules of this Court.

JANUARY 18, 1965.

Miscellaneous Orders.

No. 18, Original. ILLINOIS *v.* MISSOURI. The State of Missouri is directed to file a response within 30 days to the motion for leave to file the bill of complaint.

No. 19, Original. KELLY ET AL. *v.* E. H. SCHMIDT & ASSOC., INC., ET AL. The motion to dispense with printing the motion for leave to file the bill of complaint is granted. The motion for leave to file the bill of complaint is denied.

No. 73. UNITED STATES *v.* MISSISSIPPI ET AL. Appeal from the United States District Court for the Southern District of Mississippi. (Probable jurisdiction noted, 377 U. S. 988.) The motion of the appellees to strike portions of the brief and to strike the appendix to the brief of the American Civil Liberties Union, as *amicus curiae,* is denied. *Joe T. Patterson,* Attorney General of Mississippi, *Dugas Shands,* Assistant Attorney General, *P. M. Stockett* and *Charles Clark,* Special Assistant Attorneys General, and *Aubrey Bell* on the motion.

No. 437. BURNETT *v.* NEW YORK CENTRAL RAILROAD CO. (Certiorari, *ante,* p. 913, to the United States Court of Appeals for the Sixth Circuit.) The motion of *Robert M. Dennis* to withdraw his appearance as counsel for the respondent is granted.

No. 111. DEPARTMENT OF MENTAL HYGIENE OF CALIFORNIA *v.* KIRCHNER, ADMINISTRATRIX. (Certiorari, *ante*, p. 811, to the Supreme Court of California.) The motion of the National Association for Retarded Children, Inc., et al., for leave to file a brief, as *amici curiae*, is granted. *A. Kenneth Pye, John R. Schmertz, Jr.*, and *Bernard D. Fischman* on the motion.

No. 348. LEH ET AL. *v.* GENERAL PETROLEUM CORP. ET AL. (Certiorari, *ante*, p. 877, to the United States Court of Appeals for the Ninth Circuit.) The petitioners are directed to file a response within 20 days to the affidavits filed in opposition to the motion for leave to proceed *in forma pauperis*. *Maxwell Keith* for petitioners. *Howard Painter, Francis R. Kirkham, William E. Mussman, Thomas E. Haven, George W. Jansen, Jack E. Woods, Moses Lasky, Wayne H. Knight* and *Edmund D. Buckley* for respondents.

No. 291. MINNESOTA MINING & MANUFACTURING CO. *v.* NEW JERSEY WOOD FINISHING CO. (Certiorari, *ante*, p. 877, to the United States Court of Appeals for the Third Circuit.) The motion of Reynolds Metals Co. for leave to file a brief, as *amicus curiae*, is granted. *Lewis C. Green* and *Gustav B. Margraf* on the motion.

No. 710, Misc. TURPIN *v.* MAXWELL, WARDEN, ET AL. Motion for leave to file petition for writ of habeas corpus and for other relief denied.

No. 619, Misc. CANADY *v.* MCGINNIS, CORRECTION COMMISSIONER, ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioner *pro se*. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, *William D. Bresinhan*, Assistant Attorney General, and *Julius L. Sackman* for respondents.

No. 482. FEDERAL COMMUNICATIONS COMMISSION *v.* SCHREIBER ET AL. (Certiorari, *ante*, p. 927, to the United States Court of Appeals for the Ninth Circuit.) The motion of the Solicitor General for additional time for oral argument is granted, and 15 additional minutes are allotted to each side.

No. 670. FINNELL *v.* BROMBERG. On petition for writ of certiorari to the Supreme Court of Nevada. The motion of *George N. Leighton* to withdraw his appearance as counsel for the petitioner is granted.

No. 525, Misc. DUDA, AMBASSADOR OF CZECHOSLOVAK SOCIALIST REPUBLIC *v.* UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND. On motion for leave to file petition for writ of prohibition and/or mandamus. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 607, Misc. EASON *v.* MCGEE, CORRECTIONS ADMINISTRATOR, ET AL.;

No. 613, Misc. WHITE ET AL. *v.* WILSON, WARDEN, ET AL.;

No. 624, Misc. IN RE ROBERTS;

No. 625, Misc. GRATTER *v.* NASH, WARDEN;

No. 649, Misc. MARTIN *v.* COOK, WARDEN, ET AL.;

No. 654, Misc. JACKSON *v.* MARYLAND;

No. 656, Misc. LORENZANA *v.* PUERTO RICO;

No. 693, Misc. HYMES *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL.;

No. 697, Misc. FERRO *v.* DUNBAR, CORRECTIONS DIRECTOR, ET AL.;

No. 716, Misc. MACFADDEN *v.* UNITED STATES;

No. 717, Misc. SCHACK *v.* FLORIDA ET AL.; and

No. 740, Misc. JACKSON *v.* MARYLAND. Motions for leave to file petitions for writs of habeas corpus denied.

No. 95. LINKLETTER *v.* WALKER, WARDEN. (Certiorari, 377 U. S. 930, to the United States Court of Appeals for the Fifth Circuit); and

No. 578. ANGELET *v.* FAY, WARDEN. (Certiorari, *ante*, p. 815, to the United States Court of Appeals for the Second Circuit.) The motions of the National District Attorneys' Association for leave to participate in oral argument, as *amicus curiae*, are granted. *Michael Juviler* on the motions.

No. 599, Misc. SCOTT *v.* ANDERSON, JAIL SUPERINTENDENT. Motion for leave to file petition for writ of habeas corpus denied. Treating the papers submitted as a petition for writ of certiorari, certiorari is denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall* and *Harold H. Greene* for respondent.

No. 626, Misc. LEEPER *v.* ANDERSON, JAIL SUPERINTENDENT;

No. 683, Misc. HOLLAND *v.* ANDERSON, JAIL SUPERINTENDENT;

No. 708, Misc. PARSONS *v.* ANDERSON, JAIL SUPERINTENDENT;

No. 719, Misc. MATTHEWS *v.* TEXAS ET AL.; and

No. 725, Misc. CANTRELL *v.* CALIFORNIA ET AL. 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. 533, Misc. NEWMAN *v.* UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO. Motion for leave to file petition for writ of mandamus denied.

No. 598, Misc. WILLIAMSON ET AL. *v.* GILMER ET AL. Motion for leave to file petition for writ of mandamus denied. Petitioners *pro se*. *William D. Neary* for Gilmer et al., and *T. W. Davidson, pro se*, respondents.

Probable Jurisdiction Noted.

No. 538. UNITED STATES *v.* HUCK MANUFACTURING CO. ET AL. Appeal from the United States District Court for the Eastern District of Michigan. Probable jurisdiction noted. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel* and *Arthur J. Murphy, Jr.*, for the United States. *John A. Blair* and *Thomas W. Pomeroy, Jr.*, for appellees. Reported below: 227 F. Supp. 791.

No. 179. CORBETT, GUARDIAN *v.* STERGIOS, ALIAS STERYIAKIS. Appeal from the Supreme Court of Iowa. Probable jurisdiction noted. *George S. Porikos* for appellant. *Harry H. Smith* for appellee. *Solicitor General Cox* filed a memorandum for the United States. Reported below: 256 Iowa 12, 126 N. W. 2d 342.

No. 598. WESTERN PACIFIC RAILROAD CO. ET AL. *v.* UNITED STATES ET AL. Appeal from the United States District Court for the Northern District of California. Probable jurisdiction noted. *E. L. Van Dellen, Walter G. Treanor* and *E. Barrett Prettyman, Jr.*, for appellants. *Solicitor General Cox* for the United States, *Robert W. Ginnane* and *Robert S. Burk* for the Interstate Commerce Commission, and *William P. Higgins, Charles W. Burkett, Earl F. Requa* and *Frank S. Farrell* for Union Pacific Railroad Co. et al., appellees. Reported below: 230 F. Supp. 852.

Certiorari Granted. (See also No. 38, *ante*, p. 497; No. 25, *ante*, p. 644; and No. 263, Misc., *ante*, p. 648.)

No. 580. GRAHAM ET AL. *v.* JOHN DEERE CO. OF KANSAS CITY ET AL. C. A. 8th Cir. Certiorari granted. *Claude A. Fishburn* and *Orville O. Gold* for petitioners. *W. W. Gibson* and *Thomas E. Scofield* for respondents. Reported below: 333 F. 2d 529.

No. 464. HOLT ET AL. *v.* VIRGINIA. Supreme Court of Appeals of Virginia. Certiorari granted. *Melvin L. Wulf* and *Len W. Holt* for petitioners. *Robert Y. Button,* Attorney General of Virginia, and *D. Gardiner Tyler,* Assistant Attorney General, for respondent. Reported below: 205 Va. 332, 136 S. E. 2d 809.

No. 575. UNITED STATES *v.* YAZELL. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Douglas* and *Sherman L. Cohn* for the United States. *J. V. Hammett* for respondent. Reported below: 334 F. 2d 454.

No. 602. WALKER PROCESS EQUIPMENT, INC. *v.* FOOD MACHINERY & CHEMICAL CORP. C. A. 7th Cir. Certiorari granted. *Edward A. Haight* and *Louis Robertson* for petitioner. *Sheldon O. Collen* and *James W. Clement* for respondent. *Solicitor General Cox* for the United States, as *amicus curiae,* in support of the petition. Reported below: 335 F. 2d 315.

No. 606. INTERSTATE COMMERCE COMMISSION *v.* ATLANTIC COAST LINE R. CO. ET AL. C. A. 5th Cir. Certiorari granted. *Robert W. Ginnane* and *Leonard S. Goodman* for petitioner. *J. Edgar McDonald, Phil C. Beverly* and *Urchie B. Ellis* for respondents. *John F. Donelan* and *John M. Cleary* for the National Industrial Traffic League, as *amicus curiae,* in support of the petition. *Solicitor General Cox* filed a memorandum for the United States. Reported below: 334 F. 2d 46.

No. 626. FEDERAL TRADE COMMISSION *v.* MARY CARTER PAINT CO. ET AL. C. A. 5th Cir. Certiorari granted. *Solicitor General Cox* and *James McI. Henderson* for petitioner. *David W. Peck* for respondents. Reported below: 333 F. 2d 654.

No. 646. UNITED STATES *v.* SPEERS, TRUSTEE IN BANKRUPTCY. C. A. 6th Cir. Certiorari granted. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *I. Henry Kutz* for the United States. *Robert B. Gosline* for respondent. Reported below: 335 F. 2d 311.

No. 644. UNITED GAS IMPROVEMENT CO. *v.* CONTINENTAL OIL CO. ET AL.; and

No. 693. FEDERAL POWER COMMISSION *v.* MARR ET AL. C. A. 5th Cir. Certiorari granted. The cases are consolidated and a total of two hours is allotted for oral argument. *William T. Coleman, Jr., Richardson Dilworth* and *Harold E. Kohn* for petitioner in No. 644. *Solicitor General Cox, Ralph S. Spritzer, Frank Goodman, Richard A. Solomon, Howard E. Wahrenbrock* and *Peter H. Schiff* for petitioner in No. 693. *John A. Ward III, Herf M. Weinert, Bruce R. Merrill, W. McIver Streetman, Stanley M. Morley, Robert E. May* and *W. D. Deakins, Jr.*, for respondents in both cases. Reported below: 336 F. 2d 320.

No. 652. UNITED STEELWORKERS OF AMERICA, AFL–CIO *v.* R. H. BOULIGNY, INC. C. A. 4th Cir. Certiorari granted. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *David E. Feller, Elliot Bredhoff, Jerry D. Anker* and *Michael H. Gottesman* for petitioner. *Joseph W. Grier, Jr.*, for respondent. Reported below: 336 F. 2d 160.

No. 228, Misc. CASE *v.* NEBRASKA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the Supreme Court of Nebraska granted. Case transferred to the appellate docket. Petitioner *pro se. Clarence A. H. Meyer,* Attorney General of Nebraska, and *C. C. Sheldon,* Assistant Attorney General, for respondent. Reported below: 177 Neb. 404, 129 N. W. 2d 107.

No. 650. INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, AFL–CIO *v.* SCOFIELD ET AL. C. A. 7th Cir. Certiorari granted. *Joseph L. Rauh, Jr., John Silard, Stephen I. Schlossberg, Harold A. Katz, Irving M. Friedman* and *Philip L. Padden* for petitioner. *John G. Kamps* and *James Urdan* for Scofield et al., and *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board, respondents.

Certiorari Denied. (See also No. 553, *ante,* p. 645; No. 557, *ante,* p. 646; No. 563, *ante,* p. 646; No. 564, *ante,* p. 644; No. 565, *ante,* p. 647; No. 566, *ante,* p. 649; and Misc. Nos. 599, 626, 683, 708, 719 and 725, *supra.*)

No. 415. GOLDNER *v.* SILVER, DISTRICT ATTORNEY, KINGS COUNTY, NEW YORK. Court of Appeals of New York. Certiorari denied. *Bernard A. Berkman* for petitioner. *Aaron E. Koota* for respondent. Briefs of *amici curiae,* in support of the petition, were filed by *Herman B. Gerringer* for New York State Association of Trial Lawyers, and by *Israel Steingold* for American Trial Lawyers Association.

No. 432. MCGINNESS *v.* LUNA, PRESIDENT, BROTHERHOOD OF RAILROAD TRAINMEN, ET AL. Appellate Court of Illinois, First District. Certiorari denied. Petitioner *pro se. John J. Naughton* for respondents. Reported below: 46 Ill. App. 2d 43, 196 N. E. 2d 711.

No. 547. KEHOE *v.* BOYLE, EXECUTOR, ET AL. Court of Common Pleas of Ohio, Hamilton County. Certiorari denied. *Thomas J. Kehoe, pro se, Millard W. Rice* and *Joseph B. Matre* for petitioner. *Louis A. Ginocchio* for respondents.

No. 536. ROGERS ET AL. *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. *Russell H. Volkema* for petitioners. *Solicitor General Cox* for the United States.

No. 539. HOUSE, GROSSMAN, VORHAUS & HEMLEY ET AL. *v.* HUDSON & MANHATTAN CORP. C. A. 2d Cir. Certiorari denied. *Edward M. Garlock* for petitioners. *David W. Peck* for respondent.

No. 540. AMERICAN CASUALTY CO. OF READING, PENNSYLVANIA *v.* LINE MATERIALS INDUSTRIES. C. A. 10th Cir. Certiorari denied. *W. Peter McAtee* for petitioner. Reported below: 332 F. 2d 393.

No. 541. CINQUEGRANO *v.* UNITED STATES; and
No. 546. MOGAVERO *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Moses L. Kove* for petitioner in No. 541. *Alfred Donati, Jr.*, for petitioner in No. 546. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 336 F. 2d 376.

No. 548. ROBINSON *v.* ILLINOIS HIGH SCHOOL ASSOCIATION ET AL. Appellate Court of Illinois, Second District. Certiorari denied. *B. P. Reese, Jr.*, for petitioner. *John G. Poust* for respondents. Reported below: 45 Ill. App. 2d 277, 195 N. E. 2d 38.

No. 550. AU ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox* for respondent. Reported below: 330 F. 2d 1008.

No. 551. CHESAPEAKE & OHIO RAILWAY CO. *v.* LUDWIG, GUARDIAN, ET AL. C. A. 6th Cir. Certiorari denied. *Robert A. Straub* for petitioner. *John von Batchelder* for respondents. Reported below: 333 F. 2d 621.

No. 549. DANDY PRODUCTS, INC., ET AL. *v.* FEDERAL TRADE COMMISSION. C. A. 7th Cir. Certiorari denied. *Charles Rowan* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum* and *James McI. Henderson* for respondent. Reported below: 332 F. 2d 985.

No. 556. SAKRETE OF NORTHERN CALIFORNIA, INC. *v.* NATIONAL LABOR RELATIONS BOARD. C. A. 9th Cir. Certiorari denied. *Robert L. Black, Jr.,* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli, Norton J. Come* and *Warren M. Davison* for respondent. Reported below: 332 F. 2d 902.

No. 559. JOHNSON ET AL. *v.* LEVITT, EXECUTOR. C. A. 1st Cir. Certiorari denied. *Edward B. Hanify, Robert Haydock* and *John F. Cogan* for petitioners. *Paul L. Ross* and *Benedict Wolf* for respondent. Reported below: 334 F. 2d 815.

No. 569. HERRESHOFF *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Acting Assistant Attorney General Jones* and *Gilbert E. Andrews* for the United States.

No. 570. LORD ET AL. *v.* KELLEY, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 1st Cir. Certiorari denied. *Louis Bender* and *John Warren McGarry* for petitioners. *Solicitor General Cox* for respondents. Reported below: 334 F. 2d 742.

No. 573. BOOTH ET AL. *v.* VARIAN ASSOCIATES. C. A. 1st Cir. Certiorari denied. *Louis Loss* for petitioners. *H. Brian Holland* for respondent. Reported below: 334 F. 2d 1.

No. 572. LEFKOWITZ ET UX. *v.* TOMLINSON, DISTRICT DIRECTOR OF INTERNAL REVENUE. C. A. 5th Cir. Certiorari denied. *E. David Rosen* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Burton Berkley* for respondent. Reported below: 334 F. 2d 262.

No. 574. JULIUS GARFINCKEL & CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari denied. *Wallace S. Jones, Richard R. Dailey* and *John A. Corry* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, I. Henry Kutz* and *Gilbert E. Andrews* for respondent. Reported below: 335 F. 2d 744.

No. 576. RUSSO *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Julius Lucius Echeles* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for the United States. Reported below: 335 F. 2d 299.

No. 581. LOCKLIN ET AL., DOING BUSINESS AS RADIANT COLOR CO. *v.* SWITZER BROTHERS, INC., ET AL. C. A. 7th Cir. Certiorari denied. *Carl Hoppe* for petitioners. *Benjamin H. Sherman* and *Anthony R. Chiara* for respondents. Reported below: 335 F. 2d 331.

No. 582. PURDY CO. *v.* ARGENTINA ET AL. C. A. 7th Cir. Certiorari denied. *Ralph O. Clare* for petitioner. *George C. Pendleton* for respondents. Reported below: 333 F. 2d 95.

No. 583. B & W, INC. *v.* SWOFFORD ET AL. C. A. 5th Cir. Certiorari denied. *Lewis E. Lyon, James H. Mitchell, Jr.,* and *Tom Arnold* for petitioner. *Jack W. Hayden* for respondents. Reported below: 336 F. 2d 406.

No. 579. St. Luke's Hospital Association of Cleveland *v.* United States. C. A. 6th Cir. Certiorari denied. *David A. Gaskill* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Fred E. Youngman* for the United States. *Charles E. Connor* for Ohio Hospital Association, as *amicus curiae,* in support of the petition. Reported below: 333 F. 2d 157.

No. 584. Camellia Apartments, Inc., et al. *v.* United States. Court of Claims. Certiorari denied. *Carl L. Shipley* for petitioners. *Solicitor General Cox* for the United States. Reported below: —— Ct. Cl. ——, 334 F. 2d 667.

No. 586. Nash *v.* N. V. Nederlandsche Schoenen-Lederfabrieken Bata-Best. C. A. D. C. Cir. Certiorari denied. *Harold E. Stassen* and *John Alvin Croghan* for petitioner. *John Dickey, J. Roger Wollenberg* and *Max O. Truitt, Jr.,* for respondent.

No. 587. Boese et al. *v.* Randolph-Wells Building Corp. et al. C. A. 7th Cir. Certiorari denied. *Francis B. Stine* for petitioners. *Edwin A. Rothschild* and *John C. Roberts* for respondent Randolph-Wells Building Corp. Reported below: 332 F. 2d 963.

No. 589. Joseph *v.* Connecticut. Supreme Court of Errors of Connecticut. Certiorari denied. *Richard S. Levin* for petitioner. *John D. LaBelle* for respondent. Reported below: 151 Conn. 592, 200 A. 2d 724.

No. 590. Ahlers *v.* United States. C. A. 2d Cir. Certiorari denied. *Edward Bennett Williams* and *Harold Ungar* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 336 F. 2d 191.

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No. 591. South Puerto Rico Sugar Co. Trading Corp. *v.* United States. Court of Claims. Certiorari denied. *Philip C. Scott* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Robert V. Zener* for the United States. Reported below: —— Ct. Cl. ——, 334 F. 2d 622.

No. 592. Wojtas et al. *v.* Village of Niles. C. A. 7th Cir. Certiorari denied. *Lawrence Speiser* for petitioners. *Alvin G. Hubbard* and *Reese Hubbard* for respondent. Reported below: 334 F. 2d 797.

No. 593. Karpe *v.* United States et al. Court of Claims. Certiorari denied. *Armond M. Jewell* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Richard J. Heiman* for the United States. Reported below: —— Ct. Cl. ——, 335 F. 2d 454.

No. 594. Maryland Casualty Co. *v.* Jacobson. C. A. 8th Cir. Certiorari denied. *Rodger J. Walsh* for petitioner. Reported below: 336 F. 2d 72.

No. 595. Schuringa et al. *v.* City of Chicago et al. Supreme Court of Illinois. Certiorari denied. *Albert W. Dilling* and *Kirkpatrick W. Dilling* for petitioners. *John C. Melaniphy* and *Sydney R. Drebin* for respondents. Reported below: 30 Ill. 2d 504, 198 N. E. 2d 326.

No. 597. Cuff et ux. *v.* Van Bogart. Supreme Court of Ohio. Certiorari denied. *E. F. Trunko* for petitioners.

No. 601. Estes *v.* United States. C. A. 5th Cir. Certiorari denied. *John D. Cofer* and *Hume Cofer* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Marshall Tamor Golding* for the United States. Reported below: 335 F. 2d 609.

No. 599. BRUNO ET AL. *v.* PENNSYLVANIA. Superior Court of Pennsylvania. Certiorari denied. *Marjorie Hanson Matson* for petitioners. Reported below: 203 Pa. Super. 541, 201 A. 2d 434.

No. 603. DELAWARE SPORTS SERVICE *v.* DIAMOND STATE TELEPHONE CO. ET AL. Supreme Court of Delaware. Certiorari denied. *Arthur B. Hanson, Henry A. Wise, Jr.,* and *Emmett E. Tucker, Jr.,* for petitioner. *William S. Potter* and *John B. King* for Diamond State Telephone Co., and *David P. Buckson,* Attorney General, *Thomas Herlihy III,* Chief Deputy Attorney General, and *Ruth M. Ferrell,* Deputy Attorney General, for the State of Delaware, respondents.

No. 604. WATWOOD *v.* REAL ESTATE COMMISSION OF THE DISTRICT OF COLUMBIA. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Chester H. Gray* and *Hubert B. Pair* for respondent.

No. 607. PRESS, ALIAS GRADY, ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Max Feigin* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 336 F. 2d 1003.

No. 608. BAUMAN, TRUSTEE *v.* CHOCTAW-CHICKASAW NATIONS ET AL. C. A. 10th Cir. Certiorari denied. *Walter J. Arnote* for petitioner. Reported below: 333 F. 2d 785.

No. 610. JONES *v.* METZGER DAIRIES, INC. C. A. 5th Cir. Certiorari denied. *Dee C. Blythe* for petitioner. *Charles P. Storey* for respondent. Reported below: 334 F. 2d 919.

No. 609. AERONAUTICAL RADIO, INC., ET AL. *v.* UNITED STATES ET AL. C. A. 7th Cir. Certiorari denied. *Donald C. Beelar, John S. Yodice* and *John E. Stephen* for petitioners. *Solicitor General Cox, Assistant Attorney General Orrick, Lionel Kestenbaum, Henry Geller* and *Daniel R. Ohlbaum* for the United States et al. Reported below: 335 F. 2d 304.

No. 613. POWELL *v.* JAMES. Court of Appeals of New York. Certiorari denied. *Henry R. Williams* and *George D. Covington* for petitioner. *Raymond Rubin* for respondent.

No. 614. SPECTOR *v.* UNITED STATES. Court of Claims. Certiorari denied. *Eugene Gressman* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for the United States. *E. G. Neumann* for the American Federation of Government Employees, as *amicus curiae,* in support of the petition. Reported below: 165 Ct. Cl. 33.

No. 615. FALSETTI, ADMINISTRATOR, ET AL. *v.* LOWMAN ET AL. C. A. 5th Cir. Certiorari denied. *Cecil L. Woodgate* and *William VanDercreek* for petitioners. *Willard B. Wagner, Jr.,* for respondents. Reported below: 335 F. 2d 632.

No. 618. GODFREY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 6th Cir. Certiorari denied. *Paul J. Buckley* for petitioners. *Solicitor General Cox* and *Assistant Attorney General Oberdorfer* for respondent. Reported below: 335 F. 2d 82.

No. 622. BRITT, TRUSTEE IN BANKRUPTCY *v.* DAMSON. C. A. 9th Cir. Certiorari denied. Reported below: 334 F. 2d 896.

No. 619. ALLEN ET AL. *v.* DAVID ET AL. C. A. 5th Cir. Certiorari denied. *Leon Jaworski* for petitioners. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondents. Reported below: 334 F. 2d 592.

No. 621. DECK ET AL. *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. *William H. Deck, pro se,* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Joseph M. Howard* for the United States. Reported below: 119 U. S. App. D. C. 240, 339 F. 2d 739.

No. 627. GREAT ATLANTIC & PACIFIC TEA CO., INC. *v.* ATCHISON, TOPEKA & SANTA FE RAILWAY CO. C. A. 7th Cir. Certiorari denied. *Thomas R. Mulroy* and *Daniel Walker* for petitioner. *Kenneth F. Burgess, D. Robert Thomas* and *Wilbur C. Delp, Jr.,* for respondent. Reported below: 333 F. 2d 705.

No. 629. GRAIN ELEVATOR, FLOUR & FEED MILL WORKERS, INTERNATIONAL LONGSHOREMEN ASSOCIATION, LOCAL 418, AFL–CIO *v.* MADDEN, REGIONAL DIRECTOR, NATIONAL LABOR RELATIONS BOARD. C. A. 7th Cir. Certiorari denied. *Irving M. Friedman, Harold A. Katz* and *Harry G. Fins* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for respondent. Reported below: 334 F. 2d 1014.

No. 637. MCCLENNY *v.* COLORADO. Supreme Court of Colorado. Certiorari denied. *Anthony F. Zarlengo* for petitioner. *Duke W. Dunbar,* Attorney General of Colorado, *Frank E. Hickey,* Deputy Attorney General, and *John P. Moore,* Assistant Attorney General, for respondent. Reported below: 155 Colo. ——, 393 P. 2d 736.

No. 630. CONTINENTAL CASUALTY CO., INC., ET AL. *v.* ALLSOP LUMBER CO., INC., ET AL. C. A. 8th Cir. Certiorari denied. *Rodger J. Walsh* for petitioners. *Charles Monroe Thorp, Jr.*, for respondents. Reported below: 336 F. 2d 445.

No. 631. ROBBINS MEN'S & BOYS' WEAR CORP. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Melvin Lloyd Robbins* for petitioner. *Solicitor General Cox, Roger P. Marquis* and *A. Donald Mileur* for the United States.

No. 634. PAULING *v.* NEWS SYNDICATE CO., INC. C. A. 2d Cir. Certiorari denied. *Eleanor Jackson Piel* for petitioner. *James W. Rodgers* and *Andrew L. Hughes* for respondent. Reported below: 335 F. 2d 659.

No. 639. MCCLELLAN *v.* PHINNEY, DISTRICT DIRECTOR OF INTERNAL REVENUE, ET AL. C. A. 5th Cir. Certiorari denied. *William F. Billings* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas* and *Alan S. Rosenthal* for respondents. Reported below: 331 F. 2d 307.

No. 642. CROFT-MULLINS ELECTRIC CO., INC. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *Jesse W. Bush* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Robert V. Zener* for the United States. Reported below: 333 F. 2d 772.

No. 647. BORUM *v.* WISCONSIN EX REL. AMERICAN MOTORS CORP. ET AL. Supreme Court of Wisconsin. Certiorari denied. *Leonard S. Zubrensky* for petitioner. *George Thompson,* Attorney General of Wisconsin, *Gordon Samuelsen,* Assistant Attorney General, and *Alfred E. La France* for respondents.

No. 638. JAYS FOODS, INC. *v.* NATIONAL LABOR RELATIONS BOARD ET AL. C. A. 7th Cir. Certiorari denied. *Bernard M. Kaplan* for petitioner. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* for the National Labor Relations Board.

No. 648. DEPARTMENT OF FISH AND GAME OF CALIFORNIA *v.* FEDERAL POWER COMMISSION ET AL.; and

No. 659. PACIFIC POWER & LIGHT CO. *v.* FEDERAL POWER COMMISSION. C. A. 9th Cir. Certiorari denied. *Thomas C. Lynch,* Attorney General of California, *Charles E. Corker,* Assistant Attorney General, and *Burton J. Gindler* and *Ralph W. Scott,* Deputy Attorneys General, for petitioner in No. 648. *Gregory A. Harrison* and *Malcolm T. Dungan* for petitioner in No. 659. *Solicitor General Cox, Richard A. Solomon, Howard E. Wahrenbrock* and *Josephine H. Klein* for the Federal Power Commission. Briefs of *amici curiae,* in support of the petition in No. 648, were filed for their respective States by *John J. O'Connell,* Attorney General of Washington, and *Joseph L. Coniff, Mike Johnston* and *Dennis G. Seinfeld,* Assistant Attorneys General; *Robert Y. Thornton,* Attorney General of Oregon, and *Roy C. Atchison,* Assistant Attorney General; and *Jack P. F. Gremillion,* Attorney General of Louisiana. Reported below: 333 F. 2d 689.

No. 651. SHEFFIELD *v.* BROOKS, SHERIFF, ET AL. C. A. 5th Cir. Certiorari denied. *Thurman Arnold, Stuart J. Land, Hume Cofer* and *John D. Cofer* for petitioner. Reported below: 336 F. 2d 835.

No. 653. GLOBE SLICING MACHINE CO., INC., ET AL. *v.* HASNER ET AL. C. A. 2d Cir. Certiorari denied. *Roy E. Monaco* for petitioners. *Rogers M. Doering* for respondents. Reported below: 333 F. 2d 413.

No. 654. NG SUI SANG *v.* ESPERDY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE. C. A. 2d Cir. Certiorari denied. *Abraham Lebenkoff* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for respondent. Reported below: 335 F. 2d 656.

No. 656, HERSHEY ET UX. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 9th Cir. Certiorari denied. *Bernard B. Laven* for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Melva M. Graney* for respondent.

No. 658. SOUTH DAKOTA *v.* NATIONAL BANK OF SOUTH DAKOTA, SIOUX FALLS, ET AL. C. A. 8th Cir. Certiorari denied. *Frank L. Farrar,* Attorney General of South Dakota, and *Gary R. Richards, L. A. Weisensee* and *Walter W. Andre,* Assistant Attorneys General, for petitioner. *Melvin T. Woods* for respondents. Reported below: 335 F. 2d 444.

No. 660. WALKER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 663. MATTHEWS ET VIR *v.* SOUTHERN PACIFIC CO. C. A. 5th Cir. Certiorari denied. *Billy Hunt* for petitioners. *Ben G. Sewell* for respondent. Reported below: 335 F. 2d 924.

No. 664. ROMEO *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. *Thomas E. Durkin, Jr.,* for petitioner. Reported below: 43 N. J. 188, 203 A. 2d 23.

No. 665. TEXACO, INC. *v.* HOLSINGER ET AL. C. A. 10th Cir. Certiorari denied. *J. D. Lysaught* for petitioner. Reported below: 336 F. 2d 230.

No. 666. BRITT *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. *James Leon Young* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer* and *Frederick Youngman* for the United States. Reported below: 335 F. 2d 907.

No. 667. GORIN ET AL. *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. *John F. Cogan, Jr.,* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 336 F. 2d 211.

No. 668. CHAMBERS *v.* ALASKA. Supreme Court of Alaska. Certiorari denied. Reported below: 394 P. 2d 778.

No. 388. AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY & MOTOR COACH EMPLOYEES OF AMERICA, DIVISION 1267 *v.* DADE COUNTY ET AL. Motion for leave to supplement petition for writ of certiorari granted. Petition for writ of certiorari to the Supreme Court of Florida denied. *Bernard Cushman, Edward D. Cowart* and *Mozart G. Ratner* for petitioner. *Darrey A. Davis* for respondents. *Solicitor General Cox, Arnold Ordman, Dominick L. Manoli* and *Norton J. Come* filed a memorandum for the National Labor Relations Board.

No. 562. QUECHAN TRIBE OF THE FORT YUMA RESERVATION *v.* THOMPSON ET AL. Court of Claims. Certiorari denied. THE CHIEF JUSTICE took no part in the consideration or decision of this petition. *Wm. Douglas Sellers* for petitioner. *Robert W. Barker, Walter M. Gleason, Claron C. Spencer* and *John W. Cragun* for Thompson et al., and *Solicitor General Cox* and *Roger P. Marquis* for the United States, respondents. Reported below: —— Ct. Cl. ——.

No. 554. Air Line Stewards & Stewardesses Association, Local 550, TWU, AFL–CIO, et al. *v.* Transport Workers Union of America et al. C. A. 7th Cir. Certiorari denied. Mr. Justice Goldberg took no part in the consideration or decision of this petition. *Ruth Weyand* and *Rita C. Davidson* for petitioners. *Bernard Kleiman, Gilbert A. Cornfield* and *Gilbert Feldman* for respondents. Reported below: 334 F. 2d 805.

No. 567. Ramey *v.* United States. Motion to dispense with printing petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied. *William L. Jacobs* for petitioner. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Howard A. Glickstein* for the United States. Reported below: 336 F. 2d 512.

No. 605. McReynolds et al. *v.* Christenberry, Postmaster of New York City, et al. C. A. 2d Cir. Certiorari denied. Mr. Justice Black is of the opinion that certiorari should be granted and the case set down for oral argument immediately following *Lamont* v. *Postmaster General,* No. 491. Mr. Justice White took no part in the consideration or decision of this petition. *Nanette Dembitz* and *Melvin L. Wulf* for petitioners. *Solicitor General Cox* for respondents.

No. 616. City of Los Angeles *v.* Union Oil Co. of California. District Court of Appeal of California, Second Appellate District. Certiorari denied. Mr. Justice Harlan took no part in the consideration or decision of this petition. *Roger Arnebergh, Bourke Jones* and *James A. Doherty* for petitioner. *Carl A. Stutsman, Jr.,* and *Vincent C. Page* for respondent. Reported below: 227 Cal. App. 2d 608, 38 Cal. Rptr. 923.

No. 711. FRY, ALIAS GRADY *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Bernard Burlakoff* and *Sydney R. Sutton* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 336 F. 2d 1003.

No. 633. NEW YORK STOCK EXCHANGE *v.* LEGATE; and No. 645. LEGATE *v.* MALONEY, RECEIVER. Motion for leave to file supplement to petition for writ of certiorari in No. 633 granted. Petitions for writs of certiorari to the United States Court of Appeals for the First Circuit denied. *Marcien Jenckes* and *Richard Wait* for petitioner in No. 633. *Mark M. Horblit* for petitioner in No. 645 and respondent in No. 633. *Marcien Jenckes* for respondent in No. 645. Reported below: 334 F. 2d 704.

No. 640. BURROWS *v.* CARR, ATTORNEY GENERAL OF TEXAS, ET AL. Motion to docket petition for writ of certiorari as of October 11, 1964, *nunc pro tunc,* or for other relief denied. Petition for writ of certiorari to the Court of Civil Appeals of Texas, Fourth Supreme Judicial District, denied. *C. P. Von Herzen* for petitioner. *Hawthorne Phillips,* First Assistant Attorney General of Texas, and *J. S. Bracewell* and *Ben M. Harrison,* Assistant Attorneys General, for Carr, and *Chas. W. Duke* for Smith et al., respondents. Reported below: 373 S. W. 2d 514.

No. 662. OREGON STEVEDORING CO., INC. *v.* ITALIA SOCIETA PER AZIONI DI NAVIGAZIONE. Motion to use the record in No. 82, October Term, 1963, granted. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. MR. JUSTICE BLACK is of the opinion that certiorari should be granted. *Floyd A. Fredrickson* for petitioner. *Erskine B. Wood* for respondent. Reported below: 336 F. 2d 124.

No. 568. ADAMS *v.* UNITED STATES. Motion to dispense with printing petition for writ of certiorari granted. Petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit denied. *Kenneth K. Simon* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 333 F. 2d 766.

No. 641. PIERRE ET AL. *v.* JORDAN, SECRETARY OF STATE OF CALIFORNIA, ET AL. Motion of petitioners to strike respondents' brief denied. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit denied. Petitioners *pro se*. *Thomas C. Lynch,* Attorney General of California, *Burton J. Gindler* and *A. Wallace Tashima,* Deputy Attorneys General, and *Harold W. Kennedy* for respondents. Reported below: 333 F. 2d 951.

No. 649. IN RE HOLOVACHKA. Supreme Court of Indiana. Certiorari denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Robert J. Downing* and *William M. Ward* for petitioner. *Edwin K. Steers,* Attorney General of Indiana, *Robert W. McNevin,* Assistant Attorney General, and *C. Dickson Faires, Jr.,* Deputy Attorney General, for the State of Indiana. Reported below: 245 Ind. 483, 198 N. E. 2d 381.

No. 385, Misc. STELLO *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 11, Misc. ROBINS *v.* RARBACK ET AL. C. A. 2d Cir. Certiorari denied. *Burton H. Hall* for petitioner. *Herbert S. Thatcher* for respondents. Reported below: 325 F. 2d 929.

No. 109, Misc. GONZALES *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. 160, Misc. NEAL *v.* MAXWELL, WARDEN. Supreme Court of Ohio. Certiorari denied. Petitioner *pro se.* *William B. Saxbe,* Attorney General of Ohio, and *William C. Baird,* Assistant Attorney General, for respondent. Reported below: 176 Ohio St. 206, 198 N. E. 2d 465.

No. 199, Misc. CRACHY *v.* WARDEN, STATE PRISON OF SOUTHERN MICHIGAN. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Frank J. Kelley,* Attorney General of Michigan, and *James R. Ramsey,* Assistant Attorney General, for respondent.

No. 211, Misc. DAILEY *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. *George L. Russell, Jr.,* for petitioner. *Thomas B. Finan,* Attorney General of Maryland, and *Mathias J. DeVito,* Assistant Attorney General, for respondent. Reported below: 234 Md. 325, 199 A. 2d 211.

No. 289, Misc. NEWMAN *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Theodore George Gilinsky* for the United States. Reported below: 331 F. 2d 968.

No. 360, Misc. BERTSCH *v.* TEXAS. Court of Criminal Appeals of Texas. Certiorari denied. *Clyde W. Woody* for petitioner. *Waggoner Carr,* Attorney General of Texas, and *Howard M. Fender, Gilbert J. Pena* and *Allo B. Crow,* Assistant Attorneys General, for respondent. Reported below: 379 S. W. 2d 657.

No. 412, Misc. CZAKO *v.* MARONEY, WARDEN. C. A. 3d Cir. Certiorari denied. Petitioner *pro se*. *W. Bertram Waychoff* for respondent.

No. 317, Misc. WILLIAMS *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Robert S. Erdahl, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 332 F. 2d 36.

No. 380, Misc. BOGAN *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Louis J. Lefkowitz,* Attorney General of New York, and *Philip Kahaner* and *Frank J. Pannizzo,* Assistant Attorneys General, for respondent.

No. 393, Misc. HIRSH *v.* UNITED STATES. C. A. 5th 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: 329 F. 2d 319.

No. 460, Misc. SULLIVAN ET AL. *v.* FOUTS ET AL. Supreme Court of Montana. Certiorari denied. Reported below: 143 Mont. 567, 393 P. 2d 354.

No. 485, Misc. CALO *v.* SUPREME COURT OF PUERTO RICO ET AL. Supreme Court of Puerto Rico. Certiorari denied. *Vicente Geigel-Polanco* for petitioner. *Fernando Ruiz-Suria* for respondent C. Brewer Puerto Rico, Inc.

No. 499, Misc. CROSBY *v.* RUNDLE, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied. *David H. Kubert* for petitioner. Reported below: 415 Pa. 81, 202 A. 2d 299.

No. 490, Misc. ADAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Robert Martin* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 118 U. S. App. D. C. 364, 336 F. 2d 752.

No. 477, Misc. GAMRECKI *v.* UNITED STATES. C. A. 1st Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 495, Misc. STANTURF *v.* SIPES ET AL. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Hale Houts* for respondents. Reported below: 335 F. 2d 224.

No. 497, Misc. CARPENTER *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied.

No. 506, Misc. PRICE *v.* UNITED STATES. Supreme Court of Colorado. Certiorari denied.

No. 516, Misc. MATTHEWS *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.

No. 522, Misc. RICKERT *v.* SMITH, WARDEN, ET AL. Supreme Court of Vermont. Certiorari denied.

No. 524, Misc. HARRIS *v.* FLORIDA. Supreme Court of Florida. Certiorari denied.

No. 532, Misc. ABAIR *v.* WILKINS, WARDEN. C. A. 2d Cir. Certiorari denied. *Leon B. Polsky* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Barry Mahoney,* Assistant Attorney General, for respondent. Reported below: 333 F. 2d 742.

No. 520, Misc. SAUNDERS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 325 F. 2d 840.

No. 538, Misc. RIVERA *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. *Leon B. Polsky* for petitioner. *Frank S. Hogan, H. Richard Uviller* and *Irving Lang* for respondent. Reported below: 14 N. Y. 2d 441, 201 N. E. 2d 32.

No. 539, Misc. MARYANSKI *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 543, Misc. MICKENS *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 544, Misc. BROWN *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 235 Md. 401, 201 A. 2d 852.

No. 546, Misc. ARBUCKLE *v.* ILLINIOS. Circuit Court of Winnebago County, Illinois. Certiorari denied.

No. 548, Misc. SANDERS *v.* COX, WARDEN. Supreme Court of New Mexico. Certiorari denied. Reported below: 74 N. M. 524, 395 P. 2d 353.

No. 550, Misc. LATHAN *v.* KROPP, WARDEN. C. A. 6th Cir. Certiorari denied.

No. 556, Misc. LUPINO *v.* MINNESOTA. Supreme Court of Minnesota. Certiorari denied. *John S. Connolly* for petitioner. *Walter F. Mondale,* Attorney General of Minnesota, for respondent. Reported below: 268 Minn. 344, 129 N. W. 2d 294.

No. 552, Misc. KING *v.* MISSOURI. Supreme Court of Missouri. Certiorari denied. Reported below: 380 S. W. 2d 370.

No. 554, Misc. ROHR *v.* NEW YORK. C. A. 2d Cir. Certiorari denied.

No. 558, Misc. LIZARRAGA *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 559, Misc. FITTS *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. *John W. Low* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 335 F. 2d 1021.

No. 560, Misc. BARBARO *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 564, Misc. MAHURIN *v.* CARTER, CORRECTIONS DIRECTOR, ET AL. C. A. 8th Cir. Certiorari denied.

No. 565, Misc. NUSSBAUM *v.* WAREHIME ET AL. C. A. 7th Cir. Certiorari denied. *William D. Hall* for petitioner. *Robert G. Robb* for respondents. Reported below: 333 F. 2d 462.

No. 568, Misc. SHAFER ET AL. *v.* TENNESSEE. Supreme Court of Tennessee. Certiorari denied. *Grover N. McCormick* and *Hal Gerber* for petitioners. *George F. McCanless,* Attorney General of Tennessee, and *Edgar P. Calhoun,* Assistant Attorney General, for respondent. Reported below: 214 Tenn. 416, 381 S. W. 2d 254.

No. 569, Misc. GUERRIERI *v.* OHIO ET AL. Supreme Court of Ohio. Certiorari denied.

744-008 O-65-62

No. 577, Misc. REED *v.* PATE, WARDEN. C. A. 7th Cir. Certiorari denied.

No. 579, Misc. SMITH *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 581, Misc. ROBERTS *v.* MARYLAND. C. A. 4th Cir. Certiorari denied.

No. 582, Misc. ENGRAM *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States.

No. 583, Misc. JONES *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 584, Misc. SIMONTON *v.* DISTRICT COURT OF IOWA, LEE COUNTY. C. A. 8th Cir. Certiorari denied.

No. 585, Misc. MCDOWELL *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: 336 F. 2d 435.

No. 586, Misc. METZGER *v.* ILLINOIS ET AL. Supreme Court of Illinois. Certiorari denied.

No. 593, Misc. CRUMP *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Arnold M. Lerman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 118 U. S. App. D. C. 302, 335 F. 2d 724.

No. 590, Misc. SCARBECK *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Samuel C. Klein* for petitioner. *Solicitor General Cox* for the United States.

No. 592, Misc. DAEGELE *v.* KANSAS. Supreme Court of Kansas. Certiorari denied. Reported below: 193 Kan. 314, 393 P. 2d 978.

No. 595, Misc. GWYNN *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. *Frances Kahn* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *John De Witt Gregory,* Assistant Attorney General, for respondent.

No. 597, Misc. ELLIS *v.* OREGON. Supreme Court of Oregon. Certiorari denied. Petitioner *pro se. George Van Hoomissen* for respondent. Reported below: 238 Ore. 104, 392 P. 2d 647.

No. 600, Misc. BANKS *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 601, Misc. HLOZANSKY *v.* COX, PENITENTIARY SUPERINTENDENT. Supreme Court of New Mexico. Certiorari denied.

No. 603, Misc. WREGE *v.* BURKE, WARDEN. Supreme Court of Wisconsin. Certiorari denied.

No. 604, Misc. BRAZZELL *v.* MAXWELL, WARDEN, ET AL. Supreme Court of Ohio. Certiorari denied. Reported below: 176 Ohio St. 408, 200 N. E. 2d 309.

No. 609, Misc. FARRELL *v.* BURKE, WARDEN. Supreme Court of Wisconsin. Certiorari denied.

No. 606, Misc. MEHOLCHICK *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 610, Misc. HICKOCK *v.* CROUSE, WARDEN; and
No. 614, Misc. SMITH *v.* CROUSE, WARDEN. C. A. 10th Cir. Certiorari denied. *Joseph P. Jenkins* for petitioner in No. 610, Misc. Petitioner *pro se* in No. 614, Misc. *William M. Ferguson,* Attorney General of Kansas, and *J. Richard Foth,* Assistant Attorney General, for respondent in both cases. Reported below: 334 F. 2d 95.

No. 611, Misc. WILLIAMS *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States.

No. 615, Misc. RAVENELL *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Reported below: 43 N. J. 148, 171, 203 A. 2d 1, 13.

No. 617, Misc. SMART *v.* SUPERIOR COURT, SACRAMENTO COUNTY, CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 618, Misc. RINEHART *v.* NEW MEXICO. Supreme Court of New Mexico. Certiorari denied.

No. 620, Misc. GARY *v.* ILLINOIS. C. A. 7th Cir. Certiorari denied.

No. 630, Misc. DELL *v.* NEW YORK. Court of Appeals of New York. Certiorari denied. Petitioner *pro se. Charles T. Matthews* for respondent.

No. 623, Misc. CRAIG *v.* INDIANA. C. A. 7th Cir. Certiorari denied.

No. 639, Misc. LUPO *v.* FAY, WARDEN. C. A. 2d Cir. Certiorari denied. *John C. Lankenau* for petitioner. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, *Barry Mahoney,* Assistant Attorney General, and *Lillian Z. Cohen,* Deputy Assistant Attorney General, for respondent. Reported below: 332 F. 2d 1020.

No. 647, Misc. GRAY *v.* WILSON, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 672, Misc. CAMPBELL *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 337 F. 2d 396.

No. 673, Misc. ANTHONY *v.* NEW YORK. Court of Appeals of New York. Certiorari denied.

No. 680, Misc. RIVERA *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied. *Leon B. Polsky* for petitioner.

No. 696, Misc. PORTER *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox* for the United States. Reported below: 335 F. 2d 602.

No. 628, Misc. LESER ET AL. *v.* UNITED STATES. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit and for other relief denied. *Morris Lavine* for petitioners. *Solicitor General Cox* for the United States. Reported below: 335 F. 2d 832.

No. 674, Misc. SULLIVAN *v.* HEINZE, WARDEN. C. A. 9th Cir. Certiorari denied.

No. 578, Misc. TOWNSEND *v.* OGILVIE, SHERIFF, ET AL. Motion of *George N. Leighton* to withdraw his appearance as counsel for petitioner granted. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied. Petitioner *pro se*. *Daniel P. Ward* and *Edward J. Hladis* for respondents. Reported below: 334 F. 2d 837.

Rehearing Denied.

No. 17. CALHOON, PRESIDENT, OR PETERS, SECRETARY-TREASURER OF DISTRICT NO. 1, NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AFL–CIO *v.* HARVEY ET AL., *ante*, p. 134;

No. 137. STRAIGHT ET AL., DOING BUSINESS AS PRYOR HAY & GRAIN CO., ET AL. *v.* JAMES TALCOTT, INC., *ante*, p. 822;

No. 381. NORTHWESTERN PACIFIC RAILROAD CO. *v.* INTERSTATE COMMERCE COMMISSION ET AL., *ante*, p. 132;

No. 439. KATZ *v.* PEYTON, *ante*, p. 915;

No. 449. ASSOCIATED PRESS ET AL. *v.* WALKER, *ante*, p. 47;

No. 458. POWELL *v.* NATIONAL SAVINGS & TRUST CO., *ante*, p. 920;

No. 461. HALLER ET UX. *v.* UNITED STATES, *ante*, p. 921;

No. 465. KATZ *v.* KATZ, *ante*, p. 921;

No. 472. MCCULLOCH *v.* CALIFORNIA FRANCHISE TAX BOARD, *ante*, p. 133;

No. 502. UNION LEADER CORP. *v.* HAVERHILL GAZETTE CO., *ante*, p. 931; and

No. 517. TWOMBLEY *v.* CITY OF LONG BEACH ET AL., *ante*, p. 904. Petitions for rehearing denied.

No. 522. AIR LINE PILOTS ASSOCIATION, INTERNATIONAL, ET AL. *v.* AAXICO AIRLINES, INC., *ante*, p. 933;

No. 125, Misc. AVELLINO *v.* UNITED STATES, *ante*, p. 922;

No. 328, Misc. BATEMAN *v.* RHAY, PENITENTIARY SUPERINTENDENT, *ante*, p. 916;

No. 362, Misc. HARRIS *v.* TURNER ET AL., *ante*, p. 907;

No. 367, Misc. ENGLING *v.* CROUSE, WARDEN, *ante*, p. 907;

No. 422, Misc. BRADFORD *v.* NASH, WARDEN, *ante*, p. 924;

No. 463, Misc. SPIRES *v.* BOTTORFF, *ante*, p. 938; and

No. 488, Misc. GEGENFURTNER *v.* SCHMIDT, DIRECTOR, WISCONSIN DEPARTMENT OF PUBLIC WELFARE, ET AL., *ante*, p. 939. Petitions for rehearing denied.

No. 17, Original. NEBRASKA *v.* IOWA, *ante*, p. 911. Motion of Roy M. Harrop for reconsideration of the denial of the motion for leave to intervene denied.

No. 20. BRULOTTE ET AL. *v.* THYS CO., *ante*, p. 29. Petition of petitioner for rehearing and clarification of opinion denied. Petition of respondent for rehearing denied.

No. 55. INDEPENDENT PETROLEUM WORKERS OF AMERICA, INC. *v.* AMERICAN OIL CO., *ante*, p. 130. Petition for rehearing denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition.

No. 157. AMERICAN EXPORT LINES, INC. *v.* AMMAR, *ante*, p. 824. Motion to substitute Gloria Dawn Ammar, as Administratrix of the Estate of Howard Ali Ammar, deceased, in the place of Howard Ali Ammar granted. Motion for leave to file supplement to petition for rehearing granted. Petition for rehearing denied.

No. 165. ROSENTHAL *v.* UNITED STATES, *ante*, p. 845. Petition for rehearing denied. MR. JUSTICE WHITE took no part in the consideration or decision of this petition.

No. 494. BROTHERHOOD OF RAILROAD TRAINMEN ET AL. *v.* LOUISVILLE & NASHVILLE RAILROAD CO., *ante*, p. 934. Petition for rehearing denied. MR. JUSTICE BLACK is of the opinion that the petition for rehearing should be granted.

JANUARY 22, 1965.

Dismissal Under Rule 60.

No. 611. LOMENZO, SECRETARY OF STATE OF NEW YORK, ET AL. *v.* WMCA, INC., ET AL. Appeal from the United States District Court for the Southern District of New York. Dismissed pursuant to Rule 60 of the Rules of this Court. *Louis J. Lefkowitz*, Attorney General of New York, *Paxton Blair*, Solicitor General, *Samuel A. Hirshowitz*, First Assistant Attorney General, *Mathias L. Spiegel*, Special Assistant Attorney General, and *Daniel M. Cohen* and *Barry Mahoney*, Assistant Attorneys General, for appellants. *Leonard B. Sand, Max Gross, Leo A. Larkin, Jack B. Weinstein* and *Robert B. McKay* for appellees.

JANUARY 25, 1965.

Miscellaneous Orders.

No. 688. KRISTOVICH, PUBLIC ADMINISTRATOR *v.* SHU TONG NG. On petition for writ of certiorari to the District Court of Appeal of California, Second Appellate District. The Solicitor General is invited to file a brief expressing the views of the United States.

No. 430, Misc. COLLIGAN *v.* ROSETTI, PROPERTY CLERK, NEW YORK COUNTY, ET AL. Motion for leave to file petition for writ of certiorari denied. Petitioner *pro se*. *Leo A. Larkin* for respondents.

No. 240. Local Union No. 189, Amalgamated Meat Cutters & Butcher Workmen of North America, AFL–CIO, et al. *v.* Jewel Tea Co., Inc. (Certiorari, *ante,* p. 813, to the United States Court of Appeals for the Seventh Circuit.) The motion of American Farm Bureau Federation for leave to file a brief, as *amicus curiae,* is granted. The motion of National Livestock Feeders Association et al. for leave to file a brief, as *amici curiae,* is granted. The motion of the National Independent Meat Packers Association for leave to file a brief, as *amicus curiae,* is granted. *Allen A. Lauterbach* for American Farm Bureau Federation. *Allen Whitfield* for National Livestock Feeders Association et al. *Edwin H. Pewett, Jonathan W. Sloat* and *George A. Avery* for National Independent Meat Packers Association.

No. 360. Harman et al. *v.* Forssenius et al. Appeal from the United States District Court for the Eastern District of Virginia. (Probable jurisdiction noted, *ante,* p. 810.) The motion of the Solicitor General for leave to participate in the oral argument, as *amicus curiae,* is granted and fifteen minutes are allotted for that purpose. Counsel for the appellants are allotted an additional fifteen minutes for oral argument. The motion of the appellants to strike the brief, as *amicus curiae,* of the Solicitor General is denied. Counsel for the appellants are allowed thirty days from the date of service to file a reply to the brief of the Solicitor General. *Solicitor General Cox, Assistant Attorney General Marshall, Louis F. Claiborne, Harold H. Greene* and *David Rubin* for the United States, as *amicus curiae,* in opposition. *Robert Y. Button,* Attorney General of Virginia, *Richard N. Harris,* Assistant Attorney General, *Joseph C. Carter, Jr.,* and *E. Milton Farley III* for appellants on the motion.

No. 531, Misc. Bennett *v.* Pate, Warden. Motion for leave to file petition for writ of habeas corpus denied.

No. 489. UNITED STATES *v.* ATLAS LIFE INSURANCE CO. (Certiorari, *ante*, p. 927, to the United States Court of Appeals for the Tenth Circuit.) The motion of the Solicitor General to enlarge the time for oral argument is granted and a total of one hour is allotted to the petitioner. Counsel for the respondent is allotted a total of forty-five minutes for oral argument. The motion of the Attorney General of Louisiana et al. for leave to participate in the oral argument on behalf of the respondent, as *amici curiae*, is granted. *Solicitor General Cox* on the motion to enlarge the time for oral argument. *Norris Darrell* for respondent. *Jack P. F. Gremillion*, Attorney General of Louisiana, *John J. O'Connell*, Attorney General of Washington, and *Daniel B. Goldberg* on the motion for leave to participate in the oral argument.

Certiorari Granted. (See also No. 560, *ante*, p. 671.)

No. 695. UNITED STATES *v.* JOHNSON. C. A. 4th Cir. Certiorari granted. MR. JUSTICE WHITE took no part in the consideration or decision of this petition. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. *George Cochran Doub* for respondent. Reported below: 337 F. 2d 180.

Certiorari Denied. (See also No. 698, *ante*, p. 673.)

No. 670. FINNELL *v.* BROMBERG. Supreme Court of Nevada. Certiorari denied. *Douglas A. Busey* and *William R. Ming* for petitioner.

No. 674. JACUZZI BROS., INC., ET AL. *v.* LANDON, INC. C. A. 9th Cir. Certiorari denied. *Frank A. Neal* and *Jas. M. Naylor* for petitioners. *Jack E. Hursh, Oscar A. Mellin* and *Carlisle M. Moore* for respondent. Reported below: 336 F. 2d 723.

No. 107. COFFEE COUNTY, TENNESSEE *v.* CITY OF TULLAHOMA. C. A. 6th Cir. Certiorari denied. *Gerald L. Ewell, David W. Shields III* and *H. J. Garrett* for petitioner. *Edwin F. Hunt* for respondent. *Solicitor General Cox, Assistant Attorney General Douglas, Morton Hollander, Kathryn H. Baldwin, Charles J. McCarthy* and *Robert H. Marquis* for the United States, as *amicus curiae,* in opposition. Reported below: 328 F. 2d 683.

No. 655. SMITH *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Mozart G. Ratner* and *Frederick Bernays Wiener* for petitioner. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *Norman Sepenuk* for the United States. Reported below: 335 F. 2d 898.

No. 675. PORT OF SEATTLE *v.* MARTIN ET AL. Supreme Court of Washington. Certiorari denied. *Robert W. Graham* for petitioner. *Richard H. Riddell* for respondents. Reported below: 64 Wash. 2d 309, 391 P. 2d 540.

No. 677. GUIBERSON CORP. ET AL. *v.* WEBBER ET AL. C. A. 5th Cir. Certiorari denied. *Frank J. Scurlock* for petitioners. *Joe E. Edwards, J. Vincent Martin* and *M. H. Gay* for respondents. Reported below: 336 F. 2d 461.

No. 669. KLIX CORP. *v.* CABLE VISION, INC., ET AL. C. A. 9th Cir. Certiorari denied. *George M. McMillan* for petitioner. *E. Stratford Smith* and *Robert W. Healy* for respondents. Reported below: 335 F. 2d 348.

No. 689. CITY OF TULSA, OKLAHOMA *v.* MIDWESTERN DEVELOPMENTS, INC. C. A. 10th Cir. Certiorari denied. *Charles E. Norman* for petitioner. *Robert J. Woolsey* for respondent. Reported below: 333 F. 2d 1009.

No. 672. GRANDINETTI ET UX. *v.* UNITED STATES. C. A. 3d Cir. Certiorari denied. *John B. Nicklas, Jr.*, for petitioners. *Solicitor General Cox, Assistant Attorney General Oberdorfer, Joseph M. Howard* and *John M. Brant* for the United States. Reported below: 337 F. 2d 1010.

No. 686. UNITED MINE WORKERS OF AMERICA *v.* SUNFIRE COAL CO. ET AL. C. A. 6th Cir. Certiorari denied. *Harrison Combs* and *M. E. Boiarsky* for petitioner. *James S. Greene, Jr.*, and *Logan E. Patterson* for respondents. Reported below: 335 F. 2d 958.

No. 687. INDUSTRIAL SHOE MACHINERY CORP. *v.* UNITED SHOE MACHINERY CORP. C. A. 1st Cir. Certiorari denied. *Joseph Zallen* for petitioner. *Harry L. Kirkpatrick* and *William W. Rymer* for respondent. Reported below: 335 F. 2d 577.

No. 691. BROTHERHOOD OF RAILROAD TRAINMEN, AFL–CIO *v.* FLORIDA EAST COAST RAILWAY CO. C. A. 5th Cir. Certiorari denied. *Neal Rutledge* and *Allan Milledge* for petitioner. *William B. Devaney* and *George B. Mickum III* for respondent. Reported below: 336 F. 2d 172.

No. 697. EDDLEMAN *v.* SUPREME COURT OF WASHINGTON. Supreme Court of Washington. Certiorari denied. *Bryce Rea, Jr.*, for petitioner. *T. M. Royce* for respondent. Reported below: 63 Wash. 2d 775, 389 P. 2d 296.

No. 701. TURKEL ET AL. *v.* FOOD AND DRUG ADMINISTRATION, DEPARTMENT OF HEALTH, EDUCATION AND WELFARE. C. A. 6th Cir. Certiorari denied. *Leo E. Rattay* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 334 F. 2d 844.

No. 699. FAR EAST CONFERENCE ET AL. *v.* FEDERAL MARITIME COMMISSION ET AL.;

No. 700. PACIFIC COAST EUROPEAN CONFERENCE *v.* FEDERAL MARITIME COMMISSION ET AL.; and

No. 703. FAR EAST CONFERENCE *v.* FEDERAL MARITIME COMMISSION ET AL. C. A. D. C. Cir. Certiorari denied. *Herman Goldman, Elkan Turk, Jr., Seymour H. Kligler, Burton H. White, Elliott B. Nixon* and *Arthur E. Tarantino* for petitioners in No. 699. *Henry R. Rolph* for petitioner in No. 700. *Herman Goldman, Elkan Turk, Jr.*, and *Seymour H. Kligler* for petitioner in No. 703. *Solicitor General Cox, Assistant Attorney General Orrick, Robert B. Hummel, Irwin A. Seibel, James L. Pimper* and *Robert E. Mitchell* for respondents. Reported below: 119 U. S. App. D. C. 110, 337 F. 2d 146.

No. 588. RUSS *v.* SOUTHERN RAILWAY CO. C. A. 6th Cir. Certiorari denied. MR. JUSTICE BLACK, MR. JUSTICE BRENNAN and MR. JUSTICE GOLDBERG are of the opinion that certiorari should be granted. Petitioner *pro se*. *Hugh B. Cox, Stanley L. Temko* and *W. Graham Claytor, Jr.*, for respondent. Reported below: 334 F. 2d 224.

No. 690. AMERICAN INTERNATIONAL ALUMINUM CORP. *v.* UNITED STEELWORKERS OF AMERICA, AFL–CIO. C. A. 5th Cir. Certiorari denied. MR. JUSTICE GOLDBERG took no part in the consideration or decision of this petition. *Emanuel Levenson* for petitioner. Reported below: 334 F. 2d 147.

No. 353, Misc. COMLEY *v.* UNITED STATES; and

No. 399, Misc. CHOW *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioners *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Ronald L. Gainer* for the United States. Reported below: 334 F. 2d 343.

No. 702. COMI *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Julian R. Manelli* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Robert G. Maysack* for the United States. Reported below: 336 F. 2d 856.

No. 177, Misc. KIRBY *v.* WARDEN, MARYLAND PENITENTIARY. Court of Appeals of Maryland. Certiorari denied. Petitioner *pro se*. *Thomas B. Finan,* Attorney General of Maryland, and *Donald H. Noren* for respondent. Reported below: 234 Md. 614, 197 A. 2d 910.

No. 217, Misc. WRIGHT *v.* UNITED STATES ET AL. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall, Harold H. Greene* and *Gerald P. Choppin* for the United States et al.

No. 226, Misc. HOLT *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Charles J. McCarthy* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 329 F. 2d 368.

No. 292, Misc. KYLE *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 331 F. 2d 286.

No. 633, Misc. SMITH *v.* CALIFORNIA. Supreme Court of California. Certiorari denied.

No. 629, Misc. SEITERLE *v.* WILSON, WARDEN. Supreme Court of California. Certiorari denied. *Earl Klein* for petitioner. Reported below: 61 Cal. 2d 651, 394 P. 2d 556.

No. 294, Misc. URBANO *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied. Petitioner *pro se.* *Arthur J. Sills,* Attorney General of New Jersey, and *Eugene T. Urbaniak,* Deputy Attorney General, for respondent. Reported below: 333 F. 2d 845.

No. 350, Misc. SUAREZ *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: 333 F. 2d 366.

No. 421, Misc. MORET ET UX. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Jacob Rassner* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Kirby W. Patterson* for the United States. Reported below: 334 F. 2d 887.

No. 427, Misc. JONES *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. *Ware Adams* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 334 F. 2d 809.

No. 472, Misc. STAPF *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States.

No. 509, Misc. MAHLER *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: 333 F. 2d 472.

No. 638, Misc. WERNER *v.* PENNSYLVANIA. Supreme Court of Pennsylvania. Certiorari denied.

No. 641, Misc. DORSEY *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 651, Misc. CARTY *v.* FLORIDA. C. A. 7th Cir. Certiorari denied.

No. 662, Misc. CUMMINGS *v.* PEPERSACK, WARDEN. C. A. 4th Cir. Certiorari denied.

No. 666, Misc. MAYBERRY *v.* RUSSELL, CORRECTIONAL SUPERINTENDENT. Supreme Court of Pennsylvania. Certiorari denied.

No. 684, Misc. JENNINGS *v.* CALIFORNIA. C. A. 9th Cir. Certiorari denied.

No. 705, Misc. MOORE *v.* UNITED STATES. C. A. 8th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 337 F. 2d 350.

No. 720, Misc. EDWARDS *v.* UNITED STATES. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 652, Misc. HARRIS *v.* MAXWELL, WARDEN, ET AL. Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit and for other relief denied. Reported below: 337 F. 2d 710.

Rehearing Denied.

No. 5. LUPPER ET AL. *v.* ARKANSAS, *ante*, p. 306;

No. 528. HY-LAN FURNITURE CO., INC. *v.* WILSON, TRUSTEE IN BANKRUPTCY, ET AL., *ante*, p. 946;

No. 457, Misc. STEBBINS *v.* YOUNG ET AL., *ante*, p. 949;

No. 496, Misc. IN RE STEBBINS, *ante*, p. 949;

No. 480, Misc. MULLEN *v.* BREWER, DIRECTOR, DEPARTMENT OF PUBLIC WELFARE, *ante*, p. 949;

No. 484, Misc. BROYDE *v.* WILLIS ET AL., *ante*, p. 949;

No. 493, Misc. WOLFSOHN, EXECUTRIX *v.* BAZELON, CHIEF JUDGE, U. S. COURT OF APPEALS, ET AL., *ante*, p. 942; and

No. 518, Misc. EMERICH *v.* AL SIRAT GROTTO, MYSTIC ORDER OF THE ENCHANTED REALM, ET AL., *ante*, p. 950. Petitions for rehearing denied.

FEBRUARY 1, 1965.

Miscellaneous Orders.

No. 843. CASE *v.* NEBRASKA. (Certiorari, *ante*, p. 958, to the Supreme Court of Nebraska.) The motion for the appointment of counsel is granted, and it is ordered that *Daniel J. Meador, Esquire,* of Charlottesville, Virginia, a member of the Bar of this Court, be, and he is hereby, appointed to serve as counsel for the petitioner in this case.

No. 726, Misc. CADENA *v.* WASHINGTON ET AL.;

No. 735, Misc. FARRANT *v.* BENNETT, WARDEN, ET AL.;

No. 736, Misc. GONZALEZ *v.* DEPARTMENT OF WELFARE, CITY OF NEW YORK; and

No. 783, Misc. CORBIN *v.* MYERS, CORRECTIONAL SUPERINTENDENT. Motions for leave to file petitions for writs of habeas corpus denied.

744-008 O-65-63

No. 551, Misc. HOLLEY *v.* UNITED STATES. 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. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Marshall,* and *Harold H. Greene* for the United States.

No. 537, Misc. MCCOY *v.* RANDOLPH, WARDEN. 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. Petitioner *pro se*. *William G. Clark,* Attorney General of Illinois, and *Edward A. Berman,* Assistant Attorney General, for respondent.

No. 17, Original. NEBRASKA *v.* IOWA. (Argued January 25, 1965.)

IT IS ORDERED that the motion of the State of Nebraska for leave to file a bill of complaint is granted.

IT IS FURTHER ORDERED that the Honorable Joseph W. Madden, Senior Judge of the United States Court of Claims, be, and he is hereby, appointed Special Master in this case with authority to fix the time and conditions for the filing of additional pleadings and to direct subsequent proceedings, and with authority to summon witnesses, issue subpoenas, and take such evidence as may be introduced and such as he may deem it necessary to call for. The master is directed to submit such reports as he may deem appropriate.

The master shall be allowed his actual expenses. The allowances to him, the compensation paid to his technical, stenographic, and clerical assistants, the cost of printing his report, and all other proper expenses shall be charged against and be borne by the parties in such proportion as the Court hereafter may direct.

IT IS FURTHER ORDERED that if the position of Special Master in this case becomes vacant during a recess of the

Court, THE CHIEF JUSTICE shall have authority to make a new designation which shall have the same effect as if originally made by the Court herein.

Clarence A. H. Meyer, Attorney General of Nebraska, and *Joseph R. Moore* and *Howard H. Moldenhauer,* Special Assistant Attorneys General, for plaintiff. *Evan Hultman,* Attorney General of Iowa, *W. N. Bump,* Solicitor General, and *William J. Yost,* Assistant Attorney General, for defendant. [For earlier orders herein, see *ante,* pp. 876, 911.]

Probable Jurisdiction Noted or Question Postponed.

No. 848. FIXA, POSTMASTER, SAN FRANCISCO, ET AL. *v.* HEILBERG. Appeal from the United States District Court for the Northern District of California. Probable jurisdiction noted. This case is set for oral argument immediately following No. 491. MR. JUSTICE WHITE took no part in the consideration or decision of this case. *Solicitor General Cox, Assistant Attorney General Yeagley* and *Kevin T. Maroney* for appellants. Reported below: 236 F. Supp. 405.

No. 571. SWIFT & CO., INC., ET AL. *v.* WICKHAM, COMMISSIONER OF AGRICULTURE & MARKETS OF NEW YORK. Appeal from the United States District Court for the Southern District of New York. Further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits. The Solicitor General is invited to file a brief on the merits. *William J. Condon, William J. Colavito, Edmund L. Jones, William P. Woods* and *Earl G. Spiker* for appellants. *Louis J. Lefkowitz,* Attorney General of New York, *Samuel A. Hirshowitz,* First Assistant Attorney General, and *Philip Kahaner* and *Lester Esterman,* Assistant Attorneys General, for appellee. Reported below: 230 F. Supp. 398.

Certiorari Granted. (See also No. 387, *ante*, p. 684, and No. 585, *ante*, p. 687.)

No. 679. FRIBOURG NAVIGATION CO., INC. *v.* COMMISSIONER OF INTERNAL REVENUE. C. A. 2d Cir. Certiorari granted. *Simon H. Rifkind* and *James B. Lewis* for petitioner. *Solicitor General Cox* for respondent. Reported below: 335 F. 2d 15.

No. 711, Misc. HICKS *v.* DISTRICT OF COLUMBIA. Motion for leave to proceed *in forma pauperis* and petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit granted. Case transferred to the appellate docket. *Melvin L. Wulf, Lawrence Speiser* and *Monroe Friedman* for petitioner. *Chester H. Gray, Milton D. Korman, Hubert B. Pair* and *Ted D. Kuemmerling* for respondent.

Certiorari Denied. (See also Misc., Nos. 537 and 551, *supra.*)

No. 226. FORTSON, SECRETARY OF STATE OF GEORGIA *v.* DORSEY ET AL. C. A. 5th Cir. Certiorari denied. *Eugene Cook,* Attorney General of Georgia, and *Paul Rodgers,* Assistant Attorney General, for petitioner. *William C. O'Kelley, Edwin F. Hunt* and *Charles A. Moye, Jr.,* for respondents. Reported below: See 228 F. Supp. 259.

No. 696. R. D. MCALLISTER & SON ET AL. *v.* CITY OF ERIE. Supreme Court of Pennsylvania. Certiorari denied. *John M. Wolford* and *Ernest Schein* for petitioners.

No. 555. RIVER BRAND RICE MILLS, INC. *v.* GENERAL FOODS CORP. C. A. 5th Cir. Certiorari denied. *Marcus B. Finnegan* and *William W. Beckett* for petitioner. *Ralph H. Hudson* and *Jack W. Hayden* for respondent. Reported below: 334 F. 2d 770.

No. 673. D'ANDREA *v.* IMMIGRATION AND NATURALIZATION SERVICE. C. A. 6th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Jerome M. Feit* for respondent. Reported below: 335 F. 2d 377.

No. 684. RORER *v.* UNITED STATES; and

No. 724. SIMPSON *v.* UNITED STATES. C. A. 4th Cir. Certiorari denied. *Philip N. Brophy* for petitioner in No. 684. *Edward L. Carey* and *Walter E. Gillcrist* for petitioner in No. 724. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 337 F. 2d 784.

No. 694. UNITED STATES *v.* C. O. MASON, INC., ET AL. Court of Customs and Patent Appeals. Certiorari denied. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *John C. Eldridge* for the United States. *Harold A. Segall* and *Robert Layton* for respondent C. O. Mason, Inc. Reported below: 51 C. C. P. A. (Cust.) 107.

No. 708. INTERNATIONAL BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA (AFL–CIO) ET AL. *v.* C. J. MONTAG & SONS, INC., ET AL. C. A. 9th Cir. Certiorari denied. *Frederick Bernays Wiener, Francis X. Ward* and *R. Max Etter* for petitioners. *Manley B. Strayer* for C. J. Montag & Sons, Inc., et al., and *Smithmoore P. Myers* for Curtis Construction Co., respondents. Reported below: 335 F. 2d 216.

No. 706. LEVIN *v.* UNITED STATES. C. A. D. C. Cir. Certiorari denied. *Jacob W. Friedman* for petitioner. *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States. Reported below: 119 U. S. App. D. C. 156, 338 F. 2d 265.

No. 704. BORN *v.* OKLAHOMA. Court of Criminal Appeals of Oklahoma. Certiorari denied. *Fred A. Tillman, Bill Heskett* and *Jack D. Heskett* for petitioner. Reported below: 397 P. 2d 924.

No. 707. ALASKA AGGREGATE CORP. *v.* BEELER. C. A. 9th Cir. Certiorari denied. *Floyd A. Fredrickson* for petitioner. Reported below: 336 F. 2d 108.

No. 709. WITTICH MEMORIAL CHURCH *v.* RICHTERBERG. C. A. 10th Cir. Certiorari denied. *Leslie L. Conner, James M. Little* and *Grester Lamar* for petitioner. Reported below: 334 F. 2d 869.

No. 712. UNITED STATES *v.* BOSSIER PARISH SCHOOL BOARD ET AL. C. A. 5th Cir. Certiorari denied. *Solicitor General Cox* for the United States. Reported below: 336 F. 2d 197.

No. 716. INDUSTRIAL INSTRUMENT CORP. *v.* FOXBORO CO. C. A. 5th Cir. Certiorari denied. *Joe E. Edwards* and *J. Vincent Martin* for petitioner. *Edward G. Curtis* and *Daniel L. Morris* for respondent. Reported below: 335 F. 2d 123.

No. 717. LEWES DAIRY, INC. *v.* FREEMAN, SECRETARY OF AGRICULTURE, ET AL. C. A. 3d Cir. Certiorari denied. *James M. Tunnell, Jr.,* and *Andrew B. Kirkpatrick, Jr.,* for petitioner. *Solicitor General Cox, Assistant Attorney General Douglas, Alan S. Rosenthal* and *Richard S. Salzman* for respondents. Reported below: 337 F. 2d 827.

No. 719. EDWARDS ET AL. *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioners *pro se. Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States. Reported below: 334 F. 2d 360.

No. 720. PEISNER *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 236 Md. 137, 202 A. 2d 585.

No. 721. MCFARLIN ET VIR *v.* CHICAGO, ROCK ISLAND & PACIFIC RAILROAD CO. C. A. 10th Cir. Certiorari denied. *Emmett C. Hart* for petitioners. *William R. Federici* for respondent. Reported below: 336 F. 2d 1.

No. 705. GIANCANA *v.* JOHNSON, AGENT IN CHARGE, FEDERAL BUREAU OF INVESTIGATION. C. A. 7th Cir. Certiorari denied. MR. JUSTICE DOUGLAS is of the opinion that certiorari should be granted. *William R. Ming, Jr.*, for petitioner. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for respondent. Reported below: 335 F. 2d 366.

No. 14, Misc. MOODY *v.* HOLMAN, WARDEN. C. A. 5th Cir. Certiorari denied. Petitioner *pro se. Richmond M. Flowers,* Attorney General of Alabama, and *Paul T. Gish, Jr.,* Assistant Attorney General, for respondent.

No. 311, Misc. MCLESTER *v.* UNITED STATES. C. A. 10th Cir. Certiorari denied. Petitioner *pro se. Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Richard W. Schmude* for the United States. Reported below: 328 F. 2d 992.

No. 332, Misc. HINRICHS *v.* FLORIDA. District Court of Appeal of Florida, First Appellate District. Certiorari denied. Petitioner *pro se. James W. Kynes,* Attorney General of Florida, and *George R. Georgieff,* Assistant Attorney General, for respondent.

No. 470, Misc. GENSBURG *v.* HEINZE, WARDEN, ET AL. C. A. 9th Cir. Certiorari denied.

No. 710. LORENT *v.* TOZER, SHERIFF. Motion to dispense with printing the petition for writ of certiorari granted. Petition for writ of certiorari to the Supreme Court of Missouri denied.

No. 378, Misc. OTTO *v.* SOMERS, MAYOR, ET AL. C. A. 6th Cir. Certiorari denied. Petitioner *pro se.* *Joseph P. Duffy* for respondents. Reported below: 332 F. 2d 697.

No. 390, Misc. MILLIKEN *v.* GLEASON, ADMINISTRATOR OF VETERANS' AFFAIRS. C. A. 1st Cir. Certiorari denied. *Milton Stanzler* for petitioner. *Solicitor General Cox* for respondent. Reported below: 332 F. 2d 122.

No. 403, Misc. PHILLIPS *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Daniel H. Benson* for the United States. Reported below: 334 F. 2d 589.

No. 473, Misc. DANIELS *v.* NEW JERSEY. C. A. 3d Cir. Certiorari denied.

No. 475, Misc. LA CLAIR *v.* UNITED STATES. C. A. 7th Cir. Certiorari denied. Petitioner *pro se.* *Solicitor General Cox, Assistant Attorney General Miller, Beatrice Rosenberg* and *Sidney M. Glazer* for the United States.

No. 510, Misc. HUNTER *v.* CALIFORNIA. District Court of Appeal of California, Second Appellate District. Certiorari denied. *Caryl Warner* for petitioner.

No. 621, Misc. CASIAS *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.

No. 491, Misc. WILLIAMS *v.* UNITED STATES. C. A. D. C. 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: 118 U. S. App. D. C. 108, 332 F. 2d 308.

No. 492, Misc. FUENTES *v.* NEW YORK. Appellate Division, Supreme Court of New York, First Judicial Department. Certiorari denied.

No. 553, Misc. SCHELLIN *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied. Reported below: 227 Cal. App. 2d 245, 38 Cal. Rptr. 593.

No. 557, Misc. WILLIAMS *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied.

No. 634, Misc. HUNTER *v.* PATE, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 648, Misc. NOLEN *v.* CALIFORNIA. District Court of Appeal of California, First Appellate District. Certiorari denied.

No. 667, Misc. STILTNER *v.* WASHINGTON. Supreme Court of Washington. Certiorari denied.

No. 675, Misc. SHUMATE *v.* LOUISIANA ET AL. Supreme Court of Louisiana. Certiorari denied.

No. 676, Misc. ROWE *v.* RANDOLPH, WARDEN. Supreme Court of Illinois. Certiorari denied.

No. 691, Misc. ALVARADO *v.* CALIFORNIA ET AL. Supreme Court of California. Certiorari denied.

No. 681, Misc. WOYKOVSKY *v.* UNITED STATES. C. A. 9th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States. Reported below: 336 F. 2d 803.

No. 685, Misc. HARBAUGH *v.* MARONEY, CORRECTIONAL SUPERINTENDENT, ET AL. C. A. 3d Cir. Certiorari denied.

No. 687, Misc. CRUMP *v.* UNITED STATES. C. A. 5th Cir. Certiorari denied. Petitioner *pro se*. *Solicitor General Cox* for the United States.

No. 689, Misc. CURRY *v.* MARYLAND. Court of Appeals of Maryland. Certiorari denied. Reported below: 235 Md. 378, 201 A. 2d 792.

No. 690, Misc. BURGESS *v.* FARRELL LINES, INC. C. A. 4th Cir. Certiorari denied. *David Rein* and *Joseph Forer* for petitioner. *David R. Owen* for respondent. Reported below: 335 F. 2d 885.

No. 695, Misc. STEVENSON *v.* MYERS, CORRECTIONAL SUPERINTENDENT. C. A. 3d Cir. Certiorari denied.

No. 698, Misc. TENNANT *v.* MARYLAND. Seventh Judicial Circuit Court of Maryland. Certiorari denied.

No. 700, Misc. COBB *v.* ILLINOIS. Appellate Court of Illinois, Cook County. Certiorari denied.

No. 701, Misc. BROWNE *v.* WISCONSIN. Supreme Court of Wisconsin. Certiorari denied. Reported below: 24 Wis. 2d 491, 131 N. W. 2d 169.

No. 707, Misc. FORD *v.* ALABAMA. Supreme Court of Alabama. Certiorari denied. Reported below: 277 Ala. 83, 167 So. 2d 166.

No. 706, Misc. SMITH *v.* NEW JERSEY. Supreme Court of New Jersey. Certiorari denied. Petitioner *pro se*. *Guy W. Calissi* for respondent. Reported below: 43 N. J. 67, 202 A. 2d 669.

No. 721, Misc. GREEN *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: 338 F. 2d 127.

No. 731, Misc. BECK ET AL. *v.* UNITED STATES. C. A. 2d Cir. Certiorari denied. *Melvin L. Wulf* for petitioners. *Solicitor General Cox, Assistant Attorney General Miller* and *Beatrice Rosenberg* for the United States.

No. 732, Misc. CHING *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: 338 F. 2d 333.

No. 567, Misc. WHITE *v.* NORTH CAROLINA. Motion of *Brainerd Currie* for leave to file a brief, as *amicus curiae*, granted. Petition for writ of certiorari to the Supreme Court of North Carolina denied. *Wade H. Penny, Jr.*, for petitioner. *T. W. Bruton*, Attorney General of North Carolina, and *Harry W. McGalliard*, Deputy Attorney General, for respondent. *Brainerd Currie, pro se*, on the motion to file a brief, as *amicus curiae*, in support of the petition. Reported below: 262 N. C. 52, 136 S. E. 2d 205.

No. 704, Misc. WHITED *v.* PITCHESS, SHERIFF. Petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit and for other relief denied.

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Employer negligence—State appellate court invading province of the jury.—Where employee was awarded damages by a jury under the Act, the state appellate court improperly invaded the province of the jury by holding that the issue of employer negligence should not have been submitted to the jury and that the trial court erred in denying employer's motion for a directed verdict. Davis v. Baltimore & O. R. Co., p. 671.

FEDERAL POWER COMMISSION. See also **Collateral Estoppel**; **Interstate Commerce**, 2–3.

Jurisdictional scope—Natural Gas Act—Rule-making or adjudication.—The jurisdictional boundaries of the Commission may be established by adjudication rather than by rule-making. California v. Lo-Vaca Co., p. 366.

FEDERAL RESERVE BOARD. See **Bank Holding Company Act of 1956.**

FEDERAL RULES OF CIVIL PROCEDURE. See also **Jurisdiction**, 2; **Mandamus**; **Service of Process.**

1. *Rule 35 (a)—Mental and physical examination of defendants.*—Rule 35 (a) of the Federal Rules of Civil Procedure applies to mental and physical examination of defendants as well as plaintiffs and as so applied is constitutional and authorized by the Rules Enabling Act. Schlagenhauf v. Holder, p. 104.

2. *Rule 35 (a)—Requirements of "in controversy" and "good cause."*—The requirements of Rule 35 (a) that the condition of the party sought to be examined be "in controversy" and that "good cause" be shown for the examination are not met by mere conclusory allegations of the pleadings, but must be applied with discrimination by the trial judge. Schlagenhauf v. Holder, p. 104.

3. *Rule 45 (e)—Expenses of transporting witnesses—Taxation of costs.*—The 100-mile subpoena provision in Rule 45 (e) does not com-

FEDERAL RULES OF CIVIL PROCEDURE—Continued.

pletely bar a district court from taxing as costs expenses of transporting witnesses more than 100 miles, for Rule 54 (d) leaves the district court discretion to tax such expenses. Farmer v. Arabian American Oil Co., p. 227.

4. *Taxation of costs—Second trial.*—It was not error for a district court judge at the end of the second trial to determine costs for both trials, as the first judgment and taxation of costs were upset by the reversal of the trial judgment. Farmer v. Arabian American Oil Co., p. 227.

FEDERAL-STATE RELATIONS. See **Civil Rights Act of 1964; Constitutional Law,** VII; **Federal Airport Act; Jurisdiction,** 1; **Labor; Procedure,** 1.

FIFTH AMENDMENT. See **Constitutional Law,** III, 2; **Interstate Commerce,** 1.

FINAL JUDGMENT. See **Procedure,** 6.

FIRST AMENDMENT. See **Constitutional Law,** V, 1–4; **Public Officers.**

FLORIDA. See **Constitutional Law,** IV, 1.

FOREIGN BRANCH BANKS. See **Jurisdiction,** 2; **Service of Process.**

FORFEITURE. See **Constitutional Law,** II.

FOURTEENTH AMENDMENT. See **Constitutional Law,** III, 1, 3; IV, 1–3; **Federal Airport Act; Jurisdiction,** 1; **Procedure,** 4–5, 7.

FOURTH AMENDMENT. See **Constitutional Law,** VI, 1–2; **Procedure,** 1.

FRAUD. See **Internal Revenue Code,** 1–2.

FREEDOM OF SPEECH AND ASSEMBLY. See **Constitutional Law,** V, 1–4; **Public Officers.**

GEORGIA. See **Constitutional Law,** I, 1; III, 2; IV, 3; **Procedure,** 4.

GOVERNMENT CLAIM. See **Bankruptcy Act,** 2.

HABEAS CORPUS. See **Procedure,** 1.

HOP-PICKING MACHINES. See **Patents.**

HOTELS. See **Constitutional Law,** I, 1; III, 2; **Interstate Commerce,** 1.

IMPAIRMENT OF CONTRACT OBLIGATION. See **Constitutional Law,** II.

INDEPENDENT CONTRACTOR. See **National Labor Relations Act**, 1.

INJUNCTIONS. See **Jurisdiction**, 2; **Procedure**, 4; **Service of Process.**

INSOLVENCY. See **Bankruptcy Act.**

INTANGIBLES. See **Escheat.**

INTERNAL REVENUE. See **Jurisdiction**, 2; **Service of Process.**

INTERNAL REVENUE CODE.

1. *Fraud—Statute of limitations—Summons.*—Internal Revenue Service need not show probable cause to suspect fraud in order to enforce summons for tax records, either before or after the expiration of statute of limitations, and unless the taxpayer raises a substantial question of abuse of the court's process, the Service need only show that the investigation is relevant to a legitimate purpose to acquire information properly determined to be necessary. United States v. Powell, p. 48.

2. *Summons—Statute of limitations—Fraud.*—Internal Revenue Service need not show probable cause for suspecting fraud in order to examine taxpayer's records for closed years. Ryan v. United States, p. 61.

INTERRACIAL COHABITATION. See **Constitutional Law**, IV, 1.

INTERSTATE COMMERCE. See also **Collateral Estoppel; Constitutional Law**, I, 1–2; **Federal Power Commission; Procedure**, 3.

1. *Interstate travel—Racial discrimination—Moral wrongs.*—The protection of interstate commerce, which includes interstate movement of persons, is within the regulatory power of Congress whether or not the transportation is "commercial" and even though Congress in removing the disruptive effect of racial discrimination was also legislating against moral wrongs. Atlanta Motel v. United States, p. 241.

2. *Transportation of natural gas—Commingling in pipeline—"Restricted use" contracts.*—Actuality of interstate transportation and resale of substantial portion of natural gas commingled in pipeline invokes Federal Power Commission jurisdiction, notwithstanding contracts providing for restricted use of the gas. California v. Lo-Vaca Co., p. 366.

3. *Transportation of natural gas—Sale of commingled gas intrastate and interstate—Federal Power Commission jurisdiction.*—Where interstate pipeline company commingles gas from several

INTERSTATE COMMERCE—Continued.

sources and uses some intrastate and sells some out of state, the parties may not avoid Federal Power Commission jurisdiction by stipulating in their contract that, contrary to actuality of transportation, all of one supplier's gas will be used intrastate. Federal Power Comm'n v. Amerada Petroleum Corp., p. 687.

INTERSTATE COMMERCE ACT.

Railroad rates—Class rates—All-commodity rates.—Section 1 (6) of the Act applies to the setting of class rates but not to all-commodity railroad rates, although the latter are subject to Interstate Commerce Commission control under other provisions of the Act. All States Frgt. v. N. Y., N. H. & H. R. Co., p. 343.

INTERSTATE COMMERCE COMMISSION.

1. *Railroad merger—Protection of employees' interests.*—Judgment dismissing employees' complaint to set aside in part Interstate Commerce Commission railroad merger orders for failure to protect employees' interests pursuant to provisions of a collective bargaining agreement vacated insofar as judgment relates to those provisions, with instructions to remand case to the Commission for clarification of orders. Railway Labor Assn. v. U. S., p. 199.

2. *Railroad rate reductions—Order not supported by adequate findings.*—Interstate Commerce Commission should reconsider its order canceling certain railroad rate reductions in view of District Court's determination that the order was not supported by adequate findings. Arrow Co. v. Cincinnati, N. O. & T. P. R. Co., p. 642.

INVOLUNTARY SERVITUDE. See **Constitutional Law**, III, 2; **Interstate Commerce**, 1.

JONES ACT. See **Admiralty**, 1–3; **Procedure**, 6.

JUDGES. See **Constitutional Law**, V, 1; **Federal Rules of Civil Procedure**, 2–4; **Public Officers.**

JUDGMENTS. See **Procedure**, 6.

JURISDICTION. See also **Bank Holding Company Act of 1956; Collateral Estoppel; Escheat; Federal Airport Act; Federal Power Commission; Interstate Commerce**, 2–3; **Labor-Management Reporting and Disclosure Act of 1959**, 1; **Procedure**, 3; **Service of Process.**

1. *Supreme Court—State court decision based on state and federal grounds—Not reviewable.*—This Court has no jurisdiction to review state court judgment based on independent and adequate state grounds, even though it also rested on similar federal grounds. Jankovich v. Toll Road Comm'n, p. 487.

JURISDICTION—Continued.

2. *District Courts — Injunction "freezing" foreign corporation's account in foreign branch of domestic bank—Internal revenue laws.*—District Court has jurisdiction to issue injunction "freezing" foreign corporation's account in foreign branch of domestic bank, pending personal service on the corporation, in connection with the enforcement of the internal revenue laws. U. S. v. First Nat. City Bank, p. 378.

3. *District Courts—Union election—Labor-Management Reporting and Disclosure Act of 1959.*—Federal district court has no jurisdiction over suit by union members under § 102 of the Act charging that union's eligibility requirements deprived them of right to nominate candidates guaranteed by § 101 (a)(1), that provision being directed solely against discrimination in the electoral process itself. Calhoon v. Harvey, p. 134.

JURY. See **Constitutional Law**, III, 1; **Federal Employers' Liability Act.**

JUST COMPENSATION. See **Federal Airport Act; Jurisdiction**, 1.

LABOR. See also **Interstate Commerce Commission**, 1; **Jurisdiction**, 3; **Labor-Management Reporting and Disclosure Act of 1959**, 1–2; **National Labor Relations Act**, 1–3.

Labor Management Relations Act—Contract grievance procedures—Severance pay.—Under federal policy reflected in the Act, contract grievance procedures, which apply to severance and other claims, must, unless specified as nonexclusive, be exhausted before direct legal redress is sought. Republic Steel Corp. v. Maddox, p. 650.

LABOR MANAGEMENT RELATIONS ACT. See **Labor.**

LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959. See also **Jurisdiction**, 3.

1. *Union election—Nomination of candidates—Complaints.*—Eligibility requirements for nomination for union office are governed by § 401 (e) of the Act, and the remedy for protecting rights thereunder is post-election suit by the Secretary of Labor following complaint by member who has exhausted his union remedies and an investigation by the Secretary showing probable cause of violation. Calhoon v. Harvey, p. 134.

2. *Voting at union conventions—Weighted voting of delegates.*—Section 101 (a)(3)(B) of the Act permits weighted-voting system whereby delegates cast a number of votes equal to the membership of their local union. Musicians Federation v. Wittstein, p. 171.

LEGISLATURES. See **Constitutional Law**, IV, 2–3; **Procedure**, 4, 7.

LIBEL. See **Constitutional Law**, V, 1; **Public Officers.**

LICENSE. See **Patents.**

LIENS. See **Jurisdiction**, 2; **Service of Process.**

LITIGATION. See **Federal Rules of Civil Procedure**, 3–4.

LOUISIANA. See **Bank Holding Company Act of 1956; Constitutional Law**, III, 1, 3; V, 1–4; **Public Officers.**

LUNCH COUNTERS. See **Constitutional Law**, I, 2; VII.

MALAPPORTIONMENT. See **Constitutional Law**, IV, 2–3; **Procedure**, 4, 7.

MANDAMUS. See also **Federal Rules of Civil Procedure**, 1–2; **Procedure**, 6.

Power of District Court to order mental and physical examinations of defendant in negligence action—Appropriate remedy.—In this case mandamus was an appropriate remedy to review the challenged power of the District Court to order mental and physical examinations of defendant in negligence suit. Schlagenhauf v. Holder, p. 104.

MENTAL EXAMINATIONS. See **Federal Rules of Civil Procedure**, 1–2; **Mandamus.**

MERGER. See **Interstate Commerce Commission**, 1.

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MOOTNESS. See **Procedure**, 4.

MOTELS. See **Constitutional Law**, I, 1; III, 2; **Interstate Commerce**, 1.

NATIONAL BANK ACT. See **Bank Holding Company Act of 1956.**

NATIONAL LABOR RELATIONS ACT.

1. *Collective bargaining — Independent contractor.*—Contracting out to an independent contractor of maintenance work which replaces employees in bargaining unit is a statutory subject of collective bargaining under § 8 (d) of the Act. Fibreboard Corp. v. Labor Board, p. 203.

2. *Discharge of employees for alleged misconduct—Unfair labor practice.*—Discharge of employees in good faith for alleged miscon-

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duct while soliciting for union membership is an unfair labor practice where there was no misconduct and discharge would tend to discourage activity protected by § 7 of the National Labor Relations Act. Labor Board v. Burnup & Sims, p. 21.

3. *Failure to bargain—Reinstatement of employees.*—Where employer failed to comply with statutory duty to bargain the National Labor Relations Board did not exceed its remedial powers in ordering employer to reinstate employees with back pay and to bargain. Fibreboard Corp. v. Labor Board, p. 203.

NATURAL GAS ACT. See **Collateral Estoppel; Federal Power Commission; Interstate Commerce**, 2–3.

NEGLIGENCE. See **Admiralty; Federal Employers' Liability Act; Federal Rules of Civil Procedure**, 1–2; **Mandamus; Procedure**, 6.

NEGROES. See **Civil Rights Act of 1964; Constitutional Law**, I, 1–2; III, 2–3; IV, 1; V, 2–4; VII; **Interstate Commerce**, 1; **Procedure**, 1, 3.

NOMINATIONS. See **Jurisdiction**, 3; **Labor-Management Reporting and Disclosure Act of 1959**, 1.

OBSTRUCTION OF JUSTICE. See **Constitutional Law**, V, 4.

PAIN AND SUFFERING. See **Admiralty**, 2; **Procedure**, 6.

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PATENTS.

License agreement—Royalties beyond expiration of patents.—Royalty provisions of a patent license agreement covering machines incorporating certain patents may not extend beyond the expiration of the last incorporated patent. Brulotte v. Thys Co., p. 29.

PENNSYLVANIA. See **Constitutional Law**, IV, 2.

PERMISSION. See **Constitutional Law**, III, 3; V, 3–4.

PHYSICAL EXAMINATIONS. See **Federal Rules of Civil Procedure**, 1–2; **Mandamus.**

PICKETING. See **Constitutional Law**, V, 4.

PIPELINES. See **Collateral Estoppel; Federal Power Commission; Interstate Commerce**, 2–3.

POLICE OFFICIALS. See **Constitutional Law**, III, 1, 3; V, 3.

PRIORITY. See **Bankruptcy Act**, 2.

PROCEDURE. See also **Admiralty; Bank Holding Company Act of 1956; Bankruptcy Act,** 1, 3; **Constitutional Law,** I, 2; IV, 2; **Federal Airport Act; Federal Rules of Civil Procedure,** 1–2; **Internal Revenue Code,** 1–2; **Jurisdiction,** 1–2; **Labor; Mandamus.**

1. *Supreme Court—Appeal from state criminal conviction—Remand to determine whether federal claims were waived.*—Case remanded to state appellate court to determine whether petitioner knowingly waived his federal claim before deciding whether nonfederal procedural ground is adequate to bar review by this Court. Henry v. Mississippi, p. 443.

2. *Supreme Court—Appeal improperly brought—Petition for certiorari.*—Although the appeal was improperly brought under 28 U. S. C. § 1254 (2), this Court treats the papers as a petition for certiorari under 28 U. S. C. § 2103. El Paso v. Simmons, p. 497.

3. *Supreme Court — Declaratory relief — Constitutional question before the Court in companion case.*—Since interference with governmental action has occurred and the constitutionality of Title II of the Civil Rights Act of 1964 is before the Court in a companion case, the Court reaches the merits of this case by considering it as an application for declaratory judgment, instead of denying relief for want of equity jurisdiction. Katzenbach v. McClung, p. 294.

4. *District Court—Legislative apportionment—Present need for injunction.*—District Court which had enjoined Georgia election officials from placing on the ballot the question of adopting a new state constitution until the legislature was properly apportioned should reconsider the present need for the injunction. Fortson v. Toombs, p. 621.

5. *State courts—Criminal trial—Confessions.*—Defendant who has not been afforded an adequate hearing on voluntariness of his confession is not necessarily entitled to a new trial, but is entitled to state court hearing under standards designed to insure proper resolution of the issue; and, if not afforded a hearing or a new trial in a reasonable time, is entitled to his release. Boles v. Stevenson, p. 43.

6. *Final judgment—Appealability.*—Requirement of finality of a judgment should be given practical rather than technical construction and does not necessarily mean that to be appealable an order must be the last possible one to be made in a case. Gillespie v. U. S. Steel Corp., p. 148.

7. *Stipulation modifying District Court judgment — Legislative apportionment.*—Stipulation modifying remedial portion of District Court judgment holding Vermont constitutional provisions concerning legislative apportionment invalid approved by this Court. Parsons v. Buckley, p. 359.

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Criminal libel—Private defamation—Freedom of speech.—Accusation concerning judges' official conduct did not become private defamation because it might also have reflected on the judges' private character. Garrison v. Louisiana, p. 64.

RACIAL DISCRIMINATION. See **Civil Rights Act of 1964**; **Constitutional Law**, I, 1–2; III, 2; IV, 1; V, 2–4; VII; **Interstate Commerce**, 1; **Procedure**, 3.

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RAILROADS. See **Interstate Commerce Act.**

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REAL PROPERTY. See **Constitutional Law**, II.

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REMEDIES. See **Jurisdiction**, 3; **Labor-Management Reporting and Disclosure Act of 1959**, 1; **National Labor Relations Act**, 1, 3; **Procedure**, 7.

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ROYALTIES. See **Patents.**

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Federal Rules of Civil Procedure—Service on nonresident—State law.—Federal Rules of Civil Procedure 4 (e) and (f) provide for service of process on nonresidents in accordance with state statute. U. S. v. First Nat. City Bank, p. 378.

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1. *"A party."*—Federal Rule of Civil Procedure 35 (a). Schlagenhauf v. Holder, p. 104.

2. *"Good cause."* — Federal Rule of Civil Procedure 35 (a). Schlagenhauf v. Holder, p. 104.

3. *"In controversy."*—Federal Rule of Civil Procedure 35 (a). Schlagenhauf v. Holder, p. 104.

4. *"Near."*—La. Rev. Stat. § 14.401 (Cum. Supp. 1962). Cox v. Louisiana, p. 559.

5. *"Place of public accommodation."*—Civil Rights Act of 1964, § 201. Blow v. North Carolina, p. 684.

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